The law of attempts and s.170(2) CEMA 1979

Introduction and overview

A statutory attempt under s.1 of the Criminal Attempts Act 1981, and an "attempt at evasion" under s.170(2) of the Customs and Excise Management Act 1979, are similar in nature but they are certainly not the same. Offences under s.170(2) are substantive offences that may be committed in one of two ways, namely, by 'evading' or 'attempting to evade' a prohibition/restriction on importation/exportation of goods. It is usually appropriate to adopt the CAA 1981 definition of "attempt" if the accused is charged with an "attempt at evasion" under s.170(2). On such a charge, it is probably only necessary for the prosecution to prove that the accused intended to evade the importation/exportation of prohibited or restricted goods of some kind, but where the charge is one of attempt under the 1981 Act to contravene s.170 CEMA, the prosecution is required to prove that the defendant intended to commit the crime i.e. to cause the actus reus of the offence, and therefore the type of goods which the defendant intended to import/export might be a material circumstance. The offence of an "attempt at evasion" under s.170(2) is sufficiently wide to catch those who take steps to evade a statutory provision in connection with prohibited or restricted goods that did exist but which were seized/lost prior to importation. But where, from the moment the defendant took steps to contravene s.170, no prohibited or restricted goods existed (e.g. where the defendant was a victim of a trick and only an innocuous substance existed) the safest course is for the defendant to be charged with a statutory attempt under the CAA 1981.

Not all attempts in English law are subject to the Criminal Attempts Act 1981

1. In an interesting short article concerning the law of attempts in Jersey,[1] Stephen Pallot[2] remarks (emphasis added):

   "….existing local statutes do often make provision regarding attempts. For example, offences relating to importation of drugs comprehend knowingly being concerned in carrying, removing, handling, keeping or concealing or in any manner dealing with any goods and, in relation to evasion of duty, any attempt at evasion of duty and so on. Thus activity involving attempt is in this instance already an offence….As stated, English law is governed by the Criminal Attempts Act 1981."

2. That last statement is generally true, but there might be an exception. Section 170(2) of the Customs and Excise Management Act 1979 makes it an offence to be "in any way knowingly concerned in any fraudulent evasion or *attempt at evasion* - (a) of any duty chargeable on the goods; (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or (c) of any provision of the Customs and Excise Acts 1979 applicable to the goods".[3]

3. It is doubtful that the subsection is subject to the provisions of the Criminal Attempts Act 1981 but in practice, the courts of England and Wales tend to adopt the statutory definition of attempt as it appears in section 1 of the 1981 Act for the purposes of s.170(2) [4]: see *Qadir and Khan* (unreported, Court of Appeal, Friday 25th July 1997).

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1 *The Law Of Attempt In Relation To Crimes, Délits And Contraventions* (June 2005); Jersey Legal Information Board: http://www.jerseylegalinfo.je/publications/jerseylawreview/June99/shorter_articles_and_notes.aspx.

2 Steven Pallot is an advocate of the Royal Court, and a legal adviser in the Law Officers' Department, Jersey.

3 Section 170 is set out fully below.

4 Section1(1) CAA 1981 provides:
1(1)"If, with intent to commit an offence to which this section applies, a person does an act which is more than merely

4. It is not entirely clear why the offence of "attempt at evasion" under section 170(2) CEMA was not made subject to the provisions of the CAA 1981 [see s.3]. Oversight apart, one explanation is that by 1981 it was clear that offences under s.170 CEMA are sufficiently widely drawn to deal with most situations that are likely to be encountered by the courts,[5] but no appellate court had then decided that an "attempt at evasion" embraced attempts that were factually impossible to commit.

Does the existence of two statutory attempts matter?

5. The choice of section 170 versus section 1 of the 1981 Act may be important for several reasons:
   A. Applicability where no prohibited goods existed from the beginning (e.g. where the defendant has been the victim of a trick and was supplied an innocuous substance and not a prohibited one);
   B. Applicability where prohibited goods existed but, at a stage prior to importation, innocuous goods are substituted and imported;
   C. What *mens rea* must the Crown establish: is it sufficient that D is shown to have had an intention as to the consequence – the importation of drugs - or must the Crown must go further and prove an intention to import drugs of the relevant Class [the *Courtie* issue[6]]?

