Agree to Act Together: An Exposition of the Contemporary Laws on Conspiracy Under Ghanaian Criminal Jurisprudence.

Charles Boakye

Abstract— Conspiracy, as one of the four main inchoate criminal offences, has not only been effectively safeguarded and ingrained in Ghanaian Criminal Jurisprudence, but requires a careful consideration in its formulation under statute in order not to superfluously exonerate offenders from being culpable. This paper aims to discuss the current essential elements of conspiracy, the liability or otherwise and punishment of a conspirator(s), and argues strappingly that the Ghanaian Courts have now shifted from a restrictive evidential approach adopted immediately after the coming into force of the new rendition to a broad evidential approach which in effect have reduced the unbearable burden on the prosecution and strictly hold offenders accountable. The article further prays that the courts should continue to follow this broad evidential approach in proving the 'agree to act together' in their subsequent decisions.

Index Terms— Conspiracy, Essential Ingredients, Agree Together, Common purpose, Restrictive and Broad Evidential Approach, Liability, Punishment, Ghanaian Criminal Jurisprudence.

1 INTRODUCTION

CONSPIRACY is one of the four main inchoate criminal offences[1] that have their ***fons et origo*** from the received English common law;[2] and which have not only been ***mutatis mutandis*** embraced, but have also been effectively safeguarded and ingrained in the Ghanaian Criminal Jurisprudence. As such, the offence of conspiracy, it is said, requires a careful consideration in its formulation under statute in order not to superfluously exonerate offenders from being culpable.

The old Ghanaian statutory formulation of conspiracy under *section 23 of the Criminal Code, 1960 (Act 29)* has been revised by the work of the Statute Law Review Commissioner (SLRC),[3] given birth to a new formulation of conspiracy under *section 23 of the Criminal Act, 1960 (Act 29)*. The revision in effect, altered section 23(1) of Act 29 by removing an "or" that linked two parts of the provision, and replacing it with a "to."[4] Whereas the old formulation required two or more persons to agree or act together for a common purpose, the new formulation requires them to agree to act together for a common purpose. In the ***Francis Yirenkyi v. the Republic Case*** infra, **Dotse JSC** (as he then was) held that: "*The essence of the changes brought about by the work of the Statute Law Review Commissioner is that, under the new formulation, a person could no longer be guilty of conspiracy in the absence of any prior agreement, whereas under the old formulation a person could be guilty of conspiracy in the absence of any prior agreement*."

Among the effects of this new formulation as pointed out by legal luminaries, are that, it preserves only one form of liability i.e. the agreement to act, and also reinforces the principle that conspiracy is an offence requiring intentional conduct.[5] The formulation has made a chain of previous authorities in the law reports holding that a person could be guilty of conspiracy in

• *Charles Boakye is an LLB graduate from University of Ghana School of Law. He is currently waiting to be admitted into the Barrister at Law Programme at the Ghana School of Law.*
• *I express my profound and sincerest gratitude to Dr. Kwame Baah-Nuakoh, for his indispensable support that has made this work successful.*

[1] "***Inchoate offence***" describes the category of offence that precedes the commission of any substantive offence. It includes, *Conspiracy*, *Abetment*, *Attempt* and *Preparation*. See: Sections 23-24, 20-21, 18 & 19 of the Criminal Offences Act, 1960 (Act 29) respectively; and also, Henrietta J. A. N. Mensa-Bonsu, "The General Part of Criminal Law – A Ghanaian Source Book" (Volume II) at Chapter 5.

[2] State v. Otchere & Ors. [1963] GLR 463, Korsah CJ stated at page 471 that: "*We observe that the law of conspiracy as stated in our Criminal Code embodies the principles of the English law of conspiracy as enunciated in judicial decisions of the English courts …which have been followed by this court in the case of State v. Teiko Tagoe High Court (Special Criminal Division), Accra, 17th April, 1963, unreported.*"; Also in Behome v. the Republic [1979] GLR 112, Osei-Hwere J. sated at Page 120 that: "*It has been well recognised that our law of conspiracy contained in section 23 of our Criminal Code, 1960 (Act 29), embodies those principles of the English law of conspiracy which have been enunciated in judicial decisions and which have been applied by courts in this country.*" Also see, H.J.A.N. Mensa-Bonsu, "Conspiracy in Two Common Law Jurisdictions - A Comparative Analysis," 4 Afr. J. Int'l & Comp. L. 419 (1992), at page 421, for detailed position of conspiracy under English law.

[3] The Laws of Ghana (Revised Edition) Act 1998 (Act 562) as amended by Act 711, established the Statute Law Review Commission to revise all the then existing laws of Ghana. Section 2(1)(d) (i)&(ii) of the Act empowers the Commissioner to: "*alter the order of sections in any Act and renumber the sections; or the form or arrangement of any sections by transferring words, by combining any sections or other sections or by dividing any sections into two or more subsections.*"

[4] Henrietta J. A. N. Mensa-Bonsu, "O, the Difference That a Word Makes - Remaking the Laws of Ghana by the Statute Law Revision Process", 28 U. Ghana L.J. 1 (2015), at Page 17.

[5] Ibid. at Page 19.

the absence of any prior agreement no longer good law.[6] Many lawyers including judges hold the view that it is very stringent to the point that it is almost impossible to prove beyond reasonable doubt the agreement to act together, without considering their acting together alone as a prima facie prove of previous agreement thereby exculpating perpetuators.[7]

The new formulation according to **Prof. HJAN Mensah Bonsu**,[8] does indeed, present difficulties to the prosecution as it overlooks the fact that the offence of conspiracy is one that is usually committed in secret, and by willing parties rendering detection and prosecution almost impossible.[9] However, notwithstanding these complications, the Supreme Court unanimously held in ***Francis Yirenkyi v. the Republic***[10] that: "*…the new formulation in section 23(1) of Act 29 is the law on conspiracy in Ghana and until that formulation has been changed by constitutional amendment or recourse to the Supreme Court, the changes brought about by the work of the Statute Law Revision Commissioner are valid and remain the laws of Ghana*."

Forthrightly, it is worthy of note to point out that, this paper sets out to explore and elucidate the intricacies of the current notion of conspiracy under the *Criminal Offences Act, 1960 (Act 29)* and to meticulously scrutinise the case laws on how the Ghanaian Courts of law have so far expressed about this new conspiracy provision in their bid to uphold and judiciously guard criminal justice. It further discusses the current essential elements of conspiracy, the liability or otherwise and punishment of a conspirator(s); and argues forcefully that the Ghanaian Courts have now shifted from a restrictive evidential approach adopted immediately after the coming into force of the new rendition to a broad evidential approach which in effect have reduced the unbearable burden on the prosecution and strictly hold offenders accountable.

2 ESSENTIAL ELEMENTS OF CONSPIRACY

The current definition of conspiracy in our law is as encapsulated in section 23(1) of the Criminal Offences Act, 1960 (Act 29), which states:
"*Where two or more persons agree to act together with a common purpose for or in committing or abetting a criminal offence, whether with or without a previous concert or deliberation, each of them commits a conspiracy to commit or abet the criminal offence*."

This definition preserves only one form of liability, namely, the agreement to act together. Thus, under our current law, an accused can only be charged with the offence of conspiracy if it is found out that he agreed with another person or others with a common purpose for or in committing or abetting a crime though he did not eventually partake in the commission of the crime. In such a situation, the particulars of the charge of such an accused person would read that he 'agreed together' with the others with a common purpose for or in committing or abetting the crime. Here, the two most essential elements of the offence required to be proved are: (1) the ***actus reus*** (agreement to act) and (2) the ***mens rea*** (common criminal purpose). Thus in ***Hayford Ofosu Amaning v. the Republic***,[11] **Dotse JSC** (as he then was) held that: "*The evidence … laid bare the fact that the accused persons including the appellant, in fact* ***conspired together*** *for a* ***common purpose to commit crime*** *to wit robbery*."

