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R v Shivpuri

HOUSE OF LORDS

LORD HAILSHAM OF ST MARYLEBONE LC, LORD ELWYN-JONES, LORD SCARMAN, LORD BRIDGE OF HARWICH AND LORD MACKAY OF CLASHFERN

4, 24 FEBRUARY, 15 MAY 1986

Criminal law - Attempt - Impossible offence - Belief of accused that his acts constitute an offence - Impossible for accused to commit full offence - Accused attempting to deal with and harbour a substance he believed to be a prohibited drug - Substance not in fact a prohibited drug - Whether accused guilty of attempt to deal with and harbour prohibited drug - Customs and Excise Management Act 1979, s 170(1)(b) - Criminal Attempts Act 1981, s 1.

Customs and excise - Importation of prohibited goods - Knowingly concerned in fraudulent evasion of prohibition or restriction - Knowingly - Importation of drugs - Whether necessary for prosecution to prove defendant knew drugs were of class appropriate to offence charged - Customs and Excise Management Act 1979, s 170(1)(b).

The appellant was arrested by customs officers while in possession of a suitcase which he believed to contain prohibited drugs. After his arrest he told the officers that he was dealing in prohibited drugs. However, on analysis the substance in the suitcase was found to be not drugs but snuff or similarly harmless vegetable matter. The appellant was charged under s 1[a] of the Criminal Attempts Act 1981 with attempting to commit the offence of being knowingly concerned in dealing with and harbouring prohibited drugs, contrary to s 170(1)*(b)*[b] of the Customs and Excise Management Act 1979. At his trial the judge directed the jury that in proving that the appellant acted 'knowingly' the

[a] Section 1 is set out at p 342 *c* to *e*, post

[b] Section 170(1), so far as material, provides: '... if any person ... (*b*) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with [inter alia, goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force], and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods he shall be guilty of any offence under this section and may be arrested.'

prosecution did not have to prove that the appellant knew precisely what the prohibited goods were as long as he knew they were prohibited. He was convicted. He appealed, contending (i) that because the substance found in his possession was not a prohibited drug he could not be guilty of attempting to deal in or harbour prohibited drugs and therefore he had not done 'an act which is more than merely preparatory to the commission of the offence', as required by s 1(1) of the 1981 Act to constitute an attempt, because commission

of the actual offence was impossible, and (ii) that the trial judge had misdirected the jury when he stated that the appellant did not have to know precisely what the prohibited goods were, because there were different maximum penalties attaching to the offence of possessing prohibited drugs depending on which of the three classes of prohibited drugs created by the Misuse of Drugs Act 1971 the drug in question fell into, and therefore it had to be proved that the appellant knew that the drugs were of the class appropriate to the offence charged. The Court of Appeal dismissed his appeal. The appellant appealed to the House of Lords.

Held - The appeal would be dismissed for the followed reasons--

(1) On the true construction of s 1(1) of the 1981 Act a person was guilty of an attempt merely if he did an act which was more than merely preparatory to the commission of the offence which he intended to commit, even if the facts were such that the actual offence was impossible. Since the appellant had intended to commit the offence of dealing with and harbouring prohibited drugs, which was an offence to which s 1 of the 1981 Act applied, and since he had done acts which were more than merely preparatory to the commission of the intended offence, he had been rightly convicted (see p 336 *d e*, p 337 *c d j* to p 338 *b*, p 342 *f* to p 343 *a* and p 345 *c g h*, post); *Anderton v Ryan* [1985] 2 All ER 355 overruled.

(2) Irrespective of the different penalties attaching to offences connected with the importation of prohibited drugs the only mens rea necessary for proof of such offences was knowledge that the drugs were subject to a prohibition on their importation. Accordingly, the trial judge's direction that the appellant did not have to know precisely what the drugs were did not amount to a misdirection (see p 336 *d e*, p 337 *j* to p 338 *b*, p 340 *j*, p 341 *b c* and p 345 *g h*, post); *R v Hussain* [1969] 2 All ER 1117 approved.

Decision of the Court of Appeal [1985] 1 All ER 143 affirmed.

Notes

For attempts to commit an offence and acts constituting an attempt, see 11 *Halsbury's Laws* (4th edn) paras 63-65.

For the Misuse of Drugs Act 1971, see 41 *Halsbury's Statutes* (3rd edn) 878.

For the Customs and Excise Management Act 1979, s 170, see 13 *Halsbury's Statutes* (4th edn) 432.

For the Criminal Attempts Act 1981, s 1, see 12 ibid 846.

Cases referred to in opinions

Anderton v Ryan [1985] 2 All ER 355, [1985] AC 560, [1985] 2 WLR 23, HL.

Haughton v Smith [1973] 3 All ER 1109, [1975] AC 476, [1974] 2 WLR 1, HL.

Hyam v DPP [1974] 2 All ER 41, [1975] AC 55, [1974] 2 WLR 607, HL.

R v Collins (1864) 9 Cox CC 497, CCR.

