

## PART XI – LAWS OF ATTEMPTED CRIME

### I Introduction

#### A Inchoate Crimes

Inchoate crimes encompass doctrines of attempt, incitement and conspiracy, which share the common characteristic of making it criminal to participate in the commission of incomplete offences. Here, we are specifically concerned with attempt. Laws of attempt extend criminal liability beyond acts of a defendant to include what they try but fail to do.

The general common law doctrine of attempt states that an attempt to commit a crime is itself a crime. However, most states and territories have introduced legislation codifying the doctrine into statutory form (see, in Victoria, *Crimes Act 1958* (Vic) ss 321M-S).

The difficulty arises in attempting to articulate the legal boundaries to this doctrine. For example, if I try to kill a person but am unable to achieve that result (eg, because of police intervention or my own incompetence or mistake), how close to committing the full crime must I be in order to be found guilty of attempted murder?

#### B Relationship between Inchoate Crimes and Other Offences

Laws of attempt may be distinguished from specific crimes that set a penalty for some lesser offence (eg, attempted murder in New South Wales and South Australia – but not Victoria, in which attempted murder is covered by the general law of attempt). Attempted crimes are also different from crimes whose actus reus consists of a lesser (often summary) offence with an intention to commit a further crime (see, eg, *Crimes Act 1958* (Vic) ss 31, 40). The commission of these offences is a complete, and not inchoate, crime.

By contrast, laws of attempt set out a general approach applicable to any indictable offence. In this way, a separate 'attempt to commit X' offence need not be created for every offence X. Of course, a failed attempt may yet constitute some lesser crime. For example, attempted murder could also satisfy the elements of intentionally causing serious injury (*Crimes Act 1958* (Vic) s 16). Attempted murder is, however, the more serious offence.

#### C Justifications for Expanding Criminal Liability

The case has been argued that there is no need for a general law of attempt. Its detractors claim that if an attempt is serious enough to warrant prohibition, a substantive offence with its own actus reus should be enacted. Were there no laws of attempt, a separate offence for attempted murder, rape, assault, armed robbery, theft, obtaining property by deception, and the like, would need to be created as required. This is hardly practicable. Critics respond that criminal liability is rests on the causation of prohibited consequences, and that, where no such consequence in fact eventuates, no liability should be attached at all.

See, for example:

- Fisse and Howard at 385;
- Glazebrook (1969) *Law Quarterly Review*

Two primary reasons are offered for the use of inchoate offences to expand criminal liability beyond acts done and consequences caused:

- Moral reason
  - Arguably (at least if one accepts a deontological normative system), a person who intends to commit a crime but fails to do so is equally morally culpable (or, at least, almost as culpable) as a person who actually commits the crime
- Practical reason
  - Police and ordinary citizens are able to lawfully arrest a suspected offender prior to their commission of the complete offence
  - This allows the benefit of a conviction without the cost to society of the crime they were attempting to commit
  - As noted above, an overarching law of attempt avoids the need to create hundreds of duplicate 'attempt' offences

## D *Critiquing Doctrines of Attempt*

There are several ways in which laws of attempt are able to be manifested in a modern system of law:

### 1 **Current system**

- The general doctrine of attempt exists as at present.
- Penalties are slightly less than those for the completed offence
- Eg, in Victoria, the penalty is one 'level' of punishment below

### 2 **Current system, equal penalties**

- As above, but penalties for attempted and completed crime are the same
- This reflects an extreme subjectivist position
  - Current law leans toward the subjective end of the objectivity spectrum, both in terms of the mental element for attempts and completed offences (largely the same), and in terms of the punishment meted out to principals

### 3 **Specific attempts only**

- Only have specific attempt offences (eg, attempted murder, attempted rape) on a per offence basis
- If an attempt is undesirable enough to be prohibited, it should be defined and enacted as a substantive offence

### 4 **No criminal liability for attempts**

- This reflects an extreme objectivist/teleological (loosely, utilitarian) perspective
- No liability should be attached unless the prohibited consequence is actually caused
- This is the approach of tort law (ie, there is no such thing as an attempted tort)

## E Limits on Attempted Crime

### 1 Summary offences

In Victoria, it is not possible to attempt to commit a summary offence (*Crimes Act 1958* (Vic) s 321M, which applies only to indictable offences). Note, however, that an attempt to commit an indictable offence is itself an indictable offence.

The same applies in other common law jurisdictions; in *R v Bristol Magistrates Court* [1998] 1 WLR 390, 391 Simon Brown LJ noted that the attempt to commit a summary offence is not an offence. However, the attempt to commit a crime that is triable either way is an offence.

This approach may be contrasted with complicity, where secondary parties (accomplices) can aid, abet, counsel or procure both indictable offences (*Crimes Act 1958* (Vic) s 323) and summary offences (*Crimes Act 1958* (Vic) s 324).

### 2 Combining inchoate crimes

It is unclear to what extent it is possible to combine inchoate crimes with complicity.<sup>1</sup> Conceivably, it is possible to be liable for a crime that is quite far removed from the substantive offence:

- Complicity in an attempt
- Attempted conspiracy
- Conspiracy to incite
- Complicity in incitement
- Incitement to complicity
- Incitement to conspire (abrogated in Victoria - *Crimes Act 1958* (Vic) s 321F(3))
- Attempted complicity (abrogated in England by the *Criminal Attempts Act* (UK) s 1(4)(b))
- Complicity in conspiracy
- Attempted incitement
- Incitement to incite<sup>2</sup>

Clearly, such combinations as 'incitement to incite' (or perhaps even more hilariously, 'secondary liability for attempted conspiracy to incite an incitement to commit murder') broaden the scope of criminal liability for consequences not caused to the point of ridiculousness.

## II Legislative Regime

### A Victorian Provisions

Current Victorian laws of attempt are set out in Division 12 of the *Crimes Act 1958* (Vic), as amended by the *Crimes (Amendment) Act 1985*.

As part of the 1985 amendments, the old common law offence of attempt was abolished (by s 321S) and replaced with a new statutory offence: ss 321M-321S.

<sup>1</sup> Andrew Ashworth, *Principles of Criminal Law*.

<sup>2</sup> Fisse and Howard 317 (describing the various combinations that have been held to exist).

