CASES ON PRELIMINARY CRIMES

INCITEMENT

Race Relations Board v Applin [1973]

The defendant members of the 'National Front' had conducted a campaign against a Mr and Mrs W (a white couple) fostering black children. They had written threatening letters, distributed circulars and held public meetings in an attempt to persuade the married couple to stop fostering black children. The RRB sought a declaration that the defendants' acts were unlawful under s12 of the Race Relations Act 1968, which makes it unlawful to discriminate in the public provision of services, and an injunction restraining them from inciting a person to do an act which was unlawful under the 1968 Act.

It was held, by the Court of Appeal (Civil Division) that the defendants had 'incited' Mr and Mrs W, within s12 of the 1968 Act, to discriminate unlawfully. The word 'incite' in s12 was not limited to advice, encouragement or persuasion of another to do an act but included threatening or bringing pressure to bear on a person. Accordingly the defendants, bringing pressure to bear on Mr and Mrs W to take white children only, had 'incited' them to do so. It followed that, since it would have been unlawful discrimination under the Act for Mr and Mrs W to take white children only, it was, by virtue of s12, unlawful for the defendants to incite them to do so.

Invicta Plastics Ltd v Clare [1976]

The defendant had advertised a device with a photograph showing a view of a speed restriction sign, implying that it could be used to detect police radar traps. It was not an offence to own one of these devices, but it was an offence to operate one without a licence. In confirming the company's conviction for inciting readers of the adverts to commit breaches of the Wireless Telegraphy Act 1949, the Divisional Court held that the *mens rea* involved not only an intention to incite, but also an intention that the incitee should act upon the incitement.

R v Curr [1968] 2 QB 944

The defendant ran a loan business whereby he would lend money to women with children in return for their handing over their signed family allowance books. He would then use other women to cash the family allowance vouchers. He was convicted of inciting the commission of offences under s9(b) of the Family Allowance Act 1945, which made it an offence for any person to receive any sum by way of family allowance knowing it was not properly payable.

He appealed successfully to the Court of Appeal, where it was held that the trial judge had erred in not directing the jury to consider whether these women, who were being incited to use the signed allowance books to collect money on behalf of the defendant, had actually known that what they were being asked to do was unlawful. It would have been more appropriate to have charged the defendant as the principal offender relying on the doctrine of innocent agency.

R v Fitzmaurice [1983]

The defendant's father had asked the defendant to recruit people to rob a woman on her way to the bank by snatching wages from her. The defendant approached B and encouraged him to take part in the proposed robbery. Unknown to the defendant, no crime was to be committed at all; it was a plan of his father's to enable him to collect reward money from the police for providing false information about a false robbery. The defendant was convicted of inciting B to commit robbery by robbing a woman near the bank. He appealed against conviction on the ground that what he had incited had in fact been impossible to carry out.

The Court of Appeal dismissed the appeal. It was held that (1) At common law incitement to commit an offence could not be committed where it was impossible to commit the offence alleged to have been incited. Accordingly, it was necessary to analyse the evidence to decide the precise offence which the defendant was alleged to have incited and whether it was possible to commit that offence. (2) Since at the time the defendant encouraged B to carry out the proposed robbery the defendant believed that there was to be a wages snatch from a woman on her way to the bank, and since it would have been possible for B to carry out such a robbery, the defendant had incited B to carry out an offence which it would have been possible rather than impossible for B to commit. It followed that the defendant had been rightly convicted.

CONSPIRACY

R v Chrastny [1991]

The defendant had been convicted of conspiracy to supply a Class A drug, and sought to challenge her conviction on the ground that the trial judge had erred in law in directing the jury that, although the defendant had only agreed with her husband that the offence should be committed, s2(2)(a) of the Criminal Law Act 1977 provided no protection where she had nevertheless known of the existence of the other conspirators.
In dismissing the appeal, Glidewell LJ pointed out that the provision does not enable a wife to escape liability simply by taking care only to agree with her spouse, even though she knows of the existence of other parties to the conspiracy. Only where she remained genuinely ignorant of other parties to such a conspiracy would s2(2)(a) protect her.

