Intention and criminal attempts

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Cases cited
R. v Khan (Mohammed Iqbal) [1990] 1 W.L.R. 813 (CA (Crim Div))
R. v Pace (Martin Edward) [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867 (CA (Crim Div))
Attorney General's Reference (No.3 of 1992) [1994] 1 W.L.R. 409; Times, November 18, 1993 (CA (Crim Div))

Legislation cited
Proceeds of Crime Act 2002 (c.29)
Criminal Attempts Act 1981 (c.47) s.1(3)

Crim. L.R. 142 It has been a continuing matter of academic debate, for many years, what should be the mens rea of an attempted crime. Moreover, as we shall see, judicial opinion on the point is diverse. That said, everyone agrees about two matters. The first is that the mens rea component relating to any factual element of an attempt can *never be less demanding* than it is for that element of the completed crime. The second is that, precisely because all attempts involve failure, it follows that some factual element must be missing, with the result that the mental element assumes even greater importance than usual. In short, we may expect the mens rea component(s) to be *more demanding* than for the completed crime. At that point, the consensus ends. As a result of the decision of the Court of Appeal (Criminal Division) in *Pace*, [1] there seem to be three, radically different strands of opinion as to the way in which those components are to be treated. Before turning to that case, it will be worth examining the other two strands.

In what, for many commentators is the most persuasive decision on the point, *Khan*, [2] the Court of Appeal embraced a distinction that had been set out by the late Professor Sir John Smith QC in a most influential article. [3] What he argued was that, though, to be a guilty of attempting a crime, one must have intended any consequential elements of the crime at hand (even if the completed crime does not require intention as to any such elements), one need not have intended any circumstantial elements (unless the completed crime does require it). This argument had its basis in the persuasive proposition that, whilst the very idea

of attempt entails that one must have intended the consequence, or result, of one's actions, there is no need for the same to be true of circumstantial elements of the crime in question.

In *Khan* itself, the four appellants had, in turn, tried to penetrate a complainant, but had failed to do so. The jury had been directed that the mens rea of attempted rape would be present only if the given accused had intended to have intercourse with the complainant, and had either known that she was not consenting, or had been reckless as to that matter. In ruling that direction correct, the court explicitly relied upon the distinction between consequences and circumstances. In other words, intercourse, because it would have been the consequence of the actions in ***Crim. L.R. 143*** question, had the complainant been penetrated, had to have been intended, but lack of consent, because a circumstance, need only have been foreseen.

The second strand is to be found in *Attorney General's Reference (No.3 of 1992)*.[4] There, the charge was one of attempted aggravated arson, under s.1(2) of the Criminal Damage Act 1971. The completed offence required an accused to have destroyed or damaged property by fire, to have either intended or been reckless as to that destruction or damage, and to have either intended or been reckless as to whether the life of another person would thereby be endangered. What was not required was that the life of another person had actually been endangered. On the facts at hand, the charge had been one only of attempted aggravated arson, because petrol bombs allegedly thrown by the various accused at a car had failed to hit their target. The reason that the aggravated version had been charged was that there had been several people either in the car or near to it, at the time. The judge had directed the jury to acquit, the basis for her ruling being that there was no evidence that the accused had intended to endanger the lives of others, yet mere recklessness as to that matter was insufficient to allow of a conviction for attempt. In so doing, the judge had ruled that the endangering of life "was a consequence of the intended damage".[5] Of course, having regard to the distinction between consequences and circumstances, that reasoning might seem to be unimpeachable (as long as the (potential) endangering of life had properly been treated as a consequence, rather than a circumstance, a matter to which we shall return). However, the Court of Appeal overturned the judge's ruling, its reason for doing so having nothing at all to do with Sir John's distinction. Rather, it relied upon a different way of dividing up the elements of offences, for the purposes of attempts. It held that intention was required as to the missing element (here damage to the car), but not as any other matter at issue. Therefore, recklessness as to the endangering of life did suffice for liability.

