NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2015
[2016] NZSC 83

BETWEEN	JUSTIN AMES JOHNSTON Appellant
AND	THE QUEEN Respondent

Hearing:	9 February 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	R M Lithgow QC and N Levy for the Appellant A Markham for the Respondent
Judgment:	6 July 2016

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by O'Regan J)

[1] The appellant was convicted following a trial by jury on one count of attempted sexual violation by unlawful sexual connection. He was sentenced to preventive detention. The trial was a re-trial: he had earlier been convicted but his conviction had been set aside by the Court of Appeal [*Johnston* (CA 2012)].[1] He appealed against conviction after the re-trial but his appeal was dismissed by the Court of Appeal [*Johnston* (CA 2015)].[2]

---

1 *Johnston v R* [2012] NZCA 559, [2013] 2 NZLR 19 (White, Allan and Lang JJ) [*Johnston* (CA 2012)].

2 *Johnston v R* [2015] NZCA 162 (Wild, Clifford and Dobson JJ) [*Johnston* (CA 2015)].

Issue

[2] The appellant applied for leave to appeal against the Court of Appeal's decision in *Johnston* (CA 2015). Leave was granted on one issue only:[3]

> The approved question is whether the trial Judge was wrong to conclude that the actions of the applicant on the night of the alleged offending were sufficiently proximate to constitute the actus reus of an attempt.

[3] The granting of leave on that issue was not opposed by the Crown. The appellant sought leave to raise two other issues on appeal but leave was declined on those issues.[4]

Facts

[4] The events leading to the charge faced by the appellant occurred at a residential property. The property comprised a family home, a separate garage at the front of the property and a separate sleepout at the rear of the property. The home was at the end of a long driveway. A 16 year old girl (whom we will call Ms A), used the sleepout as her bedroom.

[5] On the night in question, 19 July 2010, Ms A went from the family home to the sleepout at about 7 pm. About 30 minutes later, her father (Mr A) went out of the house to get firewood and discovered the appellant crouched on the back lawn in dark clothing, wearing a beanie and gloves and carrying a torch. There was evidence from which it could be inferred that he had armed himself with a garden fork. Mr A chased the appellant on to a neighbour's property. The appellant escaped after threatening Mr A. He was subsequently apprehended by the police. His car was located nearby.

[6] There was evidence that the appellant had observed the property and Ms A's family on several occasions prior to the night in question. The evidence relied on by

---

3 *Johnston v R* [2015] NZSC 143.

4 At the hearing of the appeal counsel for the appellant, Mr Lithgow QC, addressed argument to one of the questions on which leave was refused in an apparent hope that the Court would revisit its leave decision and give leave on that point. The Court did not do so and this judgment deals only with the question in respect of which leave was granted.

the Crown to show that the appellant had taken an interest in the property for some time prior to the offending was:

(a) a male intruder had been seen on the property about six weeks before the offending;

(b) the appellant's car had been seen parked outside a neighbouring property on several occasions in the evenings prior to the night of the offending;

(c) Ms A's family's wheelie bin full of rubbish had been stolen five nights before the offending (on a night that the appellant's car had been seen outside a neighbouring property);

(d) a note pad with the phone number of the wheelie bin company on it was found at the appellant's flat;

(e) either on the night of the offending or earlier, the appellant had spent some time on the driveway of a neighbour's property at a location that gave him a good view of the front door of Ms A's family's property. Six cigarette butts belonging to the appellant were found at that location.

[7] There was evidence that the security lights at the property had been triggered, which the Crown said supported its theory that the appellant had been moving towards the sleepout when he triggered the security lights, and had then retreated to the location where he was disturbed by Mr A.

[8] The Crown adduced evidence which it said supported its contention that the appellant's purpose for being at the property was to rape Ms A. This evidence consisted of:

(a) evidence that, in 1993, the appellant broke into the home of a 26 year old woman and raped and sexually violated her. Although she did not know him, he used her name;

(b) evidence that, in 1994, the appellant abducted a 15 year old girl from the bedroom of her family home, gagged and blindfolded her, took her away in a car and raped and sexually violated her;

(c) evidence from a prison inmate, also a sex offender, who had been in jail with the appellant. This witness said that, in discussions that took place in 2006, the appellant had spoken openly about a sexual obsession with school-aged girls. He said that he had discussed a proposed bank robbery with the appellant. The appellant knew the bank manager had a teenage daughter and their discussions included the proposed abduction and rape of this girl as part of the offending. The appellant had given the witness a list of items to obtain in preparation for this offending, and the list also included the name of the female Department of Corrections psychologist and of his 15 year old victim from the 1994 offending. The list, in the appellant's handwriting, was produced in evidence. The witness had reported these matters to Corrections and police in 2006 and 2008; and

(d) evidence from a witness with whom the appellant had shared accommodation at a halfway house. This witness said the appellant was obsessed with teenage girls and spoke about them constantly. He said the appellant had, in the period of November/December 2009, frequently spoken of an intention to abduct and rape a teenage girl once his parole conditions expired in February 2010. The witness had notified the police of these matters in January 2010. The present offending happened in July 2010.