R v Anderson [1986]

The defendant agreed for a fee to supply diamond wire to cut through prison bars in order to enable another to escape from prison. He claimed that he only intended to supply the wire and then go abroad. He believed the plan could never succeed. He appealed against his conviction for conspiring with others to effect the release of one of them from prison, claiming that as he did not intend or expect the plan to be carried out, he lacked the necessary *mens rea* for the offence of conspiracy.

The House of Lords dismissed the appeal. Lord Bridge stated that beyond the mere fact of agreement, the necessary *mens rea* of the crime is established if it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. On the facts of the case, the defendant clearly intended, by

providing diamond wire to be smuggled into the prison, to play a part in the agreed course of conduct in furtherance of the criminal objective.

Yip Chiu-Cheung v R [1994]

The defendant had entered into an agreement with an undercover police officer, whereby the officer would fly from Australia to Hong Kong, collect a consignment of heroin from the defendant, and return with it to Australia. In due course, however, the defendant was charged with, and convicted of, conspiring to traffic in dangerous drugs. He appealed on the ground that there could be no conspiracy as his co-conspirator had been acting to promote law enforcement, and that the officer's purpose had been to expose drug-trafficking.

The appeal was dismissed by the Privy Council. Even though the officer would have been acting courageously and from the best of motives, it had nevertheless been his intention, at the time the agreement was made, to take prohibited drugs from Hong Kong to Australia. If the agreement had been executed he would have committed a serious criminal offence. It followed that there had been a conspiracy and the defendant had been properly convicted.

DPP v Nock [1978] 2 All ER 654

The defendants were charged with conspiracy to contravene s4 of the Misuse of Drugs Act 1971. They had agreed together to obtain cocaine from a quantity of powder which they had obtained from one of their co-defendants. Contrary to their belief, however, the powder contained no cocaine and so it proved impossible to obtain cocaine from it. The defendants were convicted.

The House of Lords held that where the conspiracy alleged by an indictment was conspiracy to commit a crime it had to be shown that the accused had agreed to carry out a course of conduct which, if carried out, would have resulted in the commission of a crime. Since the only agreement proved against the defendants was an agreement to pursue a course of conduct which could not in any circumstances have resulted in the statutory offence alleged, ie producing cocaine, they were not guilty of conspiracy and their appeals would therefore be allowed. (Note: Today the agreement in *Nock* would amount to a conspiracy to produce a controlled drug.)

Scott v MPC [1975]

The defendant agreed with the employees of cinema owners that, in return for payment, they would remove films without the consent of their employers or of the owners of the copyright, in order that the defendant could make copies infringing the copyright, and distribute them for profit. The defendant argued that the conspiracy charged did not involve any deceit of the companies and persons who owned the copyright. The House of Lords held that the defendant was guilty of a conspiracy to defraud and that it did not necessarily involve deceit.

Wai Yu-Tsang v R [1992]

The defendant was convicted of conspiring to defraud a bank, of which he was the chief accountant. He had agreed with others not to enter certain dishonoured cheques on the records of the bank in order to save the bank's

reputation. The trial judge's direction to the jury, with which the Privy Council agreed, was to the effect that for conspiracy to defraud, no desire to cause loss on the part of the defendant need be shown, it being sufficient that he had imperiled the economic or proprietary interests of another party.

Shaw v DPP [1962]

The defendant published a “Ladies Directory" which advertised the names and addresses of prostitutes with, in some cases, photos and in others, details of sexual perversions which they were willing to practise. The House of Lords held that an offence of conspiracy to corrupt public morals existed at common law. The conspiracy to corrupt public morals consisted of an agreement to corrupt public morals by means of the magazine; and the defendants had been rightly convicted.