For the third strand, we must turn to *Pace* itself. The two accused both worked at a scrap metal yard. That yard was one of those targeted by the Thames Valley Police as the object of an undercover operation to test whether or not such yards would accept purportedly stolen items for purchase. Two undercover officers described metals that they brought to the yard, either explicitly or by necessary implication, as stolen. Those metals were later bought either by or at the behest of one or other of the accused. In fact, none of the metals was stolen, but belonged to the police.

Pace and Rogers were charged, not, as one might have supposed, with attempting to handle stolen property, but with attempting the offence of stealing, disguising or converting criminal property, which is contained in s.327(1) of the Proceeds of Crime Act 2002. Though one cannot be sure, it may be that this lesser attempted offence was charged because the mens rea required, as regards the criminal property, for the completed offence, is only that the accused "knows or *suspects*" (emphasis added) it to constitute such property (see s.340(3)). Of course, in the case of handling, under s.22(1) of the Theft Act 1968, the accused must know or *believe* the goods in question to be stolen (a point mentioned by the Court of ***Crim. L.R. 144*** Appeal).[6] And, indeed, it seems to have been the prosecution case that the states of mind of Pace and Rogers were ones only of suspicion, without necessarily extending to belief.[7]

At all events, the jury had been directed that the applicable mens rea in respect of the offences of attempt charged was capable of being suspicion that the metals constituted criminal property. Though there were other elements to the appeals in the case, this note deals only with the issue of whether or not that had been a misdirection.

What is abundantly clear is that the appeals were allowed because it had indeed been a misdirection. What may be controversial is *why* it had constituted a misdirection, for there were, potentially, three mens rea problems in the case. First, is something short of intention as to the existence of some element of a crime *ever* capable of being mens rea sufficient for attempt? Secondly, if it is, is *mere suspicion* as to an element ever sufficient? Thirdly, the present charges being, in any event, of impossible attempts, then, even if suspicion is capable of sufficing for a possible attempt, is it capable of doing so for an impossible one?

Most certainly, the court heard and assessed argument on both the general points and the impossible attempts one. As to the latter, counsel for the Crown had submitted that s.1(3) of the Criminal Attempts Act 1981 provided the answer in its favour. It states:

"In any case where —

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded,"

then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.

That subsection may be thought to address the impossibility problem, but, as the court pointed out, [8] it was incapable of applying here, since it allowed of the accused being regarded as intending that the metals were criminal property only where they *believed* them (contrary to the true situation) to be such property; mere *suspicion* of that fact was insufficient.

It was precisely because of that ruling that the court turned its attention to the general provision in s.1(1) of the 1981 Act, which provides:

"If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."

The court's view of the effect of that provision could not have been made clearer by Davis LJ:

"… we consider that, as a matter of ordinary language and in accordance with principle, an 'intent to commit an offence' connotes an intent to commit all ***Crim. L.R. 145*** the elements of the offence. We can see no sufficient basis, whether linguistic or purposive, for construing it otherwise." [9]

Applying that reasoning to the present facts, his Lordship went on to say:

"A constituent element of the offence of converting criminal property is, as we have said, that the property in question *is* criminal property. That is an essential part of the offence. Accordingly, an intent to commit the offence involves, in the present case, an intent to convert criminal property: and that connotes an intent that the property should *be* criminal property." [10]

It is worth emphasising what this entails. Every single factual element of the crime allegedly attempted must have been intended, so that, if, as regards any such element at all, there was something short of intention, say recklessness, suspicion or negligence, there could be no criminal liability.

One can quickly see why the holding has not been welcomed by those who support the consequences/circumstances distinction. [11] It does not seem conceivable that the status of property in the offence under s.327 as "criminal" can count as anything other than a circumstance, yet the court makes it pellucidly clear that the accused would have been guilty only if they had intended it to have that status, something that the prosecution had never alleged.