Section 72

[9] Section 72 of the Crimes Act 1961 provides:

> **72 Attempts**
>
> (1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his or her object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

> (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.
>
> (3) 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.

[10] To place s 72 in its broader context, the law relating to attempts criminalises actions undertaken for the purpose of committing an offence, in circumstances where the intended offence is not ultimately committed. The Crimes Act treats attempts as being less threatening to social order (and less culpable) than completed offences by providing that the maximum penalty for an attempt is half the maximum penalty for the completed offence.[5]

[11] Section 72 requires both an intention to commit an offence and an act or omission giving effect to that intention. However, in many cases, it is only the actor's intention which indicates that an apparently (or possibly) innocent act or omission is criminal in nature. It is for this reason that intention has been described in relation to attempt as the essence of the crime.[6] Given the language of s 72(2) and (3), the act or omission relied upon must be "immediately or proximity connected with the intended offence" – it cannot be "only preparation" and therefore "too remote". On the other hand, it need not be an act or omission which shows, unequivocally, an intent to commit the offence.[7] These factors provide the parameters for the actus reus of attempt.

[12] The question whether the act or omission relied on by the Crown is "only preparation", and therefore too remote, or is sufficiently proximate to constitute an attempt is a question of law for the judge. Although described as a question of law, answering the question will necessarily involve an evaluation of the facts.[8] The judge makes this evaluation on the basis of the Crown's case, but leaves to the jury

---

5 Crimes Act 1961, s 311. This is subject to any specific provision prescribing a penalty for an attempt to commit a particular offence.

6 *R v Whybrow* (1951) 35 Cr App R 141 (CA) at 147 per Lord Goddard CJ.

7 Subsection (3) was included in the Crimes Act specifically to remove the old "unequivocality" rule. See *R v Barker* [1924] NZLR 865 (CA); *Campbell & Bradley v Ward* [1955] NZLR 471 (SC); and Crimes Bill 1961 (82–1) (Explanatory Note) at xiii.

8 *Police v Wylie* [1976] 2 NZLR 167 (CA) at 170.

the question whether the acts or omissions relied on by the Crown have been established beyond reasonable doubt (assuming sufficient proximity).

[13] As a class, inchoate offences raise the risk of the criminal law over-reaching and imposing criminal liability on people on the basis essentially of their thoughts, which is generally considered to be an inappropriate basis for criminal liability. In relation to attempts, judges perform an important gate-keeping role when determining whether particular acts or omissions amount to more than mere preparation and so are sufficiently proximate to constitute attempts, as their decisions determine the reach of the law in particular cases. Ultimately, this comes down to a judicial evaluation.

[14] As we noted at the outset, this case is about proximity, that is, whether the actions relied on by the Crown were sufficiently proximate to the intended offence to constitute an attempt. Much of the argument focussed on two decisions of the Court of Appeal – *R v Wilcox*[9] and, more particularly, the later case of *R v Harpur*,[10] both of which contain discussion of the considerations at play in this area. As a general observation, *Harpur* has been seen as taking a more expansive approach to the concept of proximity than was taken in *Wilcox*, and was challenged on this basis by Mr Lithgow QC for the appellant.

Two trials: two appeals

[15] As noted earlier,[11] the appellant has faced two trials (and has been convicted on each occasion) and two appeals. In order to give context to the present appeal we summarise the process below.

First trial

[16] The appellant's first trial took place in the High Court in December 2011. He was convicted of attempted sexual violation.

---

9 *R v Wilcox* [1982] 1 NZLR 191 (CA).
10 *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909.
11 See above at [1].

Johnston (CA 2012)

[17] His first appeal was determined in December 2012. A number of grounds of appeal were considered by the Court of Appeal, but only two of these are relevant now.

