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[STRONGE, C.J., AND THOMAS, J.]

POLICE

v.

STYLLIS CHRYSANTHOU & OTHERS.

(*Criminal Appeal No.* 1654.)

Criminal Law — Meaning of Attempt — Charge of attempted Larceny — Necessity of proving an intent to commit Larceny — Act amounting to an Attempt to commit Criminal Trespass.

The appellants were surprised at night in the act of removing the stones from a blocked-up doorway of a yard in which there were some lambs, and on that evidence alone were convicted of attempting to steal the lambs.

Held, (1) that in a charge of attempted larceny there is an onus on the prosecution to prove that there was an intention to commit larceny; and

(2) that, as the overt act given in evidence was not necessarily referable to an intent to steal, the charge of attempted larceny was not established.

Held further, that the overt act given in evidence amounted to an attempt to commit criminal trespass.

Appeal against a conviction by the Nicosia Magisterial Court dated 19th August, 1935, (Case No. 1797/35).

Costas Zannettides for appellants:—

The conviction is unsustainable (1) because the removal of the stones is not so immediately connected with the commission of larceny as to amount in law to an attempt, and (2) because that act, being equally referable to an intent to murder or assault, was equivocal and, therefore, did not warrant the conclusion that it was done with the intention of stealing.

Neoptolemos Paschalis, K.C., Solicitor-General, for respondent:

The act must be immediately connected with the offence charged. *R.* v. *Cheeseman*, 9 Cox, 102, *R.* v. *Robinson* (1915) 2 K.B., 342. I admit an intent to steal is not the only inference that could have been drawn from the appellants' act. Might it not, however, amount to an attempt to commit criminal trespass ?

Cur. adv. vult.

STRONGE, C.J.: The appellants in this case were charged before the Magisterial Court of Nicosia and convicted of an "attempt to commit a felony, to wit, the theft of lambs." The following facts were deposed to at the trial. The complainant's house opens upon his yard which is surrounded by a wall. In this wall are two doorways—the one fitted with a door provided with a lock, the other not having any door but blocked up with stones piled on top of each other. On the night of 18th May, 1935—a moonlight night—R. C. Christodoulos Haji Kyriacou about the hour of 11.30 p.m.

saw and recognized the three appellants in the act of removing the stones from the blocked-up doorway. On being asked by him what they were doing the three appellants ran away. There were at the time four lambs in the yard of the complainant but there was nothing to indicate that their presence there was known to any of the appellants.

Mr. Zannettides on behalf of the appellants argued that their conviction of an attempt to steal lambs was unsustainable on two grounds: Firstly, because the overt act relied on by the prosecution as constituting the attempt, viz., the removal of the stones blocking up the doorway was not so immediately connected with the commission of the offence as to amount in law to an attempt; secondly, because the overt act in question was just as much referable to an intent to assault or murder the complainant as to an intent to steal his lambs, and there being nothing in the evidence to show the existence of the one intent rather than the other, the trial Court had nothing before it to warrant the conclusion that it was with an intent to steal that the appellants removed the stones. As to the first point advanced by Mr. Zannettides the learned author of Mayne's Commentaries on the Indian Penal Code, in his commentary on section 511 which relates to attempts and is somewhat similar in tenor to section 354—the Attempts section—of the Cyprus Criminal Code, 1928, observes that prior to the completion of a crime, three stages may be passed through, namely, the intention to commit, the preparation for its committal, and lastly the attempt to commit. It is only the third of these stages that is punishable, that is to say, the direct movement towards the commission of the offence. In *R.* v. *Eagleton* (1855, 6 Cox C.C.), Parke, B., at p. 571 states the law on the point as follows: " The mere intention to commit a misdemeanour is not criminal, some act is required and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are ". No abstract test can be given for determining whether a particular act is sufficiently closely connected with the offence to amount to an attempt. In his judgment in *R.* v. *Robinson* (1915, 2 K.B., 342) Lord Reading, C.J., at p. 348 after approving as " a safe guide " the passage from the judgment of Parke, B., which I have just quoted, goes on to say: " In some cases it is a difficult matter to determine whether an act is immediately or remotely connected with the offence of which it is alleged to be an attempt."