There is little doubt that it will be argued, with strong conviction by commentators and before courts, that the judgment of Davis LJ in *Pace* is simply wrong on the intention requirement point. Indeed, Professor Virgo has already argued that "[t]his part of the judgment is best forgotten" and even that, "the decision should simply be ignored as *per incuriam*." [12]

Though the court in *Pace* was aware that its own reasoning was at odds with *Khan*, it sought to distinguish *Khan* on two grounds. [13]

First, *Pace*, unlike *Khan*, involved an impossible attempt, so it might be argued that the requirement of intention applies only to such attempts. This seems unconvincing, doctrinally, especially since the leading House of Lords case, *Shivpuri*, [14] draws together the two species of attempt.

The second difference from *Khan*, according to his Lordship, was that the completed offence of rape did require recklessness, yet the completed present offence would be satisfied by something short thereof, namely suspicion that the metals were criminal property. As regards this point, one must bear in mind that an argument that has considerable support in the academic literature is that the minimum content of *any* mens rea element of an attempt, even one relating to circumstances, should be (advertent)

recklessness. [15] There can be no doubt that, if that argument is sound, the actual result in *Pace*, as opposed to the reasoning in ***Crim. L.R. 146*** the case, is not inconsistent with *Khan*. In effect, to convict Pace and Rogers, one would have had to descend too far down the mens rea scale, but that had not been so in *Khan*, since the jury there had been directed that they could convict Khan only if they found him to have been advertently reckless.

But is it sound? One problem is that, once we have departed from the idea that intention [16] is necessarily required, *whatever the content of the completed offence*, it is not easy to see why, in principle, there is anything else to confine us (other than what is required for the completed offence). An answer may be, as was mentioned earlier in this note, [17] that precisely because, in attempted crime, some factual element is necessarily missing, so the mental element should be more demanding. And that demand might be thought to be satisfied only if the minimum mens rea requirement were to be one of advertent recklessness. But that leads to a second problem, one that might be thought to be demonstrated by *Pace* itself. In short, what is the proper doctrinal basis for drawing the line required? As the court said, suspicion is not the same as recklessness, yet recklessness, in its advertent form, shares in common with suspicion precisely that it is an advertent state of mind, so why not draw the line at the other side of suspicion, since one would, then, still be ruling out, as insufficient, all *inadvertent* states? [18]

One should be aware of what might be seen by some as an unacceptable result of applying such a minimum mens rea requirement with complete rigour. Under s.1(1) of the Sexual Offences Act 2003, the accused can now be guilty of rape, even if they genuinely believed that the complainant was consenting, as long as that belief was not reasonable. That is certainly not advertent recklessness. Therefore, the logical effect of a minimum mens rea requirement for attempt would be that, to be guilty of attempted rape, the accused must have been aware of the risk that the complainant was not consenting to the intercourse, even though that state of mind would not have been required had the intercourse eventuated. Such a position would not, it may reasonably be supposed, be found appealing, in policy terms, by everyone; some will say that an accused who has taken no proper care to ensure that the other person is consenting should no more escape conviction of attempted rape in the absence of (intended) intercourse than they would had it taken place. However, to follow that policy line would entail embracing the untenable proposition that advertent recklessness must be the minimum requirement for circumstances in attempt cases, *except* as regards lack of consent to intercourse in attempted rape.

It is submitted that it would be a great pity if *Pace* were to be distinguished into oblivion. The element that often seems to be pushed to the sidelines by many of the writers is the actual wording of s.1(1) of the 1981 Act. It begins, "[i]f, with intent to commit an offence to which this section applies …". As Davis LJ pointed out, it seems clear what this means, and this must be so whether one likes it or not. ***Crim. L.R. 147*** Applied to *Khan*, how can it sensibly be claimed that the accused intended to commit rape? He most certainly intended to have sexual intercourse, but that was not an intent to commit "an offence", since lack of consent is a key part, indeed one might say the defining part, of that offence. The Law Commission, in recommending the enactment of what, with some changes that are not relevant for present purposes, [19] became s.1(1), had this to say about the future state of the law

"it is right in principle that the concept of the mental element in attempt should be expressed as an intent to bring about each of the constituent elements of the offence attempted." [20]

What could be clearer than that?

