

PRELIMINARY CRIMES

INTRODUCTION

An inchoate offence is one that is "committed by doing an act with the purpose of effecting some other offence" (G. Williams, *Textbook of Criminal Law*). It is committed when the defendant takes certain steps towards the commission of a crime. Unlike liability for secondary participation in a crime, it is unnecessary that the main offence be committed.

There are three main inchoate offences - incitement, conspiracy and attempt - and the nature of the requisite steps that need to be taken varies with each:

- With incitement the defendant must have tried to persuade another to commit a crime.
- With conspiracy at least two defendants must have agreed to commit a crime.
- With attempt the defendant must have tried to commit the offence and have got relatively close to achieving this objective.

INCITEMENT

A) ACTUS REUS

The *actus reus* of incitement is the act of persuading, encouraging or threatening another to commit a crime. See:

Race Relations Board v Applin [1973] 1 QB 815.

If the person incited agrees to commit the crime, both are liable for conspiracy. If the incitee actually commits the crime, the incitor will be liable as an accomplice to the complete offence.

B) MENS REA

The incitor must intend that as a result of his persuasion, the incitee will bring about the crime. See:

Invicta Plastics Ltd v Clare [1976] RTR 251.

Generally, the incitee must know of the facts that make the conduct incited criminal. Hence, a defendant can only be guilty of incitement to handle stolen goods if the incitee knew or believed the goods in question to be stolen. (However, the incitor might still be guilty of attempted incitement here.) See:

R v Curr [1968] 2 QB 944.

If an innocent incitee actually committed the crime, the incitor could be liable as a principal offender acting through an innocent agent, if it is capable of being so committed.

C) IMPOSSIBILITY

There can be liability for incitement to commit the impossible only if the commission of the crime was possible at the time of the incitement. See:

R v Fitzmaurice [1983] QB 1083.

CONSPIRACY: STATUTORY

A conspiracy is an agreement by two or more persons to commit a crime. Under s1(1) of the Criminal Law Act 1977 (as amended by s5 of the Criminal Attempts Act 1981):

“... if a person agrees with any other person that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either-

- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or-
 - (b) would do so but for the existence of facts which render the commission of the offence or any offences impossible,
- he is guilty of conspiracy to commit the offence or offences in question.”

A) ACTUS REUS

There must be an agreement between at least two persons. The parties must reach a stage where they agree to carry out the commission of the offence so far as it lies within their power to do so. Once agreement is reached it must be communicated between the parties.

Section 2 of the Criminal Law Act 1977 does place certain restrictions upon those who can become parties to a conspiracy:

- * Section 2(1) provides that a person cannot be charged with conspiracy if he is the intended victim of the crime.
- * Section 2(2) provides that a person cannot be charged with conspiracy if the only other party or parties to the conspiracy comprise of: (a) that person's spouse, (b) a person under the age of 10, or (c) the intended victim of the conspiracy.

However, see the limitation in:

R v Chrastny [1991] 1 WLR 1381.

B) MENS REA

In *R v Anderson* [1986] AC 27, the House of Lords held that it is sufficient for the prosecution to establish, by way of *mens rea*, that the defendant had agreed on a course of conduct which he knew would involve the commission of an offence and that it was not necessary to prove that he intended that it be committed. See:

R v Anderson [1986] AC 27

Yip Chiu-Cheng v R [1994] 3 WLR 514.

With regard to crimes of strict liability, s 1(2) Criminal Law Act 1977 expressly requires proof of *mens rea* on the part of those charged with

conspiracy. At least two parties to such a conspiracy must be shown to have known of the facts that would result in the agreed course of conduct involving the commission of a criminal offence.

C) IMPOSSIBILITY

There can be liability for a conspiracy even though there exist facts which render the commission of the offence impossible. See s1(1)(b) Criminal Law Act 1977 (which was inserted by the Criminal Attempts Act 1981), above. This reverses the old common law as applied in:

DPP v Nock [1978] 2 All ER 654.

CONSPIRACY: COMMON LAW

A) CONSPIRACY TO DEFRAUD

Conspiracy to defraud was considered by Viscount Dilhorne in *Scott v MPC* [1975] AC 819. His Lordship stated:

“... it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled, and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.”