A brief description of these sections follows:

- Section 321S: abolishes the common law offence of attempt
- Section 321M: creates the new statutory offence
  - ‘A person who attempts to commit an indictable offence is guilty of the indictable offence of attempting to commit that offence’
- Section 321P: establishes penalties
  - The general rule is that the maximum penalty for an attempt is one level below that for the full offence
  - This reflects a conception of attempt as slightly less morally culpable than successful completion of a crime
- Section 321N: limits the operation of s 321M

### **s 321N – Conduct constituting attempt:**

- (1) A person is not guilty of attempting to commit an offence unless the conduct of the person is –
  - (a) more than merely preparatory to the commission of the offence; and
  - (b) immediately and not remotely connected with the commission of the offence.
- (2) For a person to be guilty of attempting to commit an offence, the person must –
  - (a) intend that the offence the subject of the attempt be committed; and
  - (b) intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time the offence is to take place.
- (3) A person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which make the commission of the offence attempted impossible.

Note that many of the cases considered below are of limited relevance as they predate or do not involve interpretations of the Victorian statutory provisions on attempt. However, they are useful to the extent that they illustrate the underlying theoretical and legal frameworks within which legal decisions about criminal responsibility for inchoate crimes take place. To this extent, they serve as indicators of future approach and potential interpretations of s 321N and related sections.

## **B Mental Element**

In determining whether an attempt has taken place, it is first necessary to examine the mental state of the accused. Mens rea assumes primary importance in laws of attempt, largely because articulating the exact actus reus is much more problematic (so if there is any doubt about the mens rea there is a preference to decide the case on that basis).

As an example of the difficulty of articulating the actus reus element of an attempt, consider attempted murder. The mens rea of attempted murder is an intention to commit the offence (ie, cause death) and intend or believe relevant facts or circumstances of the offence (that the victim is alive, etc). However, the actus reus is much more difficult to define. There are an infinite number of ways in which to fail to kill somebody. The only possibility that *can* be excluded is that the accused actually *does* cause the death of the victim (were this the cause, murder – and not attempted murder – would have taken place).

### 1 Recklessness is insufficient

The defendant must intend that the full crime be committed.

The mens rea is narrower than that required for the full offence in two important respects. First, intention is required, which excludes recklessness. Recklessness is thus insufficient (see s 321N(2)(a)).

The rationale for recklessness being insufficient is set out by Fisse and Howard in an example provided at 387:

*An aircraft designer places a bomb in the prototype of the aircraft of his competitor when it launches for a test flight. D's purpose is to gain a commercial advantage, but he knows that, incidentally, the test pilot will be killed.*

*Why should D not be convicted of attempted murder if the bomb fails to explode?*

Recklessness as to death is insufficient for an attempt because the mental state of recklessness consists only of advertence and acting any way – advertence to a risk of harm and preparedness to run the risk of it eventuating. This is, however, a passive mental state, and – even where, as here, the risk is one to the point of virtual certainty – not of the same directedness as the intent required by s 321N(2)(a).

That recklessness is insufficient to satisfy the mens rea of attempted murder was noted in *Alister* by Gibbs CJ (in dissent). What is required is an intention to kill another human being. Note, however, that *Alister* predates the 1985 amendments to the *Crimes Act 1958* (Vic).

#### ***Alister* (19xx) HCA:**

##### Facts:

- Alister forms a 'suicide pact' with several friends
- They decide that, in the event that they are stopped by police, they will detonate a bomb stored in their car, killing them and the police officer
- Alister is charged with the attempted murder of the police officer and other passengers

##### Issue:

- Has Alister committed attempted murder?

##### Reasoning:

- The defendant did not intend that the police officer be killed; however, he did intend that his fellow passengers be killed (as part of the 'suicide pact')
- Even if Alister was recklessly indifferent to the probability that the police officer would have been killed, such recklessness is insufficient to constitute an attempt

##### Decision:

- Conviction for attempted murder upheld

*Alister* is affirmed in *Knight*, where Mason CJ, Dawson and Toohey JJ note that the mens rea that must accompany the inchoate crime of attempt is an *intention* to commit the completed offence. Recklessness is insufficient.

## 2 *Attempted strict liability offences*

Because laws of attempt only apply to indictable offences (which don't generally impose strict liability), strict liability offences are not normally spoken of as being 'attempted'. However, just as complicity in the commission of a strict liability offence has a distinct mental state, it may be presumed that it is possible to attempt to commit an offence of strict liability under s 321N.

## 3 *Intention is narrower*

Second, the scope of the required intention may be confined to the consequence of the actual offence. For example, to be guilty of attempted murder, the defendant must have intended to kill. It is not sufficient to intend to cause grievous bodily harm.

## 4 *Circumstances*

The defendant must *intend or believe* that the factual circumstances that comprise the crime will exist at the time of the attempt to commit it.

In the case of rape, awareness that the victim 'is not consenting or might not be consenting' (s 38(2)(a)) is part of the mens rea. Section 321N(2)(b) makes it clear that this awareness is still part of the mens rea of attempted rape.

This means that, despite s 321N(2)(a) (which requires that the defendant intend to sexually penetrate the victim), the defendant does *not* have to intend to sexually penetrate the victim without the victim's consent. To be guilty of the attempt, the prosecution need only prove beyond reasonable doubt that the defendant intended to sexually penetrate the victim 'while being aware that the victim is not or might not be consenting' (*R v Evans* (1987) 48 SASR 35 [RY708]).

Rape is a crime that be committed in its complete form without an intention to commit a forbidden act (penetration per se is not illegal) or bring about a forbidden consequences. It is the circumstances ('while not consenting') that make it criminal. For crimes dependent on the existence of circumstances, the mens rea for an attempted is the same as the full crime. That is, recklessness as to circumstance ('might not be consenting') is sufficient mens rea to commit attempted rape. On this point, see further *Evans*.

In summary:

- Section 321N(2)(a) suggests that there must be an intention to commit the full crime
- Section 321N(2)(b) serves to preserve the knowledge, awareness, foresight or belief element for the attempted as well as completed crime
- Attempted rape has the same mens rea requirement as rape: the intention to sexually penetrate the victim while being aware that the victim is not consenting or might not be consenting

## 5 *Impossibility*

Even if it is *factually* impossible to commit the full crime, the accused may still be guilty of an attempt. See further Part III Section C below.

## C *Physical Element*

The law draws a distinction between acts connected with the attempt of a crime and acts merely preparatory to its commission. The logic behind this distinction seems sound: if the defendant has not yet indicated a clear commitment to carry out the offence or made any substantial progress towards its commission, he should not be criminally liable. The difficulty lies in articulating where preparatory acts end and acts capable of constituting an attempt begin.

Recent case law has seen a litany of tests proposed, adopted, and rejected. However, the 1985 introduction of the amendments to the *Crimes Act 1958* (Vic) cast doubt on their applicability, and – several decades after their introduction – it is still unclear how they will be applied.