It seems plain enough that a major reason for commentators playing down the actual words of s.1(1) is that, for them, good policy indicates that Khan should be accounted guilty of attempted rape. One might, perhaps, be forgiven for entering a caveat about the policy. The complainant's experience in *Khan* must have been quite appalling. There had been "gang rape" elements to the case, since three of the original accused had had intercourse with her, whilst the four appellants had tried but failed, all of this in quick succession. However, she had not actually been penetrated by any of those four, who were undoubtedly guilty, at least, of very serious sexual assaults. For such assaults, condign punishment would be accounted appropriate, in any event. Indeed, there might well have been a case for charging them with aiding and abetting the rapes carried out by the other men.

Put that point to one side. Even if it would be better, in policy terms, for Khan, and others similarly placed, to be guilty of attempted crime, it might be thought that there are two rather important policies or principles pointing the other way, not least because constitutional in nature. As Davis LJ clearly recognised, it is not for judges to overturn the clear words of a sovereign parliament even on the most convincing policy grounds. And he may also have had in mind the important idea, which is part of the rule of law, that, where there is uncertainty, criminal statutes should be interpreted in the way least favourable to the prosecution.

Nor is the consequences/circumstances distinction one that commands universal support among commentators. It was persuasively contested by Richard Buxton QC (later Buxton LJ) in an article published just over 30 years ago. [21] The essence of Buxton's argument was that the line between consequences and circumstances was so thin in the case of some criminal offences that judges there faced with directing juries to use the distinction, and juries faced with having to apply it, would be left with the most unenviable of tasks, much to the detriment of the proper carrying out of their respective roles. One telling example of that thinness may be thought to be demonstrated by *Attorney General's Reference (No.3 of 1992)* (considered above). Though it is true that the completed offence at issue there did not require that life had *actually* been endangered, only that the accused had had the appropriate mens rea as to the *risk* that it *might be* endangered, the ***Crim. L.R. 148*** case does, nonetheless, illustrate Buxton's point. We are concerned here only with mens rea, so the question is whether the mens rea required as regards endangering of life relates to a consequence or to a circumstance. Most certainly, it is an entirely tenable view of the offence that it contemplates two possible consequences of an accused's action, namely damage to or destruction of property, and the endangering of life, yet it would be no less tenable to regard it as contemplating damage or destruction as the consequence, in circumstances where life would be endangered. So, which view should the trial judge take? In short, the distinction offered is unstable.

Nor should we forget, too readily, the reasoning of the decision in *Attorney General's Reference (No.3 of 1992)*. It has become commonplace for the "missing element" idea, proposed in that case, to be treated as contained in something of a throwaway line, such that it should not be taken seriously. Because that idea fits no better with the actual wording of s.1(1) of the Act than does the consequences/circumstances distinction, no support for it is offered here. However, it does seem possible that the Supreme Court might find not entirely without merit a distinction that would have the valuable quality of being capable of practical application, obviating the need for strained judicial directions and jury headaches. After all, there always is a missing element in an attempt.

At all events, we do, now, have a trio of appeal cases, in *Khan*, *Attorney General's Reference (No.3 of 1992)* and *Pace*, that sound wholly conflicting notes. The views of this writer as to the legally correct position in such cases should be clear enough, namely that it is the one set out in *Pace*. However, whatever may be one's view of the merits, or lack thereof, of the three strands of opinion, the best way of sorting this matter out would seem clearly to be a trip to the Supreme Court. In short, what is today's trial judge to do when presiding over a case raising this issue? In that respect, the court in *Pace* did certify that a point of law of general public importance arose from the case, but did not grant leave to appeal. At the time of writing, having regard to what was then posted on the Supreme Court's website, [22] it did not seem that the prosecution had sought leave from that court itself.