A conspiracy, then consists not merely in the intention of two or more but in agreement of two or more to commit a crime. In the ***Francis Yirenkyi v. the Republic Case*** supra, **Dotse JSC** (as he then was) noted that: "*In this new formulation, the only ingredient that has been preserved is the agreement to act to commit a substantive crime, to commit or abet that crime*."[12] Congruently, in ***Republic v. Bonnie and Others***,[13] **Eric Kyei Baffour J.A** (as he then was) sitting as an additional High Court Judge held on a charge of conspiracy that: "*For prosecution to be deemed to have established a prima facie case, the evidence led without more, should prove that: (i) That there were at least two or more persons; (ii) That there was an agreement to act together; and (iii) That sole purpose for the agreement to act together was for a criminal enterprise*."

However, in my noble view, from the definition, the essential or main ingredients of criminal conspiracy as it is in Ghana today are:

1) ***There must be two or more parties to it;***
2) ***The parties must agree to act together;***
3) ***They must do so for a common purpose; and***
4) ***The common purpose of their agreeing to act together must be to commit or abet a crime.***

[6] Republic v. Augustine Abu, Case No Acc 15/2010; (Unreported); judgment delivered on 23' December, 2009; coram Marful-Sau J.A. sitting as an additional High Court Judge. {Commissioner of Police v. Afari and Addo [1962] 1 GLR 486, S.C; Azamatsi and others v. the Republic [1974]1 GLR 228; Duah v. Republic [1982-88] 1 GLR 343; Logan v. the Republic [2007-2008] SCGLR 76 Behome v. Republic [1979] GLR 112, Frimpong alias Iboman v. The Republic [2012] 1SCGLR 297; etc.: All these case laws in effect held that, conspiracy as defined in section 23 (1) of Act 29 "*consists not only in the criminal agreement between two minds but also in the acting together in furtherance of a common criminal objective*."}

[7] Republic v. Ekene Anozie Criminal Appeal Suit No. H2/44/12; (Unreported); Judgment delivered on 27h June 2013; coram ApalooJA (presiding) Gyaesayor & Sowah JJA.: A charge of conspiracy in a robbery case involving two accused persons was dismissed because the prosecution could not lead evidence to prove that the parties had agreed to act for a common criminal purpose. Marful-Sau J.A. Concluded in the Abu case (Ibid at note 6) that the new formulation had raised the burden of proof as only a narrow doorway remained.

[8] Currently, a Justice of the Supreme Court of Ghana.

[9] Ibid., Note 5

[10] Supreme Court, 17th February, 2016 (Criminal Appeal: No. J3/7/2015); Coram: Dotse JSC (presiding), Gbedegbe JSC, Akoto-Bamfo (Mrs.) JSC, Akamba JSC, and Pwamang JSC.

[11] (J3/05/2018) [2020] GHASC 47; Coram: Dotse, Appau, Pwamang, Dordzie, and Kotey JJSC.

[12] Note 9, ibid. Page 30

[13] (Suit No. CR/904/2017) [2020] GHAHC Criminal Division 1 (12th May 2020)

These ingredients are carefully examined in the face of Ghanaian Case laws to be able to appreciate what constitute conspiracy in Ghana today. They are as explicated below in ***extenso***.

2.1 Plurality of Minds

The new formulation requires two or more parties to a conspiracy. The general common law rule is that "*a man cannot conspire with himself.*"[14] Therefore, in order to prove an agreement, there must first of all be evidence of two minds. Thus, it has been held in Ghanaian case of ***Blay v. Republic***[15] that 'two persons' means two human beings. Therefore, when the evidence showed that the parties involved in the alleged conspiracy were a man and a 'spiritual being' the Court refused to conclude that the offence of conspiracy had been committed. In this case, the accused person had been convicted of, inter alia, conspiracy to defraud. The evidence showed that the defendant offered to double any sum of money the complainant would give to him for that purpose, using spiritual means. On three occasions the defendant performed some rituals and was heard engaging in a whispered conversation with the voice of someone he claimed was an invisible being. He subsequently bolted with the complainant's money and was convicted of, inter alia, conspiracy to defraud. On appeal, **Archer J.** (as he then was) held that, the conspiracy count was not sustained because conspiracy involved an agreement between two or more human beings and not between one human being and an unknown voice or spirit.

The courts in Ghana have also interpreted the two minds to mean that, when all the accused persons to a charge of conspiracy are acquitted except one, that one must also be acquitted since there will be no other to conspire with, unless proven that there is some other person not named in the charge whom he has conspired with. In the ***Republic v. Bossman***,[16] where the first and the second accused were charged with conspiring with the Minister of Trade to extort money and wilful oppression contrary to *sections 23 (1) and 239 (1) of Act 29*. The first accused was acquitted, and the issue was what is the effect of the acquittal of one conspirator on the remaining conspirator? **Amissah J.A.** (as he then was) held that, on a conspiracy charge, if all but one of the parties were acquitted that one must also be acquitted unless it was charged and proved that he conspired with some other persons not named in the charge. Since the Minister of Trade was found by the commission not to have committed extortion in concert with the accused persons and the first accused was acquitted on the conspiracy charge, the second accused must also be acquitted.

The principle in the Bossman case supra was made clearer in the case of ***Doe v. the Republic***,[17] where B, D and seven other persons were charged and tried inter alia with conspiracy to steal, the seven other persons pleaded guilty of the offense. The Counsel for B maintained that since B and D were charged with the offence of conspiracy to steal and D had pleaded not guilty, the tribunal should not to have convicted and pronounced sentence until the charge against D had been proved, as one person could not be charged with the offence of conspiracy under *section 23(1) of Act 29*. **Akoto-Bamfo JA**. (as she then was) delivering the judgment of the Court of Appeal correctly held that, the offence of conspiracy could not be maintained against one person only since by virtue of *section 23(1) of Act 29*, the offence was committed where two or more persons agreed. However, it was possible to charge a known person together with others at large. In the instant case, since (i) B and D were jointly tried with seven other persons, (ii) the seven other accused persons were inter alia charged with the offence of conspiracy and they all pleaded guilty to the charge, and (iii) a common thread ran through their activities, namely, that they all falsified the accounts of customers of the bank and withdrew monies from these accounts, there was no need for the prosecution to lead further evidence on that count, as the charge, stated that B "*did agreed together with seven others with a common purpose to commit the offence*."

Similarly, in ***Kwakorakwa and Another v. the Republic***,[18] where the two appellants were charged inter alia conspiracy to commit murder. The trial judge convicted and sentenced them to various terms to run concurrently. They appealed against their conviction, and the Court of Appeal reversed the conviction of the 1st appellant on the charges of conspiracy and murder. In respect of the 2nd appellant, **Yaw Appau J.A.** (as he then was) held that: "*On the conspiracy charge, since it takes two or more people to commit the offence of conspiracy, and this Court has concluded that the evidence on record did not support the charge of conspiracy and murder against the 1st appellant, it follows logically that the conspiracy charge as leveled against the 2nd appellant also fails since there was no evidence that the two appellants … agreed … together to commit the crime of murder as the particulars on the Bill of Indictment indicated*."

A more recent case which also followed the principle of plurality of minds is the ***Republic v. Bonnie and Others*** supra, where **Eric Kyei Baffour J.A** (as he then was) sitting as an additional High Court Judge held on a charge of conspiracy that: "*Despite the overwhelming evidence on record, I cannot convict A1 of stealing as he was only charged with conspiracy to steal. A1 is not charged with the substantive offence of stealing. With all the other accused persons having been discharged and acquitted on the conspiracy charge and A5 having also been acquitted on the substantive offence, it means that the charge against A1 cannot hold without any indication from the charge sheet that A1 conspired with persons other than the ones listed on the counts.*"[19]

[14] R. v. Shannon 11974] 2 All ER 1009.