6. The likelihood is that the Courts will hold that the law in respect of situations 3A and 3B above, both are caught by s.1 of the 1981 Act *and* by s.170(2). The question is whether the language of each provision can properly be construed to produce that result. Although it is obviously desirable that rules relating attempts should be the same no matter how the 'attempt' is framed, the fact is that comparing "attempt at evasion" in s.170(2), with the offence under s.1 CAA 1981, is not to compare 'like-with-like'.[7]

The prosecutor's choice: matters to be considered

7. It would seem that prosecutors acting on behalf of Her Majesty's Revenue and Customs (HMRC) tend to mount prosecutions for attempt under s.170(2) rather than under the1981 Act, relying (at least in part) on the case of *R. v. Isleworth Crown Court and Uxbridge Magistrates Court, ex Parte Petrus Buda* (Divisional Court, 19th October 1999, CO 3886/99; [2000] Crim.L.R. 111).[8] In that case, Buda appeared at a Magistrates' Court on a charge of importing what was then believed to be cocaine,[9] and he indicated a plea of guilty.[10] Following B's committal to the

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preparatory to the commission of the offence, he is guilty of attempting to commit the offence.
(1A).Computer Misuse Act 1990}
(1B).Computer Misuse Act 1990}
(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."

5 *Hussain* [1969] 2 Q.B. 567; *Hennessey* (1978) 68 Cr.App.R.419

6 (1984) 78 Cr.App.R.292; [1984] AC 483. Unlawful importation or exportation of a Class A drug carries a maximum penalty of life imprisonment. As from the 29th January 2004, the unlawful importation or exportation of either a Class B or a Class C drug carries a maximum penalty of 14years imprisonment.

7 In *Qadir and Khan*, the Court said, "While in reality it may amount to much the same thing, it is not the same thing…"

8 The author is grateful to Ms Tanya Robinson, barrister, of 6 Pump Court, and to the officers of HMRC, for pointing this out.

9 A charge that appears to have alleged the commission of an offence contrarty to s.170(2)(b) of CEMA 1979.

Crown Court, but before he appeared at the Crown Court, it was discovered that the substance was in fact sodium bicarbonate. The Divisional Court said [emphasis supplied]:[11]

> "The Applicant makes two points: firstly, he sought and, at one stage, appeared to be persisting in seeking to contend that he had committed no offence because sodium bicarbonate, as is well known, is not a prohibited substance. He raised that before the Recorder.
>
> It is now accepted that that submission was hopeless. The Applicant was guilty of an offence under section 170 of the Customs and Excise Management Act 1979. He was guilty of an offence of attempt, notwithstanding that the goods were not cocaine but were, on the contrary, merely sodium bicarbonate. **In order to prove an attempt, the prosecution had to do no more than to prove that he had an intention to commit the offence of importation and had committed an act that was more that merely a preparatory step towards its commission (see *R v Shivpuri* [1987] 1 AC at 1).** That the offence, for which he was charged, included not only the full offence but also an attempt has, more recently, been **confirmed in *R v Latif*** (1996) 1 WLR 104.
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> The second point is of greater substance in that it is plain that the decision of the magistrates to commit, pursuant to section 38(2) of the Magistrates Court Act 1980, was made on a wrong view of the facts. The duty to consider the facts before deciding whether to commit or not (in relation to an offence triable either way) is an important safeguard for the protection of a defendant."

8. The commentary to that case [12] was written on the basis that as the definition of the s.170(2) offence includes attempting to evade a prohibition, as well as evading one, the applicant was "therefore properly convicted under that section, and it was not necessary (as it would have been in most other cases of an attempt) to charge him under the Criminal Attempts Act 1981".

9. This was a strong Divisional Court, and it is to be noted that in *Forbes*, the House of Lords said (albeit that the charge was one of 'fraudulent evasion'):[13]

