IN THE SUPREME COURT OF NEW ZEALAND

SC 49/2005
[2006] NZSC 18

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v

THE QUEEN

Hearing: 14 December 2005

Court: Elias CJ, Blanchard, Tipping, McGrath and Henry JJ

Counsel: P J Davey for Appellant
J C Pike and B J Horsley for Crown

Judgment: 30 March 2006

JUDGMENT OF THE COURT

A. The appeal against the conviction for attempted sexual violation is allowed and that conviction is set aside. There is to be no retrial on that count.

B. The appeal against the conviction for sexual violation is dismissed.

C. The case is remitted to the Court of Appeal to reassess the appropriate sentence for the offence of sexual violation in the light of the setting aside of the conviction for attempted sexual violation.

REASONS

Para No

ELIAS CJ, BLANCHARD, TIPPING AND McGRATH JJ

(Given by Tipping J)

[1] The appellant, a 49 year old woman, was found guilty of attempted sexual violation of a 15 year old male. She was also found guilty of sexual violation of the same complainant on a separate occasion.[1] Her appeal against these convictions was dismissed by the Court of Appeal. The Solicitor-General's application for leave to appeal against the total sentence of four and a half years imprisonment was granted, and the Court of Appeal increased the total sentence to five and a half years.[2]

[2] The appellant was granted leave to appeal to this Court against the attempt conviction on grounds relating to the legal ingredients of the crime of attempted sexual violation and the way in which the Judge directed the jury on that topic. We have come to the conclusion that the conviction for attempted sexual violation should be set aside and that no re-trial should be ordered on that count. It is proper to note that the Crown did not, in the circumstances, seek a re-trial if this Court was of the view that the attempt conviction should be set aside. We do not, however, consider the setting aside of the conviction for attempted sexual violation requires the conviction for sexual violation to be set aside as well. But it is necessary for the sentence imposed on that count to be re-examined, as it appears to have been designed to reflect the total criminality of the appellant on both counts. The case must therefore be remitted to the Court of Appeal for that purpose.

[3] The appellant was found guilty on the attempted sexual violation count on the following basis. The 15 year old complainant testified that the appellant had grabbed

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1 After trial in the High Court at Auckland: CRI 2004-092-6552.
2 CA115/05, 132/05 18 July 2005, O'Regan, Chisholm and Salmon JJ.

his penis and tried to put it into her vagina. He said he would not let it go in. She tried doing it a couple of times and he then stopped her and told her he could not do it. We will come later to the trial Judge's directions on the legal aspects of attempted sexual violation. It is appropriate first to examine the issue which arose between counsel in this Court on the legal ingredients of that offence.

[4] The count involving attempted sexual violation was framed in the following way. The appellant was charged that she:

> attempted to sexually violate [the complainant] by unlawful sexual connection, namely connection occasioned by the penetration of [her] genitalia by [his] penis.

[5] The case was unusual in that it was the female who was charged and the male who was the complainant but this makes no difference in principle to the legal analysis and the general discussion which follows.

[6] A completed offence of sexual violation of the present kind involves:

(i) intentional penetration of the genitalia by the penis;

(ii) without the consent of the complainant; and

(iii) without the accused believing on reasonable grounds that the complainant is consenting.

[7] The first element requires the Crown to prove the physical act of penetration accompanied by the necessary mental state, namely the intention of the accused that there shall be penetration. The second element requires proof of the fact that the complainant did not consent to the penetration. The third element requires the Crown to prove either that the accused did not believe the complainant was consenting to the penetration; or, if the accused did or might as a reasonable possibility have so believed, that the accused had no reasonable grounds for that belief.

[8] Section 129 of the Crimes Act 1961 creates the crime of attempted sexual violation. Section 72 of the Act is relevant to the legal ingredients of that crime. It 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 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.

The important phrase in s 72 for present purposes is the phrase in subs (1) "having an intent to commit an offence".

[9] The Court of Appeal discussed the difference between the parties as to the true meaning of this phrase in this way:[3]

> According to Mr Davey the answer is provided by *Shepherd v R* HC AK T.192/91 20 February 1992 which proceeded on the basis that the prosecution must prove an intent to carry out the proscribed sexual activity without the consent of the victim. On the other hand, Mr Horsley claimed that *R v Khan* [1990] 2 All ER 783 (CA) reflects the correct approach and that the prosecution must prove the statutory elements of sexual violation, namely, intent to have sexual connection with the complainant, without the complainant's consent, and without believing on reasonable grounds that the complainant consented.