R v Courtie [1984] 1 All ER 740, [1984] AC 463, [1984] 2 WLR 330, HL.

R v Hennessey (1978) 68 Cr App R 419, CA.

R v Hussain [1969] 2 All ER 1117, [1969] 2 QB 567, [1969] 3 WLR 134, CA.

Appeal

Pyare Shivpuri appealed with leave of the Court of Appeal, Criminal Division, granted on 13 November 1984, against the decision of that court (Ackner LJ, Stuart Smith and Leggatt JJ) ([1985] 1 All ER 143, [1985] QB 1029) given on 5 November 1984 whereby it (i) dismissed the appellant's appeal against conviction in the Crown Court at Reading before his Honour Judge Pigot QC and a jury on 23 February 1984 of attempting to be

knowingly concerned in dealing with a controlled drug, the importation of which was prohibited and of attempting to be knowingly concerned in harbouring a controlled drug, the importation of which was prohibited, both offences being contrary to s 1(1) of the Criminal Attempts Act 1981 and s 170(1)*(b)* of the Customs and Excise Management Act 1979, (ii) quashed the concurrent sentences of three years' imprisonment passed in respect of each count and substituted therefor concurrent sentences of two years' imprisonment and (iii) certified that a point of law of general public importance was involved, namely whether a person committed an offence under s 1 of the 1981 Act where, if the facts were as that person believed them to be, the full offence would have been committed by him but where on the true facts the offence which that person set out to commit was in law impossible, eg because the substance imported and believed to be heroin was not heroin but a harmless substance. The facts are set out in the opinion of Lord Bridge.

David Christie for the appellant.

Alan Suckling QC and Tony Docking for the Crown.

Their Lordships took time for consideration

15 May 1986. The following opinions were delivered.

LORD HAILSHAM OF ST MARYLEBONE LC.

My Lords, I have had the advantage of reading in draft the speech about to be delivered (and now available in print) by my noble and learned friend Lord Bridge. Save for one relatively minor point I agree with it in its entirety and would dispose of this appeal as he proposes and for the reasons which he gives. I add a few remarks of my own for reasons which will appear.

The first comment I make is that I believe that this is the first time that the 1966 Practice Statement *(Note* [1966] 3 All ER 77, [1966] 1 WLR 1234) has been applied to a decision as recent as that in *Anderton v Ryan* [1985] 2 All ER 355, [1985] AC 560. Ordinarily I might have been loath to take so bold a step, even though I may have entertained privately the thought that such a case so recently and so carefully considered and supported by two such powerfully reasoned judgments was nevertheless seriously open to question. Quite clearly a departure from recent decisions by means of the 1966 Practice Statement has dangers of its own which are too obvious to need elaboration. But there is obviously much to be said for the view about to be expressed by my noble and learned friend that 'If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better'. This consideration must be of all the greater force when the error is, as in the present case, to be corrected by a palinode composed by one of the original au-

thors of the majority judgment. I also agree with my noble and learned friend that in the very nature of the present case it would seem impossible that anyone could have acted to his detriment in reliance on the law as stated in the decision departed from. Thirdly, as one of the authors of the decision in *Haughton v Smith* [1973] 3 All ER 1109, [1975] AC 476, I must say that I had hoped that my opinion in that case would be read by Parliament as a cri de coeur, at least on my part, that Parliament should use its legislative power to rescue the law of criminal attempts from the subtleties and absurdities to which I felt that, on existing premises, it was doomed to reduce itself, and, after long discussions with the late Lord Reid, I had reached the conclusion that the key to the anomalies arose from the various kinds of circumstance to which the word 'attempt' can be legitimately applied, and that the road to freedom lay in making an inchoate crime of this nature depend on a prohibited act (the so-called, but ineptly called, 'actus reus') amounting to something more than a purely preparatory act plus an intent (as distinct from an attempt) to carry the act through to completion. When the Criminal Attempts Act 1981 was carried into law, and I read s 6 which abolished altogether the common law offence except as regards acts done before the commencement of the Act, I was happily under the impression that my hopes had been realised, and that my carefully prepared speech in *Haughton v Smith* would henceforth be relegated to the limbo reserved

for the discussions of medieval schoolmen. It was therefore with something like dismay that I learned that the ghost of my speech had risen from what I had supposed to be its tomb and was still clanking its philosophical chains about the field, and that the new Act had formed a tilting yard for a joust of almost unexampled ferocity between two of the most distinguished professors of English criminal law in the United Kingdom.

I must add, however, that, even had I not been able to follow my noble and learned friend in interring *Anderton v Ryan* by using the 1966 Practice Statement, I would still have dismissed the instant appeal by distinguishing its facts from that case. Shortly, my reasoning would have been that the appellant was guilty on the clear wording of s 1(1) and (2) of the 1981 Act and that no recourse was therefore necessary to the wording of s 1(3), which if so would be irrelevant.