[15] [1968] GLR 1040.

[16] [1968] GLR 595.

[17] [1999-2000] 2 GLR 32.

[18] (No. H2/2/2007) [2008] GHACA 5 (06 November 2008).

[19] Ibid., Note 13, at pages 45 to 46.

2.2 Agreement to Act Together - The Actus Reus of Conspiracy

The new provision begins by stipulating the ***actus reus*** of the offence of conspiracy which is the very agreement to act as: "*Where two or more persons agree to act together …*" Thus, the essence of conspiracy lies in the formation of a scheme or agreement between the parties, not in doing of the act or accomplishing the purpose for which the conspiracy is formed nor in attempting to do them, nor in instigating others to do them. Agreement or collaboration is essential. The mere knowledge or even discussion of the plot is not per se enough. The ***actus reus*** or external factor of the crime is acting in a coordinated fashion by which initial consent to a common purpose is exchanged.[20]

To prove the existence of a conspiracy it is not necessary to show that any overt act was done beyond the agreement. It is also not necessary that the means or devices for achieving the purpose of the conspiracy have been agreed. It is the agreement itself which is proscribed and which gives the state an interest to interfere by instituting proceedings. As **Brett J.A**. (as he then was) said in ***R v. Aspinall***[21] that: "*The crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at one or at some future time certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may be prevented or may fail. Nevertheless, the crime is committed; it was completed when they agreed.*" **Professor Glanville William** has also commented that: "*A conspiracy is not merely a concurrence of wills but a concurrence resulting from agreement.*"[22] It requires an act, the act of entering into an agreement, for: "*[t]he very plot is an act in itself, and the act of each of the parties, promise against promise actus contra actum...*"[23]
As the second illustration on *section 23(1) of Act 29* goes: A and B agree together to procure C to commit a criminal offence. Here, A and B have both committed conspiracy to abet that criminal offence.

The ***locus classicus*** or the most comprehensive statement on the law of conspiracy in Ghana is that explicated in the 1963 Supreme Court Case of ***State v. Otchere***.[24] In this case, five persons were charged with inter alia the offence of conspiracy to commit treason. Obetsebi Lamptey and the first two accused persons held meetings in Lomé where it was agreed to overthrow the Government of Ghana by unlawful means. In his defence, the first accused stated that he had recanted after having agreed with the others, and that he did nothing further to bring to fruition what had been agreed upon. **Korsah C.J** (as he then was) delivering the unanimous judgment of the Supreme Court held that, though the first two accused persons might not, apart from the initial agreement, have taken any further steps in the execution of the plans agreed to in Lomé, they were nevertheless responsible for the Kulungugu incident and the subsequent bomb outrages perpetrated in Accra as these acts were done in furtherance of the objects of the conspiracy as formulated at Lomé. Their responsibility as conspirators was complete the moment they agreed with the others at Lomé to do what was eventually done.

Also, in ***Amaniampong v. the Republic***,[25] **Owusu (Ms.) JSC** (as she then was) said: "*If the evidence is enough to establish the conspiracy charge against the Appellant, then it is immaterial that he did not actually rob p.w. 1 of her hand bag. Once the robbery was committed in furtherance of the object of the conspiracy, he is equally as guilty as the person who actually snatched the bag in the course of which, the victim's palm was slashed. His responsibility as conspirator was complete the moment he agreed with the others to go out at that time of the day to do what was eventually done.*"

On the same footing, in ***Francis Yirenkyi v. The Republic***,[26] the appellant was convicted of conspiracy to steal and stealing. On appeal, the appellant contended that the charge of conspiracy was not made out against him as the prosecution could not establish any link between him and the other accused persons. The Court of Appeal found as a fact that there had been a prior agreement between all the accused persons to execute "the deal" which was found to be the stealing. The Court held that the fact that the appellant may not have taken part in the actual stealing is irrelevant. For the offence of conspiracy is complete on agreement.

Once a conspiracy has come into existence any person who subsequently joins the plot hatched is contaminated from the moment of entry.[27] The agreement may take one of two different forms: "***chain conspiracy***" (i.e., it occurs when various persons join a criminal enterprise or arc recruited at various points in time or from various places, either by an initiator of the conspiracy, or by the members of an existing conspiracy to participate in the activities of the group. Thus all the individuals are involved in one conspiracy and are therefore linked by a common purpose) and "***wheel conspiracy***" (it involves different personalities whose activities are unrelated in any way except that they have one personality as their common co-conspirator. The common co-conspirator would be the hub connecting each of the other conspirators, i.e. the spokes, as is the case with a wheel).

These two forms of agreement were postulated by **Lord Hewart**

[20] Ibrahim Adam v. The Republic, SUIT No. FT/MISC.2/2000 28th APRIL 2003(unreported).
[21] (1876) 2 Q. B.D 48 at page 58.
[22] Glanville William Criminal Law (the General Part) (1953 ed.) at page 516.
[23] Mulcahy v. R. (1868) L.R. 3 H.L. 306; R. v. Green (1970)62 Cr. App. R. 74 at 79.
[24] [1963] 2 GLR 403.
[25] Unreported, CRIMINAL APPEAL No: J3/10/2013 28TH MAY 2014. Page 10 of the Judgment.
[26] C.A, Criminal Appeal No. H2/15/13; Decided on 10th April 2014; Coram: Kanyoke J.A. (Presiding), Aduama Osei J.A. and A Dordzie (Mrs.) J.A.
[27] R. v. Hammond 170 E.R. 508.

CJ in the case of ***R. v. Meyrick and Ribuffi*,**[28] succinctly as: "*... it was necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other, or directly consulting together, but that they entered into an agreement with a common design. Such agreements may be made in various ways. There may be one person… round whom the rest revolve. The metaphor is the metaphor of the centre of a circle and the circumference. There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B. B with C, C with D. and so on to the end of the list of conspirators. What has to be ascertained is always the same matter: is it true … that the acts of the accused were done in pursuance of a criminal purpose held in common between them?*"[29]

These forms of agreement make a person within the jurisdiction of Ghana liable for conspiracy if that person agrees with another person outside the jurisdiction of Ghana to commit an offense within or outside Ghana. *Section 23(2) of the Criminal Offenses Act, 1960 (Act 29)* enunciates that: "*A person within the jurisdiction of the Courts can be convicted of conspiracy by agreeing with another person who is beyond the jurisdiction, for the commission of abetment of a criminal offence to be committed by them or either of them, or by any other person, within or beyond the jurisdiction.*" *Sec. 23(3)* provides that, for the purposes of subsection (2) as to a criminal offence to be committed beyond the jurisdiction, "***criminal offence***" means an act which, if done within the jurisdiction, would be a criminal offence under this Act or under any other enactment. By way of illustration: A in Accra and B in Lagos agree and arrange by letter for the scuttling of a ship on the high seas, with intent to defraud the underwriters. Here A has committed a conspiracy punishable under Act 29.