[10] After discussing a number of authorities, the Court of Appeal expressed its conclusion in this way:[4]

> If the accused's state of mind is assessed at the time of the attempted sexual violation the difficulties encountered in *R v Shepherd* fall away. The focus is on the attempt, not on some future event that does not happen. Given that approach the statutory definition in s 128(3) can be applied without difficulty:

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3 At [16].
4 At [26].

> (3) A person has unlawful sexual connection with another person if that person has sexual connection with the other person -
>
> (a) Without the consent of the other person; and
>
> (b) Without believing on reasonable grounds that the other person consents to that sexual connection.

> Thus in the context of an attempt the accused must intend at the time of the attempt to have sexual connection with the complainant, without the consent of the complainant to the activity which amounts to attempted sexual connection, and without believing on reasonable grounds that the complainant consents to that activity.

The focus in the last part of this passage on the activity constituting the attempt is problematic, but we will come back to that aspect later.

[11] Mr Davey, for the appellant, contended that the phrase "having an intent to commit an offence" comprehended only an intent to achieve penetration without consent; or, put in a different way, an intent to effect non-consensual penetration. The Crown argued that s 72(1) required attention to be given to all aspects of the completed offence. It will emerge from the discussion which follows that we consider the answer lies essentially in the Crown's approach. There are several reasons for this, not least of which is the desirability of having symmetry between an attempt and the completed crime, save, of course, to the extent necessitated by the fact that, in physical terms, an attempt must necessarily fall short of the full crime.

[12] In making his submissions, Mr Davey drew heavily on the decision of the High Court in *Shepherd v R*,[5] already noted in the extracts cited above from the judgment of the Court of Appeal. He also suggested that there was a helpful analogy with the case of attempted murder. In *Shepherd*'s case, Anderson J effectively excluded any necessity for the Crown to prove the third element of the completed crime of sexual violation when the charge was simply an attempt to commit sexual violation. This is what the Judge said:

> It follows that if one combines the elements of s.72 and s.128 an accused must intend to have proscribed sexual activity with a person and intends that at the time such activity shall occur it shall be carried out:
>
> (a) without that person's consent, and

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5 HC AK T192/91 20 February 1992 per Anderson J.

(b) without the accused believing on reasonable grounds that the alleged victim is consenting.

> As a matter of logic, of course, if one intends to have proscribed sexual activity with a person without that person's consent at the time it shall occur, one's mind must be directed to a future situation where the intended conduct will be carried out with the offender knowing that the victim is not consenting. Thus, the second limb of the definitions of rape and unlawful sexual connection specified in s.128(2) and (3) have no practical application when considering a charge of attempted sexual violation. It follows that in order to obtain a conviction for attempted sexual violation or assault with intent to commit sexual violation pursuant to s.129 Crimes Act 1961, the Crown must prove beyond reasonable doubt that the accused intends to commit the proscribed sexual activity and intends that it will be carried out without the consent of the victim.

[13] It was on this basis that Mr Davey argued that the Court of Appeal had been wrong to require the Crown to prove, for attempt purposes, that the accused had no belief or no reasonable grounds for a belief that the complainant was consenting. We deliberately leave aside for the moment the conduct to which the consent should relate – whether it be the conduct constituting the attempt, as the Court of Appeal held, or the conduct which would, had it taken place, have constituted the completed offence. Mr Davey invited this Court to prefer what counsel took from Anderson J's approach and hold that, in an attempt case, it was necessary for the Crown to prove that the accused did not have any belief that the complainant was consenting. It followed that the Crown had to prove that the accused intended to have non-consensual activity with the complainant. This meant, according to Mr Davey's submission, that a belief in consent, even on unreasonable grounds, would be a defence. On that premise the Crown would have to establish that the accused had no belief in consent. It would not be enough for the Crown to establish that any belief the accused may have had in consent was unreasonable.

[14] Mr Davey seemed at one point to be suggesting, and the terms of Anderson J's ruling give some support for the proposition, that in an attempted sexual violation case the requirement that the accused must intend to have non-consensual connection means that the accused must want the connection to be non-consensual. We do not consider this can be what Anderson J meant. The absence of the complainant's consent is a matter of fact which the Crown must establish. It is not something which the accused must be shown to desire. It is the

third ingredient of the offence which deals with the necessary state of mind of the accused as regards the consent of the complainant.