### 1 *Requirements of s 321N(1)*

Section 321N(1) offers two indicators of connexion. The acts of the accused must be both (a) ‘more than merely preparatory to’; *and* (b) ‘immediately and not remotely connected with’ the commission of the offence.

The question then arises, ‘when do actions move beyond being “merely preparatory” and become “immediately connected with” the commission of the offence?’ It seems evident that common law tests will still need to be used to determine the scope of conduct included under s 321N.

### 2 *Common law indicia*

At common law several tests were devised, none of which appear particularly useful:

- Last act test
- Series of acts test
- Proximity test
  - Acts remotely leading towards the commission of an offence are not attempts but acts immediately connected are attempts
  - A similar wording is to be found in s 321N(1)(b)
- Substantial step forward
- Unequivocal act test
- Common sense theory

It is not entirely clear how the statutory test departs from the common law. This leaves a wide discretion to the judge of how to put the question to the jury.

### 3 *Fallback offences*

Even if it cannot be established that the defendant committed an act ‘immediately and not remotely connected with’ the full offence, there may exist a lesser fallback offence on the basis of which to secure a prosecution.

Such ‘preparatory offences’ are examples of specific laws of attempt as codified into statute. They typically offer minor penalties for engaging in conduct which is regarded as, in that context, sufficiently proximate to a higher offence to warrant punishment. Some examples follow.

It might be difficult to prove attempted theft where the accused simply possesses implements designed for that purpose. Arguably, such implements would amount to ‘mere preparations’ to

the act of theft. However, a specific offence has been created that broadens liability to this earlier point in the series of acts:

**s 91 – Going equipped for stealing:**

- (1) A person shall be guilty of a summary offence if, when not at his place of abode, he has with him any article for use in the course of or in connexion with any burglary, theft or cheat.

Note, however, that s 91(1) is a summary offence only.

In the context of sexual offences, where the prosecution faces difficulty in proving attempted rape (as where the defendant makes no physical contact with the victim), they might also allege:

**s 40 – Assault with intent to rape:**

- (1) A person must not assault or threaten to assault another person with intent to commit rape.

Penalty: Level 5 imprisonment (10 years maximum).

It is important to remember the availability of these defences as alternative charges to an unsuccessful conviction for attempt.

### III **Issues**

#### A *Scope of Conduct Constituting an Attempt*

As noted above, severe difficulties are encountered in formulating and applying the various tests used to distinguish criminal from non-criminal preparatory conduct. The issue here is where (or at what point), throughout a course of conduct, can it be said that an attempt has been made? It is a line-drawing exercise of great difficulty.

The earliest test employed was the last act test. To be guilty of an attempt, the accused must have already performed the last act 'depending on himself [sic]' (*R v Eagleton*).



**R v Eagleton (1855) UK:**Facts:

- Eagleton is a store owner who is credited by an authority for food he supplies to the poor
- Eagleton would tender aid tickets to the authority, who would credit him for the loaves of bread he provides
- Eagleton supplies underweight loaves to customers
- He is caught and charged with attempting to obtain money by false pretences (as the crime was then formulated)

Issue:

- Has Eagleton engaged in conduct sufficient to found an attempt?

Reasoning:

- Baron Parke:
  - Applies the last act test, though the discussion is also phrased in terms of proximity
  - Mere intention to do something is not criminal
    - There needs to be some act or acts
  - Acts 'remotely leading towards the commission of an offence' are not 'attempts'
    - However, acts 'immediately connected' with its commission are
  - On the facts of this case, there was no further step, no other act, required by Eagleton: 'It was the last act depending on himself'

Decision:

- In supplying the underweight loaves (as opposed to merely intending to do so, or baking them), Eagleton carried out the last act dependent on him for commission of the offence
- All that remained was for the authority to credit his ill-gotten tickets
- Consequently, Eagleton is guilty of the attempt

In summary, the 'last act' test consists of the following requirements:

- *An act*  
The mere intention to commit a crime is not criminal
- *No further act*  
An attempt will have been committed where 'no further step, no other act, was required by the defendant'
- *The last act*  
That is, where 'it was the last act, depending on himself' (*Eagleton*)

Of course, the major limitation of the 'last act' approach is that it is only applicable where something remains to be done after the defendant's last action for the crime to be complete (eg, filing a fraudulent insurance claim, which must subsequently be approved; or setting a deadly trap, which must subsequently be triggered).

Where the defendant's last act *is* the offence (eg, stabbing the victim), it is no longer a useful indicia on which to distinguish attempt from commission.

**R v Robinson (1915) UK:**Facts:

- Robinson is a jeweller, who has insured his store against theft and burglary
- He conceals some jewellery in his shop and ties himself up, with the intention of filing a claim for loss with his insurer
- He later tells the police that he had been robbed
- Police later find the jewellery where he had hidden it
- Robinson confesses his intentions
- He is subsequently convicted of attempting to obtain money by false pretences

Issue:

- Has an attempt been committed?

Reasoning:

- Lord Reading:
  - D's acts were only remotely and not immediately connected with the offence of obtaining by false pretences
  - There was no communication of Robinson's claim and the story supporting it to his insurers
- The case is decided on the basis of the proximity test posed in *Eagleton* (acts 'immediately connected' with the offence), and not the 'last act' test there posed
  - However, Robinson's counsel had originally appealed to the 'last act' test

Decision:

- Nevertheless, the conviction is quashed
- There was no communication of the claim to the insurers, and faking the burglary was not itself sufficiently proximate or 'immediately connected' with the offence of obtaining money by false pretences from the insurer

Glanville Williams has described the decision in *Robinson* as 'as favourable to a defendant as any that can be found in the criminal law'. It is likely that the outcome would be different under s 321N(1), where it may be argued that the conduct was clearly 'more than merely preparatory' since, unlike concealment of the jewellery or the accused tying himself up, making a false report to the police was part of the deception constituting the offence.

Though it is less clear whether the act of lying to police would be 'immediately and not remotely connected with' the deception in relation to the insurer, the deception need not have come to the attention of the intended victim in order for an attempt to have been committed (*DPP v Stonehouse*).

**DPP v Stonehouse (1978) HL:**Facts:

- Stonehouse is a famous British politician who fakes his own death
- Prior to doing so, he takes out insurance policies naming his wife as beneficiary
- She does not know about his scheme
- He is discovered, arrested, and convicted of obtaining property by deception
- He appeals his conviction, contending on the basis of *Robinson* that he had merely made preparation to create a situation whereby his wife could claim

Issue:

- Stonehouse's counsel accepted that his client had made the 'final contribution' (last act)
- However, on the basis of *Robinson*, was Stonehouse's faking of his own death 'immediately connected' with the claim of his wife, which had yet to be made?