In ***State v. Otchere*** supra, five persons were charged with inter alia the offence of conspiracy to commit treason. Obetsebi Lamptey and the first two accused persons held meetings in Lomé at Togo where it was agreed to overthrow the Government of Ghana by unlawful means and also the last three accused persons subsequently joined in the said conspiracy. According to the prosecution's case the three remaining accused persons joined the conspiracy in Accra when Obetsebi Lamptey, one of the architects of the plot hatched in Lomé, returned to Ghana to put it into execution. The Supreme Court unanimously held via **Korsah CJ** that, a person who joins or participates in the execution of a conspiracy which had been previously planned would be equally as guilty as the planners even though he did not take part in the formulation of the plan or did not know when or who originated the conspiracy. So that if the prosecution proved that the third, fourth and fifth accused persons joined Obetsebi Lamptey in Accra and participated in the execution of the plans agreed to at Lomé, they would be just as guilty as the original planners of the conspiracy. However, there was no conclusive evidence either direct or circumstantial to prove that the third, fourth and fifth accused persons joined in the conspiracy or participated in the execution of the objects of the conspiracy. Therefore, they were accordingly discharged.

Pari passu, in ***State v. Yao Boahene***,[30] **Sowah J** (as he then was) poignantly adumbrated the following profound summary of the accurate statement of the law as: "*Conspiracy consists not merely in the intention of two or more persons, but in the agreement of two or more to do an unlawful act or to do a lawful act by an unlawful means. For the purposes of this case the prosecution is seeking to establish that there was an agreement between George Monney, Yao Boahene and Samuel Monney to do an unlawful act, to wit, to forge the currency of Ghana... To constitute an indictable conspiracy there must be an agreement between the conspirators to do some common thing. Whether they had met each other or not, does not matter in the slightest degree so long as they are working for the same common object. They need not know whether a conspiracy was already in existence. The test is whether or not there was a community of design or a common purpose.*"[31]
In this Case, there was a conspiracy between Y.B. and G.M. to forge Ghana currency notes, and this conspiracy was later joined in by S.M., who, by his letters, was counselling and advising G.M. in West Germany to expedite negotiations for the purchase of a machine to forge Ghana currency notes. The Court held that, S.M. is also guilty of conspiracy.

2.3 Proof of the Agreement to Act Together

The standard of proof, which the law prescribes in all criminal charges including conspiracy, is notoriously known as, "***proof beyond reasonable doubt.***"[32] In the ***Francis Yirenkyi v. the Republic Case*** supra, **Dotse JSC** speaking on prove of conspiracy stated that: "*As with all criminal cases [including conspiracy], the duty of the prosecution is to prove the charge or charges against the accused person, in this case appellant beyond all reasonable doubt.*"[33]

There has been persistent ambivalent stance in the decisions of the Ghanaian courts as to the real imports of the new formulation vis-à-vis the proof of the agreement to act together. There is no doubt that the new rendition has narrowed the scope of the law of conspiracy in Ghana (i.e. a person could no longer be guilty of conspiracy in the absence of any prior agreement), however, the problem lies in the extent to which the "***agree to act together***" may be proved.

Upon the coming into force of the new formulation, the courts adopted a ***restrictive evidential approach*** (i.e. prove of prior

[28] (1929), 21 Crim. App. Rep. 94; 45 T.L.R. 421

[29] Ibid., at p. 424

[30] [1963] 2 GLR at 556.

[31] Ibid., at pages 564-565.

[32] Section 11(3) of the Evidence Act, 1975 (NRCD 323); Amartey v. The State [1964] GLR 256 at 295; Tetteh v. The Republic [2001-2002] SCGLR 854; Dexter Johnson v. The Republic [2011] 2 SCGLR 601; Frimpong a.k.a Iboman v. Republic [2012] 1 SCGLR 297: All illustrate the fact that what proof beyond reasonable doubt actually means is "*proof of the essential ingredients of the offence charged and not mathematical proof.*" (Dotse JSC in Fuseini v. Republic (J3/02/2016) [2018] GHASC 35 (06 June 2018))

[33] Ibid., Note 10, at page 29.

agreement through direct evidence only) in proving the agreement to act together by the prosecution. Here, what is required is for the prosecution to lead direct evidence to establish the prior agreement and no inference from their acts of committing the crime per se will suffice. Such evidence may be offered by a person who may have concurred in the conspiracy for the sole aim of detecting and punishing the actual conspirators or by the confession statements of some of the conspirators themselves, or by any eye witness account. Therefore, many cases have failed due to the inability of the prosecution to lead direct evidence to prove beyond reasonable doubt that, the accused persons have agreed to act together to commit a crime.

The first application of the restrictive evidential approach was witnessed in the case of ***Republic v. Augustine Abu***,[34] where **Marful Sau J.A** (as he then was), sitting as an additional High Court judge in the case acquitted the accused persons on two counts of conspiracy to commit robbery on grounds of the prosecution's failure to lead direct evidence to prove prior agreement of the accused persons to act together with a common purpose to commit robbery. This case was unanimously affirmed by the Supreme Court in the ***Martin Kpebu v. Attorney General Case*** infra, where **Akamba JSC** (as he then was) commented as follows: "*In this vein, the decision of the High Court, Accra, coram, Marful Sau, J.A, sitting as an additional High Court judge in the case of Rep vs Augustine Abu, No Acc 15/2010 delivered on 23/12/2009 (Unreported) which acquitted the accused persons on two counts of conspiracy to commit robbery was correct. The High court reasoned that the new formulation by the Commissioner had changed the old law on conspiracy such that proof of prior agreement to act together with a common purpose is now a new and necessary ingredient that must be proved by the prosecution, failing which the charge must fail.*"

The trial judge decision in ***Ekene Anozie v. The Republic***[35] is relevant on this point since in effect upheld the restrictive evidential approach, notwithstanding that, the judgment of the Court of Appeal setting aside the trial judge's decision which was affirmed by the Supreme Court in that case has been unanimously overruled subsequently by the Supreme Court in ***Martin Kpebu v. Attorney General***.[36] In the ***Ekene Anozie Case***, the facts were that three young men broke into a home at about 2.30am and attacked the family at gunpoint. They made away with 3 laptops and a number of cell phones belonging to the complainant and other members of his family. Subsequently, the complainant's laptop was traced to the 1st accused, as the one who had sold the laptop to another. He was subsequently arrested together with the 2nd accused, and Two laptops, an Acer and HP, were found in their possession. The 2nd accused claimed ownership of the HP laptop. The two men were subsequently positively identified as the robbers, and the HP laptop was also later identified as belonging to one of the complainants. On these facts they were charged with inter alia conspiracy to commit robbery. The trial judge acquitted the accused persons on the charge of conspiracy since the prosecution had not been able to prove a prior agreement to act together with a common criminal purpose.

Consimili casu, in ***Agyapong v. The Republic***,[37] a number of accused persons were tried and convicted of inter alia conspiracy to commit robbery for the part they played in an attack on a businessman in his hotel room. The complainant a non-resident Ghanaian confided to a friend that he had come to visit Ghana for the purpose of buying gold. Sometime later, he received a group of visitors to his hotel room. They put a gun to his head and asked him for money. He managed to escape through the window, but he run straight into the arms of other members of the group who had been waiting outside. He alleged that the visitors ransacked his room and took all the money he had. He also alleged that those he met outside assaulted him further, and bundled him into a vehicle, and drove him to the Tesano Police Depot to a senior police officer, later charged as 1st accused, who subjected him to interrogation and then demanded $30,000 from him. Since he had no money on him, he requested to be taken to Tema to see a friend for help. This was the person to whom he had originally confided the purpose of his visit to Ghana. The vehicle was driven by the 3rd accused. After some time at Tema, the friend, later charged as the 8th accused, drove him back to his hotel in Accra. The next day he lodged a complaint with the police and the accused persons were arrested and charged with inter alia conspiracy to commit robbery. The 3rd accused was convicted and sentenced to twenty years imprisonment. The Court of Appeal held, inter alia, that the new formulation of the law on conspiracy in *section 23(1) of the Criminal Offences Act* required the prosecution to prove an agreement to act together for an unlawful purpose and since the prosecution had failed to so prove, the conviction could not stand.