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Footnotes

1 *Pace [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 1 Cr. App. R. 34* (p.501). The case has already been commented upon in this *Review* —see M. Dyson, "Scrapping *Khan*" [2014] Crim. L.R. 445.
2 *Khan [1990] 1 W.L.R. 813; (1990) 91 Cr. App. R. 29*.
3 Professor Sir John Smith QC, "Two Problems in Criminal Attempts" (1957) 70 Harv. L.R. 422.
4 *Attorney General's Reference (No.3 of 1992) [1994] 1 W.L.R. 409; (1994) 98 Cr. App. R. 383*.
5 *Attorney General's Reference (No.3 of 1992) [1994] 1 W.L.R. 409 at 411; (1994) 98 Cr. App. R. 383*.
6 *Pace [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 1 Cr. App. R. 34* (p.501) at [36].
7 See *Pace [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 1 Cr. App. R. 34* (p.501) at [20].
8 *Pace [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 1 Cr. App. R. 34* (p.501) at [61].
9 *Pace [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 1 Cr. App. R. 34* (p.501) at [62].
10 *Pace [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 1 Cr. App. R. 34* (p.501) at [63].

11 See, in particular, G. Virgo, "Criminal Attempts — the Law of Unintended Circumstances" [2014] C.L.J. 244; F. Stark, "The Mens Rea of a Criminal Attempt" [2014] 3 Arch. Rev. 7. Dyson, "Scrapping *Khan*" [2014] Crim. L.R. 445 is also highly critical of the decision.

12 See G. Virgo, "Criminal Attempts — the Law of Unintended Circumstances" [2014] C.L.J. 244, 246.

13 *Pace [2014] EWCA Crim 186; [2014] 1 W.L.R. 2867; [2014] 1 Cr. App. R. 34* (p.501) at [52].

14 *Shivpuri [1987] A.C. 1; (1986) 83 Cr. App. R. 178*.

15 See, e.g. *A.P. Simester, J.R. Spencer, G.R. Sullivan and G.J. Virgo, Simester and Sullivan's Criminal Law, 5th edn (Oxford: Hart Publishing, 2013), pp.351 and 353*; and, though less unequivocally, *Ormerod, Smith and Hogan's Criminal Law, 13th edn (Oxford: Oxford University Press, 2011), p.408*. Support for this minimum content argument is not universal; see, e.g. Stark, "The Mens Rea of a Criminal Attempt" [2014] 3 Arch. Rev. 7, 7–8.

16 No position is taken here on whether or not oblique intention, i.e. the state of mind of someone that sees a particular matter as a virtually certain present fact related to their conduct, or future result of it, rather than embraces that matter as their purpose, does, under the present criminal law, intend that matter. Whatever be the answer to that question, nobody doubts that advertent recklessness of the so-called *Cunningham [1957] 2 Q.B. 396* variety is different from intention.

17 See above p.140.

18 Though the inadvertent form of recklessness of the person that does not think whether or not there is a risk, when they ought reasonably to have done so, usually known as *Caldwell* recklessness (after *Caldwell [1982] A.C. 341; (1981) 73 Cr. App. R. 13*), does seem to have been expunged from the law by *G [2003] UKHL 50; [2004] 1 A.C. 1034; [2004] 1 Cr. App. R. 21* (p.237), that does not affect the point being made here.

19 The Commission recommended the phrase: "If, with intent to commit a relevant offence …" in cl.1(1) of its draft Criminal Attempts Bill — see *Law Commission, Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement (1980), Law Com. No.102*. Its definition of "relevant offence", in cl.1(3), was, for these purposes, essentially equivalent to the delimitation of "an offence to which this section applies", in s.1(4) of the 1981 Act.

20 See *Law Commission, Attempt, and Impossibility in relation to Attempt, Conspiracy and Incitement, para.2.14*.

21 See R. Buxton QC, "Circumstances, Consequences and Attempted Rape" [1984] Crim. L.R. 25; see also G.R. Sullivan, "Intent, Subjective Recklessness and Culpability" (1992) 12 O.J.L.S. 380, 381–385.

22 See www.supremecourt.uk [Accessed November 20, 2014].