[18] The first was that the trial Judge had erred in ruling under s 72(2) that the appellant's acts on the night in question had gone beyond mere preparation for the commission of the offence, and were therefore not too remote to constitute an attempt to commit the offence of attempted sexual violation. In coming to that conclusion, the Judge adopted the approach set out in the judgment of the full court of the Court of Appeal in *Harpur*. We will discuss the decision in *Harpur* later.

[19] The Court of Appeal concluded that the Judge was right to rule that the appellant's actions amounted to more than preparation.[12] In doing so, it noted that this was based on an assumption that the appellant intended to rape Ms A on the night in question as the Crown alleged.[13]

[20] As will become apparent, this ruling by the Court of Appeal in *Johnston* (CA 2012) is the real focus of the present appeal.

[21] The second ground of appeal dealt with in *Johnston* (CA 2012) was that the trial Judge had misdirected the jury that the actus reus of an attempt would be made out if the jury found the appellant did not intend to rape Ms A on the night in question but did intend to rape her on another occasion. The actual words used by the Judge in the summing up were:[14]

> [The appellant] was there with the purpose or objective of committing sexual violation either that evening or shortly after that evening.

[22] The Court of Appeal found that the possibility that the appellant's intention was to sexually violate Ms A on a night other than the night on which he was disturbed by Mr A had not been part of either the Crown or defence cases and had

---

12 *Johnston* (CA 2012), above n 1, at [28].

13 At [32].

14 Quoted in *Johnston* (CA 2012), above n 1, at [37]. The Judge used a number of variations of this expression as well: see *Johnston* (CA 2012), above n 1, at [55].

not been squarely addressed by counsel in their closing addresses.[15] The Court of Appeal considered that, if the basis on which the appellant was said to have committed the attempt was that his presence at the property was part of a scoping exercise for a sexual violation that was to occur on another occasion, the Judge needed to revisit his decision that the appellant's conduct was more than mere preparation. The Court said that, if the Judge had done this, he would have concluded that being present on the property without the intent to commit the rape on the night in question was not a sufficiently proximate act to constitute an attempt.[16] It therefore allowed the appeal and ordered a re-trial.

Second trial

[23] The re-trial took place in July 2013. The trial Judge directed the jury in accordance with the decision of the Court of Appeal in *Johnston* (CA 2012). The defence was that the purpose for which the appellant was present at the property was that he intended to commit a burglary, contrary to the Crown's case that he intended to sexually violate Ms A. Although the appellant did not put forward a "not on this night" defence, the trial Judge did, in accordance with the decision of the Court of Appeal in *Johnston* (CA 2012), direct the jury that if they found the appellant was on the property because he was planning the possible sexual violation of Ms A (or someone else) at some future time, the Crown would not have proved beyond reasonable doubt an attempt to commit sexual violation. The appellant was convicted.

Johnston (CA 2015)

[24] The appellant again appealed against conviction. The judgment in *Johnston* (CA 2015) was delivered in May 2015. One of the grounds of appeal was that the appellant's presence on the property on the evening of the offending was not sufficiently proximate to constitute an attempt to commit sexual violation. The Court pointed out that this issue had already been resolved in *Johnston* (CA 2012) and that if a further challenge to that decision was to be made it should be by way of

---

15 At [52].
16 At [56].

an appeal to this Court.[17] It dismissed the other grounds of appeal and the appeal to this Court followed.

The appeal to this Court

[25] As the above narrative makes clear, the real target of the present appeal is the Court of Appeal's decision in *Johnston* (CA 2012). We now turn to what the Court of Appeal said in that decision on the issue that is now before us. Before doing so, we consider *Harpur* because the decision in that case was followed by the trial Judges at both trials and by the Court of Appeal in *Johnston* (CA 2012). As noted earlier, the argument advanced by the appellant in this case focused on *Harpur* and suggested it should be overruled.

Harpur

[26] The facts were that Mr Harpur, using the name Adam, had sent a series of text messages to a young woman, whom the Court called Ms Black, that indicated he was involved in the sexual exploitation of very young children. Ms Black alerted the police and under their guidance she arranged to meet Mr Harpur. She said she would bring her four year old niece and her 10 year old sister (neither of whom actually existed). Mr Harpur sent texts to Ms Black describing in graphic language and detail his intended sexual violation of both girls. Mr Harpur went to the arranged meeting place, but instead of Ms Black, a female police officer was there. He was arrested and charged. Subsequent inquiries led to the police seizing his computer. He faced a number of charges to which he pleaded guilty, but he contested two charges of attempting to sexually violate the four year old girl and attempting to rape the 10 year old girl to whom reference had been made in Ms Black's text messages.

