The mens rea of criminal attempts

A.P. Simester

Table of Contents

[there is no table of contents for this document]

Case Comment

Law Quarterly Review

L.Q.R. 2015, 131(Apr), 169-173

Subject
Criminal law

Other related subjects
Criminal evidence

Keywords
Attempts; Concealment of criminal property; Criminal intent; Mens rea; Scrap metal dealing

Cases cited
R. v Pace (Martin Edward) [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 2 WLUK 569 (CA (Crim Div))
R. v Khan (Mohammed Iqbal) [1990] 1 W.L.R. 813; [1990] 1 WLUK 712 (CA (Crim Div))
Attorney General's Reference (No.3 of 1992) [1994] 1 W.L.R. 409; [1993] 11 WLUK 148 (CA (Crim Div))

Legislation cited
Criminal Attempts Act 1981 (c.47) s.1(1)

L.Q.R. 169 The time has come, the Court of Appeal might well have said, for the Supreme Court to speak of the law of attempts. In truth, such a speech is overdue. For the moment, though, the Court of Appeal has offered a helpful new take on how the mens rea requirement should be interpreted.

In *R. v Pace and Rogers [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867* , the defendant scrap metal dealers were charged with attempting to convert "criminal property". They had purchased second-hand metal which they suspected was stolen. Had it indeed been stolen, the defendants could have been convicted under the Proceeds of Crime Act 2002 : according to s.327(1) of the Act , read together with s.340 , liability for the full offence requires only that an offender *suspects* the property is stolen. In fact, however, the transactions were part of a police "sting" operation and the property was not stolen. The question for the Court of Appeal was, therefore, whether the same state of mind sufficed for commission of the attempt.

The court's answer was that the same state of mind did not suffice. Section 1(1) of the Criminal Attempts Act 1981 requires that the attempt be done "with intent to commit an offence." The court held that:

"as a matter of ordinary language and in accordance with principle, an ‘intent to commit an offence’ connotes an intent to commit all the elements of the offence"(at [62]).

Since both Pace and Rogers merely suspected that the property was stolen, neither *intended* to convert criminal property. Their convictions were quashed.

Starting with the language of s.1 is plainly the right approach. Notwithstanding that both defendants satisfied the mens rea requirements of the full offence, conviction of an *attempt* is under the 1981 Act . Even so, the proper interpretation of s.1 is itself bedevilled by controversy. In particular, the court in *Pace and Rogers* is at odds with its own rulings in ***L.Q.R. 170** *R. v Khan [1990] 1 W.L.R. 813; [1990] 2 All E.R. 783* and *Attorney General’s Reference (No.3 of 1992) [1994] 1 W.L.R. 409; [1994] 2 All E.R. 121* .

In *Attorney General’s Reference* , the Court of Appeal had favoured a "missing element" analysis, according to which (see *[1994] 1 W.L.R. 409* at 417):

"a defendant, in order to be guilty of an attempt, must be in one of the states of mind required for the commission of the full offence, and did his best, as far as he could, to supply what was missing from the completion of the offence".

On that view, D need not intend any element of the actus reus that is in fact present, unless a corresponding intention is also required by the full offence. As the court in *Pace and Rogers* saw, that approach is clearly inconsistent with the wording of s.1(1) of the 1981 Act . It is also inconsistent with ordinary language. To "attempt" to do something is to *try* to do it. If only for the sake of speaking clearly to the citizens it is meant to guide, a law criminalising the "attempt" to do something should mean what it says, i.e. that trying to do the thing is a crime. Once this is accepted, we can see why the missing element analysis is wrong in principle. Consider the law of rape. Under s.1 of the Sexual Offences Act 2003 , it suffices for the full offence that D lacks a reasonable belief about V’s consent. Rightly so. But no-one could describe D, however blameworthy he may be, as *trying to rape* someone whom he genuinely yet negligently believes to be consenting to sex. Attempts cannot be made inadvertently. Ordinary language simply does not allow that conclusion. Neither does s.1(1) of the 1981 Act . And that means the missing element analysis must fail.