[15] Counsel endeavoured to support his primary submission by suggesting that the position was similar to that which applies in the case of attempted murder. In that case nothing less than an intention to kill will suffice.[6] The alternative states of mind which suffice for the completed offence of murder are not enough for an attempt. It is of course of the essence of murder that there has been a death caused by the accused. Death may have been something which the accused meant to happen, in which case it will be murder in terms of s 167(a) of the Crimes Act. Alternatively, the death may have arisen in circumstances of recklessness as prescribed by s 167(b); or indeed in the circumstances specified in s 167(d).

[16] Only mens rea under s 167(a) suffices for attempted murder. That state of mind focuses sharply on the result of the accused's actions. The alternatives which are treated as equally culpable for the completed crime, are not sufficient for the attempt because in those cases the intent required by s 72(1) is not related to the necessary result, ie death. The fact that in the case of attempted murder the necessary mental state of the accused is confined to the first of the statutory states of mind sufficient for the completed crime, does not, in our view, mandate the result for which Mr Davey contends in relation to attempted sexual violation. In relation to an attempt to commit that crime, Mr Davey's submission has the effect of eliminating altogether an express ingredient of the completed crime and substituting another, which has the accused's intent wrongly focused on the complainant's lack of consent. We do not consider the analogy Mr Davey sought to draw is valid in principle or sound in policy terms. To have the proposed degree of dissonance between attempted sexual violation and the full offence would be undesirable in practical terms and, in our view, the statutory regime militates against Mr Davey's submission.

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[6] See *R v Whybrow* (1951) 35 Cr App R 141, 148 (CCA) and *R v Murphy* [1969] NZLR 959, 960 (CA).

[17] We consider Mr Pike and the Court of Appeal were correct in deriving assistance from the decision of the Court of Appeal in England in *R v Khan*.[7] Under s 1 of the Sexual Offences Act 1956 (UK) a man committed rape by having sexual intercourse with a woman without her consent, if at the time he knew she was not consenting or was reckless as to whether she was consenting. In *Khan* the English Court of Appeal were concerned with how the element of recklessness fitted in with the crime of attempted rape. There is some conceptual analogy between the English recklessness criterion and our need for a belief in consent to be on reasonable grounds.

[18] The argument for the appellant in *Khan* was that recklessness was not a sufficient state of mind to found a charge of attempted rape. This proposition is equivalent conceptually to what the appellant in this case seemed to be advancing; namely that for attempted sexual violation belief in consent need not be on reasonable grounds. That, as Mr Davey was constrained to accept, seemed to be the practical effect of his submission. As noted above, if the accused believes, however unreasonably, that the complainant is consenting, he cannot, according to the submission, intend to have non-consensual intercourse.

[19] In *Khan* Russell LJ, giving the judgment of the Court, cited a passage from the judgment of the same Court, delivered by Mustill LJ in *R v Millard and Vernon*,[8] which included the following:

> When one turns to the offence of attempted rape, one thing is obvious, that the result, namely the act of sexual intercourse, must be intended in the full sense. Also obvious is the fact that proof of an intention to have intercourse with a woman, together with an act towards that end, is not enough: the offence must involve proof of something about the woman's consent, and something about the defendant's state of mind in relation to that consent. The problem is to decide precisely what that something is. Must the prosecution prove not only that the defendant intended the act, but also that he intended it to be non-consensual? Or should the jury be directed to consider two different states of mind, intent as to the act and recklessness as to the circumstances? Here the commentators differ: contrast Smith and Hogan *Criminal Law* (5th edn, 1983) p 255 ff with a note on the Act by Professor Griew in *Current Law Statutes 1981*.

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7 [1990] 1 WLR 813 (CA).
8 [1987] Crim LR 393.

[20] Russell LJ then said:

> We must now grapple with the very problem that Mustill LJ identifies in the last paragraph of the passage cited.
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> In our judgment an acceptable analysis of the offence of rape is as follows: (1) the intention of the offender is to have sexual intercourse with a woman; (2) the offence is committed if, but only if, the circumstances are that (a) the woman does not consent and (b) the defendant knows that she is not consenting or is reckless as to whether she consents.
>
> Precisely the same analysis can be made of the offence of attempted rape: (1) the intention of the offender is to have sexual intercourse with a woman; (2) the offence is committed if, but only if, the circumstances are that (a) the woman does not consent and (b) the defendant knows that she is not consenting or is reckless as to whether she consents.
>
> The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and in attempted rape and the mens rea is identical, namely an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arises; the attempt relates to the physical activity; the mental state of the defendant is the same. A man does not recklessly have sexual intercourse, nor does he recklessly attempt it. Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse.
>
> If this is the true analysis, as we believe it is, the attempt does not require any different intention on the part of the accused from that for the full offence of rape. We believe this to be a desirable result which in the instant case did not require the jury to be burdened with different directions as to the accused's state of mind, dependent on whether the individual achieved or failed to achieve sexual intercourse.
>
> We recognise, of course, that our reasoning cannot apply to all offences and all attempts. Where, for example as in causing death by reckless driving or reckless arson, no state of mind other than recklessness is involved in the offence, there can be no attempt to commit it.
>
> In our judgment, however, the words 'with intent to commit an offence' to be found in s 1 of the 1981 Act mean, when applied to rape, 'with intent to have sexual intercourse with a woman in circumstances where she does not consent and the defendant knows or could not care less about her absence of consent'. The only 'intent', giving that word its natural and ordinary meaning, of the rapist is to have sexual intercourse. He commits the offence because of the circumstances in which he manifests that intent, ie when the woman is not consenting and he either knows it or could not care less about the absence of consent.

[21] We regard the essence of this analysis as equally appropriate to the ingredients of sexual violation in combination with the ingredients of an attempt, as specified in our s 72. The reference in that section to "having an intent to commit an offence" means that to be guilty of attempted sexual violation the person charged must intend to complete the first element of the full offence. That is the only intent necessary in the classic sense of that concept. But, as the context is an attempt to commit the full offence, the completed first element is not enough. It must be accompanied not only by the lack of consent of the victim required by the second element, but also by the lack of belief about the victim's consent required of the accused person by the third element. That means the intent must be to complete the first element, ie in a conventional case of sexual violation by rape, to effect penetration, in circumstances where that penetration is without the consent of the complainant and the accused does not believe on reasonable grounds that the complainant consents.

[22] This brings us to the Court of Appeal's linkage of the concept of the complainant's consent to the actions constituting the attempt, rather than to the actions necessary to constitute the full offence. For convenience we repeat what the Court of Appeal said in this respect:

> Thus in the context of an attempt the accused must intend at the time of the attempt to have sexual connection with the complainant, without the consent of the complainant to the activity which amounts to attempted sexual connection, and without believing on reasonable grounds that the complainant consents to that activity.

[23] We consider that this formulation has the subject matter of the complainant's consent wrongly identified. It is focused on conduct which necessarily precedes penetration. The question is not whether the complainant consented to the conduct of the accused which constituted the attempt. Rather it is whether the complainant would have consented to the conduct which was necessary to constitute the full offence. In this respect, as a matter of principle, the focus must be on the prohibited act. The circumstances are unlikely to be such as will cause any practical difficulty for a jury.

[24] The approach which we prefer means that the difference between an attempt and the full offence of sexual violation lies solely in the fact that the accused has tried to fulfil the first element of the completed offence but has not achieved his or her objective. In the ordinary case of attempted rape the man has tried to penetrate the woman but has not done so. The legislative policy, introduced in 1985, that any belief in consent on the part of the accused must be on reasonable grounds is maintained for the attempt consistently with what is required for the completed offence.[9] Parliament can hardly have intended the position to be otherwise. There is a clear indication to that effect in the recently introduced s 134 of the Crimes Act in combination with s 134A, where the need for any belief about the age of the complainant to be on reasonable grounds is expressly required both for the completed offence and for an attempt.[10] The difference between the attempt and the completed offence will, on this basis, be simple to explain to juries; much simpler than would be the case in the approach advanced by the appellant. Under that approach confusingly different tests would apply if the jury was having to consider whether the facts amounted to the full offence or only to an attempt. The resolution of the issue presented by this case in the way outlined is thus consistent with the general policy of current sexual offences legislation, with principle, and with practical considerations.

Summary

[25] Using a conventional case of attempted sexual violation by rape as an example, the Crown must prove: (1) that the accused tried to penetrate the complainant's genitalia with his penis; (2) that the complainant did not consent to the intended penetration; and (3) that the accused did not believe on reasonable grounds that the complainant consented to the intended penetration. This is all that needs to be said about the first issue raised by this appeal. Various other cases and materials were cited to the Court but we have not found it necessary to refer to them in developing these reasons.

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9 See s 2 of the Crimes Amendment Act (No 3) 1985.