The courts have now "*turned over a new leaf*" from the ***restrictive evidential approach*** (i.e. prove of prior agreement through direct evidence only) to a ***broad evidential approach*** (i.e. prove of prior agreement through both direct and circumstantial evidence) by revisiting the well-known decision of the 1963 Supreme Court per **Korsah C.J** (as he then was) in the locus classicus case of **State v. Otchere & Ors**. that: "*…in order to prove a conspiracy the evidence may either be direct or circumstantial, but where it is sought to prove a conspiracy by circumstantial evidence it must be such that not only may an inference of conspiracy be drawn*

[34] No Acc 15/2010 delivered on 23/12/2009 (Unreported).

[35] [Republic v. Ekene Anozie (Unreported); Judgment delivered on 4h April, 2012.] {Ekene Anozie v. The Republic, (SC), Criminal Appeal No J3/6/2014; (Unreported); Judgment delivered on 13th May 2015; coram Atuguba JSC (presiding), Ansah, Bonnie, Bamfo & Akamba JJSC.: Overruled in Martin Kpebu v. Attorney General (J1/8/2016) [2016] GHASC 26 (05 December 2016)}

[36] (J1/8/2016) [2016] GHASC 26 (05 December 2016); coram Wood CJ (Mrs.) (Presiding), Adinyira (Mrs.), Dotse, Anin Yeboah, Gbadegbe, Benin and Akamba JJSC.

[37] [2015] 84 Ghana Monthly Judgments, 142, CA; Suit No. H2/1/2009; decided on 12 February, 2015 coram: Mariama Owusu J.A. (presiding) F.G. Korbieh and S. Dzamefe JJ.A.

from it but also that no other inference can be drawn from it." This was unanimously affirmed by the Supreme Court per **Dotse JSC** (as he then was) in the **Francis Yirenkyi Case** Supra, adding that: "*…unless clear investigations that have been conducted disclose through direct or circumstantial evidence, the culpability of the remaining four accused persons who were tried and convicted [of conspiracy], was in serious doubt*."

In the context of proving the prior agreement of the accused persons, circumstantial evidence means where it is rare to prove a prior agreement by evidence of eye-witnesses (i.e. direct evidence), inferences from the facts proved may prove the guilt of the accused.[38] In other words, in respect of the new formulation, the courts have observed that in the law of conspiracy it is rare for direct evidence to be adduced for prior agreement and that this is usually proved by evidence of subsequent acts done in concert to indicate a prior agreement. This point was reiterated in the ***Amaniampong Case*** supra, where **Owusu JSC** (as she then was) held on the new formulation of conspiracy that "*The agreement to commit a crime is not always proved by direct evidence. It may be established by inferences from proven facts*."[39]

In this case, the appellant was charged together with two others and convicted of inter alia conspiracy to commit robbery. The evidence of the victim was that on that morning while she was heading towards Melcom, she saw four boys who were on the other side of the road. When she got to Melcom, she branched to the right heading towards the Accra station. In the middle of the road, she saw these same four boys hurriedly walking after her. One of them closely approached her and she held her bag in her armpit. He closed in and tried to pull the bag from behind. She was pushed down and the bag was taken away and the boy ran away. According to her, her bag contained a camera mobile phone, ¢875,000.00, a book and ID students' and voter cards. When the four boys were arrested, a search conducted on them revealed a locally manufactured pistol, one Nokia mobile phone on 2nd accused and another one on the 1st accused, a brand-new sharp cutlass was found hidden in the trousers of the appellant. Some razor blades were also found on them. Two I. D. Cards of the victim were found in a purse. The 3 to 2 majority of the Supreme Court per **Owusu JSC** (as she then was) concurring by **Adinyira JSC** and **Anin Yeboah JSC** held that although from the evidence, there is no direct prove of the agreement to commit robbery, on the identity of the appellant, there is enough circumstantial evidence to establish that the four boys including the appellant were out at that time of the day with a common purpose to commit crime which they achieved by robbing the victim of her bag and its contents. Therefore, he was rightly convicted of conspiracy to commit robbery.

The ***broad evidential approach*** had been explained earlier in the 1968 case of ***Lartey v. The Republic***.[40] In this case, the first appellant was a tally clerk of a Cargo Hauling Company employed to check the quantity of goods loaded on to trucks carrying goods delivered by his employers and to issue way-bills covering the goods. The second appellate was a driver assigned by his employers to cart some bales of cloth from Company. 360 bales of cloth, made up into six rows of 60 bales each, were loaded on to the second appellant's truck, instead of 420 bales which it was expected he would carry. The first appellant gave a way-bill covering 360 bales. The second appellant who claimed to be illiterate, signed the way-bill, after having counted six rows of bales each of which he took to contain 70 bales, and in the expectation that there were 420 bales on the truck. The second appellant was stopped at a control point and the discrepancy was detected. Meanwhile, the first appellant had issued another way-bill covering the additional 60 bales upon the discrepancy having been pointed out to him by a representative of the consignee present at the loading. The appellants were inter alia convicted of conspiring to steal the 60 bales of cloth. They appealed against their convictions. The High Court allowed the appeal against the conviction for conspiracy, holding that, the evidence on record did not justify an irresistible inference of agreement to steal the 60 bales. **Akuffo-Addo CJ** (as he then was) brilliantly stated at page 989 that: "*Conspiracy import an agreement to commit a crime, and where there is no direct evidence of any such agreement, as indeed there was not in this case, the circumstances establishing facts from which conspiracy is to be inferred must lead uniquely to an inference of the existence of an agreement, that is to nothing else. If the circumstances merely lead to suspicion that there might have been such an agreement the charge of conspiracy is not proved*."

In the Supreme Court's deliberations on the new law of conspiracy under the *Criminal Offenses Act, 1960 (Act 29*), the ***broad evidential approach*** in proving the prior agreement to commit an unlawful act was sufficiently and coherently elucidated by **Yaw Appau JSC** (as he then was) in the 2017 Supreme Court Case of ***Faisal Mohammed Akilu v. The Republic***,[41] as follows:
"*From the definition of conspiracy as provided under section 23(1) of*

[38] In State v. Anane Fiadzo [1961] GLR 416 at 417, Sarkodee-Adoo, JSC delivering the judgment of the Supreme Court said: "*Presumptive or circumstantial evidence is quite usual, as it is rare to prove an offence by evidence of eye-witnesses, and inferences from the facts proved may prove the guilt of the appellant. A presumption from circumstantial evidence should be drawn against the appellant only when that presumption follows irresistibly from the circumstances proved in evidence; and in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the appellant, and incapable of explanation upon any other reasonable hypothesis than that of guilt. A conviction must not be based on probabilities or mere suspicion.*"; See: Lord Hewart C.J. in R. v. Taylor (1928) 21 CR. App. R. 20 at p. 21, C.C.A applied in The Republic v. Affail (1975) 2 GLR 69; and also Adinyira JSC in Gyamfi v. Republic (J3/5/2015) [2015] GHASC 115 (2 December, 2015). {Other Cases on Circumstantial evidence include: Frimpong a.k.a Iboman v. Republic [2012] 1 SCGLR 297; Bosso v. Republic [2009] SCGLR 420, holden 1; Gligah & Anr. v. The Republic; Dexter Johnson v. The Republic [2011] 2 SCGLR 601.}

[39] Ibid., Note 26 at page 7

[40] [1968] GLR 986.

[41] [2017-2016] SCGLR 444 dated 5th July, 2017. Coram: Adinyira (Mrs.) JSC (Presiding), Annin Yeboah, Akoto-Bamfo (Mrs.), Benin and Yaw Appau JJSC. See: Yaw Appau J.A in the Case of Abodakpi v. The Republic [2008] 2 GMJ 33.