Reasoning:

- Lord Edmund-Davies:
  - Rejects the 'series of acts' and 'last act' tests
  - Instead proposes a proximity test:
    - Has D gone 'a substantial distance towards attainment of his goal'?
    - Was D's conduct 'sufficiently proximate'?
  - The ruling that there cannot be a conviction for an attempt to obtain by false pretences unless the pretence or deception has come to the knowledge of the intended victim should not be followed
  - Applying the proximity test:
    - The act of taking out the insurance policies might be regarded as preparation
    - However, here what he had done was, in relation to the offence, 'sufficiently proximate thereto to constitute the attempts charged'
  - *Robinson* is far too favourable to the defendant; the proximity test set out in *Eagleton* was not properly applied
  - Refers to Stephen's 'series of acts' test, noting Glanville Williams' criticisms:
    - On the one hand, the 'series of acts' test is too narrow because an impossible attempt is still an attempt
    - So, even if the 'series of acts' were to be completed, there would still be no 'completed' crime
    - On the other hand, the 'series of acts' test is too broad and it is not clear when the series begins
- Lord Diplock:
  - To be guilty of an attempt, the defendant 'must have crossed the Rubicon and burned his boats'
  - By faking his death, this Stonehouse had done
  - (This is not the law of Australia)

Decision:

- Appeal dismissed
- 'It must be shown that the conduct of the accused was more than merely preparatory to the commission of the offence *and* was immediately and not merely remotely connected to the commission of the offence.'
  - This is more consistent with the Victorian approach

The proximity test seems capable of more precise articulation. However, it also appears bedevilled by circularity: at what point along the series is it possible to discern the making of an attempt, rather than just preparatory acts? The test offers no guidance on this point. Further, and confusingly, the relevant dividing line – whether identified by some subtle advancement in whimsical causal proximity or by metaphoric razing of a vessel of transportation – is still merely one act in a broader 'series of acts'; the relevant act is, after all, just the 'last act' in a longer causal chain. The lack of distinction between the various tests of connexion seems to signal that the real problem lies not in articulating the problem (which the tests do quite creatively) but in applying legal principles to a given set of facts and circumstances.

To combat some of the problems associated with defining the scope of an attempt, the Criminal Law Working Group was commissioned to investigate laws of attempt. Their findings are here summarised:<sup>3</sup>

- To be guilty of an attempt, D must have come ‘very close indeed to committing the substantive offence’
- It needs to be clear that D is ‘on the job’
- Various tests have been used in the past to determine whether this is the case
  - ‘Last act depending on himself’ (*Eagleton*)
  - ‘Immediately and not remotely connected with’ (proximity: *Smith, Eagleton*)
  - ‘crossing the Rubicon’ (*Stonehouse* per Lord Diplock)
  - ‘Series of acts’
  - ‘Uniquivocality’
  - ‘Substantial step’ (*Stonehouse* per Lord Edmund-Davies; *Smith* per Lord Hailsham)
- Recommends a test using 4 criteria:
  - 1 Give ‘attempt’ ordinary meaning
    - Conduct must be an ‘attempt’ as the word is ordinarily used. [This the ordinary usage/common sense ‘test’?] REJECTED
    - What is the ‘ordinary meaning’?
  - 2 Conduct ‘more than merely preparatory’
    - This has since been accepted in s 321N(1)(b)
  - 3 Conduct must amount to a ‘substantial step towards commission’
    - This recommendation was rejected
  - 4 Conduct must be ‘immediately and not remotely connected with’ the commission of the offence
    - It must be ‘within striking distance’
    - This has been accepted in s 321N(1)(b)
- In explanation of the ‘substantial step’ criterion, the Report says:
  - ‘...The [substantial step] test ensures that the conduct in question, while it obviously falls short of the actual commission of the substantive offence, is nevertheless in itself substantial. To give an example: a person has a loaded pistol in his pocket and intends to kill an enemy. He sees his enemy and reaches towards his pocket. He has obviously gone beyond the stage of merely preparing for murder, and it may even be said that his conduct is immediately and not remotely connected with the commission of the substantive offence; but it could hardly be said that his conduct amounted in itself to a substantial step towards the commission of the murder’
  - This is unconvincing
  - The report adds yet more colourful metaphors without clarifying any

In summary:

- *Crimes Act 1958* (Vic) s 321N(1) lays down the proximity test
- There are other tests which have been applied at common law

<sup>3</sup> Criminal Law Working Group (Victoria) (1985) *Report on Attempt*, Part II, [4]–[8].

- These can be used in conjunction with the proximity ‘test’ to provide an answer to the question of whether the accused’s conduct is sufficient proximate to the offence for it to amount to an attempt
- It seems likely secondary indicia will continue to support the primary test legislated in the *Crimes Act* as determinants of the scope of attempts
  - Even if the proximity test is officially the law of Victoria, secondary tests are still embodied to some extent by the language of s 321N(1)

## B      *Withdrawal*

**Issue:** at what point does withdrawal from or abandonment of the crime, before it is completed, mean that no attempt has been committed?

### ***R v Boyle & Boyle (1987) UK CCA:***

#### Facts:

- The defendants damage a house door with a view to gaining entry
- They desist their operation shortly afterwards
- The Boyles are convicted of attempted burglary
- They appeal on the grounds that their conduct did not amount to an attempt because there was no evidence that the act was anything more than merely preparatory

#### Issue:

- The issue was one of the interpretation (of the equivalent English attempt provision, s 21N(1), which contained a similar proximity test of conduct)
- Is the Boyles’ conduct ‘more than merely preparatory to the commission of the offence’?

#### Reasoning:

- This constitutes an attempt according to any test
  - The case is at [1987] Crim LR 111, which contains brief summaries and commentaries by Prof J C Smith (of Smith and Hogan)
  - The commentaries are influential in England
- Prof Smith refers disapprovingly to Lord Diplock’s Rubicon test as merely another version of the ‘last act test’ in *Eagleton*, which has since been rejected
  - The defendants in this case certainly did not satisfy the ‘last act’ test
  - After damaging the door, they simply turned away: ‘[t]here was no Rubicon for them to be drowned in’
  - The defendants’ appeal can only be dismissed on the basis that the proximity test excludes the last act/crossing the Rubicon tests
  - The ‘crossing the Rubicon’ test was probably not part of English law, so even if the legislation excluded it, the legislation does not change the law
  - Nevertheless, if the legislation does exclude this test (and Smith is not saying it does), then that change would be worthwhile
- On the facts, *Boyle & Boyle* is a clear case of the proximity test being satisfied
- The Ds were ‘on the job’, despite the last act test not being satisfied

#### Decision:

- Appeal dismissed

The question of withdrawal is, thus, largely a non-issue, and does not factor into attributions of criminal liability for attempts (though it may impact on sentence). The issue to be determined remains whether the defendant's conduct up to the point of withdrawal was sufficiently proximate to the commission of the offence to constitute an attempt.