I would have arrived at this conclusion by asking myself three simple questions to which the answers could only be made in one form. They are: *Question 1*. What was the intention of the appellant throughout? *Answer*. His intention throughout was to evade and defeat the customs authorities of the United Kingdom. He had no other intention. His motive was gain (the bribe of £1,000). But as I pointed out in *Hyam v DPP* [1974] 2 All ER 41 at 51, [1975] AC 55 at 73 motive is not the same thing as intention. *Question 2*. Is the knowing evasion of the United Kingdom customs in the manner envisaged in the appellant's intent an offence to which s 1 of the 1981 Act applies? *Answer*. Yes: see s 1(4). *Question 3*. Did the appellant do an act which was more than preparatory to the commission of the offence? *Answer*. Yes, for the reasons stated in the relevant paragraphs of my noble and learned friend Lord Bridge's speech.

In this connection I do not feel it would have been necessary to invoke the doctrine of dominant and subordinate intention referred to by my noble and learned friend. The *sole* intent of the instant appellant from start to finish was to defeat the customs prohibition. In *Anderton v Ryan* the only intention of Mrs Ryan was to buy a particular video cassette recorder at a knock-down price, and the fact that she believed it to be stolen formed no part of that intention. It was a belief, assumed to be false and not an intention at all. It was a false belief as to a state of fact, and, if it became an intention, it was only the result of the deeming provisions of s 1(3). Whether or not *Anderton v Ryan* was correctly decided, one has to go to s 1(3) to decide whether Mrs Ryan had committed a criminal attempt under the Act as the result of her belief, assumed to be false, that the video cassette recorder had in fact been stolen. Similarly, to my mind, the only intention of the lustful youth postulated by my noble and learned friends Lord Roskill and Lord Bridge by way of example in *Anderton v Ryan* was to have carnal connection with a particular girl. One has to go to s 1(3) to discover whether or not a criminal attempt had been committed as the result of his false belief that she was under age.

By way of conclusion I have to say that I think it a pity that, as it emerged from Parliament, the 1981 Act departed from the draft Bill attached to the Law Commission Report, Criminal Law: Attempt and Impossibility in

Relation to Attempt, Conspiracy and Incitement (1980) (Law Com no 102), which might have saved a lot of trouble. In particular the distinction which I have sought to draw above between the facts in *Anderton v Ryan* and the instant appeal would have been patently obvious and not to some extent controversial. In the second place it may perhaps have been inevitable, but is none the less unusual, that, in defining the prohibited act in s 1, the draftsman in both cases was driven to define the act by reference to an intent, instead, as is more usual in criminal jurisprudence, of defining the criminal intent by reference to a separately defined prohibited act. It is this feature of s 1 which, I believe, has caused the trouble, and once this road has been followed it was I believe impossible to avoid the disadvantages pointed out in para 2.97 of the Law Commission's report to which my noble and learned friend has drawn attention.

In the circumstances I am happy that my noble and learned friend's conclusion has enabled the House to arrive at its destination without resorting to these, possibly excessively sophisticated, subtleties.

LORD ELWYN-JONES.

My Lords, I would for my part have been content to dismiss

this appeal by distinguishing its facts from *Anderton v Ryan* [1985] 2 All ER 355, [1985] AC 560 as my noble and learned friend the Lord Chancellor has done in his speech, which I have had the advantage of reading in draft.

Having now also had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge, with which I agree, I would dismiss the appeal as he proposes and for the reasons which he gives.

LORD SCARMAN.

My Lords, I have had the advantage of studying in draft the speech to be delivered by my noble and learned friend Lord Bridge. I agree with it. For the reasons which he gives I would dismiss the appeal, answering the certified question as he proposes.

LORD BRIDGE OF HARWICH.

My Lords, on 23 February 1984 the appellant was convicted at the Crown Court at Reading of two attempts to commit offences. The offences attempted were being knowingly concerned in dealing with (count 1) and in harbouring (count 2) a class A controlled drug, namely diamorphine, with intent to evade the prohibition of importation imposed by s 3(1) of the Misuse of Drugs Act 1971, contrary to s 170(1)*(b)* of the Customs and Excise Management Act 1979. On 5 November 1984 the Court of Appeal, Criminal Division ([1985] 1 All ER 143, [1985] QB 1029) dismissed his appeals against conviction but certified that a point of law of general public importance was involved in the decision and granted leave to appeal to your Lordships' House. The certified question granted on 13 November 1984 reads:

> 'Does a person commit an offence under Section 1, Criminal Attempts Act, 1981, where, if the facts were as that person believed them to be, the full offence would have been committed by him, but where on the true facts the offence which that person set out to commit was in law impossible, e.g., because the substance imported and believed to be heroin was not heroin but a harmless substance?'

