

## **JOHNSTON V R – WHEN DO ATTEMPTS BEGIN AND END?**

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In *Johnston v R*<sup>1</sup> the Supreme Court took the opportunity to examine the law relating to proximity in attempts and to lay down the correct approach to determining whether an attempt had begun, but it gave very limited thought to when an attempt may end, the focus of this case note. In a fairly brief judgment, the Supreme Court considered the law as to proximity of attempts and affirmed the approach taken by the Court of Appeal both at an earlier stage of proceedings in *Johnston's* case and in *R v Harpur*.<sup>2</sup>

### I. THE FACTS

The facts of *Johnston v R* can be succinctly stated. The appellant had been found in the back garden of a house, having with him gloves and a beanie which could have been used to avoid leaving fingerprints or to conceal identity respectively. He was arrested shortly thereafter. The garden also contained a sleep-out in which a teenage female member of the family usually slept. There was evidence that the appellant had reconnoitred the premises on earlier occasions. Most importantly, there was both strong propensity evidence that the defendant was a rapist with a fixation on teenage girls and a habit of attacking them in detached buildings, and direct evidence from witnesses to whom the appellant had spoken that he had plans to rape a teenager in the near future. On this basis the prosecution contended that the appellant was guilty of an attempt to sexually violate the female teenager who normally slept in the sleep out. The defence argument was, essentially, that the appellant's conduct was equally compatible with his being there to commit burglary and theft – and therefore could not be sufficiently proximate for an attempt to commit sexual violation. At his first trial the appellant had been found guilty, but the conviction was quashed by the Court of Appeal.<sup>3</sup> Although the appellant's acts were considered to be sufficiently proximate,<sup>4</sup> the judge, in his summing up, took the point accepted in *Harpur* that a remote actus reus will constitute an attempt if the intent is clear to an extreme, and had introduced a possibility that the appellant had been on another reconnoitring expedition with intent to rape at a later date – something neither side had argued – and thus the jury had been asked to convict on a basis which the appellant had not been given an opportunity to provide a defence.

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<sup>1</sup> *Johnston v R* [2016] NZSC 83, [2016] 1 NZLR 1134.

<sup>2</sup> *R v Harpur* [2010] NZCA 319, (2010) 24 CRNZ 909.

<sup>3</sup> *Johnston v R* [2012] NZCA 559, [2013] 2 NZLR 19.

<sup>4</sup> At [28] and following.

At the retrial Johnston was again convicted and his appeal to the Court of Appeal was dismissed. When the matter came before the Supreme Court it was common ground that the real issue was the correctness of the Court of Appeal's decision following the first trial, where it had held that the appellant's conduct was proximate enough for an attempt to commit sexual violation (absent the learned District Court Judge's intervention about timing).

## II. THE PROXIMITY ISSUE

The Supreme Court approved the reasoning of the Court of Appeal both in the immediate case and also in *R v Harpur* where the defendant was held to have been correctly convicted of attempting to sexually violate a child that was the figment of his imagination (dreamed up by police authorities), principally because his conduct evinced a clear intention to do so.<sup>5</sup> The core issue in both cases was whether the alleged offender's conduct – to use a neutral word – was sufficiently proximate to amount to an attempt.

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 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 Supreme Court rejected an argument that subs (2) required the judge determining the proximity issue to take into account only the conduct of the defendant, and to put to one side any evidence of intent. The Court stated:<sup>6</sup>

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:

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<sup>5</sup> The defendant was exchanging e-mails with a person who, under police guidance, indicated the existence of a young girl to whom the defendant could have access for sexual purposes.

<sup>6</sup> *Johnston v R* [2016] NZSC 83, [2016] 1 NZLR 1134 at [53].

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

As the Court further noted,<sup>7</sup> this approach would resurrect the “unequivocal test” abolished by s 72(3).

Consistently with the earlier law, the court emphasized that evidence of intent would not of itself turn a merely preparatory act into an attempt.<sup>8</sup> However, where evidence of intent was available and demonstrated planning by the defendant, the decision as to whether conduct was to be classed as preparation only or as sufficiently proximate could be made with much greater certainty.<sup>9</sup> On that basis the judge at Johnston’s first trial had correctly taken into account the evidence as to prior intent and used that in assessing whether the conduct was sufficiently proximate.

While there has been academic criticism of this interpretation of s 72 as enunciated in earlier stages of the proceedings against Johnston,<sup>10</sup> the Supreme Court’s approach is a much more natural reading of s 72(2) than is the alternative advanced by the appellant. The decision may therefore be seen as providing clarity and – to a large extent - certainty in the law. The qualification is necessary because the approach confirmed in *Johnston v R* raises, but only partially answers, a significant question.

### III. THE TERMINATION OF AN ATTEMPT ISSUE

If an attempt may be complete at a point significantly before an unequivocal act is committed, does liability for that attempt terminate if the offender experiences a change of heart and abandons the enterprise? The Supreme Court gave a partial answer to that question late in their judgment,<sup>11</sup> endorsing the view of Woodhouse J in *Police v Wylie*<sup>12</sup> that an intent which was qualified or conditional in that the offender would desist should circumstances become unfavourable was nevertheless

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<sup>7</sup> At [54].

<sup>8</sup> At [58].

<sup>9</sup> At [58].

<sup>10</sup> Margaret Briggs “The Conduct Requirement in the Law of Attempt: A New Zealand Perspective” (2015) 44 CLWR 145.

<sup>11</sup> *Johnston v R* [2016] NZSC 83, [2016] 1 NZLR 1134 at [61].

<sup>12</sup> *Police v Wylie* [1976] 2 NZLR 167 (CA) at 169.

sufficient for the intention to commit the offence and thus for an attempt. That view is undoubtedly correct.