**Lankford v R (1950) UK:**Facts:

- Lankford attempts to rape the victim; however, he desists in his attempt prior to penetration on what he argues was a 'change of heart'
- A passer-by subsequently appears and alerts the police
- Lankford is convicted of attempted rape
- He appeals was on the basis that his desistance meant he no longer intended to commit the crime, and not because he feared getting caught by the passer-by

Issue:

- Is the fact of desistance relevant to the question of whether an attempt has been committed?

Reasoning:

- The accused's argument is quite irrelevant
- It is irrelevant whether Lankford desisted for some genuinely moral reason (pangs of conscience, feelings of contrition, remorse) or out of fear of being caught
- The question is simply whether there is sufficient proximity between his conduct by the time that the desistance occurred and the commission of the crime
- Prof J C Smith:
  - If the events are far enough advanced, it is irrelevant whether failure to complete the crime results from a voluntary withdrawal (change of heart), intervention by police, or some other cause

Decision:

- Here, the appeal against conviction is upheld – but not due to the withdrawal
- Instead, it is held that there is an insufficient degree of proximity
  - Lankford's acts amount to 'mere preparation'
  - The case is decided on a factual basis
- However, voluntary desistance – as indicating a change of heart, contrition, or remorse – is relevant only to sentencing

If the withdrawal occurs at a stage before it can be said an attempt has occurred (that is, at a stage where there the conduct is 'mere preparation'), then withdrawal is irrelevant since mere preparation cannot amount to an attempt.

If, on the other hand, the withdrawal occurs after there is an attempt, it is again irrelevant because the attempted crime has already been committed.

The leading case in Victoria is *R v Page*. A criminal attempt may be committed 'in cases in which the offender voluntarily desists from the actual commission of the crime itself' (*R v Page* per Mann ACJ).

**R v Page (1933) Vic SC:**Facts:

- ‘The accused induced a young fellow named Partridge to join him in a shopbreaking enterprise at Geelong. The accused kept watch in a lane, while his companion mounted a wall. He put the lever under the window-ledge for the purpose of prising it open, but, before using any force, he decided he would not “continue on with the job”. [He said he thought about what his mother would think.] He dropped the lever to the ground and himself descended, and was arrested with his confederate.’
- [Page and Partridge will be treated as joint principals unless Partridge is below the age of criminal responsibility, in which case he would be an innocent agent and Page the sole principal]

Issue:

- Is the conduct of Page and Partridge sufficiently proximate to the commission of burglary to constitute an attempt, despite the fact of their desistance prior to gaining entry?

Reasoning:

- An attempt has been committed despite the desistance; the fact that an accomplice desisted is no answer to the charge
- Mann ACJ:
  - Notes Russell and Archbold, who define attempt using the ‘series of act’ test
    - Russell suggests that if the ‘series of acts’ is not completed because of a ‘mere change of mind’ by the defendant then there is no attempt
    - Were this correct, it would preclude criminal liability on the part of Page and Partridge
    - However, there is no authority for Russell's view
  - Citing the Draft Criminal Code definition in Archbold:
    - This definition of attempt is ‘in marked contrast’ to that in Russell
    - It is clear that a criminal attempt may be committed ‘in cases in which the offender voluntarily desists from the actual commission of the crime itself’
    - ‘An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause’
- Even if there are policy reasons favouring a defence of voluntary desistance, it is legally irrelevant to attributions of guilt; it arises only at sentencing

Decision:

- What had been done amounts to an attempt and that Page ‘desisted of his own volition ma[kes] no difference’

Smith and Hogan correctly state the law of attempt (at 317):

*If steps taken towards the offence are sufficiently advanced, [it makes] no difference whether failure to complete the crime is due to voluntary withdrawal, police intervention, or any other reason.*

## C Impossibility

**Issue:** can a person be guilty of attempting to commit a crime when it is not possible to commit the actual crime?

*Donnelly*, a New Zealand case, sets out 6 categories of impossibility:

- 1 Premature change of mind**  
D changes his mind before committing any act that amounts to an attempt.
  - No attempt
- 2 Subsequent change of mind**  
D changes his mind, but too late to deny that there has been an attempt made.
  - Attempt
- 3 Outside agency**  
D is prevented by a secondary agent from completing his commission of the crime.
  - Eg, a police officer apprehends D while he is endeavouring to force a window open prior to breaking into V's premises
  - There will be an attempt if 'sufficiently proximate overt acts' have been committed prior to the attempt being thwarted (*Donnelly*)
  - In this example: attempt
- 4 Insufficient means**  
D fails in his attempt by reason of insufficiency, misjudgement or incompetence.
  - Eg, D shoots at an intended V who is out of range, or administers an insufficient amount of poison to kill V
  - Attempt
- 5 Factual impossibility**  
D attempts a crime that would not, on the facts, have been committed had he carried out all the acts he intended to carry out.
  - Eg, picking an empty pocket, 'killing' a corpse (or a number of pillows arranged to look like a body)
  - Attempt in Victoria, New South Wales, and – now, at least – England
- 6 Legal impossibility**  
The conduct alleged to constitute the attempt is not criminal, even if completed in the presence of the facts as they are perceived by D.
  - Eg, attempted adultery (the completed conduct is not criminal), legal incapacity (by reason of age or jurisdiction)
  - No attempt

In summary, legal impossibility (6) is *always* a defence. Insufficient means (4) is *never* a defence. Factual impossibility (5) is problematic.

### 1 UK Approach

The matter of factual impossibility was first broached in *Smith* by the House of Lords. Subsequent treatments may be classed into five distinct phases of approach.

- a) Phase 1: no defence



Prior to *Smith*, the traditional position is that factual impossibility is no defence to attempt, but legal impossibility is.

b) Phase 2: *Smith* tripartite classification

Impossibility due to insufficiency of means can constitute an attempt, because it concerns circumstances within the defendant's control. However, no attempt will have been committed where the failure occurs due to circumstances beyond the defendant's control. Legal impossibility renders conduct incapable of amounting to an attempt (outside of D's control), as does factual impossibility.