The facts plainly to be inferred from the evidence, interpreted in the light of the jury's guilty verdicts, may be shortly summarised. The appellant, on a visit to India, was approached by a man named Desai, who offered to pay him £1,000 if, on his return to England, he would receive a suitcase which a courier would deliver to him containing packages of drugs which the appellant was then to distribute according to instructions he would receive. The suitcase was duly delivered to him in Cambridge. On 30 November 1982, acting on instructions, the appellant went to Southall station to deliver a package of drugs to a third party. Outside the station he and the man he had met by appointment were arrested. A package containing a powdered substance was found in the appellant's shoulder bag. At the appellant's flat in Cambridge, he produced to customs officers the suitcase from which the lining had been ripped out and the remaining packages of the same powdered substance. In answer to questions by customs officers and in a long written statement the appellant made what amounted to a full confession of having played his part, as described, as recipient and distributor of illegally imported drugs. The appellant believed the drugs to be either heroin or cannabis. In due course the powdered substance in the several packages was scientifically analysed and found not to be a controlled drug but snuff or some similar harmless vegetable matter.

Before examing the issue arising from the certified question, it will be convenient to consider an entirely separate ground of appeal, which was not raised in the Court of Appeal but which your Lordships permitted counsel for the appellant to argue before the Appellate Committee. Complaint is made of the following passage in the summing-up of the trial judge, his Honour Judge Pigot QC. In discussing the meaning of the words 'knowingly concerned' in s 170(1)*(b)* of the 1979 Act he said:

> 'The prosecution must prove that the defendants did what they did knowingly. That is to say, it must be proved that they knew the goods were prohibited goods and had been imported into the United Kingdom, although, in the context of this case, they need not know precisely what the prohibited goods were, as long as they

> knew they were prohibited. There is evidence for you to consider in this case that Mr Shivpuri particularly knew the nature of the substance. It is a matter for you to decide whether you are sure that he knew or believed the substance was heroin or, in his own expression, dried hash or cannabis (which is also prohibited) or some other prohibited drug. That is what "knowingly" means in the context of this case.'

The attack on this passage has two limbs. The first criticises the direction as erroneous in law and raises a point of law of undoubted general importance although it is doubtful whether, in the circumstances of the present case, the point is more than academic. The second criticises the direction on a narrow ground solely with reference to its applicability to the facts of the present case.

In using the words 'they need not know precisely what the prohibited goods were, as long as they knew they were prohibited' Judge Pigot was expounding the law to the jury exactly as it was laid down by the Court of Appeal in *R v Hussain* [1969] 2 All ER 1117, [1969] 2 QB 567 in relation to offences under s 304 of the Customs and Excise Act 1952 connected with the importation of prohibited goods. In that case the appellant had been convicted of being knowingly concerned in the fraudulent evasion of the prohibition of the importation of cannabis. It was submitted on his behalf that proof of knowledge on his part that the goods being smuggled were cannabis was part of the obligation of the prosecution and, since the chairman had directed that it was not necessary for the accused to know precisely the nature of the goods, there was a misdirection. Delivering the judgment of the court Widgery LJ said ([1969] 2 All ER 1117 at 1119, [1969] 2 QB 567 at 571-572):

> 'The court is not prepared to accept that submission. It seems perfectly clear that the word "knowingly" in s. 304 is concerned with knowing that a fraudulent evasion of a prohibition in respect of goods is taking place. If, therefore, the accused knows that what is on foot is the evasion of a prohibition against importation and he knowingly takes part in that operation, it is sufficient to justify his conviction, even if he does not know precisely what kind of goods are being imported. It is, of course, essential that he should know that the goods which are being imported are goods subject to a prohibition. It is essential he should know that the operation with which he is concerning himself is an operation designed to evade that prohibition and evade it fraudulently. But it is not necessary that he should know the precise category of the goods the importation of which has been prohibited.'

The submission made by counsel for the appellant is that this case and *R v Hennessey* (1978) 68 Cr App R 419 which followed it should now be overruled. The basis for the submission is that s 170 of the 1979 Act creates three distinct offences in relation to the importation of prohibited goods according to the category of goods in relation to which the offence was committed. The effect of s 170(3) and (4) and Sch 1 is that the commission of any offence under s 170(1) or (2) in relation to the importation of drugs of class A or class B under the 1971 Act attracts a maximum sentence of 14 years' imprisonment; the commission of any such offence in relation to the importation of drugs of class C attracts a maximum sentence of 5 years' imprisonment; and the commission of any such offence in relation to any other category of prohibited goods attracts a maximum sentence of 2 years' imprisonment. It follows from this, applying the reasoning in *R v Courtie* [1984] 1 All ER 740, [1984] AC 463, that each of the three distinct offences has different ingredients and, leaving aside considerations of impossibility arising under the Criminal Attempts Act 1981, part of the actus reus of the offence which must be proved in each case is the importation, actual or attempted, of goods which were in fact of the appropriate category to sustain the offence charged. So far the argument seems to me irrefutable and is not challenged by the Crown. It is the next step in the argument which is the critical one. If each of the three offences involves proof of a different element as part of the actus reus, sc importation of the appropriate category of prohibited goods, it follows, so it is submitted, that 'knowingly', wherever it appears in s 170(1) and (2) connotes a corresponding mens rea, sc knowledge of the importation of goods in the appropriate