Act 29/60, a person could be charged with the offence even if he did not partake in the accomplishment of the said crime, where it is found that prior to the actual committal of the crime, he agreed with another or others with a common purpose for or in committing or abetting that crime. In such a situation, the particulars of the charge normally read: "he agreed together with another or others with a common purpose for or in committing or abetting the crime". However, where there is evidence that the person did in fact, take part in committing the crime, the particulars of the conspiracy charge would read; "he acted together with another or others with a common purpose for or in committing or abetting the crime". This double-edged definition of conspiracy arises from the undeniable fact that it is almost always difficult if not impossible, to prove previous agreement or concert in conspiracy cases. Conspiracy could therefore be inferred from the mere act of having taken part in the crime where the crime was actually committed. Where the conspiracy charge is hinged on an alleged acting together or in concert, the prosecution is tasked with the duty to prove or establish the role each of the alleged conspirators played in accomplishing the crime."[42]

This ***broad evidential approach*** in proving the prior agreement as a sine qua non of the offense of conspiracy was quoted with full approval by His Lordship, **Eric Kyei Baffour J.A** (as he then was) sitting as an additional High Court Judge in the 2020 case of the ***Republic v. Bonnie and Others*** supra.[43] His Lordship also shared the view that, the new rendition no doubt has narrowed the scope of the law of conspiracy in Ghana. However, he argued that, it is no defence for an accused to claim when found acting together with others to contend that it cannot be used as evidence of a prior concert or deliberations. For any interpretation that appears to ignore the latter part of *section 23(1) of Act 29* to the effect that "*… whether with or without any previous concert or deliberation*", would have missed the import of the offence of conspiracy. Indeed, under illustrations to the *section 23(1)*, the subsection (1) illustration is still maintained to the effect that "*if a lawful assembly is violently disturbed (section 204), the persons who take part in the disturbance have committed conspiracy to disturb it, although they may not have violently committed any violence and although they do not act in pursuance of a previous concert or deliberations*."

In his eagerness to clear the ambiguity surrounding the new formulation accounting for the persistent ambivalence in the choice to be made by the courts between the restrictive and the broad evidential approach, **Eric Kyei Baffour J.A** (as he then was) said further that: "*In that respect, notwithstanding the removal of the word 'or' persons found to have committed or committing a crime together would be deemed to have had previous concert or deliberations to commit the crime because of the words "whether with or without any previous concert or deliberation" which is still part of the definition of criminal conspiracy. Was there an agreement to act together for a common criminal purpose for which each of the persons was a party to? As the scope of our law on conspiracy must require a proof by prosecution of agreement to act together…*"[44]

This interpretation of the law reinforces the saying in the Biblical book of wisdom that: "*Can two walk together, except they be agreed?*"[45] which means that when two people are seen walking together, it is explicit that their mind are in agreement vis-à-vis the direction to walk in. So as those seen acting together to commit a particular crime can be reasonably deemed through circumstantial evidence of law to have previously agreed together to commit that crime. In this vein, it means that their acting together would be helpful when direct evidence is rare in the prove of the prior agreement which is an indispensable ingredient in the establishment of the offense of conspiracy under the modern Ghanaian Criminal Law.

Now, as the law stands, the path is well beaten and set straight for the prosecution to lead either direct or circumstantial evidence (i.e. the ***broad evidential approach***), and the subsequent courts to accept it as a sufficient or prima facie proof of the prior agreement of the accused persons to commit unlawful act beyond reasonable doubt. This interpretation, in my respectful view will serve the purpose of upholding the sacrosanctity of criminal justice in conspiracy cases, so as not to unnecessarily exonerate offenders from being culpable as was witnessed in the epoch of the ***restrictive evidential approach***.

2.4 Common Criminal Purpose – The Mens Rea of Conspiracy

De facto, it is not new to our criminal law that to make an accused person criminally culpable, the prohibited act done by the accused (***actus reus***) must coincide with the prohibited mental state of the accused (***mens rea***). This expression is encapsulated in the Latin maxim "***actus non facit reum nisi mens sit rea***", literally translated as "*an act does not make a man a criminal unless the mind be guilty*." This fundamental principle is not only applicable, but a sine qua non in conspiracy cases. Thus, mens rea is an inevitable element to prove in a charge of conspiracy in Ghana.

It is ***luce clarius*** from *section 23(l) of Act 29* that the mental element of conspiracy is the ***common criminal purpose***: that is the common purpose of the agreement or collaboration between the parties must be to commit the crime charged. This is so even where the crime contemplated is one that can only be committed recklessly or negligently or even is a crime of strict liability. In the case of ***The Republic v. Ibrahim Adam and Others***,[46] **Afreh J.S.C** (as he then was) siting as the additional High Court judge defined the element of common purpose in conspiracy cases in the following words: "*Purpose means reason for which anything is done, created or exists; a fixed design, outcome, or idea that is the object of an action or other effort; fixed intention in doing something; determination. There must be an intention to carry out the unlawful purpose*." This was also, emphasised by the Privy Council per

[42] Ibid., at p. 447-448

[43] Note 13. Ibid., pp. 8 to 9.

[44] Ibid. Page 9.

[45] Holy Bible, King James Version, Amos chapter 3:3.

[46] SUIT NO. FT/MISC. 2/2000 dated 28TH APRIL 2003, HC (unreported), at page 20 of the judgment.

Lord Griffiths in ***Yip Chip-Cheung v. R***[47] that: "*The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea of the offence.*"

At common law, the accused persons must know the facts which make the purpose unlawful. This is so even when the offence to which the parties have agreed to commit is one of strict liability. Knowledge of the law on the part of the accused is immaterial. These propositions were stated by the House of Lords per **Viscount Dilhorne** in ***Churchill v. Walton***,[48] the head note of the Reports sums up the ratio decidendi of the case as:
"*Before a person can be convicted of conspiracy to commit an offence (even if the offence is one absolutely prohibited by Statute), it must be proved that he was a party to an agreement the object of which was to do something unlawful. Mens rea is an essential ingredient in conspiracy only in so far that there must be an intention to be a party to an agreement to do an unlawful act. Knowledge of the law on the part of the defendant is immaterial. If what the alleged conspirators agreed to do was, on the facts known to them, an unlawful act, a person cannot excuse himself by saying that, owing to his ignorance of the law, he did not realize that such an act was a crime. A person is not, however, rendered guilty of conspiracy if, following an agreement to which he was a party, an unlawful act is done, unless the act is one which he and others agreed to do. If, on the facts known to him, what he agreed to do was lawful, he is not rendered artificially guilty by the existence of other facts, not known to him, giving a different and criminal quality to the act upon which he agreed.*"[49]

The ***mens rea*** is an essential ingredient in conspiracy inasmuch as there must be an intention to be a party to an agreement to do an unlawful act. It may also be noted that the ***mens rea*** sufficient to prove the substantive offence (or whatever offence the accused is charged with) is not necessarily sufficient to support the charge of conspiracy to commit that offence. This is because the mens rea of conspiracy is always common purpose, a specific intent. But the mens rea of the substantive offence may be intention, recklessness or negligence; or it may require no mens rea at all.[50] See *section 11(2), (3), (4) and (5) of the Criminal Offenses Act,1960 (Act 29).*

These laws have been upheld by the Courts in Ghana. In the case of ***Behome v. the Republic***,[51] **Osei-Hwere J.** (as he then was) sitting in the High Court at Sunyani, said: "*It is clear that in order to secure a conviction on the charge of conspiracy, the prosecution were under a duty to prove that the appellant and those charged with him did not only agree to commit the unlawful act of unlawful entry but that they also had the intention to do that unlawful act.*"

The Case of ***Kambey & Others v. The Republic***[52] is also instructive at this juncture. In this case, the seven appellants and others went to harvest dawadawa fruits. They were challenged as to their right to enter the land and harvest dawadawa by people from another village. There was a fight and two persons were killed by arrows. None of the appellants was identified as the one who shot the arrows. The appellants were convicted of murder and they appealed. The Court of Appeal unanimously held per **Lamptey J.A**. (as he then was) that, there was no evidence to show that the seven appellants together with the others did set out to commit murder. Nor were there evidence that any of the seven appellants were armed with bows and arrows, therefore, it could not be concluded that the appellants had planned and executed a common enterprise.