Assuming for the moment in the case now before us that the appellants had, in fact, the intent to steal the lambs in complainants's yard, I am of opinion that the removal

by the appellants of the stones blocking up the doorway of the yard in which the lambs were was an act sufficiently closely connected with the crime *ex hypothesi* intended, to amount to an attempt. The lambs being in the yard, to take and carry them away from it as intended, necessitated the appellants' getting them into their control. To do this access must be obtained to complainant's yard and one means of obtaining such access was obviously the removal of the stones blocking up the doorway. In the words of Blackburn, J., in *Reg.* v. *Cheeseman* (1862, 9 Cox at p. 103): "Though nothing had been done which formed part of the crime the attempt to commit it had commenced." I can see no distinction between the act of the appellants and that of a man who unlocks or breaks open a box or chest with the intent of stealing articles of value contained in it. The act of appellants in my view went beyond the stage of a mere preparation to commit the offence and amounted to a step towards the execution of the criminal purpose and was immediately connected with the commission of the offence which *ex hypothesi* the appellants who performed the act had in view. I am consequently of opinion that Mr. Zannettides's argument on this point fails.

I now come to a consideration of the second contention advanced by him, namely, that since the sole overt act proved was in itself of an ambiguous character being equally referable to any one of several criminal intents and since furthermore there was no evidence of any kind from which could reasonably be inferred which one of these intents, in fact, actuated the appellants, the conviction of the trial Court which was based upon the conclusion that the overt act was done with one particular intent, viz., the intent to steal lambs, was unjustifiable. No cases directly bearing on the point were brought to our notice by either of the learned counsel engaged in the case and although I have myself made a fairly careful search I have been unable to find any case or authority dealing directly with the point raised. Section 354 of the Cyprus Criminal Code of 1928 deals with Attempts and its opening clause provides as follows: "When a person intending to commit an offence begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act but does not fulfil his intention to such an extent as to commit the offence he is deemed to attempt to commit the offence."

Now, if, in order to apply this section to the case of any given offence we substitute for the words "an offence" in line 1 of the section the appellation of the particular offence intended to be committed, *e.g.* "theft" as in the present case, the section will read as follows: "When

a person intending to commit 'theft' begins to put his intention (*i.e.* his intention to commit theft) into execution by means adapted to its fulfilment and manifests his intention (again his intention to commit theft) by some overt act" etc., etc. So read, it appears to me that it was within the contemplation of the legislature that the intention manifested by the overt act must be an intention referable solely to the commission of the particular crime of which the overt act constitutes the attempt. In the instant case the overt act though undoubtedly referable to an intent to commit theft was equally referable, so far as the evidence went, to several other criminal intents and the appellants could not consequently be said, I think, by their overt act of removing the stones to manifest, *i.e.* evince or show plainly an intention to commit theft rather than some other crime the intention to commit which was equally inferable from that act.

Professor Stanhope Kenny in the 14th edition of his classical "Outlines of Criminal Law" in treating of Attempts says at p. 82: "So again the buying of a box of matches would not be an act sufficiently proximate to the offence of arson to constitute an attempt to commit it for it is an ambiguous act not necessarily referable to that crime or to any crime at all." From the learned author's use of the words "not necessarily referable to that crime" it would seem as if he was of the opinion that the overt act must not be one of an equivocal character but must be one from which intention to commit the particular offence of which it is alleged to be the overt act can indubitably be inferred.