Knuller v DPP [1973]

The defendant and others had published adverts in a contact magazine aimed at homosexuals, encouraging them to have sexual relations with each other. The House of Lords held that an agreement to publish adverts to facilitate the commission of homosexual acts between adult males in private was a conspiracy to corrupt public morals, although such conduct is no longer a crime. Lord Reid believed that no licence was given to others to encourage the practice.

A majority of the House held that there is also a common law offence of outraging public decency. Lord Simon said: “… ‘outrage’, like ‘corrupt’ is a very strong word. ‘Outraging public decency’ goes considerably beyond offending the susceptibilities of, or even shocking, reasonable people.”

R v Gibson and another [1991]

The defendants exhibited at an exhibition in a commercial art gallery, a model’s head to which were attached earrings made out of freeze-dried human foetuses. The exhibit was entitled ‘Human Earrings’. The gallery was open to, and was visited by, members of the public. The defendants were charged with, and convicted of, outraging public decency contrary to common law.

ATTEMPTS

R v Gullefer (1990)

The defendant, seeing that the dog he had backed in a greyhound race was losing, jumped onto the track and attempted to distract the dogs by waving his arms. He hoped that the stewards would declare “no race" whereupon punters would be entitled to have their money back and he would recover his £18 stake. He was convicted of attempted theft and appealed on the ground that his acts were not sufficiently proximate to the completed offence of theft to be capable of comprising an attempt to commit theft.

His conviction was quashed. Lord Lane CJ questioned, Might it properly be said that when he jumped on to the track he was trying to steal £18 from the bookmaker? He had not gone beyond mere preparation. It remained for him to go to the bookmaker and demand his money.

R v Jones (1990)

The defendant had bought some guns, shortened the barrel of one of them, put on a disguise and had gone to the place where his intended victim, F, dropped his daughter off for school. As the girl left the car, the defendant jumped into the rear seat and asked F to drive on. They drove to a certain point where the defendant took a loaded sawn-off shotgun from a bag and pointed it at F and said: "You are not going to like this." F grabbed the gun and managed to throw it out of the window and escaped. The defendant was convicted of attempted murder and appealed.

In dismissing his appeal Taylor LJ felt that there was evidence from which a reasonable jury, properly directed, could conclude that the defendant had done acts which were more than merely preparatory. His Lordship pointed out that the defendant's actions in obtaining, shortening and loading the gun, and in putting on his disguise and going to the school could only be regarded as preparatory acts. But once he had got into the car, taken out the loaded gun and pointed it at the victim with the intention of killing him, there was sufficient evidence for the consideration of the jury on the charge of attempted murder.

R v Campbell (1991)

The defendant planned to rob a post-office. He drove a motorbike to near the office, parked it and approached, wearing a crash helmet. He was carrying an imitation gun and a threatening note which he planned to pass to the cashier in the post office. He was walking down the street and when one yard from the post office door, police, who had been tipped off, grabbed the defendant and arrested him. He was convicted of attempted robbery and appealed.

In allowing the appeal, Watkins LJ stated that in order to effect the robbery it would have been quite impossible unless he entered the post office, gone to the counter and made some kind of hostile act directed at whoever was behind the counter and in a position to hand him money. A number of acts remained undone and the series of acts which he had already performed - namely, making his way from his home, dismounting from the cycle and walking towards the post office door - were clearly acts which were indicative of mere preparation. If a person, in circumstances such as this, has not even gained the place where he could be in a position to carry out the offence, it is extremely unlikely that it could ever be said that he had performed an act which could be properly said to be an attempt. (*Note:* The appropriate charge would have been going equipped with intent to steal.)

A-G's Reference (No 1 of 1992) (1993)

The defendant was charged with attempted rape. He had pushed the victim to the ground, removed some of her undergarments, and lain on top of her. When the police arrived she was partially clothed, and the defendant had his trousers down. During the course of the trial the judge directed the jury to acquit, on the basis that there was insufficient evidence of the defendant having attempted to have sexual intercourse. The defendant was acquitted. The Attorney-General referred the issue to the Court of Appeal.