Khan is not quite so easily disposed of. In the context of pre-2003 rape law (whereby recklessness was required with respect to non-consent), the Court of Appeal in *Khan* adopted a distinction between circumstantial and other elements of an offence, holding that it was sufficient for attempted rape that D intended sexual intercourse while *knowing or being reckless* about V’s non-consent (see *[1990] 1 W.L.R. 813* at 819). The court in *Pace and Rogers* sought to distinguish *Khan* on two grounds (at [52]), without pursuing either in detail. One suggestion was that, unlike in *Khan* , the offence in *Pace and Rogers* was impossible to commit: seemingly a distinction without a difference, and surely unsustainable in light of *Shivpuri [1987] A.C. 1; [1986] 2 All E.R. 334 HL* . (More on this below.) Secondly, the court observed that the full offence in *Khan* required recklessness rather than suspicion. Assuming we reject the "missing element" approach, however, the decisions themselves are inconsistent in both principle and spirit. The status of the scrap metal as "criminal" property (because stolen) is a circumstance element too, just like non-consent; yet recklessness about the former is insufficient for attempt liability. Moreover, the unequivocal statement in *Pace* (at [62]), that "an ‘intent to commit an offence’ connotes an intent to commit all the elements of the offence," applies to both—indeed, all—elements of the actus reus.

Between *Pace and Rogers* and *Khan* , then, which is the better view? It is clear that, per s.1 of the 1981 Act , there can be no conviction of an attempt to commit an offence unless D intends to commit *the offence*. This means, we have noted, that attempters must be *trying* to commit the offence. But does it really mean that they must intend *every element* of that offence, or that they must be trying to bring ***L.Q.R. 171** about *every element* of that offence? With respect to the court in *Pace and Rogers* , the answer to that question is no.

Indeed, it seems that the court did not intend to suggest otherwise. The concluding paragraph of the decision accepts that knowledge or belief may be an appropriate mens rea standard for the offence of attempted handling (at [81]). That acceptance is, of course, congruent with existing case law. But it is also aligned with principle. When applied to circumstance elements within an actus reus, the mens rea requirement of "intention" has always been understood—translated—to mean its cognitive equivalent, i.e. knowledge or settled belief (with no significant doubt). Of course, one *might* hope, desire, or intend that the circumstance exists: perhaps, in a rare and sadistic case, one might even try to bring the circumstance about. D might want to have sex *only* if V does not consent. But that is an extreme case. In the standard variety of intended rape, D is aware that V does not consent, yet neither intends nor hopes, indeed does not care, that she is not consenting. D none the less intends to have

"sexual intercourse without consent", because he intends to have sexual intercourse *believing* that V does not consent. In other words, D intends *the offence*, even though he does not intend every one of its component elements.

If read literally, therefore, the court in *Pace and Rogers* goes too far when it says (at [62]) that "an 'intent to commit an offence' connotes an intent to commit all the elements of the offence." As a matter of general principle, the intent to commit an offence connotes intention with respect to behaviour or consequence elements, and knowledge or settled belief with respect to circumstance elements. This principle is applicable to full offences as well as attempts. Particularly in light of the court's concluding discussion of attempted handling, it is submitted that *Pace and Rogers* is consistent with this qualification.