[27] The District Court Judge discharged him on these counts under s 347 of the Crimes Act 1961,[18] on the basis that his actions had not proceeded beyond mere preparation for the two offences (attempted rape of the 10 year old and attempted sexual violation of the four year old). An appeal to the Court of Appeal was instigated by the Crown. Before the hearing of the appeal the Crown accepted that

---

17 *Johnston* (CA 2015), above n 2, at [10].

18 Now replaced by s 147 Criminal Procedure Act 2011.

the alleged offence relating to the 10 year old girl did not amount to an attempt so the case concerned the attempted sexual violation of the four year old only.

[28] The Court of Appeal analysed the text of s 72. It said the looseness of the language suggested Parliament intended the Courts to apply the section flexibly.[19] It said Parliament had "painted a very broad canvas".[20]

[29] The issue before the Court of Appeal was whether the Judge had been correct in finding that the acts that Mr Harpur had done with intent to commit the offence were only preparation for the commission of the offences, and therefore too remote to constitute an attempt.

[30] A full court of the Court of Appeal was convened because the Crown wished to challenge the earlier Court of Appeal decision in *Wilcox*.[21] The alleged offenders in *Wilcox* were stopped in a car about a kilometre short of a post office. Mr Wilcox admitted he planned to rob the post office. His conviction for attempted robbery was set aside by the Court of Appeal.

[31] The Crown argued in *Harpur* that *Wilcox* was inconsistent with earlier Court of Appeal authorities such as *R v Bateman*.[22] *Bateman* had not been referred to in the judgment in *Wilcox*. The Court in *Harpur* said the decisions in *Bateman* and *Wilcox* were hard to reconcile and said it preferred *Bateman*.[23]

Actus reus and mens rea

[32] The Court in *Wilcox* said that independent and careful attention to the two ingredients of mens rea and actus reus was particularly important because admissions made by Mr Wilcox as to his intention to rob a post office in conjunction with his two co-offenders "has a strong tendency to add a significance to what he did at various stages which the acts themselves may not justify".[24]

---

19 *Harpur*, above n 10, at [13].
20 At [16].
21 *Wilcox*, above n 9.
22 *R v Bateman* [1959] NZLR 487 (CA). The facts of the case are set out in *Harpur*, above n 10, at [30]–[31].
23 *Harpur*, above n 10, at [32].
24 *Wilcox*, above n 9, at 193.

[33] The Crown submitted in *Harpur* that it was artificial and wrong to suggest that the judge should not consider acts of the alleged offender in the context of evidence as to intention when making his or her decision under s 72(2). The Crown argued *Wilcox* should be overruled on this point.

[34] The Court in *Harpur* doubted that such a strict separation was required by *Wilcox*, but concluded that it would be wrong to require completely separate treatment of actus reus and mens rea.[25] It expressed agreement with the Nova Scotia Court of Appeal in *R v Boudreau* that any analysis of the actus reus must be viewed in conjunction with the mens rea.[26] It cited with approval the following passage from a text by Professor Kent Roach:[27]

> Determining whether the accused has gone beyond mere preparation and committed an actus reus for an attempted crime is difficult to predict. In a practical sense, much will depend on the strength of the evidence of wrongful intent. Going through the glove compartment of a car has been held to be the actus reus for its attempted theft when the accused indicated that he was searching for keys to steal the car. On the other hand, making a plasticine impression of a car key has been held to be only preparation to steal the car. Approaching a store with balaclavas and a gun could be a sufficient actus reus for attempted robbery, but retreat when informed that the store was closed may reveal a reasonable doubt about the intent to commit the robbery. In practice, a more remote actus reus will be accepted if the intent is clear.

Cumulative conduct

[35] The Crown also submitted in *Harpur* that the indication in *Wilcox* that the conduct of the actor could not be viewed cumulatively as constituting the actus reus of an attempt was wrong.[28] The Court agreed that a cumulative assessment was required.[29] It pointed out that, under s 33 of the Interpretation Act 1999, the reference to an act could be interpreted as referring to "acts". It considered that it was natural and inevitable for the judge to have regard to the conduct of the accused on a cumulative basis up to the point when the conduct in question stops. It held that s 72 does permit the defendant's conduct to be considered in its entirety.