Lord Taylor CJ stated: "It is not, in our judgment, necessary, in order to raise a *prima facie* case of attempted rape, to prove that the defendant with the requisite intent had necessarily gone as far as to attempt physical penetration of the vagina. It is sufficient if there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as more

than merely preparatory to the commission of the offence. For example, and merely as an example, in the present case the evidence of the young woman's distress, of the state of her clothing, and the position in which she was seen, together with the respondent's acts of dragging her up the steps, lowering his trousers and interfering with her private parts, and his answers to the police, left it open to a jury to conclude that the respondent had the necessary intent and had done acts which were more than merely preparatory. In short that he had embarked on committing the offence itself."

R v Geddes [1996]

The defendant had been seen by a teacher in the boys' toilets of a school. He had no connection with the school and no right to be there. He had a rucksack with him. A police officer saw him and shouted at him, but he left. In a cubicle in the lavatory block there was a cider can which had belonged to the defendant. His rucksack was found in some bushes, containing a large kitchen knife, rope and a roll of masking tape. The defendant was arrested and identified by the teacher and some pupils. He was charged with attempted false imprisonment. The prosecution alleged that the presence of the cider can showed that the defendant had been inside a toilet cubicle, and that the contents of the rucksack could have been used to catch and restrain a boy entering the lavatory. The defendant was convicted.

The Court of Appeal allowed the defendant's appeal. It held that the line of demarcation between acts which were merely preparatory and acts which might amount to an attempt was not always clear or easy to recognise. There was no rule of thumb test, and there must always be an exercise of judgment based on the particular facts of the case. It was an accurate paraphrase of the statutory test to ask whether the available evidence could show that a defendant had done an act showed that he had actually tried to commit the offence in question, or whether he had only got ready or put himself in a position or equipped himself to do so.

In the present case there was not much room for doubt about the defendant's intention, and the evidence showed that he had made preparations, had equipped himself, had got ready, had put himself in a position to commit the offence charged, but he had never had any contact or communication with any pupil at the school. On the facts of the case the evidence was not sufficient in law to support a finding that the defendant had done an act which was more than merely preparatory to wrongfully imprisoning a person unknown.

R v Tosti and White (1997)

The defendants had been seen by the owners of a farm, just before midnight, walking to the door of a barn, and examining the padlock. They saw that they were being watched, took fright and ran off. A car was parked in a nearby lay-by, and between the car and the barn, hidden in a hedge, was some oxygen cutting equipment. There was sufficient evidence to connect T with the equipment. The defendants were convicted of attempted burglary. The defendants appealed against conviction on the ground that there was no evidence upon which the jury could have found that an attempted burglary had been committed.

It was held by the Court of Appeal, dismissing the appeal, that the short question was whether it could be said that the defendants, in providing themselves with oxygen cutting equipment, driving to the scene, concealing the equipment in a hedge, approaching the door of the barn and bending

down to examine how best to go about the job of breaking into the barn, had committed acts which were more than merely preparatory, and which amounted to acts done in the commission of the offence. The question was essentially one of degree. It had been said in *Geddes* (1996) that the test was to ask whether the evidence if accepted could show that the defendant had done an act which showed that he had actually tried to commit the offence, or whether he had only got ready or put himself in a position or equipped himself to do so. Applying that guidance to the facts of the present case, the facts proved in evidence were sufficient for the judge to leave to the jury.

R v Toothill [1998]

The victim lived in a house with a garden, which was situated in an isolated area. At about 11pm she saw the defendant standing a few feet from the rear of her house, apparently masturbating. She telephoned the police. He was arrested in the garden, where a knife and a glove were found. A condom was found in his pocket. The defendant admitted that he had knocked at the door to ask for directions as he could not find where he had parked his car. He was charged with attempted burglary with intent to rape. The defendant was convicted and appealed on the ground that it was incumbent on the judge to look for evidence not merely of an attempt to burgle but also an attempt to commit rape, namely that he would have knowledge that there was a person in the house, to lay the foundation for a finding that that was what the defendant had in his mind.