The decisions upon the offences in England of Attempts to Murder and of Housebreaking with intent to steal throw, I think, some light upon the question now under consideration. By section 11 of the Offences against the Person Act of 1861 the administering of poison or the wounding or causing of grievous bodily harm with intent in any of such cases to commit murder is made a felony. As to the intent in such cases Halsbury (Hailsham Edition, Vol. 9, note (*u*), at p. 456) says: "But there must be a positive intention to murder and it is not sufficient that if death had resulted the prisoner would have been guilty of murder unless he actually intended to commit that crime"; and *R.* v. *Cruse* (1838) 8 C. & P., 541, and *R.* v. *Jones* (1840) 9 C. & P. are cited as authorities for the statement.

As regards Housebreaking with intent to commit felony Archbold's Criminal Pleading, 1931 Ed., at p. 690, dealing with an indictment for breaking and entering a dwelling house with intent to commit a felony therein says: "The intent laid in the indictment must be to commit some felony in a dwelling house such as larceny, murder, rape,

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and the intent must be proved as laid. Where the intent is at all doubtful it may be laid in different ways in different counts."

In the case of the *Queen* v. *Tucker* (1844, 1 Cox C.C., p. 73) the indictment charged the prisoner with burglariously breaking and entering the dwelling house of one W. Smith with intent to steal the goods of the said W. Smith then being in the said dwelling house. It was proved that the prisoner came to the window of the prosecutor's kitchen and broke a pane of glass. He then put in a knife and pushed back the window fastener after which he pulled the sash of the window down. He was then disturbed and left the premises. It was objected by his counsel that there was no sufficient entry proved, but Alderson, B., thought the entry proved sufficient. Counsel further stated that was no evidence to prove the intent as laid in the indictment. The intent laid was to steal the goods of the prosecutor whilst the entry proved could only be with the intent of effecting an entry by the prisoner himself into the house. Alderson, B., ruled that there was no evidence of the intent laid in the indictment and directed an acquittal. In an earlier case, however, mentioned in Russell on Crimes, 8th Ed., at p. 1054 in which the prisoners were indicted for burglary with intent to commit larceny the evidence was that three persons attacked the house and broke a window both in front and at the back. The occupier of the house got up and placing himself by the wall near one of the broken windows contended with them with a spade for some time when they went away. There was no evidence of actual entry but there was evidence that the prisoners had ample opportunity to enter and plunder if they were disposed. It was submitted that there was no evidence to go to the jury, but Park, J., said: "There is evidence, it is for the jury to say whether they went there with intent or not. Persons do not, in general, go to houses to commit trespass in the middle of the night, it is matter of observation that they had the opportunity and did not commit the larceny but it is for the jury to say, whether from all the circumstances they can infer that or any other intent."

This ruling of Park, J., rests upon the assumption that in England the act of breaking a man's house in the middle of the night is of itself and in the absence of any evidence pointing to a different intent *de facto* evidence of an intent to steal. Such an assumption, however, applicable it may be in the case of England, is not, in my opinion, warranted in the case of this country where housebreakings by night for purposes other than stealing are not infrequent.

The case now before us resembles that of the *Queen* v. *Tucker* (*supra*) in the respect that in both cases the sole evidence of intent to steal was the breaking in the present

case and the breaking and technical entry by putting in the knife in the latter. The fact, then, that in the *Queen* v. *Tucker* it was ruled that the breaking was not evidence of such an intent is authority upon which, notwithstanding the earlier ruling of Park, J., I am content to hold that it does not amount to evidence of such an intent in the present case.

