PROXIMITY IN CRIMINAL ATTEMPTS

R. v. BATEMAN [1959] N.Z.L.R. 487

The law does not punish mere intention to commit crimes. Nor does it punish mere preparation to commit crimes. But it punishes attempts to commit crimes. A man intends to commit a crime and starts to perform the physical acts, which, if everything goes according to plan, will result in the completed crime. Up to a certain point these physical acts will be mere preparation and not criminal. Beyond this point and until the complete crime has been achieved there is an attempt which is criminal. Where, in law, this point lies is extremely uncertain in all common law jurisdictions. The problem has been the subject of a great deal of theoretical writing and judicial utterance and is conveniently known as the problem of 'proximity'. Logically, it is submitted, the question of proximity is separate and independent from considerations of intent. In the interval between the decision to commit a crime, and the completed crime, intent remains a constant factor. Proximity is therefore determinable only from the objective observation of physical acts. It would have avoided much difficulty if the Courts had always borne this in mind.

The starting point was R. v. Eagleton (1855) Dears. 515, a case in which the accused was charged (inter alia) with attempting to obtain money by false pretences. Briefly, the accused was under contract to supply bread to the poor of a parish who would obtain tickets from a relieving officer to be given to the accused in return for loaves of bread. The accused knowingly supplied underweight loaves and handed in the tickets to the relieving officer for payment. When the fraud was discovered the accused had not actually been paid. Parke B., delivering the judgment of the Court for Crown Cases Reserved,[1] affirming the conviction, made a statement of principle which has been cited with approval ever since in English attempt cases. "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we

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1. Erroneously referred to in the report as the Court of Criminal Appeal.

do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." (Ibid. 538). This statement of principle is of course not a test which helps to indicate what is an act 'immediately connected' with an offence. The English Courts have never clearly formulated any principle which shows how they have distinguished acts which are 'remotely leading to' from acts which are 'immediately connected with' an offence. Parke B.'s statement is simply cited with approval as the law and purportedly applied as a test of proximity in its own right (e.g. R. v. Robinson [1915] 2 K.B. 342, 348, per Lord Reading C.J.: "A safe guide is to be found in the statement of the law laid down by Parke B. in Reg. v. Eagleton . . . . The difficulty lies in the application of that principle to the facts of the particular case." See also R. v. Miskell (1953) 37 Cr. App. R. 214, 217. At common law, therefore, "All that can be definitely gathered from the authorities is that to constitute a criminal attempt the first step along the way of criminal intent is not necessarily sufficient and the final step is not necessarily required." (R. v. Barker [1924] N.Z.L.R. 865, 874 per Salmond J.)

In New Zealand a similar vagueness is apparent in section 93 of the Crimes Act 1908. This section provides as follows:

> (1) Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended, whether under the circumstances it was possible to commit such offence or not.
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> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

Subsection (2) of this section leaves the question of proximity (and only the question of proximity) to the Judge as a question

of law. But the subsection provides as little indication of what it is that distinguishes an act that is, from an act that is not, 'only preparation', as was provided by the statement in R. v. Eagleton (supra). In New Zealand, however, there has been an interesting (and it will be submitted unfortunate) complication of the problem which is unique to this country.

In 1902 Salmond J. in his textbook Jurisprudence (1st ed. 1902 at 425) suggested the following principle as a test for proximity which would have general validity:

> An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done. A criminal attempt has criminal intent upon its face. Res ipsa loquitur. An act, on the other hand, which is in itself and on the face of it innocent, is not a criminal attempt, and cannot be made punishable by evidence aliunde as to the purpose with which it was done.

This suggested test formed the basis of the judgment delivered by Salmond J. in R. v. Barker [1924] N.Z.L.R. 865. Indeed, the very wording of the textbook was incorporated into the judgment with immaterial alteration (at 874, 875). Expanding upon his theory (at 875) Salmond J. continued: "That a man's unfulfilled criminal purposes should be punishable they must be manifested not by his words merely, or by acts which are in themselves of innocent or ambiguous significance, but by overt acts which are sufficient in themselves to declare and proclaim the guilty purpose with which they are done." (Emphasis added.) This test is conveniently known as the 'equivocality test' based as it is upon the unequivocal evidence of mens rea displayed by the act under review.