category. I recognise the force of this submission. The point may be put in the form of a rhetorical question. Can it be supposed that Parliament intended that the mens rea appropriate to an offence carrying a maximum sentence of 2 years' imprisonment should equally be sufficient to sustain a conviction for an offence carrying a maximum sentence of 14 years' imprisonment? On the other hand, if the submission for the appellant is right, the task of the prosecution in proving an offence in relation to the importation of prohibited drugs would in many cases be rendered virtually impossible, more particularly since the enactment of the Controlled Drugs (Penalties) Act 1985, which creates a separate category of offences in relation to the importation of drugs of class A, which now carry a maximum sentence of life imprisonment. By Sch 2 to the 1971 Act there are about 100 different drugs listed in class A, 13 in class B and 10 in class C. An educated layman would know the names of no more than a handful of these: cocaine, diamorphine, morphine, opium and perhaps a few others in class A; amphetamine, cannabis and codeine in class B; none that I recognise in class C. If a man were accused of being knowingly concerned in the importation of methyldesorphine (class A), what would a jury make of his defence that he believed it to be methylphenidate (class B) or methaqualone (class C)?

Fortunately the legislative history provides a clear resolution of these problems. Under s 304 of the 1952 Act the offences which are now the subject of s 170 of the 1979 Act were uniformly punishable by a maximum of 2 years' imprisonment 'save where, in the case of an offence in connection with a prohibition or restriction, a penalty is expressly provided for that offence by the enactment or other instrument imposing the prohibition or restriction'. No special penalty was imposed by any statute for offences under s 304 of the 1952 Act in connection with the importation of prohibited drugs until the Dangerous Drugs Act 1967. Section 7(1) of the 1967 Act increased from 2 to 10 years the maximum sentence of imprisonment which could be imposed for offences under s 304 of the 1952 Act in connection with the importation of certain drugs, including cannabis, prohibited by the Dangerous Drugs Act 1965. It was against this statutory background that *R v Hussain* [1969] 2 All ER 1117, [1969] 2 QB 567 was decided.

The 1971 Act repealed the earlier legislation and enacted a new and comprehensive code intended, one may reasonably suppose, to arm the courts with all the criminal sanctions they would need to counter the growing drugs problem. The Act created, inter alia, the offence of possessing controlled drugs: s 5(2). Different maximum penalties attached to this offence according to whether the drug the subject of the offence was of class A, B or C: s 25 and Sch 4. Parliament clearly appreciated the difficulty they would create if it

were necessary for the prosecution to prove, on a charge of possession of a drug of a particular class, not only the fact of possession of a drug of that class, but also guilty knowledge that the drug was of that class. Section 28(3) provides:

> 'Where in any proceedings for an offence to which this s applies [which includes an offence under s 5(2)] it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused--*(a)* shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but *(b)* shall be acquitted thereof--(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug ... '

Thus, on a charge of possessing a class A drug (maximum 7 years) and on proof that the drug in possession of the accused was in fact of class A, it will be no defence for him to persuade the jury that he believed it to be of class B (maximum 5 years) or class C (maximum 2 years). In other words the only mens rea required for the offence of possessing a drug in any specified class is knowledge that it was a controlled drug. I have chosen the offence of possession to illustrate the point, but s 28 also applies to a number

of other offences where, without such a provision as is found in s 28(3), the almost insurmountable difficulty, to which I have earlier alluded, of proving the appropriate guilty knowledge, would arise. By s 26, on the other hand, the maximum sentences for offences under s 304 of the 1952 Act connected with the importation of prohibited goods were raised to the limits which we still find in s 170 of and Sch 1 to the 1979 Act, viz 14 years in relation to drugs of class A or class B, 5 years in relation to drugs of class C, and these drug-related importation offences are not made subject to the provisions of s 28(3) or to any other provision to the like effect. The only possible explanation for this is that the 1971 Act was drafted on the footing that the decision in *R v Hussain* made any such provision unnecessary. Irrespective of the different penalties attached to offences in connection with the importation of different categories or prohibited goods, *R v Hussain* established that the only mens rea necessary for proof of any such offence was knowledge that the goods were subject to a prohibition on importation. Had it been decided otherwise, as the appellant submits it should have been, it is surely inconceivable that Parliament, in the 1971 Act, would not have made provision such as that which we see in s 28(3) applicable to drug-related offences connected with importation. It follows, in my opinion, that the decision in *R v Hussain* has effectively been adopted and indorsed by the legislature and thus remains good law.

