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SUPREME COURT OF VICTORIA — FULL COURT

BRITTEN v ALPOGUT

Murphy, Fullagar and Gobbo JJ

15, 16 October, 18 December 1986

[1987] VicRp 77; [1987] VR 929; (1986) 23 A Crim R 254; (1986) 79 ALR 457

CRIMINAL LAW – PROHIBITED IMPORT - BELIEVED BY IMPORTER TO BE CANNABIS – ON ANALYSIS FOUND TO BE PROCAINE – NOT A PROHIBITED IMPORT – WHETHER IMPORTER GUILTY OF ATTEMPTING TO IMPORT CANNABIS – PRECEDENT – MAGISTRATES SHOULD FOLLOW HOUSE OF LORDS DECISION UNLESS INCONSISTENT WITH DECISION OR OBSERVATIONS OF HIGH COURT OR FULL COURT OF SUPREME COURT.

1. A criminal attempt is committed if it is proven that the accused had at all material times the guilty intent to commit a recognized crime and did an act or acts (including omissions) not merely preparatory but sufficiently proximate to the intended commission of the crime.

***R v Perera* [1907] VicLawRp 47; [1907] VLR 240; 13 ALR 116; 28 ALT 176, affirmed.**

***Haughton v Smith* [1973] UKHL 4; [1975] AC 476; 1974 2 WLR 1, not followed.**

2. No Magistrate is at liberty to not follow a decision of the House of Lords which is directly in point unless there is a decision or observations of the High Court or of the Full Court of the Supreme Court of Victoria inconsistent with it.

***R v Bugg* [1978] VicRp 25; [1978] VR 251, applied.**

MURPHY J: (with whom Fullagar and Gobbo JJ agreed) *[after referring to the nature of the charge and the grounds of the order nisi, continued]*: … **[3]** In *R v Bugg* [1978] VicRp 25; (1978) VR 251 this court had said, following an indication by a single judge that he did not intend to follow *Majewski's case* [1976] UKHL 2; (1977) AC 443; [1976] 2 All ER 142; (1976) 62 Cr App R 262; [1976] 2 WLR 623 -

> "As a decision of the House of Lords it is of course entitled to the greatest respect, and it should be followed, in our opinion, in any case where it is applicable, unless there is a decision or unless there are observations, of the High Court or of the Full Court of this court inconsistent with it."

I do not pause to consider whether the remarks made in *Bugg's case* were mere *obiter dicta*. I think they probably were, but they were clearly considered remarks for the guidance of single judges and magistrates, and the magistrate in the present case was well advised to consider them binding on him. **[4]** Consequently, when he looked at the decision of the House of Lords in *Haughton v Smith* [1973] UKHL 4; (1975) AC 476; (1974) 2 WLR 1 and found that five Law Lords had unanimously affirmed the judgment of the Court of Appeal, delivered by Lord Widgery CJ, the magistrate dismissed the information on the ground that there was no case to answer. The headnote of that decision in the authorized report of *Haughton v Smith* reads insofar as relevant -

> "that it was not possible to convert a completed case of handling, which was not itself criminal because it was not the handling of stolen goods, into a criminal act by the simple device of alleging that it was an attempt to handle stolen goods on the ground that at the time of handling the accused falsely believed them still to be stolen."

This court is now asked to decide that *Haughton v Smith* does not declare the common law in Victoria. In that case, the accused had been charged on indictment that he had attempted to handle stolen goods knowing or believing them to have been stolen. Unknown to the accused, the goods though originally stolen had been intercepted by the police en route to the accused, and under police instructions they were then delivered to the accused. The accused was not charged with the offence of handling, because it was believed by the prosecution that the goods were no longer stolen goods; see s24(3) of the *Theft Act* 1968 (Eng.). Following the conviction of the accused, he appealed on the ground that he should not have been convicted of an attempt

to commit an offence when in the circumstances he could not in law have committed the offence itself. His appeal succeeded. **[5]** The decision has been roundly criticized by learned academics, who have asserted that it did not express the common law, and subsequent statutory provisions and decisions of the House of Lords have endeavoured to counter the implications flowing from it. It also appears to run counter to a number of decisions of high authority which preceded it. It may be that the actual decision in *Haughton v Smith* stemmed from a faulty acceptance by their Lordships of what Lord Bridge was later to term "the concept of 'objective innocence'". *R v Shivpuri* [1986] UKHL 2; [1987] AC 1; [1986] 2 All ER 334; (1986) 83 Cr App R 178; [1986] 2 WLR 988 at 1000; [1986] Crim LR 536.