> "[s.170(2) CEMA] extends to all cases involving the evasion or **attempted evasion** of a prohibition or restriction. It requires proof by the prosecutor of two things. First he must prove that the goods in question were the subject of a prohibition or restriction under or by virtue of any enactment which was in force at the time of the evasion or **attempt at evasion**. This is an essential element in any prosecution, but its proof in many cases is likely to be a formality. In the present case the fact that the video cassettes contained indecent photographs of children, which is prohibited indecent material, was agreed between the defendant and the prosecutor. The second thing which the prosecutor must prove is that the defendant was knowingly concerned in a fraudulent evasion or **attempt at evasion** of the prohibition or restriction. The question which has been raised by this case is whether it is sufficient for the prosecutor to prove that the defendant knew that the activity in which he was engaged was the evasion of a prohibition or restriction, or whether he must go further and prove that the defendant knew what the goods were.
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> "…. It is knowledge of the nature and purpose of the operation which has to be proved, not knowledge of what the goods were which were being brought in to this country." [14]

10. The House of Lords did not express an opinion about what constitutes an "attempt at evasion" or what the relationship is between s.170(2) and s.1 of the 1981 Act.

11. In *ex p. Buda*, the Court appears to have assumed that in the context of an "attempt at evasion" under s.170(2), the words "any prohibition or restriction for the time being in force *with respect to the goods*", include goods that the accused *imagined* existed but which in fact did not. It is doubtful that Parliament intended that s.170 should have this effect.

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10 Plea before venue.
11 Tuckey L.J. and Moses J.
12 [2000] Crim.L.R.111.
13 [2002] Cr.App.R.1; per Lord Hope of Craighead, para.17
14 Lord Hope of Craighead, para.26

12. In any event, *ex p. Buda* does not address all the issues concerning attempts in relation to s.170 CEMA. Although the Court clearly had *Shivpuri* well in mind, the fact is that Shivpuri was not charged with an "attempt at evasion" under s.170(2)(b) but with an attempt contrary to s.1 of the 1981 Act to contravene s.170(1)(b).[15]

13. In *Qadir and Khan*,[16] the court left open the question whether the word "attempt" in section 170(2) CEMA is to be construed in the same way as it is for the purposes of the Criminal Attempts Act 1981, but the court added that:

> "…it seems to us that in any event the adoption of the statutory definition for the purpose of directing himself and the jury was a proper working approach for the judge to adopt in the light of the defence case…."[17]

14. Although it makes good sense to adopt the statutory definition, the fact is that attempts under s.1 of the 1981 Act, and attempts at evasion under s.170(2) CEMA, are not the same thing. The principal difference is that whereas the CAA 1981 creates a statutory offence of attempt that may properly be described as inchoate, section 170(2) CEMA creates substantive offences that can be committed in one of two ways, namely, evading and attempting to evade. Take for example, s.170(2)(b). That offence may be committed by *evading* a prohibition or restriction with respect to the goods, or by an *attempt at evasion*, but in each case, what has been committed is the substantive offence [i.e. s.170(2)(b)]: it is not inchoate in the sense that D failed to commit a full offence.[18] There is judicial support for these propositions: see *Latif and Shahzad*,[19] and *Qadir and Khan*[20] (discussed below).

15. Establishing whether an importation of goods into the United Kingdom has taken place or not usually marks the distinction between an "evasion" and an "attempt at evasion". In *Latif*, Lord Steyn said:[21]

> "It is inherent in the concept of an evasion of a prohibition on importation that an importation has taken place. If no importation has taken place no evasion has taken place. On the other hand, if no importation has taken place, there may still be an attempted evasion of a prohibition."

16. There is clear authority for the proposition that to be convicted of the full evasion offence under section 170(2)(b), an accused need only know that he is concerned in a venture designed fraudulently to evade a prohibition on importation of the goods actually imported: see *Hussain*,[22] and *Hennessey*.[23] The nature and/or quality of the goods imported is a *circumstance* of the offence, but the accused need not have knowledge of that circumstance in order to be guilty of it. It therefore seems highly unlikely that a court would hold that an accused is to be acquitted of an "attempt at evasion" for the purposes of section 170(2)(b), on the mere ground that he made a mistake as to the nature or quality of the goods that were subject to a prohibition or restriction on