The Court of Appeal dismissed the appeal. In the present case, the *actus reus* of the offence was the act of entering the property as a trespasser. What converted it into burglary was the presence of the trespasser with the intention to commit one or other of the offences set out in s9(2) of the Theft Act 1968. The attempt was to do the act, not to have the intention. The crucial step that the defendant took, which established that he had gone beyond the preparatory to the executory stage of his plan, was that he knocked at the proposed victim's door.

R v Nash [1999]

Two letters addressed to "Paper boy" were left in the street. They were opened by a paper boy and a paper girl who found that they contained an invitation to the recipients to engage in acts of indecency with the author. A third letter purported to offer the recipient work with a security company and requested a specimen of urine. All three letters were taken to the police. At the instigation of the police the third paper boy went to meet the writer of the letter in a local park. There he saw the defendant, who asked him if he was looking for JJ, the signatory of the third letter. The defendant was arrested. A search of his home revealed a typewriter bearing the same typeface as that used in the letters and a letter written in similar terms to the other three found. There was expert evidence that all four letters had almost certainly been written on that typewriter. The defendant's defence was that he had been set up. He was convicted of three counts of attempting to procure an act of gross indecency. One of the grounds of appeal was that the judge erred in ruling that there was a case to answer on Count 3 since the fact of leaving out the third letter was no more than a mere preparatory act and was insufficient to constitute an attempt in law.

The Court of Appeal allowed the appeal in respect of Count 3. Following the decision in *Geddes* (1996), which helpfully illustrated where and how the line was drawn between acts which were merely preparatory and acts which could amount to an attempt, the terms of letter three, which did not contain an

overtly sexual invitation, as compared with the terms of letters one and two, were not such as to amount to an unequivocal invitation and were not sufficiently approximate to the act of procurement to amount to an attempt.

R v Khan and others [1990]

After a discotheque a 16-year-old girl accompanied five youths in a car to a house where they were joined by other youths. Three youths raped her. The four defendants tried to do so but failed. The defendants were charged with attempted rape and appealed. It was argued that the judge misdirected the jury by telling them that, even if a defendant did not know the girl was not consenting, he was guilty of attempted rape if he tried unsuccessfully to have sexual intercourse, being reckless whether she consented or not – ie, it was sufficient that he could not care less whether she consented or not.

The Court of Appeal held that a man may commit the offence of attempted rape even though he is reckless whether the woman consents to sexual intercourse since the attempt relates to the physical activity and his mental state of recklessness relates, as in the offence of rape itself, not to that activity but to the absence of the woman's consent. The appeals against conviction were dismissed.

Attorney-General's Reference (No 3 of 1992) [1994]

The defendants threw a petrol bomb towards the victims, four of whom were inside their car and two of whom were on the pavement outside. It passed over the car and smashed against a nearby wall. The defendants' car then accelerated away. The defendants were charged with attempted arson, being reckless whether life be endangered, contrary to s1(2) of the Criminal Damage Act 1971. The trial judge ruled that, on a charge of attempt, intent to endanger life was required; recklessness was not sufficient. The Attorney-General referred the issue to the Court of Appeal.

The Court of Appeal held that on a charge of attempted aggravated arson, it was sufficient for the Crown to establish a specific intent to cause damage by fire and that the defendant was reckless as to whether life would thereby be endangered, because if the state of mind of the defendant was that he intended to damage property and was reckless as to whether the life of another would thereby be endangered, and while in that state of mind he did an act which was more than merely preparatory to the offence, he was guilty of attempting to commit that offence. It was not necessary that he intended that the lives of others would be endangered by the damage which he intended.