It has been authoritatively decided in several cases that it is an essential principle of English Criminal Law that the burden of establishing a prisoner's guilt rests throughout the trial upon the prosecution but that while the prosecution must prove the prisoner's guilt it is sufficient for him to raise a doubt as to his guilt: he is not bound to establish his innocence. *R.* v. *Schama*, 24 Cox C.C. per Lord Reading, C.J., at p. 594. *Laurence* v. *The King*, 1933 A.C. at p. 707. *Woolmington* v. *Director of Public Prosecutions* (1935) 104 L.J.K.B. at p. 439. In the present case the prosecution had, in my opinion, to discharge the onus of proving that the appellants were guilty of an attempt to steal lambs. The sole overt act on the part of the appellants which the prosecution was able to adduce as constituting that attempt and pointing to theft as the offence intended to be committed was, it is conceded, an act equally consistent with an intention to commit any one of several different offences. In such circumstances I have, after careful consideration, come to the conclusion that the prosecution has failed to discharge the onus cast upon it of establishing beyond a reasonable doubt that the crime intended to be committed was in actual fact theft of lambs and that the removal of the stones from the doorway was an overt act committed with the intention of perpetrating that crime. In other words the trial Court had no evidence before it on which it could, in my opinion, properly conclude that the particular offence which the prisoner intended to commit was theft. For these reasons I have come to the conclusion that the conviction should be set aside. This appeal is not, however, finally disposed of by such a finding. Section 14 (*i*) of the Criminal Evidence and Procedure Law, 1929, empowers the Supreme Court on the hearing of an appeal to set aside the conviction and convict the appellant of any offence triable summarily of which he might have been convicted upon the evidence which has been adduced. Now section 270 of the Criminal Code, 1928, provides that any person who enters into or upon property in the possession of another with intent to commit an offence punishable by this Code . . . or to intimidate insult or annoy any person in possession of such property . . . commits a misdemeanour and is liable to imprisonment for two years. Upon the evidence it is, I think, clear that the appellants were removing the stones blocking up the doorway for the purpose of entering upon the

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complainant's property. That they were doing so with some unlawful or criminal intention is, I think, both a permissible and natural inference from the advanced hour of the night and the fact that when accosted by the Rural Constable they ran away. They were consequently, in my opinion, guilty of an attempt to commit criminal trespass and, I think, the justice of the case will be met by recording a conviction for that offence in lieu of the conviction for an attempt to steal lambs. The sentence of nine months' imprisonment imposed by the trial Court is not, I think, having regard to all the circumstances, unduly severe and should remain unaltered. In the case of appellants No. 2 and No. 3, however, who have been on bail since the hearing of the appeal, the commencement of their service of the unexpired portion of their sentences should run as from this date.

Thomas, J. THOMAS, J.: The appellants were convicted by the Magisterial Court, Nicosia, of attempting to " commit a felony, to wit, theft of lambs." The evidence showed that the complainant had four lambs in a yard surrounded by a fence and wall. In the latter there were two doors, one locked, and the other blocked up with stones. Shortly after 11 p.m. the Rural Constable, concealed in the shadow of the wall, saw the appellants removing the stones which blocked the door in the wall. Upon his asking them what they were doing the appellants ran away. I have assumed that the stones were outside the door and not on complainant's premises, but the evidence is silent on the point.

The appellants seek to set aside the conviction on the ground that the evidence does not establish any attempt to commit the specific offence charged, viz., theft. I expressed the opinion during the argument that acts which were equally consistent with an intention to commit any one of a number of offences could not amount to an attempt to commit the specific offence charged. A careful consideration of the authorities has confirmed me in that opinion, and, as the point is one of great importance in criminal law, I think, it is desirable that I should set out the reasons which have led me to that conclusion.

" Attempt " is defined in section 354 of the Criminal Code as follows:—

> " When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
>
> It is immaterial, except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is

prevented by circumstances independent of his will, or whether he desists of his own motion from further prosecution of his intention.

It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

The questions for determination are whether the removal by the appellants at a late hour of the night of the stones blocking a door into a yard in which there were lambs establishes: (1) an intention to steal the lambs; (2) that appellants began to put their intention to steal lambs into execution by means adapted to the carrying out of the theft; (3) whether such removal of stones is an overt act manifesting an intention to steal the lambs; and (4) whether the appellants in carrying out their intention to steal lambs stopped short of actually stealing them. The answers to these questions depend largely on whether the acts of the appellants are so closely connected with the carrying out of their intention to steal the lambs as to be a part of such carrying out, or whether the connection is only a remote one, in which case the appellants' acts form no part of the execution of their intention, and amount only to preparation.