10 See s 7 of the Crimes Amendment Act 2005.

The Judge's directions

[26] The Judge reached the subject of attempts at para [65] of his summing-up. This is what he said to the jury on this subject:

> The law relating to an attempt is this. The law provides that it is a crime to attempt to commit a crime even if, for whatever reason, that attempt is unsuccessful. To prove an attempted crime the Crown must prove two elements.
>
> [i] That the accused formed an intention to commit that crime, in this case, as I have said sexual violation by unlawful sexual connection between the accused's vagina and the boy's penis.
>
> [ii] That the accused did some act for the purpose of actually carrying that intention into effect.
>
> Both factors are of course important, but it is the second one that needs particularly careful consideration. You must be satisfied that what the accused did was for the purpose of actually beginning to commit the crime. Acts that are part of just thinking about doing it, or preparation for making the attempt to commit it, are not sufficient.
>
> The question of whether a particular act or series of acts was or was not done for the purpose of actually committing a crime, as opposed to thinking about it, or preparing to make the attempt, is a question of law which I have to decide.
>
> In this case, if you accept the boy's evidence i.e.
>
> > She grabbed my penis and tried to put it in her vagina but I wouldn't let it go in. She tried doing it a couple of times but then I stopped her and told her I couldn't do it. I was too afraid so I got up and said goodnight and went to sleep.
>
> I direct you as a matter of law that, the accused's actions do amount to an attempt to commit the crime as charged. First of all, there is the physical acts referred to, then there is the evidence of the boy, if accepted, that he stopped her, which indicated that he did not consent. The evidence that he continued to stop her after she persisted could indicate she must have known he was not consenting and she had no reasonable ground for thinking that he would.
>
> Having told you as a matter of law that the accused's actions, if accepted by you, do amount to an attempt; it still remains for you as the jury to decide as a matter of fact whether the actions described by the boy did occur. That is for you to determine.

[27] Following the conclusion of the summing-up, Mr Davey, who has represented the appellant throughout, asked the Judge to redirect the jury on aspects

of the attempt issue. The jury were recalled and the Judge further directed them in this way:

> Mr Davey [has] raised [a] matter, and I think very reasonably. It is in relation to count one, the attempt. You remember that I told you that I had to decide as a matter of law for a start whether there was evidence to support the charge. You then had to go on to decide the factual side of it. So just as there is no doubt about it, I want to say this to you again. Having told you as a matter of law that the accused's actions, if accepted by you, do amount to an attempt, it still remains for you as the jury to decide as a matter of fact whether the actions described by the boy did occur, and whether they occurred deliberately on the part of the accused, and whether they occurred without the boy's consent and without any belief on the accused's part, based on reasonable grounds, the boy did consent.

[28] At 8.40pm, having now been in retirement for some hours, the jury asked a question and this is what the Judge said in reply:

> The question you have given me is this:
>
> *"Can we please reclarify the law associated to indictment 1, in relation to "Attempt" and clarify the points of consent. As per the Judge's summary."*
>
> What I want to say to you is this. In order to prove the crime of attempting to commit sexual violation, the Crown must prove two things.
>
> [i] That the accused formed an intention to commit the crime of sexual violation, namely, the deliberate connection between her genitalia and the boy's penis, without his consent, and without any belief on reasonable grounds he would consent.
>
> [ii] That the accused did some act for the purpose of actually carrying out that intention into effect.
>
> The act that the Crown relies on is that which is referred to at p9 line 30 of the Notes of Evidence, and I will read to you the portion in question.
>
> [The Judge then referred to the relevant evidence.]
>
> In relation to that evidence, you must be satisfied that what the accused did was for the purpose of actually beginning to commit the crime, not just thinking about it, or preparation for making the attempt.

[29] During the course of the Judge's further directions in response to the consent aspect of the jury's question, a jury member interposed with this question:

> If we decide that that act did happen, that it would be a crime?

[30] The Judge responded to this inquiry by saying:

A further question offered by the jury is, if the jury finds that those acts did happen, is that sufficient to prove guilt?

The answer is that, you must be satisfied that what the accused did, namely, those acts, was for the purpose of actually beginning to commit the crime, and not just thinking about it, or preparation for making the attempt.

[31] The jury asked a second question at 9.10pm, in respect of which the Judge gave the following directions:

You have now given me a further question, namely,

"Regarding count 1 of the indictment while summing up you gave us a specific direction. Could you please repeat the same".