If this was so, that concept has now effectively been disavowed, and has no applicability to the law of criminal attempts, and the House of Lords, quick to exercise its power under the *Practice Statement (Judicial Precedent)* (1966) 1 WLR 1234, has departed from its earlier reasoning supporting such a concept, see *Shivpuri's case*.

Accordingly, the submission goes, *Haughton v Smith* does not state the common law in Victoria applicable to criminal attempts *[His Honour then referred to several authorities and continued]*. ... **[12]** It has been submitted that as the crime of attempting to import into Australia any prohibited imports to which section (s233B(1)(b) of the *Customs Act* 1901) applies, is a statutory offence, the only possible attempt of which the accused could have been guilty would be an attempt to do that which is forbidden by the legislature.

But if the word "attempt" is used in s233B(1)(b) in its common law sense, as I believe that it is, then it is to beg the question to say that it is only if the goods imported or sought to be imported, are in fact prohibited imports that an "attempt" within the meaning of the subsection can be committed.

For if the evil intent of the actor can make a sufficiently proximate though objectively innocent act, criminal so as to amount to an attempt, it would seem **[13]** irrelevant to have to go on to see whether the attempt could or would have succeeded. At common law, if the intent was to commit a recognised and not an imagined crime, and the act done was not merely preparatory but sufficiently proximate, then at that stage an attempt to commit the recognized crime has been committed, and it seems to me it is not necessary to go further.

It follows, in my view, that to prove the statutory crime created by s233B(1)(b) of the *Customs Act*, of attempting to import prohibited imports into Australia, the Crown must prove that the accused at all material times intended to import something which was as a matter of law a prohibited import and known by him to be so, and that pursuant to this intention he did an act or acts (including omissions) not merely preparatory but sufficiently proximate to the intended commission of the crime. In this case, the false bottom in the suitcase, the secreting therein of packets containing a powdery substance, the consignment of the suitcase from Turkey to Melbourne, the failure to declare the packages believed by the accused to be cannabis, the collection of the suitcase from the carousel, all provide sufficiently proximate acts to constitute the *actus reus* and to manifest the intention to import a prohibited import. Cannabis is as a matter of law a prohibited import within the meaning of s233B(1)(b). The accused admits that he intended to import cannabis. He stated that he knew that he had "made one big mistake" and that he was "prepared to suffer the consequences".

[14] If these matters are proven, there is established both the *mens rea* (the intention to import a known prohibited import, cannabis) and the *actus reus* (sufficiently proximate unequivocal acts or omissions) of the crime of attempting to import a prohibited import, namely cannabis.

In *R v Collins* (1864) 9 Cox CC 497 it was thought that the fact that the victim's pocket was empty prevented the actor from being guilty of an attempt to pick it. But in my view this was to fail properly to distinguish between the crime of attempt to steal and the crime of stealing itself. Attempts are not to be confined to acts which if not interrupted would result in the commission of the crime itself.

Attempts are crimes because of the criminal intent of the actor. A man who intends to kill V, and who picks up a gun believing it to be loaded, and who points it at V and pulls the trigger

is guilty of an attempt to murder V, even if it transpires that the gun was not loaded. Why is this an attempt? Because if the facts had been as the actor believed them to be, he would have committed the intended crime; he intended to murder V, but failed because of a mistake of fact. He is punishable for an attempt, not because of any harm that he has actually done by his conduct, but because of his evil mind accompanied by acts manifesting that intent.

The criminality comes from the conduct intended to be done. That conduct intended must amount to an actual and not an imagined crime, but if it does, then it matters not that the gun is in fact unloaded, or the police **[15]** intervene, or the victim is too far away, or the girl is in fact over 16, or the pocket is empty, or the safe is too strong, or the goods are not cannabis.

In *Haughton v Smith* [1973] UKHL 4; (1975) AC 476; (1974) 2 WLR 1 however, the emphasis to be laid upon the guilty mind of the actor was forgotten. Instead, the emphasis was placed upon the issue whether, if completed, the acts performed by the actor would in law have constituted the crime intended. This led in turn to the question: Were the acts in fact "objectively innocent" acts as Lords Roskill and Bridge were later to ask in *Anderton v Ryan* [1985] UKHL 5; [1985] AC 560; [1985] 1 All ER 138; [1985] 2 WLR 23; (1984) 80 Cr App R 235; [1984] Crim LR 483.

