

R v Pace and Rogers [2014] EWCA Crim 186

Summary

Under s 327(1) of the Proceeds of Crime Act 2002, a defendant will commit an offence (of ‘concealing, disguising or converting criminal property’) if he, among other things, conceals, disguises, converts, or transfers criminal property. The police suspected that the defendant scrap metal dealers would be prepared to commit the offence of concealing etc by buying stolen metal and then melting it down and turning it into some other form. So undercover police officers approached the defendants offering for sale various pieces of metal, making various remarks designed to make the defendants think the metal might be stolen. In fact that pieces of metal in question had never been stolen. The defendants bought the pieces of metal in question, and were subsequently charged with *attempting* to commit the offence of concealing, disguising or converting criminal property. (The full offence had obviously not been committed as the property that the defendants purchased was not stolen.)

The Court of Appeal dismissed the charges on the basis that the defendants did not possess the requisite *mens rea* for attempting to commit the offence of concealing, disguising or converting criminal property in that it had to be shown that they had intended to conceal, disguise, or convert *criminal* property when they purchased the pieces of metal from the undercover officers, and the fact that the defendants had suspected that the property was stolen was not enough to establish that they had that intent.

Comments

This case caused some consternation among academic criminal lawyers, who thought that it had overturned the existing law on what the *mens rea* for an attempt is. However, the decision is compatible with both of the established tests for determining whether someone has the *mens rea* for an attempt.

If we take the *Khan* (1990) ‘conduct-circumstances’ test first, that test says that to be guilty of attempting to commit an offence X, you have to intend to commit the conduct element of the offence while having the mental element in relation to the circumstances surrounding your conduct that would be required for the full offence. In *Khan* itself, the conduct-circumstances test was used to find the defendant guilty of attempted rape when he had tried (but failed) to have sex with a woman who was not consenting, and who he had no reasonable grounds for believing was consenting to have sex with him. The Court of Appeal in *Khan* assumed that for someone to be guilty of rape they need to have engaged in the *conduct* of having sex with someone else, in the *circumstances* that that sex is not consented to, when they had no reasonable grounds for thinking that the sex was consented to. So the defendant in *Khan* had the *mens rea* for attempted rape because he had intended to have sex with the woman, and had the requisite *mens rea* in relation to whether the sex was consented to that he would need to be guilty of the full offence (i.e. he had no reasonable grounds for believing that the woman was consenting). If we apply the ‘conduct-circumstances’ test to *Pace and Rogers*, the defendants in that case were rightly acquitted of attempting to conceal, disguise or convert criminal property. The conduct element of that offence involves concealing, disguising or converting criminal property, so under the conduct-circumstances test, the defendants could only be guilty of an attempt to conceal etc if they had intended to conceal, disguise or convert criminal property – and merely showing that they suspected that they were purchasing criminal property was not enough to establish that intent.

The subsequent ‘missing element’ test set out in *Att-Gen’s Reference (No 3 of 1992)* (1994) says that a defendant will have the *mens rea* for an attempt if he has an intent to supply the missing element or elements that prevented the defendant being guilty of the full offence. So in *Khan* the missing element that stopped the defendant being guilty of rape was that he did not actually have sex with the woman in that case. He clearly intended to have sex with her, so the ‘missing element’ test was satisfied in *Khan*. But the ‘missing element’ test was not satisfied in *Pace and Rogers* because the missing element that stopped the defendants in that case committing a crime under s 327(1) of the Proceeds of Crime Act 2002 was that the property which they were purchasing was not actually *criminal* property because it was never stolen, and the defendants never intended to supply that missing element – they could not have been said to have purchased the property with the aim or purpose of concealing etc criminal property if they only suspected that it was stolen property.

So neither of the two tests that we currently have for determining whether or not someone has the *mens rea* of an attempt applied in *Pace and Rogers*. It was therefore *obvious* that the defendants should have been acquitted. So why the kerfuffle about the decision? The reason for it is what the Court of Appeal says in para [62] of its decision. In that paragraph, the Court of Appeal held that when s 1(1) of the Criminal Attempts Act 1981 says that ‘If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence’:

we consider that, as a matter of ordinary language and in accordance with principle, an “intent to commit an offence” connotes an intent to commit all the elements of the offence. We can see no sufficient basis, whether linguistic or purposive, for construing it otherwise.

This *is* different from what was said both in *Khan* – where only an intent to commit the conduct element of the offence was required (together with the *mens rea* regarding the circumstances of the offence required for the full offence to be committed) – and in *Att-Gen’s Reference (No 3 of 1992)* – where only an intent to supply the missing element that is preventing the defendant being guilty of the full offence is required. *Pace and Rogers* seems to require that the defendant have an intent that *all* the elements of an offence be present before he can be found guilty of attempting to commit that offence. If this is right, then *Khan* looks like it was wrongly decided, as the defendant in that case did not have a positive intent to have non-consensual sex with the woman in that case. He had intent to have sex, that’s all. He also had no reasonable grounds for believing that she was consenting – but that does not come close to establishing that he intended to have non-consensual sex.

Hence the fuss about this decision – it makes it even more difficult than it was before to know what the *mens rea* for committing an attempt is. We now seem to have three competing tests – the ‘conduct-circumstances’ test, the ‘missing element’ test, and the ‘all the elements’ test – all of which have equal claims to being correct because they all emanate from the Court of Appeal. The best advice I can give for doing a problem question which raises the issue of whether the defendant had the *mens rea* for attempting to commit an offence is that you should note the different tests that have been proposed on this issues, and consider how each one would apply to the facts of the case you are considering. If – as was the case in *Pace and Rogers* – the defendant is not guilty, or guilty, whichever test you use, then all well and good. If the defendant is only guilty if you adopt a particular test, but will not be guilty if you adopt some other test, then make that clear and if you have time, suggest which test should be preferred by the courts. (As to which test should be preferred, the ‘all the elements’ test seems more faithful to the language of the Criminal Attempts Act 1981, but has the effect of acquitting the defendant in *Khan* when the only thing that stopped him being guilty of the

very serious offence of rape was a simple physical incapacity to have sex with someone else – should his guilt really turn on such morally extraneous factors as that? If this consideration leads us to reject the ‘all the elements’ test, then we should adopt the ‘missing element’ test as far simpler to apply than the ‘conduct-circumstances’ test.)

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