Now it must be borne in mind that this principle was formulated solely to test the remoteness or otherwise of an act. The problem is simply "is the act under review too remote from the offence to be punishable by law?". Salmond J. proposed that remoteness should be tested by the evidence of mens rea as manifested by the act under review. The

inadequacy of the test in the interests of justice is illustrated by R. v. Moore [1936] N.Z.L.R. 979 in which case the act of an elderly man in inviting a child into his hut was held to be too remote because the act was capable of an innocent interpretation (although there was conclusive evidence before the Court that his intention was criminal). Another example is the case of Campbell and Bradley v. Ward [1955] N.Z.L.R. 471 where an accused who climbed into another person's car, admittedly with the intention of stealing the battery of that car, was not guilty of an attempt to steal the battery because his act in climbing into the car was susceptible of an innocent interpretation. Further similar examples ad absurdum are provided in Glanville Williams, Criminal Law: The General Part (1953) 484 ff., and convincing criticisms may be found in Hall, Principles of Criminal Law (1947) 107 ff. and Jensen, The Nature of Legal Argument (1957) 159 ff.

Salmond J.'s test, though clearly open to criticism, was nonetheless a clear statement of principle which could be generally applied. This state of apparent clarity, however, lasted only four years. In R. v. Yelds [1928] N.Z.L.R. 18, the Court of Appeal in a judgment delivered by Herdman J., purported to follow R. v. Barker (supra). At page 21 the judgment reads: "From R. v. Barker certain propositions may be extracted. First, a bare intention to commit an offence does not bring a person within the bounds of Criminal Law. Proof of some act is required. Second, a criminal attempt is an act which shows criminal intent on its face. The case must be one in which res ipsa loquitur. Third, there must be proof of some overt act or acts which definitely signify that an accused person had in fact started out to commit an offence." (Emphasis added. This third requirement is, it will be submitted, destructive of Salmond J.'s "test"). The statement of principle in R. v. Yelds (supra) has been cited as the law in all subsequent New Zealand cases on the point. It will be seen that R. v. Yelds (supra) adds a further requirement, namely, that there must be proof of an overt act or acts "which definitely signify that an accused person had in fact started out to commit an offence". It is submitted with respect that this further requirement reintroduces the vagueness of the common

law and of s.93 (2) of the Crimes Act 1908, and that Salmond J.'s test has been nullified as a test. No indication is given in R. v. Yelds (supra) as to how it can be ascertained whether or not an act does "definitely signify" that the accused has "started out". There must, however, be something more than "unequivocality".

The result of this is apparent in the language of the judgment of the Court of Appeal in R. v. Bateman [1959] N.Z.L.R. 487, the facts of which may be taken from the head note and were as follows:-

> The appellant accosted a lad, aged 17 years, and used language calculated to arouse his sexual interest, made an appointment to take him to his home, and, at the appointed time, did all he could to persuade the lad (who had been joined by another lad) to accompany him then and there to the place where the offence of indecent assault could be committed. There was an express invitation or solicitation that the first lad should submit to an indecent assault, and that both lads should go to the appellant's home on the next night; and it failed only because the two lads were not willing, and informed the Police.

It was argued for the appellant that the acts of the appellant amounted to no more than preparation for the commission of an offence and were too remote from the offence to constitute an attempt to commit it. This argument failed and the conviction was affirmed. The Court considered R. v. Yelds (supra) (at 490) and cited with approval R. v. Mackie [1957] N.Z.L.R. 669 in which case it was said (at 675):

> . . . in our view, the third proposition in R. v. Yelds was introduced in order to ensure that the Court, even after the application of the unequivocality test, still remembers that it must satisfy itself that the conduct of the accused person was such that it showed that he had in fact started out to commit the offence.

With respect, this points an absurdity in the law of New Zealand but does not help solve the problem. If unequivocality is a test of proximity it surely follows that if an act is unequivocal there must necessarily have been a "starting out" to commit the offence, otherwise the act could not be proximate at all. If the "starting out" is something required in addition to unequivocality it follows that unequivocality is no test of proximity. The test of proximity is therefore: "Has the accused 'started out' to commit the offence?" According to these decisions this can only be considered after

(1) criminal intent has been proved; and

(2) criminal intent is manifested unequivocally by the act under consideration.

The extraordinary result is that while unequivocality is no longer a test of proximity it is still the sine qua non of a criminal attempt. This unsatisfactory state of affairs was criticised by F.B. Adams J. in Campbell and Bradley v. Ward (supra), for as he points out (at 475):

> The result is the rather curious one that, whereas s.93 (2) of the Crimes Act 1908 speaks only of remoteness, we have now to consider, not only the express statutory requirement that the act shall not be too remote - using that word in its ordinary meaning - but also the rule propounded by Salmond J., in R. v. Barker ([1924] N.Z.L.R. 865; [1924] G.L.R. 393) by way of interpretation of the statutory requirement, and put forward by him as a complete and exclusive interpretation. In other words, we have to apply s. 93 (2) of the Crimes Act 1908, both in the natural sense of the words (the proximity rule) and in the sense attributed to them by Salmond J. (the equivocality rule).