You may recall that, after you had retired, I called you back and added something to the earlier direction so that the direction I give you now will include that addition. Subject to that qualification, what I said to you earlier was as follows:

The law provides that it is a crime to attempt to commit a crime even if for whatever reason that attempt is unsuccessful. To prove an attempted crime the Crown must prove two elements.

[i] That the accused formed an intention to commit that crime in this case, as I have said, sexual violation by unlawful sexual connection between the accused's vagina and the boy's penis.

[ii] That the accused did some act for the purpose of actually carrying that intention into effect.

Both factors are, of course, important, but it is the second one that needs particularly careful consideration. You must be satisfied that, what the accused did, was for the purpose of actually beginning to commit the crime. Acts that are part of just thinking about doing it, or preparation for making the attempt to commit it are not sufficient. The question of whether a particular act was done, or was not done, for the purpose of actually committing a crime as opposed to thinking about it, or preparing to make the attempt is a question of law, which I have to decide. In this case, I direct you as a matter of law that, if you accept the boy's evidence, namely,

> *"she grabbed my penis and tried to put it in her vagina but I wouldn't let it go in. She tried doing it a couple of times but then I stopped her and told her I couldn't do it, I was too afraid so I got up and said "goodnight" and went to sleep",*

then the accused's actions do amount to an attempt to commit the crime i.e. grabbing the penis and trying to put it in her vagina. The evidence that the boy stopped her indicated he did not consent. The evidence that he continued to stop her after she persisted indicates she must have known[11] *he was not consenting and that she had no reasonable ground for thinking that*

[11] Note the unfortunate change from the earlier "could indicate she must have known" in the corresponding passage at the start of the summing-up to "indicates she must have known".

> *he would. Having told you as a matter of law that the accused's actions, if accepted by you do amount to an attempt, it still remains for you as the jury to decide as a matter of fact whether the actions described by the boy did occur, deliberately, and without the boy's consent, and without any belief on her part based on reasonable grounds he would consent.*

The attempt conviction

[32] During the course of presenting his oral submissions, Mr Davey accepted that his argument in respect of the Judge's directions could be summarised under three headings. First, the Judge seemed to be suggesting that a sufficiently proximate act, determination of which was for the jury, was enough to constitute an attempt crime, irrespective of the accused's state of mind, or indeed the victim's state of mind; second, the Judge had focused the minds of the jury on the wrong acts; and third, he had suggested that on the facts the necessary mental ingredients were self-evident; thus effectively taking those issues away from the jury. Counsel for the Crown did their best to support the Judge's directions by submitting that although there were problems the Judge had ultimately put the jury on the right track.

[33] The Court of Appeal was of the view that no real risk of a miscarriage of justice arose from the Judge's directions now under consideration. We find ourselves unable to agree and will now go through the directions in chronological order to examine the force of counsel's criticisms.

[34] In the general directions which the Judge gave during his summing-up, he indicated initially that it was a jury question whether the accused's conduct was sufficiently proximate to amount in law to an attempt. This is not correct. It is contrary to s 72(2) and to the longstanding decision of the Court of Appeal in *R v Ostler and Christie*.[12]

[35] The Judge then said the exact opposite of what he had just said in this respect. He was of course right on the latter occasion but the confusion he may have raised in the minds of the jury was considerable. The Judge then appears to have said, or at least come perilously close to saying, that the accused was, as a matter of

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[12] [1941] NZLR 318.

law, guilty of the crime charged. What he presumably meant to say was that the accused's conduct, if the jury accepted what was alleged, was sufficiently proximate to the completed offence to amount in law to an attempt and that this factual issue was therefore satisfied. But on that basis it was, of course, still for the jury to determine whether the conduct alleged took place and whether the Crown had proved the necessary further ingredients of the crime – elements two and three in our earlier analysis.

[36] The appellant can reasonably complain that at this point and on a reasonable reading of the Judge's words he gave a direction to convict on the attempt charge. But, as before, the Judge then immediately contradicted himself and gave the jury a correct direction on this point. But, again, he still said nothing about the mental requirements of an attempt crime. It should be noted in this connection that in his statement of the necessary two elements at the start of his attempt directions, the Judge did not expressly refer to any mental aspect. To a legal mind the necessary mental elements might be implicit from his earlier definition of the full crime and from his reference to "unlawful" sexual connection. Such an implication is, however, far too subtle to be satisfactory for what might have appeared to the jury as a self-contained direction.