As I have already said, the criticism of the passage quoted from the judge's summing up based on the submission that *R v Hussain* and *R v Hennessey* (1978) 68 Cr App R 419 ought to be overruled is in a sense academic, in that the Crown's case against the appellant depended, not on the actual character of the goods in the importation of which the appellant had been concerned, but on what the appellant believed the character of those goods to be. The narrower criticism of the judge's direction concentrates on that aspect of the case. In such a case, it is submitted, if the prosecution can establish an attempt to commit an offence at all on the basis of the appellant's mistaken belief, the attempted offence under s 170 of the 1979 Act can only be related to the attempted importation of a drug of class A or class B, thus bringing it within the category of offences attracting a maximum penalty of 14 years' imprisonment, if the appellant's mistaken belief was that it was a drug of class A or class B. From this it follows, the submission continues, that it was a misdirection to tell the jury that they should convict the appellant if they were sure 'that he knew or believed the substance was heroin or, in his own expression, dried hash or cannabis (which is also prohibited) or some other prohibited drug'. I think this submission is strictly correct and that the words 'or some other prohibited drug' amounted to a technical misdirection. However, I am satisfied it cannot in any way have misled the jury or diverted them from the only issue which, on the evidence, they had to decide. The appellant's defence, which the jury not surprisingly rejected, was that he had himself tested the powdered substance in question, both before and after importation, and found it to be harmless. The case for the Crown depended on his own admissions. These supported the case that at all material times until after his arrest the appellant believed the imported packages to contain either heroin or cannabis. No other drug was ever mentioned. The misdirection

occasioned no miscarriage of justice and, so far as this point is concerned, it is a case for the application of the proviso to s 2(1) of the Criminal Appeal Act 1968.

The certified question depends on the true construction of the Criminal Attempts Act 1981. That Act marked an important new departure since, by s 6, it abolished the offence of attempt at common law and substituted a new statutory code governing attempts to commit criminal offences. It was considered by your Lordships' House last year in *Anderton v Ryan* [1985] 2 All ER 355, [1985] AC 560 after the decision in the Court of Appeal which is the subject of the present appeal. That might seem an appropriate starting point from which to examine the issues arising in this appeal. But your Lordships have been invited to exercise the power under the 1966 Practice Statement *(Note* [1966] 3 All ER 77, [1966] 1 WLR 1234) to depart from the reasoning in that decision if it proves necessary to do so in order to affirm the convictions appealed against in the instant case. I was not only a party to the decision in *Anderton v Ryan*, I was also the author of one of the two opinions approved by the majority which must be taken to express the

House's ratio. That seems to me to afford a sound reason why, on being invited to re-examine the language of the statute in its application to the facts of this appeal, I should initially seek to put out of mind what I said in *Anderton v Ryan*. Accordingly, I propose to approach the issue in the first place as an exercise in statutory construction, applying the language of the Act to the facts of the case, as if the matter were res integra. If this leads me to the conclusion that the appellant was not guilty of any attempt to commit a relevant offence, that will be the end of the matter. But, if this initial exercise inclines me to reach a contrary conclusion, it will then be necessary to consider whether the precedent set by *Anderton v Ryan* bars that conclusion or whether it can be surmounted either on the ground that the earlier decision is distinguishable or that it would be appropriate to depart from it under the 1966 Practice Statement.

The 1981 Act provides by s 1:

> '(1) 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.
>
> (2) 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.
>
> (3) In any case where--*(a)* apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but *(b)* if the facts of the case had been as he believed them to be, his intention would be so regarded, then, for the purposes of subsection (1) above, he shall be regarded as having had an intent to commit that offence.
>
> (4) This section applies to any offence which, if it were completed, would be triable in England and Wales as an indictable offence, other than--*(a)* conspiracy (at common law or under section 1 of the Criminal Law Act 1977 or any other enactment); *(b)* aiding, abetting, counselling, procuring or suborning the commission of an offence; *(c)* offences under section 4(1) (assisting offenders) or 5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the Criminal Law Act 1967.'

Applying this language to the facts of the case, the first question to be asked is whether the appellant intended to commit the offences of being knowingly concerned in dealing with and harbouring drugs of class A or class B with intent to evade the prohibition on their importation. Translated into more homely language the question may be rephrased, without in any way altering its legal significance, in the following terms: did the appellant intend to receive and store (harbour) and in due course pass on to third parties (deal with) packages of heroin or cannabis which he knew had been smuggled into England from India? The answer is plainly Yes, he did. Next, did he, in relation to each offence, do an act which was more than merely preparatory to the commission of the offence? The act relied on in relation to harbouring was the receipt and retention of the packages found in the lining of the suitcase. The act relied on in relation to dealing was the meeting at Southall station with the intended recipient of one of the packages. In each case the act was clearly

more than preparatory to the commission of the *intended* offence; it was not and could not be more than merely preparatory to the commission of the *actual* offence, because the facts were such that the commission of the actual offence was impossible. Here then is the nub of the matter. Does the 'act which is more than merely preparatory to the commission of the offence' in s 1(1) of the 1981 Act (the actus reus of the statutory offence of attempt) require any more than an act which is more than merely preparatory to the commission of the offence which the defendant intended to commit? Section 1(2) must surely indicate a negative answer if it were otherwise, whenever the facts were such that the commission of the actual offence was impossible, it would be impossible to prove an act more than merely preparatory to the commission of that offence and sub-ss (1) and (2) would contradict each other.