In *Haughton v Smith* it seems to have been thought that the act done must be criminal in itself. Thus Lord Morris of Borth-y-Gest said – "the presence of a guilty mind does not transform what a man actually does into something that he has not done" (1975) AC at 501. Lord Reid asks the question "But how can an attempt to do something which has not been forbidden by Parliament, and is not in itself a common law offence, be a common law offence." (1975) AC at 498.

Lord Hailsham would seem to say that the accused could not be found guilty of an attempt unless the acts which he performed were part of a series "which would constitute the actual commission of the offence if it were not interrupted" (1975) AC at 496.

It was said that the accused had done all that he intended to do and that that was not criminal. But in my view the accused had not done all that he intended to do because of his mistake. He intended to handle stolen **[16]** goods, knowing or believing them to be stolen and whether he had done all that he intended to do or not, this is irrelevant to the issue whether he had been guilty of an attempt.

It is this supposed distinction between acts which are objectively innocent and those which are not, which was eventually disavowed by Lord Bridge and the House of Lords in *Shivpuri* [1986] UKHL 2, [1987] AC 1; (1986) 2 WLR 988; 2 All ER 334. His Lordship said -

> "I am satisfied on further consideration that the concept of objective innocence is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt which involves an act which is more than merely preparatory to the commission of the offence', must *ex hypothesi*, from the point of view of the criminal law be 'objectively innocent'. What turns what would otherwise, from the point of view of the criminal law, be an innocent act into a crime is the intent of the actor to commit an offence ... A puts his hand into B's pocket. Whether or not there is anything in the pocket capable of being stolen, if A intends to steal, his act is a criminal attempt ... These considerations lead me to the conclusion that the distinction sought to be drawn in *Anderton v Ryan* between innocent and guilty acts considered 'objectively' and independently of the state of mind of the actor cannot be sensibly maintained." (1986) 2 WLR at 1000-1001. (my emphasis).

In my opinion, this reasoning applies with equal force to the crime of an attempt at common law as it does to attempts under the *Criminal Attempts Act* 1981 (C47 Eng.). The law returns to the principle as enunciated by Lord Mansfield in *R v Scofield* (1784) Cald Mag Cas 397 (above), "though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable."

[17] In the Full Court of Victoria in *R v Perera* [1907] VicLawRp 47; (1907) VLR 240; 13 ALR 116; 28 ALT 176 it was held that the crime of attempting to obtain money by false pretences is committed where a specified pretence is made by an Indian Clairvoyant Trance Reader in return for half a crown even though the person to whom the pretence was made did not at any time believe in its truth, and in fact paid over his half crown. The court comprising Madden CJ,

A'Beckett and Hood JJ said –

> "In order to satisfy a presentment for obtaining money by false pretences there should be a pretence false in fact, and there should have been money obtained and the money should have been obtained in consequence of that false pretence. That denotes that the person who parts with the money believes the falsehood to be the truth, otherwise he would not have parted with his money. But where the person who parts with his money knows that the pretence is false, the money obtained is not obtained by the false pretence, because the falsehood is known to him. He parts with his money not because he is deceived by the statement but for another reason - viz. because he wants to detect the imposter, and although he has not been deceived, the prisoner has attempted by false pretence to deceive him. We think for all these reasons, sustained by the case of *R v Mills* (1784) Cald Mag Cas 397, which has been cited, the presentment for an attempt to obtain money by false pretences may be sustained." (my emphasis).

In *R v Mills* (1857) 7 Cox CC 263 the Court of Criminal Appeal (Cockburn CJ, Coleridge, Crowder and Willes JJ and Bramwell B) said per Cockburn CJ "Unless the money be obtained by the false pretence, it is an attempt only." In that case the representation that the prisoner made that he had cut sixty three fans of chaff and was entitled to be paid two pence per fan was known to be false by the representee, **[18]** who had seen the prisoner remove 18 fans of cut chaff from an adjoining shed and add them to his heap.

The fact that the prisoner in both *R v Mills* and *R v Perera* could not have succeeded in committing the substantive crime of obtaining money by false pretences because of his mistake as to the state of mind of the representee, did not mean that on proof of his (the prisoner's) guilty mind and relevant intent, he could not be guilty of an attempt to commit that crime. *R v Roebuck* (1856) 7 Cox CC 126; *R v Light* (1915) 11 Cr App R 111; *R v Hensler* (1870) 11 Cox CC, and *R v Wyatt* (1888) 22 SALR 105 are authorities to the same effect.