However it leaves unresolved the issue of whether there is (and should be) liability where an attempt has been committed but the offender desists voluntarily after a change of mind which involved completely abandoning the former plan. Let us suppose that A has formed a plan to break into a house and assault B, a resident, because A believes B had disclosed criminal offending by A's younger brother to the police. In furtherance of that plan, A procures from C a skeleton key which will fit the lock on B's house and informs C of her plans and motive. That night A travels to a street near B's house. On the test in *Johnston v R*, it would appear that A can be convicted of attempted burglary although there is still some separation between A's conduct and state of mind and an actual breaking and entering of B's house, even if it is difficult to determine exactly when the conduct ceased to be merely preparatory. However let us further assume that while walking in the street near B's house, A first receives a text message from D admitting it was D who had disclosed A's brother's offending to the police. A then has a chance meeting with C, and informs C that because of D's message A has given up on her plan to assault B. A also returns the skeleton key to C.

On those facts, should A continue to be criminally liable for the attempt committed earlier? It is suggested that imposing criminal liability in such circumstances is both incorrect in principle and undesirable as a matter of policy.

The issue of principle can be approached in two ways. Firstly there is some authority that the inchoate offence of conspiracy can be terminated short of completion of the offence agreed upon. The English Court of Appeal in *R v Bajwa*<sup>13</sup> stated that:

[O]nce the conspiracy has begun, it will normally (in the absence of evidence to the contrary) be a reasonable inference that it continues until its object had been achieved. Evidence to the contrary might include specific evidence of words or writings by which the conspirators agreed to call the whole thing off, or of actions on their part from which it can reasonably be inferred that they must have done. Likewise, once a particular defendant has joined a conspiracy, it will normally (in the absence of evidence to the contrary) be a reasonable inference that he remained a party to it until the conspiracy as a whole came to an end, typically because its object had been achieved. Evidence to the contrary might include specific evidence of words or writings by which that defendant indicated an intention to withdraw, or of actions on his part from which it can reasonably be inferred that he must have done. Often that will be in the form of a communication by conspirator (A) to another conspirator (B), or to a non-conspirator, that (A) was ceasing to be involved.

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<sup>13</sup> *R v Bajwa* [2011] EWCA Crim 1093, [2012] 1 WLR 601 at [60].

The court in *Bajwa* thus clearly contemplates that a conspirator may limit his or her criminal liability by effective withdrawal from the original agreement. That is to accept that an inchoate offence can terminate prior to commission of the full offence earlier agreed upon.

There is an obvious comparison with the defence of withdrawal from party liability, as recently recognised by the Supreme Court in *Ahsin v R*.<sup>14</sup> The Court stated that:<sup>15</sup>

Under both subsections of s 66, party liability unconditionally attaches only when the principal offender attempts or commits the crime to which the secondary offender becomes a party. Those whose conduct prospectively makes them a party to an offence upon its commission may have a window of opportunity before the offence is perpetrated during which it is conceptually possible to withdraw from involvement before criminal liability attaches.

In that case the Supreme Court stressed the need for the withdrawing party to have effectively counteracted any encouragement or assistance given to her co-offenders prior to the withdrawal.<sup>16</sup>

It is suggested that the logic underlying both *R v Bajwa* and *Ahsin v R* is that an offender who has effectively withdrawn from planned offending and taken steps to try to ensure the offence is not committed should no longer be at risk of conviction.<sup>17</sup> If that is so, then surely there is a strong case for applying a similar principle to attempts. Indeed in *Ahsin v R* the majority judgment stated that:<sup>18</sup>

... under s 66(2) the actus reus for party liability is complete at the time the defendant forms or joins a common purpose. Liability is then contingent only on commission of the offence by the principal offender in prosecution of that purpose.

The defence of withdrawal, which the Court recognised, must therefore be taken as nullifying the completion of the actus reus of party liability – changing conduct which was conditionally criminal to non-criminal on the basis of a change of mind accompanied by acts which seek to cancel out the earlier conduct.

If that is so, should not the law of attempts take a parallel step? A withdrawal defence for attempts would mean that a person who commits an attempt but then withdraws effectively from the enterprise – manifested by a change of mind and conduct which cancels out the earlier conduct – would no longer be regarded as criminally liable for the earlier conduct. True, this requires a major shift in the traditional view that a criminal act cannot be undone, but if that shift has already

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<sup>14</sup> *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

<sup>15</sup> At [113].

<sup>16</sup> At [134].

<sup>17</sup> See particularly at [122].

<sup>18</sup> At [117].

been made in party liability, it may well be made in inchoate crimes. It is recognised that the context is somewhat different; in party liability the secondary party's liability is derived from the principal's once the offence occurs, while an individual who crosses the threshold in attempt fixes their own conduct as criminal. Nevertheless, if the Supreme Court can accept that a party can undo their support for a principal through withdrawal of that support, then why not accept that someone who enters the zone of attempt can withdraw from it?

It may not obviously serve the notion that it is intrinsically wrong to engage in an attempt to inflict harm. But what if the defendant is making a valid effort to ensure the wrong never materialises? It may also be argued that such a change would undercut the deterrent policy of the law of attempt. However, that may not be so. There is a clear and obvious policy reason for recognising a withdrawal defence for attempt. If an offender was aware that once a sufficiently proximate act had been performed there was no escaping criminal liability, there would be no incentive to think again and abandon the transaction. It is therefore, at least somewhat more likely, that the offender will carry on with the planned offending and may well commit the full offence which would not otherwise have occurred. The interests of victims – and of society generally – are surely much better served by encouraging offenders to abandon attempted offending rather than completing it. It will be interesting to see whether the New Zealand courts are prepared to investigate this possibility further if a suitable case presents itself.