This very simple, perhaps over-simple, analysis leads me to the provisional conclusion that the appellant was rightly convicted of the two offences of attempt with which he

was charged. But can this conclusion stand with *Anderton v Ryan*? The appellant in that case was charged with an attempt to handle stolen goods. She bought a video recorder believing it to be stolen. On the facts as they were to be assumed it was not stolen. By a majority the House decided that she was entitled to be acquitted. I have re-examined the case with care. If I could extract from the speech of Lord Roskill or from my own speech a clear and coherent principle distinguishing those cases of attempting the impossible which amount to offences under the statute from those which do not, I should have to consider carefully on which side of the line the instant case fell. But I have to confess that I can find no such principle.

Running through Lord Roskill's speech and my own in *Anderton v Ryan* is the concept of 'objectively innocent' acts which, in my speech certainly, are contrasted with 'guilty acts'. A few citations will make this clear. Lord Roskill said ([1985] 2 All ER 355 at 364, [1985] AC 560 at 580):

> 'My Lords, it has been strenuously and ably argued for the respondent that these provisions involve that a defendant is liable to conviction for an attempt even where his actions are innocent but he erroneously believes facts which, if true, would make those actions criminal, and further, that he is liable to such conviction whether or not in the event his intended course of action is completed.'

He proceeded to reject the argument. I referred to the appellant's purchase of the video recorder and said ([1985] 2 All ER 355 at 366, [1985] AC 560 at 582): 'Objectively considered, therefore, her purchase of the recorder was a perfectly proper commercial transaction.'

A further passage from my speech stated ([1985] 2 All ER 355 at 366, [1985] AC 560 at 582-583):

> 'The question may be stated in abstract terms as follows. Does s 1 of the 1981 Act create a new offence of attempt where a person embarks on and completes a course of conduct, which is objectively innocent, solely on the ground that the person mistakenly believes facts which, if true, would make that course of conduct a complete crime? If the question must be answered affirmatively it requires convictions in a number of surprising cases: the classic case, put by Bramwell B in *R v Collins* (1864) 9 Cox CC 497 at 498, of the man who takes away his own umbrella from a stand, believing it not to be his own and with intent to steal it; the case of the man who has consensual intercourse with a girl over 16 believing her to be under that age; the case of the art dealer who sells a picture which he represents to be and which is in fact a genuine Picasso, but which the dealer mistakenly believes to be a fake. The common feature of all these cases, including that under appeal, is that the mind alone is guilty, the act is innocent.'

I then contrasted the case of the man who attempts to pick the empty pocket, saying ([1985] 2 All ER 355 at 367, [1985] AC 560 at 583):

> 'Putting the hand in the pocket is the guilty act, the intent to steal is the guilty mind, the offence is appropriately dealt with as an attempt, and the impossibility of committing the full offence for want of anything in the pocket to steal is declared by [sub-s (2)] to be no obstacle to conviction.'

If we fell into error, it is clear that our concern was to avoid convictions in situations which most people, as a matter of common sense, would not regard as involving criminality. In this connection it is to be regretted that we did not take due note of para 2.97 of the Law Commission Report, Criminal Law: Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement (1980) (Law Com no 102) which preceded the enactment of the 1981 Act, which reads:

> 'If it is right in principle that an attempt should be chargeable even though the crime which it is sought to commit could not possibly be committed, we do not think that we should be deterred by the consideration that such a change in our law

> would also cover some extreme and exceptional cases in which a prosecution would be theoretically possible. An example would be where a person is offered goods at such a low price that he believes that they are stolen, when in fact they are not; if he actually purchases them, upon the principles which we have discussed he would be liable for an attempt to handle stolen goods. Another case which has been much debated is that raised in argument by Bramwell B. in *Reg. v. Collins*. If A takes his own umbrella, mistaking it for one belonging to B and intending to steal B's umbrella, is he guilty of attempted theft? Again, on the principles which we have discussed he would in theory be guilty, but in neither case would it be realistic to suppose that a complaint would be made or that a prosecution would ensue.'

The prosecution in *Anderton v Ryan* itself falsified the Commission's prognosis in one of the 'extreme and exceptional cases'. It nevertheless probably holds good for other such cases, particularly that of the young man having sexual intercourse with a girl over 16, mistakenly believing her to be under that age, by which both Lord Roskill and I were much troubled.

However that may be, the distinction between acts which are 'objectively innocent' and those which are not is an essential element in the reasoning in *Anderton v Ryan* and the decision, unless it can be supported on some other ground, must stand or fall by the validity of this distinction. I am satisfied on further consideration that the concept of 'objective innocence' is incapable of sensible application in relation to the law of criminal attempts. The reason for this is that any attempt to commit an offence which involves 'an act which is more than merely preparatory to the commission of the offence' but which for any reason fails, so that in the event no offence is committed, must ex hypothesi, from the point view of the criminal law, be 'objectively innocent'. What turns what would otherwise, from the point of view of the criminal law, be an innocent act into a crime is the intent of the actor to commit an offence. I say 'from the point of view of the criminal law' because the law of tort must surely here be quite irrelevant. A puts his hand into B's pocket. Whether or not there is anything in the pocket capable of being stolen, if A intends to steal his act is a criminal attempt; if he does not so intend his act is innocent. A plunges a knife into a bolster in a bed. To avoid the complication of an offence of criminal damage, assume it to be A's bolster. If A believes the bolster to be his enemy B and intends to kill him, his act is an attempt to murder B; if he knows the bolster is only a bolster, his act is innocent. These considerations lead me to the conclusion that the distinction sought to be drawn in *Anderton v Ryan* between innocent and guilty acts considered 'objectively' and independently of the state of mind of the actor cannot be sensibly maintained.