In order to decide what acts constitute an attempt under our law it is of great assistance to examine the common law authorities upon which section 354 of the Criminal Law is founded.

"An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such series of acts begins cannot be defined; but depends upon the circumstances of each particular case." (Stephen's Digest of Criminal Law, p. 39.)

This passage is cited with approval in several of the leading cases. The definition given in Halsbury's Laws of England, Vol. 9, p. 259, is in similar terms:

"Any overt act immediately connected with the commission of an offence, and forming part of a series which if not interrupted or frustrated would, if the offence could be committed, end in the commission of the actual offence, is, if done with a guilty intent, an attempt to commit the offence."

In Russell on Crimes (8th Edition Vol. I, p. 145) it is stated:

"No act is indictable as an attempt to commit felony or misdemeanour, unless it is a step towards the execution of the criminal purpose, and is an act directly approximating to, or immediately connected with, the commission of the offence which the person doing it has in view."

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The question of what acts constitute an attempt was considered by the Court of Crown Cases Reserved consisting of twelve Judges in *Reg.* v. *Eagleton.* (1) The defendant was charged with attempting to obtain money from the guardians by falsely pretending to the relieving officer that he had delivered to poor persons certain loaves, and that each loaf was of a certain weight. " The evidence was that he had contracted to deliver loaves of the specified weight to any poor persons bringing a ticket from the relieving officer, and that the duty of the defendant was to return those tickets at the end of each week, together with a written statement of the number of loaves delivered by him to the paupers; whereupon he would be credited for that amount, and the money would be paid after two months. The defendant having delivered loaves of less than the specific weight, returned the tickets, and obtained credit in account for the loaves so delivered; but before the time for payment of the money arrived the fraud was discovered." At the end of the judgment of the Court delivered by Baron Parke it is stated:

> " The mere intention to commit a misdemeanour is not criminal; some act is required; and we do not think all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."

In *R.* v. *Cheeseman* (2) the accused, the servant of an army contractor, had to weigh out meat and deliver it to customers. By using false weights the accused kept back some of the meat with the intention of stealing it. Before he carried the meat away the fraud was discovered. The Court held that the accused was properly convicted of an attempt to steal on the ground that he had done all that was necessary to carry out his criminal intention, except to carry away the goods, which he would have done if not interrupted. The two cases above are accepted by all the leading authorities as containing a correct exposition of the law.

In a case charging an attempt to make counterfeit coin the evidence showed that the accused had made for him dies for making a coin of a foreign country, and was taking steps to obtain the rest of the apparatus necessary to make the coins. The Court were unanimously of opinion that the act of the prisoner amounted to an attempt, because the procuring of the dies was intimately connected with the offence of making false coin, and could only have been done for that purpose. *R.* v. *Roberts.* (3)

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(1) 6 Cox C.C. 559.
(2) 9 Cox C.C. 100.
(3) 7 Cox C.C. 39 at p. 43.

Most of the authorities lay great stress on the necessity of distinguishing between *preparation* and *attempt*. " Prior to the completion of a crime three stages may be passed through. *First*, an intention to commit the crime may be conceived; *Secondly*, preparation may be made for its committal; *Thirdly*, an attempt may be made to commit it. Of these three stages the mere forming of the intention is not punishable . . . . Nor is the preparation for an offence indictable. ' Between the preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising, or arranging, the means, or measures, necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbour; but until some movement is made to use the weapon upon the person of his intended victim there is only preparation and not an attempt.'

In America the rule has been laid down, ' that the attempt can only be manifested by acts which would end in the consummation of the offence, but for the intervention of circumstances independent of the will of the party'." (Mayne's Indian Penal Code, p. 467.)