---

25 *Harpur*, above n 10, at [25].
26 *R v Boudreau* (2005) 193 CCC (3d) 449; (2005) 28 CR (6th) 281 (NSCA) at [32].
27 Kent Roach *Criminal Law* (Irwin Law, Toronto, 2000) at 102, cited with approval in *R v Boudreau* at [32].
28 *Wilcox*, above n 9, at 194.
29 *Harpur*, above n 10, at [34]–[36].

Result in Harpur

[36] When applying the law to the facts in *Harpur*, the Court of Appeal took into account the very compelling evidence of Mr Harpur's intention to sexually violate the four year old girl as disclosed in the text messages sent by Mr Harpur to Ms Black. It concluded as follows:[30]

> In our view, the Crown evidence, if accepted, showed a clear intent to commit a sexual violation of the 4-year-old girl Mr Harpur believed Ms Black could provide. He performed a number of acts which, taken together, constituted an attempt to commit sexual violation. He had moved beyond mere preparation and, at the time of his arrest, was lying in wait for his victim. His conduct was not too remote to constitute an attempt; it was proximately connected with the intended offence.

[37] Two other aspects of the decision of the Court of Appeal in *Harpur* should be noted.

Rejection of 'real or substantial step' test

[38] The first related to the test to be applied under s 72(2). The Court said that it would be open to adopt under s 72(2) a test whereby the Court assesses whether the actor's conduct has reached the stage where it amounts to a real and practical step towards the actual commission of the crime.[31] However, having found that the test had much to be said for it, it considered that introducing the test "risks simply substituting somewhat fuzzy words for equally fuzzy words in the statutory provision".[32]

Rejection of examples

[39] The second is that the Court considered giving examples to assist trial courts in determining whether particular conduct amounted to more than preparation. One of the reasons for rejecting this approach was that it would ignore "the interplay between acts and intent".[33] However, the Court did set out the examples provided in art 5.01 of the American Model Penal Code.[34] It described these examples as being

---

30 At [44].
31 At [46].
32 At [48].
33 At [49].
34 At [51].

"of interest" but did not otherwise give them any form of approval. We share the Court of Appeal's caution about the usefulness of these examples.

Johnston (CA 2012)

[40] In *Johnston* (CA 2012), the appellant submitted that *Harpur* could be distinguished because, in the present case, the evidence as to the appellant's intent was substantially less clear than the very direct evidence of intent in *Harpur*. The Court of Appeal disagreed. It said that the Judge's assessment under s 72(2) was made on the basis that the jury would accept the Crown's evidence.[35] The Court considered that, if the Crown case (as outlined above[36]) were accepted, then there was clear evidence that the appellant intended to rape Ms A.[37] It took this into account in its determination as to whether the appellant's acts amounted to more than mere preparation. This approach followed that adopted in *Harpur.*

[41] The Court of Appeal pointed out that in *Bateman* and in *Harpur*, arranging to meet someone for the purpose of taking that person to another place to commit an offence and then going to the meeting place was considered to be sufficient to constitute an attempt.[38] This involved the defendant "lying in wait" for the victim. In the present case, the offence was either going to be committed in the sleepout or Ms A was going to be abducted from the sleepout. If the former, then the appellant's acts would be more proximate than those of the offender's in *Bateman* and *Harpur*. If the latter, there was no difference in terms of proximity between the acts of the appellant in this case and those of Mr Harpur in *Harpur*.

[42] The Court also noted that, in *Harpur*, the Court of Appeal had said that "practical considerations" could not be ignored. The Court said it would have been impractical for police, had they been alerted to the appellant's presence, to have to wait until he tried to enter the sleepout before intervening.[39]

---

35 *Johnston* (CA 2012), above n 1, at [29], citing *Harpur*, above n 10, at [14].
36 Above at [6]–[8].
37 *Johnston* (CA 2012), above n 1, at [30].
38 At [33].
39 At [34].

Relevance of intent under s 72(2)

Appellant's argument

[43] Mr Lithgow argued that the Court of Appeal in both *Harpur* and *Johnston* (CA 2012) was wrong to proceed on the basis that evidence of intent could be taken into account in determining whether the acts of the appellant had proceeded past the point of preparation so as to constitute an attempt under s 72(2). He took issue with the approach outlined by Professor Roach, that was approved in *Harpur*, in particular the observation that "a more remote actus reus will be accepted if the intent is clear".[40] As Mr Lithgow put it in his written submissions, "significant preparation, even attended to with the keenest of intent, is not sufficient if there is not the immediate or proximate connection with the intended offence". He argued that the approach taken in *Wilcox* was correct and should not have been departed from in *Harpur*. He urged us to adopt the *Wilcox* approach.