Another conceivable ground of distinction which was to some extent canvassed in argument, both in *Anderton v Ryan* and in the instant case, though no trace of it appears in the speeches in *Anderton v Ryan*, is a distinction which would make guilt or innocence of the crime of attempt in a case of mistaken belief dependent on what, for want of a better phrase, I will call the defendant's dominant intention. According to the theory necessary to sustain this distinction, the appellant's dominant intention in *Anderton v Ryan* was to buy a cheap video recorder; her belief that it was stolen was merely incidental. Likewise in the hypothetical case of attempted unlawful sexual intercourse, the young man's dominant intention was to have intercourse with the particular girl; his mistaken belief that she was under 16 was merely incidental. By contrast, in the instant case the appellant's dominant intention was to receive and distribute illegally imported heroin or cannabis.

While I see the superficial attraction of this suggested ground of distinction, I also see formidable practical difficulties in its application. By what test is a jury to be told that a defendant's dominant intention is to be

recognised and distinguished from his incidental but mistaken belief? But there is perhaps a more formidable theoretical difficulty. If this ground of distinction is relied on to support the acquittal of the appellant in *Anderton v Ryan*, it can only do so on the basis that her mistaken belief that the video recorder was stolen played no significant part in her decision to buy it and therefore she may be

acquitted of the intent to handle stolen goods. But this line of reasoning runs into head-on collision with s 1(3) of the 1981 Act. The theory produces a situation where, apart from the subsection, her intention would not be regarded as having amounted to any intent to commit an offence. Section 1(3)*(b)* then requires one to ask whether, if the video recorder had in fact been stolen, her intention would have been regarded as an intent to handle stolen goods. The answer must clearly be Yes, it would. If she had bought the video recorder knowing it to be stolen, when in fact it was, it would have availed her nothing to say that her dominant intention was to buy a video recorder because it was cheap and that her knowledge that it was stolen was merely incidental. This seems to me fatal to the dominant intention theory.

I am thus led to the conclusion that there is no valid ground on which *Anderton v Ryan* can be distinguished. I have made clear my own conviction, which as a party to the decision (and craving the indulgence of my noble and learned friends who agreed in it) I am the readier to express, that the decision was wrong. What then is to be done? If the case is indistinguishable, the application of the strict doctrine of precedent would require that the present appeal be allowed. Is it permissible to depart from precedent under the 1966 Practice Statement *Note* ([1966] 3 All ER 77, [1966] 1 WLR 1234) notwithstanding the especial need for certainty in the criminal law? The following considerations lead me to answer that question affirmatively. Firstly, I am undeterred by the consideration that the decision in *Anderton v Ryan* was so recent. The 1966 Practice Statement is an effective abandonment of our pretention to infallibility. If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better. Secondly, I cannot see how, in the very nature of the case, anyone could have acted in reliance on the law as propounded in *Anderton v Ryan* in the belief that he was acting innocently and now find that, after all, he is to be held to have committed a criminal offence. Thirdly, to hold the House bound to follow *Anderton v Ryan* because it cannot be distinguished and to allow the appeal in this case would, it seems to me, be tantamount to a declaration that the 1981 Act left the law of criminal attempts unchanged following the decision in *Haughton v Smith* [1973] 3 All ER 1109, [1975] AC 476. Finally, if, contrary to my present view, there is a valid ground on which it would be proper to distinguish cases similar to that considered in *Anderton v Ryan*, my present opinion on that point would not foreclose the option of making such a distinction in some future case.

I cannot conclude this opinion without disclosing that I have had the advantage, since the conclusion of the argument in this appeal, of reading an article by Professor Glanville Williams entitled 'The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodies?' [1986] CLJ 33. The language in which he criticises the decision in Anderton v Ryan is not conspicuous for its moderation, but it would be foolish, on that account, not to recognise the force of the criticism and churlish not to acknowledge the assistance I have derived from it.

I would answer the certified question in the affirmative and dismiss the appeal.

LORD MACKAY OF CLASHFERN.

My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Hailsham LC and Lord Bridge. I agree with the disposal of this appeal proposed by my noble and learned friend Lord Bridge. On the relatively minor point referred to in the speech of the Lord Chancellor in which he differs from Lord Bridge I agree with the Lord Chancellor's view. Otherwise I agree with the reasons given by my noble and learned friend Lord Bridge.

Appeal dismissed.

Solicitors: Francis & Co, Cambridge (for the appellant); Solicitor for the Customs and Excise.

Mary Rose Plummer Barrister.