With respect (and with a suspicion that F.B. Adams J. would have liked to express himself in stronger language) it is submitted that the result is not simply "curious", it is absurd. Before there can be a conviction for a criminal

attempt the Court as well as satisfying itself that the conduct of the accused was such that it showed that he had in fact started out to commit the offence, must apply the unequivocality test. Mens rea as well as proximity is therefore a matter of law for the Judge. The ingredient of intent must be as a matter of law proved by an unequivocally guilty act of the accused. This is an extraordinary development from the provisions of s.93 of the Crimes Act 1908 which so clearly puts mens rea as a question of fact for the Jury and proximity as the only question of law for the Judge. Nevertheless the statement of principle made in R. v. Yelds is undoubtedly the law in New Zealand and the Court in R. v. Bateman proceeded to apply it. It was conceded by Counsel for the appellant in that case that the first two requirements had been met, but counsel argued that the Crown had not shown that the appellant had in fact "started out" to commit an offence. The Court did not agree. The judgment of the Court as delivered by North J. (at 490) reads:

> In our view, the words 'had in fact started out to commit an offence' do not necessarily mean that the journey to the site of the proposed crime must have been commenced.

The Court then, citing R. v. Barker (supra) and R. v. Honor [1918] N.Z.L.R. 510, said (at 491) that in some types of crime solicitation to commit an offence could in itself constitute an attempt.

> Here the appellant accosted the lad and used language which was calculated to arouse his sexual interest . . . . There was an express invitation or solicitation that the lad should submit to an indecent assault, and the only reason it failed was that the two lads - unknown to the appellant - were not willing. . . . The series of acts - including the words - were in our view sufficiently proximate and were more than mere preparation.

It is submitted that no principle can be deduced from this. The Court did not explain why this particular series of acts

was sufficiently proximate. No abstract test of proximity is even hinted at in the judgment. In New Zealand, therefore, at the present time, the decisions of the Courts do not throw any light upon the problem of proximity. The 'question of law' put by s.93 (2) of the Crimes Act 1908 is as open as ever it was, while the Courts have burdened themselves with an additional 'question of law' in regard to mens rea. Fortunately the Crimes Bill now before Parliament proposes to deal with this situation and will in effect return the law to its condition before R. v. Barker (supra). Clause 80 (3) of the Bill reads:

> An act done or omitted with intent to commit an offence may constitute an attempt if it is immediately or proximately connected with the intended offence, whether or not there was any act unequivocally showing the intent to commit that offence.

Apart from this provision it is proposed to re-enact s.93 of the Crimes Act 1908 in its original form.

Following the abortive history of the one serious judicial effort to introduce a theoretical approach to the problem of proximity in practice it may well be asked whether a theoretical approach is desirable. Indeed it would seem that the Judges (except Salmond J.) have deliberately avoided a theoretical approach. On the other hand, writers have persisted in forming theories and putting them forward in text books and articles. For example Turner, the learned editor of Russell on Crime (11th ed. Vol. 1 p. 196) has followed Salmond J., basing his test upon the criminal intent evidenced by the act under review but without the element of unequivocality. Jensen, a South African philosopher, in his book The Nature of Legal Argument (1957) 159 ff. criticises Turner and suggests that proximity should be tested by the extent to which intent has 'hardened' as evidenced by the acts of the wrong-doer. (It is submitted that these two writers, while basing their tests upon different theoretical bases, provide the same objective test, namely, "When a person's act is unmistakable evidence of his criminal intentions". See Jensen (at 160).

It is beyond the scope of this case-note to examine the various theories in detail but it may be submitted that there is much to be said for the view of Cockburn C.J. expressed in a letter to the Attorney-General, when commenting upon the provision of the Criminal Code Bill Commission (1879) Draft Code which is now enacted as s.93 (2) of the Crimes Act 1908. He said: "To this I must stremuously object. The question is essentially one of fact, and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a Jury, to be, by a fiction, converted into a question of law . . . . The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge." (Hall, General Principles of Criminal Law (1947) p.101 footnote 10). It is submitted that much useless argument could be avoided if this view were adopted. A proposition of law presupposes a theoretical basis of general applicability. In over a hundred years no satisfactory theoretical basis has been found for the proposition of proximity in criminal attempts. It is legitimate to infer that no satisfactory theoretical basis is possible and that the question should be one of fact and not of law. However, the proposed Crimes Bill retains the question of proximity as one of law, and no doubt this will provide the Court of Appeal and the profession with employment in the years ahead.