[44] Mr Lithgow said that, in the present case, the Judge should not have allowed the evidence of intent to colour the determination under s 72(2) whether the appellant's actions had gone further than preparation. He said if the appellant had entered the sleepout or begun the process of entering it, this would have been sufficient to constitute an attempt on his approach. But simply being on the property outside the sleepout could not amount to more than preparation, regardless of the strength of the evidence as to the appellant's intent.

[45] The essential feature of Mr Lithgow's argument was that *Harpur* and *Johnston* (CA 2012) had wrongly allowed the act alleged to have been done by the defendant and the evidence of the defendant's intention to be interwoven without any clear focus or discrimination. He said that the acts done by the defendant could inform the fact finder on the question of intention but not vice versa. He said a judge's task under s 72(2) is to identify whether the act is sufficiently proximate, but in doing so the judge is assuming that the Crown case is accepted, which means that he or she must accept that the intention to commit the offence alleged by the Crown is present. He said that this led, in the present case, to the Court of Appeal accepting a remote actus reus because they identified that the intention was clear. This, he

[40] See above at [34].

argued, was flawed because it did not amount to the assessment of proximity or immediacy of acts, but allowed the Court to provide itself with a "comforting reassurance of predictive certainty and security that the feared crime was really going to happen".

[46] Mr Lithgow pointed to the academic criticism of the approach taken in *Harpur* in Simester and Brookbanks,[41] and by Associate Professor Margaret Briggs.[42]

Briggs article

[47] In her article, Associate Professor Briggs describes *Harpur* as creating a new test of "looking at matters in the round, where strong evidence of intent can assist in assessing the significance of acts done towards the commission of the intended offence".[43] She notes that the Court in *Harpur* did not explore what "strong evidence of intent" means. She then comments about the Court of Appeal's decision in *Johnston* (CA 2012) in these terms:[44]

> One of the effects of *Johnston* is to circumvent the requirement in s 72(2) that it is a matter of law for the judge to determine whether actions are preparatory and too remote. Propensity evidence is used to establish the defendant's specific intent (that is, was it rape or property burglary the appellant had in mind), which evidence is then recycled a second time to help the *actus reus* over the proximity threshold. According to *Johnston*, if the jury accepts the Crown's case (that is it was rape not property burglary the appellant had in mind) then a finding of proximity will in all likelihood follow because intention (the critical element under the *Harpur* test) has been established.

[48] Associate Professor Briggs argues that were the present case decided in England, it is most unlikely that the appellant's conduct would be regarded as attempted rape, citing *R v Geddes*, *R v Ferriter* and *R v Toothill*.[45] Associate Professor Briggs argues that there is a dissonance between the words of s 72 and "the

---

41 AP Simester and WJ Brookbanks (eds) *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2004) at ch 8.

42 Margaret Briggs "The conduct requirement in the law of attempt: A New Zealand perspective" (2015) 44(2) CLWR 145.

43 At 151.

44 At 152.

45 *R v Geddes* [1996] Crim LR 894; *R v Ferriter* [2012] EWCA Crim 2211; *R v Toothill* [1998] Crim LR 876 (CA).

new judicial vision of what attempt should look like". She says the practical result of *Harpur* and the Court of Appeal decision in *Johnston* (CA 2012) is that:[46]

> [C]ourts can now put what complexion they think fit on the section 72(3) requirement of immediate or proximate connection provided there is clear evidence of intention. Thus the point at which liability is imposed can 'depend as much on judicial discretion as on legal definition', bearing out 'legal realist claims that facts decide cases, not law'.

[49] Associate Professor Briggs suggests that a new offence of preparation to commit an offence should be included in the Crimes Act, to deal with cases which, on her narrower approach, would not constitute attempts but which should nevertheless be criminalised. Such a solution was also suggested by the England and Wales Law Commission, but was rejected after receiving negative feedback.[47]

English approach

[50] The English approach to which Associate Professor Briggs refers is best exemplified by the decision in *R v Geddes*. In that case, the defendant unlawfully entered school premises and went into a cubicle in the boys' toilets. He was carrying a knife, rope and masking tape in a rucksack with a view to capturing and restraining a boy when one entered the toilet. The England and Wales Court of Appeal held that he could not be liable for attempted false imprisonment as he had not "actually tried" to commit the offence.[48] Rather, he had "put himself in a position or equipped himself to do so".[49] *Geddes* has been the subject of some criticism, on the basis that offenders who are on the point of committing a crime still escape liability for an attempt.[50]

[51] The English decisions such as *Geddes* were made under a statutory provision that uses different wording from that of s 72, imposes the same penalty for the attempted offence as the completed offence and does not feature the legislative

---

46 Briggs, above n 42, at 155–156, citing the report of the Law Reform Commission of Ireland: Law Reform Commission (Ireland) *Inchoate Offences* (CP 48-2008, 2008) at [2.44].