Admittedly, the qualification presupposes that a genuine distinction can be drawn between circumstances and the other actus reus elements of an offence; so too does the analysis in *Khan* . One worry, therefore, is whether the distinction between circumstance and other offence elements is sustainable: a concern pressed by Richard Buxton Q.C., as he then was, in [1984] Crim. L.R. 25. While the matter cannot be pursued at length here, it is submitted that the distinction is genuine and important. The line is not always easy to draw, to be sure, but that does not mean it is non-existent or that we should abandon it. Unlike behaviour and its consequences, circumstance elements need not be within D's control or affected by D's behaviour. Thus whether the scrap metal was stolen, and hence "criminal" property, is a matter that need not be within D's control and therefore a circumstance. The same goes for such elements as a victim's age in sexual offences and the fact that the victim of an assault is a constable. (Notice that the seeming counterexample in *Attorney General's Reference* , of the ulterior mens rea requirement in aggravated criminal damage, is *neither* a circumstance nor consequence element—a point made recently by J.J. Child in (2014) 34 L.S. 537.)

Suppose, then, that we accept the foregoing qualification to *Pace and Rogers* . What implications does it have? One payoff is that nothing turns on the question whether the crimes in *Khan* and *Pace and Rogers* were possible to commit. Section 1(3) of the 1981 Act provides that a defendant's intention to commit an offence may be assessed on the basis of their *beliefs* about the facts, even if those beliefs ***L.Q.R. 172*** are false. It can now be seen that this provision merely affirms the point stated above, that an intention requirement, when applied to circumstance elements, is satisfied by proof of D's knowledge or settled belief regarding those circumstances. Properly understood, nothing in s.1(2) or (3) undermines the crucial requirement in s.1(1) , applying to all attempts, for proof of D's intention to commit the relevant offence. Pace and Rogers simply lacked that intention.

However, qualifying *Pace and Rogers* does not commit us to accepting *Khan* . Intended rape remains different from reckless rape, which would embrace cases where the defendant merely recognises a risk of non-consent (cf. *Simester and Sullivan's Criminal Law, 5th edn (2013), at §§ 5.1(v) and 5.2(iii)*). By extending attempt liability to the latter kind of cases, *Khan* goes much further than *Pace and Rogers* . We have noted that it is conventional in ordinary language to ascribe an "intention to rape" to someone who intends to have sexual intercourse believing that the victim does not consent. But it is *not* conventional to ascribe such an intention to someone who merely recognises a risk of non-consent.

Yet what about the merits? At the level of policy, someone who attempts penetration, being reckless about consent, is profoundly culpable. Indeed, as the court emphasised in *Khan* (*[1990] 1 W.L.R. 813* at 819), such a person evinces the mens rea required by the full offence. If knowledge and belief suffice for attempt liability, why not recklessness?

The most important reason why not is the one at the heart of the decision in *Pace and Rogers* itself: because that is what s.1(1) stipulates. Policy arguments are all very well, but they should not displace the clear and unequivocal terms of that statute.

Neither are the policy arguments clear-cut. A person who advertently runs the risk of harm is not thereby *trying* to cause that harm. Choosing to risk wrongdoing may be morally problematic, but it is not problematic in the same way: it is not a direct attack on the rights and interests of others but, rather, a form of endangerment. Moreover, extending the law of attempts by interpreting s.1(1) so as to create general liability for endangerment seems undesirable. To do so would generate a criminal law radically expanded beyond the one we have now, with much greater scope for officious intrusion into the day-to-day conduct of citizens. Certainly, there is a superficial attraction in the thought that, if D acts with the mens rea of a substantive offence but, luckily, does not complete the actus reus, D is just as *culpable* as someone who commits the full offence. Perhaps that is true. However, it does not follow that D's conduct should be *criminalised*. It should be remembered that mere risk-takers do not actually cause harm. (If they do, that should be criminalised separately—as when someone who makes sexual advances without being sure of V's consent already falls within the scope of sexual assault.) To be sure, there are occasions when the dangers associated with an activity are such that risk-creation should indeed be regulated. But that is best achieved through context-specific offences, such as careless driving. A general endangerment offence would render the actus reus requirement of many serious offences largely redundant. ***L.Q.R. 173*** Potentially, it could radically alter the nature of policing and the scope of human freedom. Any such move is properly a matter for Parliament.

A.P. Simester

National University of Singapore