Haughton v Smith [1975]

A van containing stolen goods was stopped by the police. It transpired that the van was proceeding to Hertfordshire where the defendant was to make arrangements for the disposal of the goods in the London area. In order to trap the defendant the van was allowed to proceed on its journey with policemen concealed inside. The van was met by the defendant who began to play a prominent role in assisting in the disposal of the van and its load. Finally the trap was sprung and the defendant was arrested. The prosecutor was of the opinion that, once the police had taken charge of the van, the goods had been restored to lawful custody, and were therefore, no longer stolen goods. Accordingly the defendant was not charged with handling

'stolen goods', contrary to s22 Theft Act 1968, but with attempting to handle stolen goods.

The House of Lords held that a person could only be convicted of an attempt to commit an offence in circumstances where the steps taken by him in order to commit the offence, if successfully accomplished, would have resulted in the commission of that offence. A person who carried out certain acts in the erroneous belief that those acts constituted an offence could not be convicted of an attempt to commit that offence because he had taken no steps towards the commission of an offence. In order to constitute an offence under s22 of the Theft Act 1968 the goods had to be stolen goods at the time of the handling; it was irrelevant that the accused believed them to be stolen goods. It followed that, since the goods which the defendant had handled were not stolen goods, he could not be convicted of attempting to commit the offence of handling stolen goods.

Anderton v Ryan [1985]

The defendant had bought a video recorder, but later confessed to the police that she believed it to have been stolen property when she bought it. The defendant was charged with attempting to handle stolen goods, although the prosecution was unable to prove that the video recorder had in fact been stolen property.

The House of Lords (by a majority of 4-1) quashed the defendant's conviction on the ground that she could not be guilty of attempting to handle stolen goods unless such property was shown to have existed. A majority of their Lordships refused to accept that the defendant's belief that goods were stolen was sufficient of itself to result in liability. Such a result may have been the aim of the 1981 Act but their Lordships felt that Parliament would have to express its intentions more clearly before the courts would be willing to impose liability solely on the basis of what the defendant had thought she was doing, as opposed to what she was actually doing.

R v Shivpuri]1986]

The defendant was paid to act as a drugs courier. He was required to collect a package containing drugs and to distribute its contents according to instructions which would be given to him. On collecting the package the defendant was arrested by police officers, and he confessed to them that he believed its contents to be either heroin or cannabis. An analysis revealed the contents of the package not to be drugs, but a harmless vegetable substance. The defendant was convicted for attempting to be knowingly concerned in dealing with and harbouring a controlled drug, namely heroin.

His appeal to the House of Lords was dismissed. Lord Bridge said, in applying s1 of the Criminal Attempts Act 1981 to the facts of the case, the first question to be asked was whether the defendant intended to commit the offence. The answer was plainly yes. Next, did he do an act which was more than merely preparatory to the commission of the offence? The acts were more than merely preparatory to the commission of the intended offence. This analysis lead to the conclusion that the defendant was rightly convicted.

R v Taaffe [1984]

The defendant smuggled a package into the UK. He mistakenly believed the package contained currency and that the importation of currency was

prohibited. The package contained drugs. He was charged under s170(2) of the Customs and Excise Management Act 1979 with being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug imposed by s3(1) of the Misuse of Drugs Act 1971. The defendant was convicted. The Court of Appeal quashed his conviction on the ground that the requisite *mens rea* for an offence under s170(2) was actual knowledge. The Crown appealed to the House of Lords.

The House of Lords held that when the state of a defendant's mind and his knowledge were ingredients of the offence with which he was charged, he had to be judged on the facts as he believed them to be. Accordingly, since the defendant mistakenly believed that by clandestinely importing currency he was committing an offence, his mistake of law could not convert his actions into the criminal offence of being 'knowingly concerned' in the importation of a controlled drug within s170(20 of the 1979 Act since he had had no guilty mind in respect of that offence. It followed that the appeal would be dismissed.

R v Taylor (1859)

It was held that an attempt was committed where the defendant approached a stack of corn with the intention of setting fire to it and lighted a match for that purpose but abandoned his plan on finding that he was being watched.