47 The Law Commission (UK) *Conspiracy and Attempts* (CP183, 2007) at 208 (proposal 15), rejected in Law Commission (UK) *Conspiracy and Attempts* (LC318, 2009) at [8.70].

48 *Geddes*, above n 45, at 895.

49 At 895.

50 See, for example, CMV Clarkson "Attempt: The Conduct Requirement" (2009) 29(1) OJLS 25 at 27–28.

rejection of the unequivocality rule as s 72 does.[51] Those factors, and the fact that the English decisions have themselves attracted criticism, mean *Geddes* and other English decisions do not provide much assistance in the interpretation of s 72(2).

Crown argument

[52] Counsel for the Crown, Ms Markham, said the appellant's argument that the consideration of the mere preparation issue under s 72(2) must be made separately from any consideration of mens rea would, in effect, revive the so called unequivocality rule derived from the judgment of Salmond J in *Barker* which was expressly abolished by Parliament in enacting s 72(3).[52] She said the inter-relationship between mens rea and actus reus was confirmed in two cases that predated *Harpur*: *Police v Wylie*[53] and *R v Yen*.[54] So *Harpur* should not be regarded as making new law.

Our assessment

[53] We do not think *Harpur* has the consequence that Associate Professor Briggs suggests. The alternative of considering whether a defendant's acts amount to more than preparation without reference to the evidence before the Court as to intention seems to us to be unworkable. If the maker of the "more than preparation" decision ignores evidence of intention, he or she will have to decide that question without considering what the defendant's actions were aimed at, that is, what offence the defendant intended to commit. That would mean that the acts of a defendant would fall short of an attempt unless:

(a) the defendant had actually done everything required to commit the offence but failed to achieve his or her aim (such as swinging a fist at the intended victim but missing because the victim evaded the punch); or

---

51 Criminal Attempts Act 1981 (UK), ss 1 and 4.
52 See above at [11] and n 7.
53 *Wylie*, above n 8.
54 *R v Yen* [2007] NZCA 203.

(b) the defendant's acts were so close to achieving the completion of the offence that they could only be explained as an attempt.

[54] We agree with Ms Markham that requiring intent to be put to one side when making the determination required by s 72(2) would have the effect of reviving the unequivocality rule abolished by s 72(3).

[55] There are three elements to an attempt under s 72. First, there is the intention to commit an offence. Second, there is the act or acts committed for the purpose of committing the offence. Third, there is the question as to whether those acts amount to more than preparation. We see intent as relevant to all three. It is obviously relevant to the first. It is relevant to the second because the acts of the defendant must have been done for the purpose of committing the offence specified in the indictment. And it is relevant to the third because, without knowing what the defendant planned to do, it is hard to evaluate the nature of his or her acts.

[56] Mr Lithgow questioned Professor Roach's observation that "in practice, a more remote actus reus will be accepted if the intent is clear".[55] Mr Lithgow suggested Professor Roach may have just meant that most cases would resolve themselves in a sensible way by offenders recognising the strength of the evidence against them. We doubt that is what Professor Roach meant. But we also think the observation is open to misinterpretation. We do not think Professor Roach meant that a merely preparatory act will be treated as an attempt where intent is clear. If he did mean that, we disagree.

[57] Rather, we see the correct position as follows. Where there is clear intent to commit the completed offence, the maker of the "more than preparation" decision has available to him or her information about what the defendant's ultimate plan was, which enables him or her to assess more accurately whether the defendant's acts amount to an attempt to commit the planned offence. Without that information, the acts may be seen as equivocal, and the decision-maker could not be confident that they amount to an attempt to commit a particular offence. This does not turn mere preparation into an attempt. Rather, it is recognising that where clear intent is

---

[55] See above at [26].

shown, the decision-maker has a basis to determine whether the conduct is more than mere preparation.

[58] Even in a case of clear intent, like *Harpur*, a merely preparatory act (for example, Mr Harpur sending one of the graphic text messages to Ms Black[56]) would not be an attempt. The clear evidence of intent would not change that. But an act that is done in the context of a known plan can be classified as preparation or proximate with greater certainty than when the plan is unknown (or is excluded from consideration).