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15 (1986) 83 Cr.App.R. 178.
16 Unreported, Court of Appeal, Friday 25th July 1997.
17 Thus, in *Archbold 2006* [para.25-476] it is stated that "On a charge of being concerned in a fraudulent attempt at evasion of duty on goods, or of a prohibition or restriction with respect thereto, contrary to section 170(2), it is appropriate to direct the jury in relation to the allegation of attempt by reference to the definition of attempt in the Criminal Attempts Act 1981,s.1(1) (post, §34-84): *R. v. Qadir and Khan* [1997] 9Archbold News 1, CA (96/2311/X4)"; and see *Hutchings and Cummings* [2002] EWCA Crim 2393, a case of 'attempt at evasion' under s.170(2), where drugs were seized by foreign police before the drugs could be imported.
18 This author tends treat the expressions "substantive offence" and "full offence" as being synonymous, namely, a crime that the defendant intended to complete.
19 *Latif and Shahzad* [1996] 1 All E.R. 353,H. L.
20 Unreported, Court of Appeal, Friday 25th July 1997.
21 [1996] 1 All ER 353, at page 362h.
22 *Hussain* [1969] 2 Q.B. 567;
23 *Hennessey* (1978) 68 Cr.App.R.419

importation/exportation. His purpose was to bring in prohibited goods of some description: see the reference to *Forbes*, above.

17. Where, however, D is the victim of a trick and the prohibited or dutiable goods *never existed* so that an "evasion" was impossible, there are strong reasons for saying that the appropriate charge is under s.1 of the 1981 Act - provided of course that D believed that he was dealing with goods of a type which, had D's belief had been true, would have been subject to a provision in force at the material time: consider *Shivpuri*,[24] and contrast *Taaffe*,[25] and consider the interesting judgment of the Supreme Court of Canada in *Arye Dynar* [1997] 2 SCR 462. This issue is considered in greater detail below.

18. A further issue that needs to be considered is that given that "evasion" is a continuing state of affairs, when does an "attempt at evasion" begin? An "attempt" in section 170(2) undoubtedly catches acts that fall just short of a fraudulent evasion. To take an extreme example, if a boat laden with cannabis heads towards the "limits of a port" (the point at which an importation takes place) but the boat sinks a ¼ nautical mile short of that imaginary line, there has been an "attempt at evasion" for the purposes of section 170(2) CEMA. However, the case law makes it plain that section 170(2) has a much longer reach than that.

19. Reference has been made to the fact that the courts of England and Wales tend to adopt the statutory definition of attempt as it appears in section 1 of the 1981 Act for the purposes of s.170(2), but for the reasons given by the Court of Appeal in *Qadir and Khan*, this only has limited value:

> "…. the statutory test does not give any substantial guidance upon where the line is to be drawn as between acts merely preparatory and the point of embarkation upon the commission of an actual crime. That is a task which can only be judged on the facts and in all the circumstances of the case."

Section 170 CEMA 1979

20. Section 170 CEMA 1979 provides:

> 170. Penalty for fraudulent evasion of duty, etc.
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> (1) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person -
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> (a) knowingly acquires possession of any of the following goods, that is to say -
>
> (i) goods which have been unlawfully removed from a warehouse or Queen's warehouse;
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> (ii) goods which are chargeable with a duty which has not been paid;
>
> (iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment; or
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> (b) is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods,
>
> 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 an offence under this section and may be arrested.
>
> (2) Without prejudice to any other provision of the Customs and Excise Acts 1979, if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion -
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> (a) of any duty chargeable on the goods;

[24] *Shivpuri* [1987] A.C. 1.
[25] *Taaffe* [1984] A.C. 539.

(b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or
(c) of any provision of the Customs and Excise Acts 1979 applicable to the goods,
he shall be guilty of an offence under this section and may be arrested

21. Section 170 re-enacts section 304 of the Customs and Excise Act 1952.

General propositions regarding the application of s.170 CEMA

22. In the 5th edition of *Misuse of Drugs: Offences, Confiscation and Money Laundering*, [para 2-042] this author states that the s.170 CEMA offence is very broadly drawn, and that the following propositions represent the law in connection with substantive offences created under that section:

"(1) If a charge is brought under s.170(1) then the prosecution must prove that:
(a) the accused either
(i) knowingly acquires possession of goods; or
(ii) is "knowingly concerned" in carrying, removing, depositing, harbouring (see *Cohen (1950) 34* Cr.App.R. *239),* keeping or concealing, "or in any other manner" dealing with goods (see *Schneider v Dawson [1960 2 Q.B. 106);* and
(b) the goods in question are subject to a prohibition or restriction on importation in force under or by virtue of any enactment (and see *Sissen [20011* Crim.L.R. *232, CA);* and
(c) the accused intended to evade a prohibition or restriction imposed with respect to the goods.