### ***Haughton v Smith* (1975) UK:**

Facts:

- The defendants are convicted of attempting to handle stolen goods
- However, because of police interception, the goods were no longer stolen when handled
- The English Court of Appeal (Criminal Division) quashes the conviction
- The DPP appeals to the House of Lords

Issue:

- Has an attempt been committed, even though the defendants cannot possibly have completed the offence charged?

Reasoning:

- Adopts a tripartite categorisation of impossibility:
  - Legal impossibility (completed acts not a crime)
  - Insufficiency of means impossibility (cannot complete because of incompetence of defendant)
  - Absolute factual impossibility (complete acts would not have satisfied elements of the offence charged)
- The type of impossibility of the crime attempted is determinative of the outcome:
  - Insufficiency of means: failure occurs because of incompetence
    - An attempt has been committed
  - Physical impossibility: failure occurs because of circumstances beyond the control of the defendant
    - No attempt has been committed (Lord Hailsham)

Decision:

- Appeal dismissed

Tripartite classification has been strongly criticised since *Smith*. To illustrate the effects of the approach, consider the following two examples:

- D fires a gun at V, who is just out of range
- D fires a gun into an empty room, believing V to be in the room

In both cases, the failure could quite easily be classified as both caused by the defendant and caused by factors beyond the defendant's control. In the case of firing out of range, the cause could be the type of gun or bullet used, or it could be miscalculation by the defendant. In the case of firing into an empty room, it could be the victim's movement out of the room, or it could be the defendant's false belief. In any case, the distinction becomes fine to the point of collapse.

## c) Phase 3: statutory intervention

In response to criticism of the *Smith* tripartite classification, the British legislature intervened, abolishing factual impossibility as a defence (*Criminal Attempts Act 1981* (UK) s 1(2)). Effectively, *Smith* is overruled by statute:

***Criminal Attempts Act 1981* (UK) – s 1(2):**

A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

d) Phase 4: *Anderton v Ryan* factual impossibility

Section 1(2) is largely ignored, with the House of Lords soon after holding that the defence of factual impossibility survives the legislative intervention (*Anderton v Ryan*).

***Anderton v Ryan* (1985) HL:**Facts:

- D buys a video recorder believing it to have been stolen
- On the facts, the video recorder has not actually been stolen
- The appellant is, like *Smith*, nevertheless charged with attempting to handle stolen goods

Issue:

- Can D be convicted notwithstanding the fact that he attempted to possess legitimate (and not stolen) goods?

Reasoning:

- *Smith* survives legislative intervention, even though the very purpose of the legislation was to overrule the *Smith* view that factual impossibility is a defence

Decision:

- D is entitled to be acquitted

e) Phase 5: *Shivpuri* overrules *Anderton v Ryan*

Less than one year later, the House of Lords overrules *Anderton v Ryan* (*R v Shivpuri*). There, the defence of factual impossibility is conclusively rejected.

***R v Shivpuri* (1986) HL:**Facts:

- *Shivpuri* is convicted of attempting to deal in heroin
- The substance is in fact not heroin
- Instead, it is a vegetable-like material similar to snuff

Issue:

- Can Shivpuri be convicted notwithstanding the fact that it would have been factually impossible for him to complete the full offence?

Reasoning:

- Lord Bridge: the issue is one interpretation
  - Does conduct need to be 'more than merely preparatory' to the intended offence, or the actual offence?
    - [In Victoria, s 321N(3) suggests it must be the former – ie, more than merely preparatory to the intended offence; here, the conduct was not even preparatory to the actual offence, but clearly more than preparatory to the intended offence]
  - The substance in which D was 'dealing' was not heroin, but the snuff-like material
    - No amount of conduct on his part was going to go beyond 'mere preparation'
    - No amount of conduct could change the fact that it was not heroin
  - Thus, if the actual offence is impossible, then *no* act would be 'more than merely preparatory' to its commission
    - Factual impossibility would in such circumstances be a defence (contrary to the Victorian s 321N(3))
    - Here, *Shivpuri* was properly convicted [???
- *Anderton v Ryan* must be overruled
  - *Anderton v Ryan* had relied on the concept of 'objectively innocent' acts
    - 'Objectively considered', the purchase of the video recorder was innocent
  - However, this logic does not withstand scrutiny
    - Is plunging a knife into a pillow 'objectively innocent'? (yes)
    - For example, A sets out to murder B; A see what he thinks to be V sleeping with an eiderdown over him; A plunges his knife into what he thinks to be B; however, it is only pillows arranged to appear like B; the knife wrecks the pillow, but does not harm B
    - But consider the counter example, where A is an amateur actor who has a part that requires killing B on stage; he practices for the part by setting the scene up as above; he too plunges his knife into a pillow; however, he knows what he is doing all the time
    - Subjective knowledge of factual impossibility distinguishes these two cases; objective innocence is present in both of them
  - Because the case cannot be distinguished, it has to be overruled

Decision:

- The conviction is affirmed

Lord Bridge's two examples provide suitable illustration of the problem of factual impossibility. Why should a person who plunges a knife into a pillow, causing relatively little damage, be criminally liable for conviction for the equal second most serious offence in the criminal calendar? Regardless of his evil intention, no prohibited consequence is caused (other than minor property damage).

On the other hand, why should a defendant, choosing the time for his attack at which his victim is most vulnerable, and who is thwarted in his plan only at the very end by the fact that the victim is

not in bed, not be just as culpable as though he had actually had succeeded? To acquit would surely be to allow the defendant to escape criminal liability because of a stroke of luck (perhaps the victim could not sleep and had gone for a walk). Such a chance occurrence (arguably) has no moral significance, so it may be argued that it should not diminish – let alone negate – the defendant's criminal responsibility for consequences attempted but not caused.

## 2 Statutory approach under s 321N(3)

Section 321N(3) provides that '[a] person may be guilty of attempting to commit an offence despite the existence of facts of which he or she is unaware which make the commission of the offence attempted impossible.'

The Victorian Supreme Court has unequivocally rejected the *Smith* defence of factual impossibility (*Britten v Alpogut*).

### ***Britten v Alpogut* (1987) Vic SC:**

#### Facts:

- D is accused of an attempt to import cannabis contrary to the *Customs Act 1901* (Cth) s 233B
- At the time of importation, D believed that he was importing, and intended to import, a prohibited import (cannabis)
- However, the substance he actually imports is another substance, which is not a prohibited import under s 233B of the *Customs Act 1901* (Cth)
- Apparently following *Smith*, the Magistrate dismisses the charges
- The prosecution seeks an Order to Review to the Supreme Court
- The Court is exercising Federal jurisdiction

#### Issue:

- Can the accused be found guilty of attempting to import what he believed to be cannabis, despite there being no possibility of actually contravening s 233B?