[59] We consider that the Court of Appeal's decision in *Harpur* was correct in finding that the determination as to whether acts have gone beyond mere preparation cannot be decided in the abstract without consideration of the evidence of intent. To the extent that *Wilcox* said the contrary (and we agree with the Court of Appeal in *Harpur* that this is not entirely clear), we disagree. *Harpur* itself was a good example of a case where the conduct of the defendant could not be meaningfully assessed without reference to the clear evidence of what he intended to do that emerged from his text message exchanges with Ms Black. Similarly, in the present case, the presence of the appellant on the property and his movement towards the sleepout could not be assessed in terms of s 72(2) without considering the evidence of his intent to sexually violate a teenage girl.

[60] We do not consider that *Harpur* changed the law; it was consistent with earlier authorities, other than *Wilcox*, as Ms Markham pointed out. For example, it can be seen as applying the approach taken in *Police v Wylie*.[57] As Woodhouse J put it in *Wylie*:[58]

> Whether or not there is an attempt to commit a crime must always involve two questions: first does the evidence establish an intent to commit the crime? If so, then was the conduct of the accused sufficient in law to amount to an attempt? The first of those two questions will often be answered by the same evidence as enables an affirmative decision to be made concerning the second.

---

56 See above at [26].
57 *Wylie*, above n 8. See above at [52].
58 At 169.

[61] We agree with Mr Lithgow that, if the appellant had actually entered the sleepout or tried to do so, the case against him would have been clearer and more conclusive. The fact that he had not yet done this when Mr A intervened leaves open the possibility that something may have happened on the night in question that would have caused him to abandon or defer the intended sexual violation of Ms A. In *Wylie*, Woodhouse J observed that an intent that was qualified in the sense that the proposed offending might be abandoned should circumstances become unfavourable was still sufficient.[59] He said that a reservation of this kind would be present in the minds of most criminals who decided on a course of criminal conduct, and it would be artificial to hold that the necessary criminal intent had not been established merely because it was associated with the recognition that change of circumstances might require a change of plan. We agree.

[62] We conclude that the finding in *Harpur* that the intent of the defendant is a relevant matter in the determination made by a judge under s 72(2) is correct and was correctly applied in *Johnston* (CA 2012).

Consideration of cumulative conduct under s 72(2)

[63] Mr Lithgow also took issue with the finding in *Harpur* that the conduct of the actor could be considered cumulatively when determining whether his or her actions had gone beyond the point of preparation. He accepted that acts or omissions occurring on the pathway of preparation for an offence could strengthen confidence about intent, but said it could not make a person at a particular stage of only preparation an offender under s 72 if the actions of another person with the same basic intent and at the same stage would not also be sufficiently proximately or immediately connected with the intended offence. His argument was, in essence, that there is a particular point at which actions cease to be only preparation and become an attempt, and that this point must arise at the same point in time on the same facts, regardless of the intention of the actor.

---

[59] At 169.

[64] We agree with the Court of Appeal in *Harpur* that s 72(2) permits a defendant's conduct to be considered in its entirety. That is, as noted in *Harpur*,[60] consistent with the approach taken in *Wylie*.[61] As noted in *Harpur*, the reference to "act" in s 72(2) can be interpreted as "acts" on the basis that references to the singular include the plural.[62] Both *Harpur* and the present case are examples of the obvious relevance of earlier conduct to the decision under s 72(2). If a cumulative approach were not taken, the presence of the appellant on the property on the night in question would have to have been considered in isolation in a way which would have been artificial. That approach would have required the Judge to determine the s 72(2) issue without reference to the evidence of the extensive earlier surveillance of the property, which was information that provided a context and insight into the acts of the appellant on the night in question.

Relevance of practical considerations under s 72(2)

[65] Mr Lithgow also took issue with the decision in both *Harpur* and *Johnston* (CA 2012) that practical considerations could affect the decision under s 72(2). We accept that practical considerations do not control the decision the judge is required to make under s 72(2). We see the decision in *Harpur* and in the present case as emerging from application of the law to the facts without the need to bring into the process the assessment of practical outcomes.

Conclusion

[66] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

---

60 *Harpur*, above n 10, at [35].
61 *Wylie*, above n 8, at 169–170.
62 *Harpur*, above n 10, at [34], citing the Interpretation Act 1999, s 33. See also discussion above at [35].