(2) If, however, the charge is brought under s.170(2) then the prosecution must prove that:
(a) the goods in question are subject to a prohibition or restriction under or by virtue of any enactment (see *Sissen* [2001] Crim.L.R. 232); and
(b) a fraudulent evasion or attempted evasion of a prohibition or restriction has taken place in relation to those goods; and
(c) the accused is concerned in that fraudulent evasion; and
(d) the accused was concerned in that fraudulent evasion 'knowingly' see *Latif and Shahzad* [1996] 1 All E.R. 353,H.L.

(3) In respect of each subsection, the following propositions currently represent the law. Propositions referable to "importations" apply equally to "exportations" thus:

(4) There must he proof (at least for an evasion) that the goods were "imported": see *Watts* [1979] 70 Cr.App.R. 187 and see *Latif and Shahzad* (1996) 1 All E.R. 353, H.L.

(5) To be "knowingly concerned" it is not necessary for the accused to have taken steps to bring about the importation of the offending item: see *Attorney General's Reference (No.1 of 1998), The Times,* October 2, 1998, and see *Neal* (1983) 77 Cr.App.R. 283.

(6) The prosecution must prove that the accused knew that the goods were prohibited or (as the case may be) restricted from importation.

(7) However, the prosecution does not have to prove that the accused knew:
(a) the precise prohibition involved; or
(b) the class of drug actually imported; or
(c) the actual drug imported.
See *Hussain* [1969] 2 Q.B. *567; Hennessey* (1978) 68 Cr.App.R. 419, CA; *Shivpuri* [1987] A.C. *1; Ellis* (1987) 84 Cr.App.R. 235; *Forbes* [2001] 3 W.L.R. 428, HL; and, by way of a contrast, see *Daghir* [1994] Crim.L.R. 945.

(8) It is therefore a defence for the accused to say that he did not know that the goods imported were subject to any prohibition or restriction on importation.

(9) It is a defence for the accused to say that he believed he was importing goods not subject to a prohibition or restriction but that they came within some other category, for instance, "dutiable goods", *e.g.* brandy.

(10) It is a defence for the accused to say that he mistakenly believed that he was importing goods of a particular description (e.g. currency) which he believed to be prohibited from importation when, as a matter of law, they would not have been prohibited: see *Taaffe* [1984] A.C. 539.

(11) An offence may he committed by a person who is involved in the venture before or after the moment of importation of the goods into the country: see *Mitchell [1992]* Crim.L.R. 594 and *Attorney General's Reference (No.] of 1998,* 163 J.P. 390.

(12) Acts committed abroad are nevertheless punishable in England if the prohibited goods are consequentially imported into that country: see *Wall* [1974] *2* All E.R. 245; and see *Latif and Shahzad* [1996] 1 All E.R. 353; and note *Jakeman* (1983) *76* Cr. App. R. 223.

Section 170(2) CEMA – "attempt at evasion" - one way of committing the full offence?

23. In *Latif and Shahzad*,[26] the House of Lords considered some aspects of this problem. The head note reads[27] [emphasis in bold supplied]:

> "The first appellant, S, approached H, a shopkeeper in Pakistan who knew local suppliers of heroin but who was also a paid informer of the United States Drugs Enforcement Agency, proposing the export of 20 kg of heroin to the United Kingdom. The arrangement was made that S would deliver the heroin to H in Pakistan, H would arrange for it to be transported to London where he would take delivery of it and then pass it on to S, who would arrange for its distribution. H reported the deal to the local British drugs liaison officer, who arranged for a British customs officer to take delivery of the heroin from H and transport it to London. H then came to London from where he persuaded S that the heroin had arrived safely and that S should come to London to pick it up. S arrived in London and, together with the second defendant, L, arranged to meet H to pick up and pay for the heroin. A customs officer pretending to act on H's behalf came to the meeting and delivered packages got up so as to resemble the original bags of heroin to S, who was immediately arrested. L was also arrested. The defendants were charged with being knowingly concerned in the fraudulent evasion of the prohibition on importation of a controlled drug, contrary to s.170(2) of the Customs and Excise Management Act 1979. At their trial the judge ruled against submissions (i) that the proceedings were an abuse of process and should be stayed since S had been incited to commit the offence by the subterfuge of H and the customs officers who had then lured him into the jurisdiction and (ii) that on the prosecution evidence the appellants were not guilty of the offence charged. The appellants were convicted and their appeals to the Court of Appeal on the ground that the judge's rulings were erroneous were dismissed. They appealed to the House of Lords.
>
> *Held* - The appeals would be dismissed for the following reasons
>
> (1) …[irrelevant]
>
> (2) Although S had not committed the full offence of evading the importation of heroin under s170(2) of the 1979 Act, it was clear that he had committed two attempts at evasion: first in Pakistan, where S had delivered the heroin to H for the purpose of exportation to the United Kingdom, and nothing that the customs office subsequently did could deprive S's conduct of its criminal character; and secondly in London, where he had tried to collect the heroin from H for distribution in the United Kingdom. That was sufficient to prove that S had intended to commit the full offence and was guilty of acts which were more than merely preparatory to the commission of the full offence. **Since an offence under s170(2) of the Act could be committed in one of two ways, namely by evasion or an attempt at evasion, S had correctly been found guilty of an offence under s170(2)** (see p 355j to p 356b, p 364f to p 365 a and p 365 j to p 366 d, post); *DPP v Stonehouse* [1977] 2 All ER 909 and dictum of Lord Griffiths in *Liangsiriprasert v US Government* [1990] 2 All ER 866 at 877 applied."

24. Lord Steyn also dealt with the question of jurisdiction [page 365 b/d]:

> "Counsel for Shahzad further submitted that in the circumstances of this case an English court would not have had jurisdiction to try an offence of an attempt at evasion under s170(2) in England. The attempted evasion in Pakistan, as well as the attempted evasion in England, were respectively directed at importation into the United Kingdom and associated with an importation into the United Kingdom. In these circumstances counsel's submission in regard to the attempt at evasion, which Shahzad committed in Pakistan, is destroyed by the decision of the House of Lords

[26] [1996] 1 All.E.R.353.

[27] *The All England Law Reports*, Butterworths, London.

in *DPP v Stonehouse* [1977] 2 All ER 909, [1978] AC 55. The English courts have jurisdiction over such criminal attempts even though the overt acts take place abroad. The rationale is that the effect of the criminal attempt is directed at this country. Moreover, as Lord Griffiths explained in *Liangsiriprasert v US Government* [1990] 2 All ER 866 at 877-878, [1991] 1 AC 225 at 250, as a matter of policy jurisdiction over criminal attempts ought to rest with the country where it was intended that the full offence should take place (see also ATH Smith, *Property Offences, The Protection of Property through the Criminal Law* (1994) p 23, para 1-37). In any event, in the present case Shahzad also committed an attempt at evasion in England. I have no doubt that counsel's submission is misconceived."

25. In *Qadir and Khan,* the Court of Appeal clearly had the same point in mind when it said:

> "It seems to us that section 170(2) creates a self contained statutory offence or category of offences one being knowingly concerned in any fraudulent evasion, the other being knowingly concerned in an attempt at fraudulent evasion. In order to establish the *actus reus* of the relevant offence, the Crown must prove: (a) there has been a fraudulent evasion, or (as in this case) an attempt at evasion in relation to any goods or duty chargeable thereon, or (where the other categories of offence are relied on) of any prohibition or obstruction in relation thereto or of any other provision of the Customs and Excise Act 1979; (b) that the accused was knowingly concerned therein. Thus, the wording is such as to create a compendious provision which includes all persons concerned in any particular transaction amounting to an evasion or an attempt at evasion, without regard to the necessity either to identify or to distinguish between those concerned in the offence in terms of principal and accessories but making all equally liable for the single offence."