[37] So, with respect, the Judge's primary directions on the attempt charge were potentially confusing and incomplete. As a result of the intervention of counsel, the Judge recalled the jury and gave them the further directions set out earlier. In spite of these further directions, the jury were obviously still having difficulties. Not surprisingly, they sought further assistance. On the first of the two occasions when they did so, the Judge effectively repeated his earlier incomplete two elements direction, made reference to the relevant evidence and then repeated the erroneous direction that the proximity question was for the jury. This time he did not correct himself as he had the first time. The question which came from the jury member shows that at least that member may have thought the crime was constituted simply by a sufficiently proximate act. The Judge, in reply, erroneously told the jury for the third time that proximity was for them.

[38] On the second occasion the Judge redirected the jury in a manner which incorporated what he had said when he recalled them after counsel had raised concerns. The Judge's composite version, given at 9.10pm, started with the problematical two elements direction. It then gave the erroneous proximity direction followed immediately by the correction that proximity was a matter of law for the Judge and, if the jury accepted the relevant evidence, his ruling was that the accused's actions did amount factually to an attempt to commit the crime. The Judge then gave a direction about the complainant's state of mind – whether he was consenting – which was a jury question, but upon which the Judge appeared to be telling the jury what the answer was as a matter of law. He then gave a similar direction about the accused's state of mind, also a jury question, which was again in terms which virtually took that issue away from the jury in favour of the Crown. Finally, the Judge appeared to resile from those directions by telling the jury that the questions whether the complainant consented, and whether the accused believed on reasonable grounds that was so, were for them.

[39] We are bound to say that all this is unsatisfactory. The risk that the appellant may have been convicted of the attempt on an erroneous legal basis is considerable. There is, at the very least, a real risk of a miscarriage of justice. This summing-up suffered from a number of errors, contradictions and inappropriate directions on jury questions. The attempt conviction cannot be allowed to stand and must be set aside.

[40] In coming to that conclusion we are mindful of the fact that the primary issue for the jury was whether the appellant had behaved as alleged. She denied it. We are also mindful that no prejudice can have ensued to the appellant if the jury thought the proximity question was for them and resolved it against the appellant. The actions of the appellant, if they happened as alleged, were clearly sufficiently proximate for an attempt. They could hardly have been more proximate without the occurrence of the factual ingredient of the full offence. The appellant's conduct, as it must have been found by the jury, was in law sufficiently proximate. The problem is that the jury could well have been left with the impression that a sufficiently proximate act was enough to constitute guilt of an attempt. Although the focus at trial was not on the mental ingredients, the jury still had to be satisfied they were

established, and the Judge could have been understood by the jury as telling them either that they were established or that they did not arise.

[41] This is unfortunately an example of an unnecessarily complicated and elaborate summing-up. If proximity was not established that count should have been withdrawn from the jury on the basis that there was not enough evidence to convict. If, as here, proximity was established as a matter of law, the Judge need not have mentioned the issue to the jury at all. The only issue for them on that aspect would then have been whether the conduct alleged did in fact occur. But, in addition, the jury had to be satisfied that the Crown had established lack of consent on the part of the complainant and, perhaps more importantly in this case, lack of belief in consent on reasonable grounds on the part of the appellant. That latter point was still a necessary matter for the jury's consideration, and for their determination, even though the primary defence was that the conduct alleged had not occurred. All in all we are not satisfied that a conviction entered following this summing-up can properly stand.

The conviction for the completed offence

[42] Mr Davey endeavoured to persuade us that the setting aside of the attempt conviction should lead to the setting aside of the conviction for the full offence. We are not persuaded that this follows. There was and could not be any suggestion of a misdirection on the ingredients of the full offence. It is clear that the difficulties the jury were having related solely to the attempt count. There is no such factual or other linkage between the two counts as to suggest, on any realistic basis, that the problems with the attempt directions somehow infected the jury's consideration of the count charging the full offence. The Judge gave the appropriate direction for separate consideration of counts. We consider the conviction for the full offence should stand. It is, however, necessary for the sentence imposed on that count to be reviewed by the Court of Appeal in the light of the setting aside of the attempt conviction.

HENRY J

[43] I agree with the reasons expressed by Tipping J leading to the disposal of this appeal, but wish to add a brief summary of my own on the primary issue, namely identification of the elements of attempted unlawful sexual connection.