In *Haughton v Smith* [1973] UKHL 4; (1975) AC 476 it was sought by Lord Hailsham (at 494) and Lord Reid (at 498-9) to distinguish *R v Hensler* (above) and like cases by saying of such an attempt to obtain money by false pretences, for example, by sending a letter which did not deceive the recipient, that "the accused had done all that he could do towards commission of the crime but final commission of the crime had been prevented by the conduct of the victim", (Lord Reid), or "the criminal had done all that he intended to do, and all that was necessary to complete the crime was an act or event wholly outside his control". (Lord Hailsham).

Insofar as it is always necessary in a crime of attempt to prove that the *actus reus* is more than a mere preparatory act, their Lordships remarks are appropriate, but, with the greatest respect, I find it otherwise difficult to follow what precise distinction **[19]** they sought to make from any other attempt that fails because of a mistake of fact.

If it is not to the actors intended result that one looks to see whether he had the necessary *mens rea* to make an otherwise non-criminal act in law, a criminal attempt, it is difficult to see why merely because the actor had done all that he "could do" or "intended to do", the otherwise non-criminal act is changed into a criminal attempt. It is simply not to the point.

This is, it would appear, but another endeavour to avoid accepting the proposition that the cases before *Haughton v Smith* support the analysis of the law of criminal attempts as involving proof of the necessary *mens rea* to commit a recognized crime, together with proof of the doing of an act or acts in furtherance of that intent which act or acts is or are seen to be more than merely preparatory to the commission of that intended and recognized crime. Throughout *Anderton v Ryan* in which Lord Edmund Davies dissented, Lords Roskill and Bridge demonstrated that they rested under the influence of *Haughton v Smith* [1973] UKHL 4; (1975) AC 476; (1974) 2 WLR 1 and *R v Perry Dalton (London) Ltd* (1949) 33 Cr App R 102. In both of these cases, the words of Birkett LJ had found favour when in the latter case he said -

> "Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit a crime, to which, if uninterrupted, they would have led; but steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime." (1949) 33 Cr App R at 110.

[20] In the same vein, Lord Bridge, said in *Anderton v Ryan* in words which he was later to consider led to a different result in *Shivpuri* -

> "The common feature of all these cases, including that under appeal, is that the mind alone is guilty, the act is innocent." (1985) 2 All ER at 366 h) (1985) AC at 583.

In referring to "all these cases" Lord Bridge was referring only to *Haughton v Smith* [1973] UKHL 4; (1975) AC 476; (1974) 2 WLR 1 and *R v Collins* (1864) 9 Cox CC 497, at 498 and to the moot cases referred to by Bramwell B in the latter case. In *Shivpuri* Lord Bridge (as I have said) frankly acknowledged his error in *Anderton v Ryan*, and in doing so also acknowledged the assistance that he had gained from reading the article of Professor Glanville Williams published in the *Cambridge Law Journal* ((1986) Camb LJ Vol 45 p33) (see (1986) 2 WLR at 1002). It is my opinion, sitting in this court, that we ought to say that we are unable to accept the law as to criminal attempts set forth in *Haughton v Smith*, and that we should affirm the general body of the law on this subject as it stood preceding *R v Perry Dalton (London) Ltd* (1949) 33 Cr App R 102. This would be, in my opinion, to affirm the reasoning apparent in our own Full Court in decisions preceding *Haughton v Smith* (e.g. *R v Perera* [1907] VicLawRp 47; (1907) VLR 240; 13 ALR 116; 28 ALT 176) and to accord with the revised general reasoning of the House of Lords in *R v Shivpuri* [1986] UKHL 2, [1987] AC 1; (1985) 2 All ER; (1986) 2 WLR 980.

It would also be to recognise that at Common Law a criminal attempt is committed if it is proven that **[21]** the accused had at all material times the guilty intent to commit a recognized crime and it is proven that at the same time he did an act or acts (which in appropriate circumstances would include omissions) which are seen to be sufficiently proximate to the commission of the said crime and are not seen to be merely preparatory to it. The "objective innocence" or otherwise of those acts is irrelevant. Impossibility is also irrelevant, unless it be that the so-called crime intended is not a crime known to the law, in which case a criminal attempt to commit it cannot be made. In my opinion, the order nisi should be made absolute and the case remitted to the Magistrate, to be tried according to law, there being a case to answer on the evidence.