#### Reasoning:

- Murpy J: in the context of criminal attempts, the focus is on the intention of the actor
  - The act itself may be innocuous
  - Whether the crime attempted could be accomplished is irrelevant
    - That was the heresy of *Smith*
  - The evil intent of a defendant can make a sufficiently proximate yet objectively innocent act criminal
  - Objective innocence of the act is irrelevant unless the so-called 'crime' intended is not really a crime (and so a case of legal impossibility; eg, attempted adultery)

#### Decision:

- The order is made absolute, and the case 'remitted to the magistrate, to be tried according to law, there being a case to answer on the evidence'
- [According to the doctrine of the separation of powers, committal proceedings before a Magistrate only have the status of executive (or administrative) decision-making. This is not regarded as an exercise of judicial power, so subsequent application of the 'order nisi' to review of a higher court will not breach the principle of double jeopardy.]
- This case was decided before the introduction of the *Criminal Code 1995* (Cth), s 11 of which now outlines the relevant approach to attempt in the context of federal offences

This case may be contrasted with *Collingridge*, in which the South Australia Supreme Court follows *Smith* in deciding that factual impossibility precludes the making of a criminal attempt.

### ***Collingridge v R (1976) SA SC:***

#### Facts:

- D tries to electrocute his wife in the bath
- However, insufficient current is applied to cause death

#### Issue:

- Did D's attempt fail because of insufficiency of means (lack of current) or factual impossibility (it being factually impossible to cause death with that amount of current)?
- If it is a case of factual impossibility, can D be convicted notwithstanding the fact that the offence (murder) could not have been committed?

#### Reasoning:

- Bray CJ:
  - Takes *Haughton v Smith* as binding, citing the six *Donnelly* categories from *Smith* per Lord Hailsham
  - The case concerns the distinction between impossibility by insufficient means and factual impossibility
  - Could a person be guilty of attempted murder by killing someone by witchcraft?
    - If the answer is 'no', this is not because of insufficient proximity, but because killing someone by witchcraft is physically impossible
    - [But factual impossibility is not a defence in Victoria, so it is possible to be convicted here of attempted murder through witchcraft; arguably this is consistent with being convicted of attempted murder for running over a corpse (*Cenzig*)]
  - The case is treated as one of insufficient means, *not* factual impossibility

#### Decision:

- The conviction for attempted murder is upheld

*Smith* has also been followed in *Bargouttis*, a NSW case on conspiracy. There, the court was concerned with *Nock*, a House of Lords conspiracy case that extended the *Smith* position on attempt to conspiracy.

However, the current preference seems to be for the *Shivpuri* and *Britten v Alpoput* approaches, which have since been followed in New South Wales (*Mai & Tran v R*).

### ***Mai & Tran v R (1992) NSW SC:***

#### Facts:

- The police substitute blocks of plaster of Paris for heroin contained in a suitcase which Mai and Train attempt to import
- The Crown relies upon the physical custody of the suitcase by Tran and upon the common purpose of both the appellants to possess the heroin which they believed the suitcase to contain

**Issue:**

- Can Mai and Train be found guilty of an attempt to import heroin under the *Customs Act* despite it being factually impossible to complete the importation by virtue of the police's substitution of the fake blocks?

**Reasoning:**

- Problem of the standing of the decisions and judgments of different state and territory supreme courts where exercising federal jurisdiction, and where no governing HC decision
- Following *Britten v Alpugut*, (in preference to *Collingridge*) factual impossibility is not a defence

**Decision:**

- The Court exercises federal jurisdiction
- Mai and Train's convictions are upheld
- The degree of criminality is demonstrated by Tran's intention to obtain the greater amount of heroin which the accused believed he was obtaining

Factual impossibility is not a defence in Victoria, so it is possible to be convicted of attempted murder whether through witchcraft or running over a corpse (*Cenzig*).

***R v Cengiz (1998) Vic CCA:*****Facts:**

- Cengiz is charged with the murder of his twin brother
- The charge of murder is withdrawn from jury, and an alternative of attempted murder substituted, because the cause of death could not be determined
  - It is possible that when Cengiz ran over the body of her twin brother, he was already dead

**Issue:**

- Can Cengiz' counsel exclude conviction for attempt on evidential grounds?
- Is there a reasonable hypothesis inconsistent with the defendant's guilt?

**Decision:**

- The conviction for attempted murder is upheld – the possibility that she was already dead when he ran over her does not preclude attempted murder

3 *Summarising the Victorian approach*

**Issue:** how would the Victorian statutory law of attempt deal with the liability of A in the following circumstances?

- A shoots at B, failing to hit his target because A has miscalculated the distance and B is out of range
  - Shooting out of range with intention to kill: insufficient means; attempted murder

- A decides to pick B's pocket. A puts his hand in B's pocket but finds it empty. When arrested by the police, A admits that he did not know what was in B's pocket but he intended to steal whatever was in the pocket
  - Factual impossibility; attempted theft
- A wishes to break into B's safe to steal its contents. He tries to open the safe but the implements he has brought with him are inadequate. The screwdriver breaks and the safe remains closed
  - Insufficient means; attempted theft.
- A, intending to kill, stabs a corpse thinking it to be living body of his intended victim
  - Stabbing corpse with intention to kill: factual impossibility; attempted murder
- A attempts to commit adultery with B believing that adultery is a crime
  - Legal impossibility: no attempt
  - No crime of adultery and so no crime of attempted adultery
- A is married to B. B disappears while on holiday and has not returned. After several years, A marries again, believing that B is still alive but will never return. In fact, B is dead.
  - A goes through a ceremony of marriage wrongly believing that his first wife is still alive: factual impossibility; attempted bigamy
  - This is not legal impossibility because the completed crime, bigamy, *does* exist (unlike adultery), and A has legal capacity to commit the crime (>10)

### III Applications

#### A Homicide

Section 321M is a general indictable offence; it must be combined with the definitions of specific, complete crimes in the *Crimes Act 1958* (Vic) in order to be applied. Some examples of various applications follow.

##### 1 Attempted murder

See the following cases:

- *R v Cenzig* [1998] 3 VR 720
  - Running over a dead body
  - Attempt
- *Alister v R* (1984) 154 CLR 404
  - Suicide pact to kill himself, passengers, and police officer
  - Attempt in relation to passengers but not police officer
- *Knight* (1992) 109 ALR 225

##### 2 Attempted voluntary manslaughter

Because attempt requires intent to commit the complete crime, there can be no such thing as attempted involuntary manslaughter (which has no subjective mens rea). However, an issue arises in relation to voluntary manslaughter (ie, murder reduced to manslaughter by provocation);

namely, is it possible to attempt voluntary manslaughter by virtue of being provoked to attempt murder?