[44] The substantive offence is created by s 128 Crimes Act 1961 as it was in force at the relevant time. Subsection (3) provided:

> (3) A person has unlawful sexual connection with another person if that person has sexual connection with the other person—
>
> (a) Without the consent of the other person; and
>
> (b) Without believing on reasonable grounds that the other person consents to that sexual connection.

[45] The essential elements of the offence are:

> an intentional act of sexual connection;
>
> an absence of consent by the victim to that connection; and
>
> an absence of belief on reasonable grounds on the part of the offender that the victim consented to that connection.

[46] The only *actus reus* is the act of sexual connection. For the offence to be established there must also be proved an absence of consent by the victim and the necessary *mens rea*. The *mens rea* is expressed in the statutory provision and unlike some others is not one which needs to be inferred. For example, it can be contrasted with the offence of rape under s 1 of the Sexual Offences Act 1956 (UK) as it was prior to the 1976 amendment – "it is felony for a man to rape a woman". The 1976 amendment to s 1 was enacted following the House of Lords decision in *R v Morgan*,[13] which also influenced the amendment to our Crimes Act resulting in the form of s 128 presently under discussion. *Morgan* was concerned with identifying the nature of the *mens rea* for rape, which at that time was only to be inferred from the statutory provision quoted above. The element of *mens rea*, however, is now

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13 [1976] AC 182.

expressed in the 1976 amendment. Under the New Zealand provision, the *mens rea* is the absence of belief on reasonable grounds there was consent. That concept, of course, includes a complete absence of belief in consent (intentional ie knowingly having non-consensual connection) as well as an unreasonably based belief that there was consent.

[47] Turning then to attempted unlawful sexual connection. Section 72(1) Crimes Act 1961 defines what is an attempt in these terms:

> (1) Every one 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 in the circumstances it was possible to commit the offence or not.

[48] It is necessary therefore to ascertain the elements of the offence of attempted unlawful sexual connection. First, an act which constitutes an attempt to have sexual connection. That is the *actus reus*. Second, that the victim was not consenting to the intended connection or, depending upon the proximity in time and place of the attempt, would not have consented to the intended connection. Third, that the offender did not believe on reasonable grounds the victim was consenting or would consent to the intended connection. The *mens rea* for the offence lies in the third element.

[49] In my respectful view, the fallacy in *Shepherd* is in relating the necessary *mens rea* element to para (a) of s 128(3), namely, the absence of consent on the part of the victim. Paragraph (a) is directed solely to the position of the victim. Paragraph (b) must therefore come into play in order to determine whether the statutory *mens rea* element for an attempt has been satisfied. The substantive offence is not restricted to knowingly having non-consensual connection, and similarly an intent to commit that offence under s 72(1) is not restricted to an intent knowingly to have non-consensual connection.

[50] There is no difference in substance between the approach to consideration of the substantive offence and the attempt to commit it. The distinction lies solely in the fact that in the case of an attempt the act of connection has not been completed.

[51] This construction gives consistency, and also avoids what otherwise would be an illogical distinction. There may well be an issue for jury determination whether there was in fact penetration or whether the intimacy fell short of that and constituted only an attempt. In that situation, on the *Shepherd* approach, the anomalous situation would arise where the jury was directed that if they found penetration was proved it also had to be proved that there was an absence of belief in consent based on reasonable grounds. But if they were not satisfied penetration was proved, then an unreasonably based belief as to consent would be a defence, and it would be necessary for the Crown to establish that the offender knew that the victim was not a consenting party.

[52] I also agree that the well established position regarding attempted murder as made clear in *R v Murphy*[14] is not analogous. The *actus reus* in the extended definition of murder necessarily requires an act which in fact causes death. So for an attempt there must be an intention to commit an act which will cause death – which equates to an intent to kill. But for attempted unlawful sexual connection, as earlier noted, the only *actus reus* is the act constituting the attempted connection. The distinction is highlighted in another way. It is the essence of an attempt that if the object of the accused was to be accomplished then the substantive offence would have been committed. In respect of an attempt under the extended definitions of murder, if the accused's object is accomplished (eg causing grievous bodily harm being reckless whether or not death ensues) the offence of murder may still not have been committed because death is not a necessary part or consequence of the object. For attempted unlawful sexual connection, the object is sexual connection. If that were to be accomplished, then the substantive offence results, providing the other separate elements of absence of consent and absence of a reasonably based belief in consent are present.

Solicitors:
Crown Law Office, Wellington

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14 [1969] NZLR 959.