" To constitute an attempt there must be an intention to commit a particular crime, a commencement of the commission, and an act done towards the commission . . . . Where a particular intent is charged, as constituting an attempt to commit a specific crime, it is not necessary that there should be any evidence of the intent besides the circumstances connected with the abortive act itself. But unless those circumstances, coupled with the other evidence (if any) establish, not only some criminal intent, but the particular criminal intent which has been charged, the prisoner must be acquitted." (*Ibidem*, p. 471.)

The view in the passage just cited from Mayne that the intent to be established must be the particular criminal intent charged is also expressed in a Canadian case, *R.* v. *Snyder*, cited in 14 English & Empire Digest, p. 106. " Prisoner made a bargain with B., who was set on by the military authorities to trap prisoner to convey four Austrians, named in the indictment, from Canada to U.S.A. by putting them across the Niagara River in a boat. Prisoner accepted money from B. for the promised service, and secreted the four men on his premises near the river. He intended to take the men across the river for the purpose mentioned in the indictment, and evidence from which the jury might properly conclude that if prisoner had not been arrested, he would have carried out that intention. *Held:* an attempt to commit a crime is an act done to commit that crime and forming part of a series of acts which would

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constitute its actual commission if it were not interrupted, and the bargain prisoner made with B., and his acts with reference to the four men, were overt acts forming part of such a series."

The distinction between preparation and attempt is well illustrated in two cases cited in the English & Empire Digest, Vol. 14, p. 106. In the first case (*R.* v. *Sharpe*) the accused had threatened to shoot S., had prepared a gun and loaded it, and then with it in his hand had gone in search of S., with intent to shoot him. It was held that this did not amount to an attempt to shoot S., presumably upon the ground that these acts were not a beginning of the commission of the offence. Had the accused gone one step further and lifted the gun to his shoulder, I think, he would have been guilty of an attempt, for that act is so closely connected with the offence of shooting as to be part of the commission, and could be done for no other purpose. The second case is *R.* v. *Robinson.* (1)

"A jeweller, who had insured his stock in trade against burglary, with the object of obtaining the policy money from the insurers, falsely represented to the police that a burglary had been committed on the premises and the jewellery stolen, in the hope that the police would make a report by which the insurers might be induced to pay; but before he had made any communication about the pretended burglary to the insurers the fraud was discovered and he was arrested. *Held:* on those facts he could not be convicted of any attempt to obtain money from the insurers by false pretences."

In accordance with the authorities I have cited to constitute an attempt there must be: (1) an intention to commit a specified offence; (2) an overt act: (*a*) directly connected with, tending to, and forming the beginning of the commission of the offence; (*b*) an act that could only have been done for the purpose of committing the specified offence; and (*c*) an act which if not frustrated would, if the offence could be committed, end in the commission of the specified offence. To constitute an attempt under section 354 of the Criminal Code the same ingredients are in my opinion required. In the present case there is no proof of intention other than the acts themselves, and these show, not an intention to steal, but an intention to commit an offence. The removing of the stones in front of one of the doors is an act not directly connected with the commission of the theft, but only remotely connected as an act preparatory to carrying the intention into execution. Had one of the appellants gone a step further and taken hold of a lamb, he could, in

(1) (1915 2 K.B. 342.

my view, be properly found guilty of an attempt to steal, because such act is part of the commission of the offence of theft and could have been intended for no other purpose.

For the reasons given I am of opinion that the acts of the appellants do not amount to an attempt to steal within the meaning of section 354 of the Code.

While the evidence against the appellants does not establish an attempt to steal lambs, it does establish an attempt to enter on the property of the complainant with intent to commit an offence punishable by the Criminal Code, and this amounts to the offence of Criminal Trespass. I think, therefore, that the conviction for an attempt to steal should be quashed, and in place thereof a conviction for criminal trespass should be entered upon the record.

Conviction of attempted larceny set aside and replaced by one of attempt to commit criminal trespass.