The problem that arises is that if it is not possible to attempt voluntary manslaughter (and so provocation does not reduce what would be attempted murder to attempted manslaughter), then the accused would be 'better off', at least so far as sentencing is concerned, to have completed the crime and caused the victim's death. Had they done so, they may only be guilty of manslaughter, which carries a lesser penalty than attempted murder.

The question of whether provocation can reduce attempted to murder to attempted manslaughter has received mixed answers from the judiciary. The original position is that it does apply and can reduce what would otherwise be attempted murder to attempted manslaughter (*R v Duvivier*).

### ***R v Duvivier (1982) SASC:***

#### Facts:

- The accused, the victim's husband, is hidden in their home's ceiling
- He overhears conversation with wife which provokes him
- He chases his wife with a gun, firing several shots as she tries to escape
- One shot enters her brain, causing her death

#### Issue:

- Can the fact of Duvivier's provocation reduce his attempt from murder to voluntary manslaughter?

#### Reasoning:

- Mitchell and Zelling JJ:
  - Provocation is a (partial) defence to attempted murder.
  - It reduces attempted murder to attempted manslaughter
- Zelling J:
  - There is no reason in logic or law why Duvivier should not be convicted of attempted manslaughter on the basis of provocation

#### Decision:

- Yes, provocation is a partial defence to attempted murder

In many cases, the applicability of provocation to an attempt to commit murder is influenced by sentiments about the inappropriateness of the provocation defence generally, and an unwillingness to expand its role in homicide prosecutions any further (*R v Farrar*).

### ***R v Farrar (1991) Vic Trial:***

#### Facts:

- Farrar stabs his wife with a knife; he is charged with her attempted murder and, in the alternative, intentionally causing serious injury in respect of the stab wound, and, in the further alternative, recklessly causing serious injury
- Farrar gives evidence at trial supporting a defence of automatism
- At the conclusion of evidence, defence counsel submits that provocation should be left to the jury in relation to the attempted murder charge



- DPP's counsel submits that provocation is not open, as a matter of law, to attempted murder, and that – even if provocation is available – there is here insufficient evidence on which to leave it to the jury

Issue:

- Is provocation legally available to an accused charged with attempted murder?

Reasoning:

- Trial judge (Hampel J): provocation is not available to attempted murder
  - As a matter of law, provocation is not available
  - Provocation should be abolished altogether
  - Certainly, it should not be extended in any way

Decision:

- No, provocation is unavailable as a defence to attempted murder

A recent line of cases spurned by the High Court's decision in *McGhee v R* reflects changing judicial views about provocation, and suggests it will not be applicable to other state and territory criminal structures unless otherwise provided. In the context of the *Criminal Code (Tas)*, provocation is not a defence to attempted murder. Note, however, that provocation has since been abolished entirely in Tasmania.

***McGhee v R (1995) HCA:***Facts:

- Ms de Vries, was McGhee's 'de facto' partner until she moved out to start a lesbian relationship with a Mrs McDonald
- On discovering this, D shoots at both; he misses Ms de Vries (she escapes out of a window), but wounds Mrs McDonald
- D is charged with the attempted murder of both
- D is convicted of attempted murder in relation to Ms de Vries and of unlawful wounding in relation to Mrs McDonald
- It is accepted that, had D shot and killed Ms de Vries, there is sufficient evidence to raise the issue of provocation
- Relevant sections of the *Criminal Code (Tas)*:
  - Section 160(1) states:
    - 'Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation'
  - Section 2(1): attempt is defined by reference to the 'series of events' test
    - 'An attempt to commit a crime is an act or omission done or made with intent to commit that crime, and forming part of a series of events which if it were not interrupted would constitute the actual commission of the crime'
- D appeals unsuccessfully to the Tasmanian Court of Criminal Appeal on the ground that provocation should have been left to the jury
- D appeals to the High Court of Australia

Issue:

- Should provocation have been left to the jury in relation to the attempted murder?

Reasoning:

- Court of Criminal Appeal majority (Green CJ and Wright J, Zeeman J dissenting):
  - Section 160 is irrelevant to the crime of attempted murder
- Brennan, Dawson, Toohey and Gaudron JJ (Deane J dissenting):
  - A plea of provocation cannot be raised under s 160(1) of the *Criminal Code* (Tas) to a charge of attempted murder

Decision:

- (4:1) Provocation is not a defence to attempted murder under s 160(1)

If *McGhee* is followed in respect of the *Crimes Act 1958* (Vic), a similar result may be reached.

### B Sexual Offences

- Attempted rape
  - *R v Evans* (1987) 48 SASR 35
    - Mens rea of attempted rape is the same as that of rape

### C Property Offences

Many attempts involve defrauding a government agency, insurer, or other institution in order to obtain a monetary benefit (eg, a welfare or compensation payment). As such, attempts to obtain property or financial advantage by deception are frequent.

- Attempted obtaining property by deception:
  - *DPP v Stonehouse* [1978] AC 55
    - Faking death with intention of collecting insurance benefit is attempt
    - Acts sufficiently proximate
  - *R v Robinson* (1915) UK
    - Jeweller fakes robbery with intention of collecting insurance benefit
- Attempted burglary:
  - *R v Page* (1933) Vic SC
    - Attempt to gain entry to a house sufficiently advanced so that desistence irrelevant by that stage
    - Attempt
  - *R v Boyle & Boyle* (1987) UK CCA
    - Damage a door with a view to gaining entry
    - Attempt

### D Drug Offences

- Attempting to import prohibited drugs
  - *Britten v Alpogut* [1987] VR 929

- Attempting to possess prohibited drugs
  - *Mai & Tran* (1992) 26 NSWLR 371
  - *R v Shivpuri* (1986) HL

## **IV Hypothetical**

### **A Examination Strategies**

- 1 Look out for attempts in the fact situation
  - Eg, if D tries to kill V but only badly injures him, this is not just intentionally causing serious injury (*Crimes Act* s 16), but attempted murder (s 321M)
- 2 Start with the mens rea of attempt (*Crimes Act* s 321N(2)) *before* turning to the actus reus (s 321N(1))
- 3 The actus reus of attempt is ‘more than merely preparatory’ and ‘immediately and not remotely connected’ (*Crimes Act* s 321N(1))
- 4 That the offence was factually impossible in the circumstances is no defence to attempting it (*Crimes Act* s 321N(3))
- 5 In general, use the legislative framework set out in s 321N to structure the analysis