In a more illustrative case of ***Faisal Mohammed Akilu v. The Republic*** Supra, where the appellant and three others chartered a taxi-cab to an area for one of them to collect money from someone. On the way, it was alleged an attempt was made by the appellant and his friends to snatch the taxi-cab in which they were, from the driver. In the process, they took an amount of GH¢40.00 from the driver but could not drive away the car. A military officer, who ventured onto the scene, assisted the driver of the taxi cab to arrest one of the accused persons while the others, including the appellant managed to escape. They were later charged and convicted of inter alia conspiracy to rob. The Court of Appeal dismissed their appeal. The Supreme Court unanimously quashed the conviction of the appellant on conspiracy for failure to prove the mental element beyond reasonable doubt and held through **Yaw Appau JSC** (as he then was) that: "*Though it could be said that sitting together with the others in the taxi-cab when the incident happened was an element of acting in concert, that alone is not conclusive on the point. There must be further proof that, being in the taxi-cab with the others was for a common purpose; i.e. to rob the driver of the car in which they were being conveyed or simply to rob. … mere presence at the scene of a crime without more is not proof of guilt.*"[53]

3 LIABILITY OF THE CONSPIRATOR

The Ghanaian courts of law have held that the liability or responsibility of a conspirator is complete the moment each party agreed to act together to commit the substantive offense. It does not matter whether the actual offense was eventually done. In other words, once the agreement has been completed, the offense of conspiracy is achieved and liability awaits, it is no defence for an accused person to say that he had countermanded his instructions or that he had had a change of heart. These propositions of law are encapsulated in the following cases: per **Korsah CJ** in ***State v. Otchere*** supra, per **Owusu JSC** in ***Amaniampong v. the Republic*** supra, per **Sowah**

[47] (1994) 99 Criminal Appeal R. 406, at page 410; See also R v. Anderson [1986] A.C. 27 H. L. per Lord Bridge at P. 39.E.
[48] [1967] 2 A. C. 224; [1967] ALL E.R. 497; 51 Criminal Appeal R. 212.
[49] Ibid., at page 212-213.
[50] Ibid, note 46. See also: Abodakpi v. The Republic [2008] 2 GMJ 33, per Kanyoke J.A.
[51] [1979] G.L.R 112 at p. 120.
[52] [1989-90] 1 GLR 213
[53] Ibid., note 41, at p. 449

J in ***State v. Yao Boahene***,[54] etc.

The liability of the conspirator comes in many forms. As stipulated by **Prof. Mensah Bonsu**, the general rule at Common Law distinguishes between the liability of a person involved in a large conspiracy with several objects, and that of one who is involved in only one of what is, in reality, several identical small conspiracies. Thus a person is liable for all the objects of a conspiracy, which, though made up of different persons, cannot be broken up in its several parts. The contrary is the case where the evidence establishes a series of plots whose only connection is an individual who provides a common link. This was elucidated by **Lord Hewart C.J**. (as he then was) in the English case of ***R. v. Meyrick and Ribuffi Case*** supra that, "*... agreements may be made in various ways. There may be one person, round whom the rest revolve .... There may be a conspiracy of another kind where the metaphor would be rather that of a chain ...*"

The eminent Professor of Law poignantly explained the liabilities associated with these forms of agreement as follows: "*Where the agreement is of the former type, each part is severable from the other parts. The conspirators in a chain are, however, liable for the whole, for they are all usually aware of all the objects of the plot. Participants in chain conspiracies are deemed to be aware of the objects of the conspiracy. This knowledge is imputed to them because the nature of the objects of the plot, and their own part in it, would usually indicate to them that there are other actors involved, besides themselves. e.g. A person involved in a conspiracy to transport smuggled goods must know that there are smugglers, buyers at either end of the transaction*."[55]

Another form of liability is vicarious liability, where the acts of one co-conspirator are binding on the other. In ***State v. Otchere Case*** supra, where a co-conspirator was convicted of conspiracy to commit treason, although he had attended meetings with the other co-conspirators, he had done nothing himself afterwards which furthered the conspiracy in any way. Also, in case of ***State v. Yao Boahene*** supra, where the contents of documents obtained by the police in a search indicated that Y.B. and G.M. were making arrangements with firms in West Germany for the purchase of printing machine for printing bank notes. There were also some letters from S.M., a brother of G.M., advising the latter to make every endeavour to get the machine for Y.B. Both Y.B. and S.M. were arrested and charged with conspiracy to forge Ghana currency notes. **Sowah J** (as he then was) held that, where it is found that there is a conspiracy, each conspirator becomes the agent of the other conspirators, and any overt act committed by any one of the other conspirators is sufficient on general principles of agency to make it the act of all the conspirators. In this case the acts of G.M. in West Germany became the acts of Y.B. and S.M.

What will then be the state of the law when one of the parties goes beyond the original objects? In Ghana, a co-conspirator is not liable where any other party goes beyond what was agreed upon and does an act that is totally different from what was agreed upon. For instance, if it was agreed between X and Y to rob Z in his workplace. During the execution of the plot, Y killed Z because Z mentioned his name to reveal his identity. Here, X is not guilty of conspiracy to kill Z.

In ***Teye alias Bardjo & Ors v. The Republic***,[56] The first, second and third appellants together with two other persons, agreed on a joint enterprise to break into and enter the deceased's house to steal therefrom. In the course of the execution of the joint enterprise, the third appellant went beyond what had been agreed upon, by killing the deceased because the deceased had recognised him and mentioned his name. The appellants were convicted of inter alia conspiracy to commit murder. Their appeal to the Court of Appeal was allowed in respect of the first and second appellants and dismissed that of the third appellant, and unanimously held per **Sowah J.A**. delivering the judgment of the court that, where two or more persons embarked upon a joint criminal exercise, each of the participants would be answerable for the acts done in pursuance of the joint enterprise including such acts as were incidental to and necessary for the achievement of the joint enterprise and were in the contemplation or ought to be in the contemplation of the participants at the time when the exercise was embarked upon. However, where one of the participants, took a different course or went beyond what had been agreed upon or was in the contemplation of the parties, as in the instant case, he alone would be liable; the other participants would not be liable for the consequences of his unauthorised act.

Are there any defences in law available to the conspirator? There is no defence to conspiracy at Common Law because as stipulated above, the offence is completely committed upon the conclusion of the agreement. The plan may be jettisoned, but it does nothing to the liability already incurred. In Ghana, there is a strict adherence to the Common Law position. Therefore, no defence exists to the charge. The Supreme Court stated in ***State v. Otchere*** supra that: "*their responsibility as conspirators [i.e. those accused persons who claimed to have recanted and played no further part in executing the treason plot] was complete the moment they agreed with the others at Lomé to do what was eventually done.*" The defence of "Countermand" that exists for abetment has been expressly ruled by the Court in ***Boahene & Monney v. State***,[57] not to exist for conspiracy in Ghana. In this case, **Ollennu J.S.C.** (as he then was) aptly explained the rationale as follows: "*The defence of countermand may only avail with respect to an offence to be committed in future, e.g. where a person having given instructions to, say, his servant, to go and beat up someone, and before the servant could put the directions into effect, recalls his directions. The offence with which the second appellant is charged is conspiracy. That offence is committed the moment two or more people agree together or act*

[54] [1963] 2 GLR at page 556.