This charge can be used against defendants who agree upon a course of conduct which, if carried out, might not result in an offence, but would involve dishonesty adversely affecting the economic interests of another.

No element of deception is required in order for the offence to be committed. See:

Scott v MPC [1975] AC 819.

There is no requirement that actual economic loss be involved as long as the victim's economic interests are put at risk. See:

Wai Yu-Tsang v R [1992] AC 269.

B) CONSPIRACY TO CORRUPT PUBLIC MORALS
OR OUTRAGE PUBLIC DECENCY

These are wide offences with no real definition.

- (i) In *Shaw v DPP* [1962] AC 220 the House of Lords held that a conspiracy to corrupt public morals is an offence.
- (ii) A majority in the House of Lords in *Knulier v DPP* [1972] 2 All ER 898, held that there is a common law offence of outraging public decency and, consequently, it is an offence to conspire to outrage public decency. A modern example is:

R v Gibson [1991] 1 All ER 439.

ATTEMPTS

Section 1(1) of the Criminal Attempts Act 1981 provides 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.”

Under s1(4) of the CAA 1981, the CAA 1981 only applies to indictable offences (unless Parliament specifically provides in another statute) and s1(4) abolishes liability for: attempting to aid, abet, counsel or procure the commission of any offence; attempted conspiracy; and attempting to assist an offender contrary to s4(1) of the Criminal Law Act 1967.

A) ACTUS REUS

NOTE: ‘A’ Level students must research the common law tests for attempts prior to the CAA 1981.

The prosecution must prove that the defendant committed an act which was “more than merely preparatory”. This is a question of fact for the jury to decide.

According to Lord Lane CJ in *R v Gullefer* (1990), the offence is committed when the merely preparatory acts come to an end and the defendant embarks upon the crime proper. When that is will depend upon the facts in any particular case. See:

R v Gullefer (1990) 91 Cr App R 356
R v Jones (1990) 91 Cr App R 351
R v Campbell (1991) 93 Cr App R 350
Attorney-General's Reference (No 1 of 1992) [1993] 2 All ER 190
R v Geddes [1996] Crim LR 894
R v Tosti and White [1997] Crim LR 746
R v Toothill [1998] Crim LR 876
R v Nash [1999] Crim LR 308.

B) MENS REA

Section 1(1) refers to the defendant acting “with intent to commit an offence”. Therefore, only intention to commit the offence in question will suffice as the *mens rea* for attempt.

In *R v Pearman* (1984) 80 Cr App R 259, it was held that the word "intent" in section 1 has the same meaning as in the common law of attempts. The court applied *R v Mohan* [1976] QB 1, where the Court of Appeal held that there must be proved: “... a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not.”

For possible liability based upon recklessness, see:

R v Khan and others [1990] 2 All ER 783
Attorney-General's Reference (No 3 of 1992) [1994] 2 All ER 121.

C) IMPOSSIBILITY

Prior to the enactment of the CAA 1981, impossibility was available in certain circumstances to a defendant charged with attempt. The basis for this was the House of Lords' decision in:

Haughton v Smith [1975] AC 476.

It was Parliament's intention to reverse the effect of this decision by enacting section 1(2) of the Criminal Attempts Act 1981, which provides that:

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

However, the House of Lords was reluctant at first to interpret these provisions in a manner that would produce the result intended by Parliament. See:

Anderton v Ryan [1985] AC 560

The effect of this decision was short-lived, however. In the next case, the House of Lords had little choice but to overrule its own previous decision:

R v Shivpuri [1986] 2 WLR 988.

The only exception is *R v Taaffe* (1984), where the defendant believed that importing currency was illegal and sought to smuggle several packages. There was no such offence and he could not be liable for attempting a crime that does not exist. See:

R v Taaffe [1984] 1 All ER 747.

D) WITHDRAWAL

It is logical that, once steps taken towards the commission of an offence are sufficiently far advanced to amount to an attempt, it can make no difference whether the failure to complete the crime is due to a voluntary withdrawal by the defendant, the intervention of the police, or any other reason (Smith and Hogan, *Criminal Law*, Eighth edition, p327). See:

R v Taylor (1859) 1 F & F 511.

REFORM OF THE LAW

See the details of the Law Commission Consultation Paper No 131, *Assisting and Encouraging Crime*.