<u>The ambit of the offence under s.170(2)(b) CEMA</u>[28]

26. In *Latif*, the Court of Appeal endeavoured to explain the scope of s.170(2)(b):

> "In our judgement the words 'fraudulent evasion' include a good deal more than merely entering the United Kingdom with goods concealed and no intention of declaring them. They extend to any conduct, which is directed and intended to lead to the importation of goods covertly in breach of a prohibition on import."; per Staughton LJ

27. In the House of Lords it was said that this passage 'went too far' (363g-h) because:

> "It gave no effect to the fact that an evasion (as opposed to an attempted evasion) necessarily involves an importation. Moreover, this reasoning does not allow for the fact that section 170(2) in so far as it is directed at an attempted importation, already covers certain pre-importation acts. The reasoning of the Court of Appeal seems to allow little or no scope for an attempted evasion for which section170(2) provides …" [emphasis added]

28. Taken literally, the words of Staughton L.J. are capable of meaning that all conduct that is intended to result in the importation of prohibited goods amounts to a fraudulent evasion, no matter whether the goods have in fact been imported or not. That certainly would be going too far: it would mean that acts performed outside the United Kingdom in pursuance of an agreement/conspiracy to import prohibited goods into that State, would amount to a 'fraudulent evasion' contrary to s.170 even if the goods were never imported. However, it is submitted that Staughton L.J. was describing a situation where the prohibited goods had been imported, albeit using, for example, an innocent agent. In such a case, persons concerned in the venture, knowing what was afoot, had taken part in a 'fraudulent evasion' of the prohibition. Staughton L.J. merely made the point supported by ample authority that acts done before (or even after) the moment of importation, may amount to being 'knowingly concerned' in the fraudulent evasion: see *Neal*, above. The case of *Jakeman* is a further illustration. It has already been said that the heart of the

[28] See *Misuse of Drugs: Offences, Confiscation and Money Laundering* (Fortson, 5th ed.)Sweet & Maxwell, December 2005.

offence, under section170(2)(b), is a 'fraudulent evasion' not a 'fraudulent importation' and therefore the offence is a continuing one.

29. The case of *Latif* highlights a further issue, namely, when is a prohibition evaded? At first sight, it may seem that if customs officers act on a tip-off and seize prohibited goods as soon as they are imported, then there has been no successful evasion of the prohibition, and D's acts amount to no more than an attempted evasion. Similarly, it may be thought that on every occasion a customs officer examines baggage, and discovers prohibited goods, then the facts disclose an attempted evasion rather than an actual evasion. However, the cases of *Green*,[29] and *Ciappara*,[30] serve as a reminder that an evasion may continue after the goods have been seized. The evasion begins the moment the goods have been 'imported' (as defined by CEMA). It follows that a 'fraudulent evasion' is a net cast over a very wide area indeed.

30. It is conceivable that the use of the word "attempt" in s.170(2) was not intended by Parliament to be construed in the same way as it was for the purposes of the common law offence of attempt (see now the CAA1981), or for the purposes of some other enactment which creates an offence of attempt to commit another offence, but given that an "evasion" is a nebulous concept (with discernible limit) Parliament added the word "attempt" to prevent the courts construing the word "evasion" too restrictively (e.g. that an evasion occurs at the moment of importation/exportation. To give an example, if D lands cannabis at Lulworth Cove in the dead of night, and he avoids being detected, then D has evaded the prohibition on importation of cannabis in accordance with his intention/purpose. But if customs officers catch D with the cannabis at Lulworth Cove then, in ordinary language, his "attempt" to get round the prohibition on importation failed! It therefore seems conceivable that the word "attempt" in s.170(2) was intended to have an ordinary, everyday meaning, and that it was not intended to be treated as a legal concept. Section 170(2) is so broadly drawn that the need for s.170(1) is questionable, but the combined effect of s.170(1) and (2) is to give the United Kingdom the greatest level of control over the movement of goods into and out of the United Kingdom and to give HM Treasury the greatest level of revenue protection with respect to dutiable goods.

<u>Circumstances not constituting an "attempt at evasion" under s.170(2) CEMA 1979</u>

31. Suppose D imported a substance into the United Kingdom believing it to be cannabis but he was the victim of a trick/fraud, and the substance was in fact dried spinach (not prohibited goods). It is submitted that this is not an "attempt at evasion" by D for the purposes of section 170(2). However, such conduct is indictable as an attempt under the Criminal Attempts Act 1981. The reasoning is as follows. It will be seen that each paragraph in section 170(2) [i.e. (a)-(c)] refers to "goods" – indeed each paragraph refers to "*the* goods". Thus for the purpose of section 170(2)(a) the attempted evasion is with respect to "any duty *chargeable* on *the* goods"; and for the purpose of section 170(2)(b), the prohibition or restriction is "with respect to *the* goods"; or the attempted evasion might be in connection with a provision of the Customs and Excise Acts 1979 that is "applicable to *the* goods" [s.170(2)(c)].