[55] H.J.A.N. Mensa-Bonsu, "Conspiracy in Two Common Law Jurisdictions - A Comparative Analysis," 4 Afr. J. Int'l & Comp. L. 419 (1992), at page 421, at page 440.

[56] [1974] 2 GLR 438.

[57] [1965] GLR 279.

together to commit a crime; one of the conspirators may recant and withdraw from the perpetration of the substantive offence, but he cannot undo the act of his previous agreement."[58]

4 PUNISHMENT

In Ghana unlike common law,[59] the penalty for conspiracy is not at large. It is the same as for the commission of the substantive offence. Thus, *section 24(1) of the Criminal Offences Act, 1960 (Act 29)* enunciates that: "*Where two or more persons are convicted of conspiracy for the commission or abetment of a criminal offence, each of them shall, where the criminal offence is committed, be punished for that criminal offence, or shall, where the criminal offence is not committed, be punished as if each had abetted that criminal offence*." As noted by **Prof. Mensah Bonsu**, a person who is convicted of conspiracy is liable to suffer the same penalty as for the substantive offence except for capital offences, i.e. offences punishable by death.[60]

In ***Amaniampong (Isaac) alias Fiifi v. The Republic***,[61] the 3 to 2 majority of the Supreme Court, per **Owusu (Ms.) JSC** (as she then was) made the following accurate statement of law that: "*If the evidence is enough to establish the conspiracy charge against the Appellant, then it is immaterial that he did not actually rob p.w. 1 of her hand bag. Once the robbery was committed in furtherance of the object of the conspiracy, he is equally as guilty as the person who actually snatched the bag in the course of which, the victim's palm was slashed. His responsibility as conspirator was complete the moment he agreed with the others to go out at that time of the day to do what was eventually done. See the cases of STATE VRS. OTCHERE and Others [1963] 2 GLR 463 at 467 and STATE VRS YAO BOAHENE [1963] 2 GLR at 556. The Appellant therefore is equally guilty of the offence of robbery*."[62]

Another proposition of law is that, when all accused persons have been tried, convicted and sentenced on conspiracy charge to the same term of imprisonment, the reduction in the sentence on appeal from higher term to lower term on the same evidence must apply to all the appellants. In ***Gyedu v. Republic***,[63] where the accused persons therein had been indicted for conspiracy and tried together, the Court held that it will be inconsistent for the jury to rely on the same evidence to acquit some of the accused persons and convict the other in a conspiracy charge. The ***Francis Yirenkyi Case*** supra is still instructive on this point. Here, the appellant was tried alongside with five others for conspiracy to steal and stealing 800 bags of sugar while on duty as a policeman. All the accused persons including the appellant was convicted and sentenced to 10 years imprisonment with hard labour. On appeal, the sentence of the 1st, 2nd, 3rd and 4th was reduced from 10 years to 2 years on the same evidence, maintaining the sentence of 10 years on the appellant. The Supreme Court allowed the appellant's appeal holding per **Dotse JSC** that: "…*when persons are charged and tried together on an offence of conspiracy, it would be inconsistent and bad in law for some of the accused persons to be acquitted and others convicted provided the evidence is the same*."[64]

Finally, the common law rule on the merger of the misdemeanour appears to have been changed, so that, it is possible to charge both the conspiracy and the substantive offence.[65] *Section 24(2) of Act 29* states: "*A Court having jurisdiction to try a person for a criminal offence shall have jurisdiction to try a person charged with conspiracy to commit or abet that criminal offence.*" Here, in the words of **Prof. Mensah Bonsu**, this provision is capable of being construed in two ways. *First* it could mean that although conspiracies were triable on indictment at Common Law, it could be tried summarily in Ghana if the substantive offence in question is triable by a District Court.[66]

The *second* meaning could be the construction placed on it in ***Republic v. Military Tribunal, ex Parte Ofosu-Amaah & Anor. (No. 2)***,[67] i.e. that the conspiracy charge could be added to any substantive offence. In this case, the applicants were convicted by a military tribunal of inter alia conspiracy to commit subversion. They brought certiorari proceedings to quash their conviction arguing that the offence of conspiracy to commit subversion did not exist in *N.R.C.D. 90, s.1 (a)* and that a military tribunal convened under *N.R.C.D. 90* could only try offences created by that Decree. The Court per **Abban J** (as he then was) held that, if any particular conduct was alleged to be an offence under *N.R.C.D. 90*, the prosecution in charging the accused with the said offence, could, in addition and in accordance with *Act 29, ss. 5 and 24 (2)* charge the accused with conspiracy to commit that particular offence despite the fact that conspiracy had not specifically been made an offence under the Decree. By *Act 29, ss. 23 (1) and 24 (2)* the legislature made special unambiguous provisions for the offence of conspiracy. Those provisions were of general application and applied to every offence created by any enactment. Consequently, by virtue of those provisions the prosecution could add a conspiracy charge to any offence and

[58] Ibid., at pp. 288-289.

[59] Williams, G., Textbook of Criminal Law; Queen v. Button, 11 QB 929; 116 ER 720 (1848).

[60] Ibid., Note 55, at page 445.

[61] Criminal Appeal No.: J3/10/2013, Unreported; Decided on 28th May 2014; Coram: Adinyira (Mrs.) (Presiding); Owusu (Ms.); Dotse; Anin-Yeboah; and Akamba JJSC.

[62] Ibid., at p. 10.

[63] [1980] GLRD 480. The same principles of law were upheld in the cases of Kannangara Aratchiege Dher Masena v. R (1951) AC Privy Council, R v. Anthony (1965) 2 QB 189 Criminal Appeal 104 and others.

[64] Page 43 of the Report.

[65] See Republic v. Military Tribunal; Ex parte Ofosu-Amaah [1973] 2 GLR 445. Also see State v. Adjekum and Amofa [1962] 1 GLR 442 and Lartey v. The Republic [1968]1 GLR 986 (the High Court has deplored the practice of charging the inchoate offence and the substantive offence on the same indictment).

[66] Ibid., Note 55, at p. 446.

[67] [1973] 2 GLR 445, HC.

jurisdiction was given to any court to try a conspiracy charge so long as that court had jurisdiction to try the substantive offence on which the said conspiracy charge was based.
The practice in Ghana has generally favoured the second interpretation.

5 CONCLUSION

Throughout this work, a strenuous effort has been made to discuss the state of the laws on conspiracy as existed in Ghana today and how the courts have so far expressed and enforced these laws. The paper had not only shared the view that the old formulation has been revised giving rise to the new rendition, but also outlined and explained the essential elements of the offence of conspiracy, the extent of liability and punishment for conspirator(s). And argued that notwithstanding the suggestions made by **Prof. Mensah Bonsu** that: "…*the Attorney-General should take steps to cause section 23(1) to be amended again, to re-enact the old formulation which, to all intents and purposes, is a more reasonable version of the law on conspiracy*,"[68] the courts have maintained the new provision and interpreted it broadly to extend its tentacles to cover the establishment of the prior agreement to act together through both direct and circumstantial evidence, i.e. the ***broad evidential approach***.

As such, it is humbly submitted that, there is no need to have the old provision restated, since the ***broad evidential approach*** adopted by the courts have in effect achieved the purpose for which the old provision sought to do, i.e. to lighten the burden of proof on the prosecutor and hold perpetuators strictly accountable. It is my noble view that, as the path is straight without any ambiguity that prior agreement to act together can be proved through both direct and circumstantial evidence, so as the courts should continue to follow this approach in their subsequent decisions.

[68] Ibid., Note 4, Page 39.