32. In the situation described in paragraph 31 above, there is the additional feature that no controlled drugs moved at all. There was never a time when prohibited goods existed as part of a plan to smuggle them into the United Kingdom: and therefore there was never a time when s.170(2) could bite. The Criminal Attempts Act 1981 goes further than section 170(2) CEMA by, for

[29] (1976) 62 Cr.App.R.74
[30] [1988] Crim.L.R.172.

example, catching persons who attempt to commit a section 170 offence "even though the facts are such that the commission of the offence is impossible": section 1(2) Criminal Attempts Act 1981. It is submitted that s.170(2) was not designed to deal with cases where the commission of the offence is impossible *from the outset*. In such a case it is not only impossible to "evade" a statutory provision, but it is not even possible to attempt an evasion. Customs officers tend to deal with 'what is' rather than 'what might have been'. In *Shivpuri*, S believed that he was importing heroin or cannabis in a suitcase whereas he actually imported harmless herbal vegetable matter. He was charged with contravening s.170(1)(b) contrary to section 1 of the 1981 Act. It was appropriate to indict Shivpuri with a statutory attempt under section 1 of the 1981 Act[31] because the goods actually imported were neither dutiable nor subject to a prohibition on importation.

Circumstances that would constitute an "attempt at evasion"

33. It may be helpful to consider two further practical situations:
    (i) D's purpose (intention) was to import a controlled drug into the United Kingdom but a third party acting outside the jurisdiction removed the prohibited goods and substituted an innocuous substance. The innocuous substance was imported into the United Kingdom.[32]
    (ii) D's purpose was to import a controlled drug into the United Kingdom but the drugs were seized abroad and nothing was in fact imported into the United Kingdom.

34. A feature common to situations (i) and (ii), is that prohibited goods were part of the chain of events that existed until the goods were seized (or destroyed) outside the United Kingdom. That is not a circumstance that features in the hypothetical situation described in paragraph 31 above. Accordingly, section 170(2) CEMA has something to bite on, namely, the goods that formed part of the planned fraudulent evasion (for example, prohibited goods: s.170(2)(b)). It is submitted that this is one explanation for the decision of the House of Lords in *R v Latif and Shahzad*, where it was said that although Shahzad had not committed the full offence of evading the importation of heroin under s170(2) of the 1979 Act, it was clear that he had committed two attempts at evasion of which the first attempt occurred in Pakistan, where S had delivered the heroin to another for the purpose of exportation to the United Kingdom. In situations (i) and (ii) above, it became impossible to "evade" the prohibition on importation, but this was the position only after D had taken steps to set at nought the prohibition on importation.

Does the fact that prohibited/dutiable goods never existed really make a difference?

35. It has been submitted that section 170(2) can only bite on prohibited/dutiable goods that existed as part of a plan with which D was concerned, to evade the relevant statutory provision with regard to those goods. A person can be knowingly concerned in a fraudulent evasion of a prohibition on importation of goods *after* the goods had been imported: *Neal and others*. The reason is that such a person with knowledge of the unlawful evasion of the prohibition on importation participates in the on-going stratagem of evasion. This means that a person who sells cannabis in London knowing that the drug had been unlawfully imported into the United Kingdom could be convicted of an offence under s.170 CEMA. But a person in London who passes off an Indian herb (which he bought from a man in an English pub) as "best Jamaican cannabis", mistakenly believing the substance to be cannabis, has not committed an "attempt at evasion" under

[31] *Shivpuri* (1986) 83 Cr.App.R.178.
[32] That is to say, as part of a 'clean' cross-border delivery.

s.170(2)(b). It would be factually impossible to commit an "evasion", but s.1 of the CAA 1981 creates its own scheme for punishing acts and intentions where the commission of a substantive offence is impossible.

Secondary liability in attempt

36. If, as in *Shivpuri*, a person may be convicted under s.1 of the 1981 Act with respect to a substantive offence under CEMA 1979 that is factually impossible to commit, can another person be convicted as a secondary party to that attempt? Suppose D1 possesses a powder that he knows to be innocuous, and supplies it to D2 as "cocaine" knowing that the latter intends to smuggle cocaine into the United Kingdom. D2 is arrested at Heathrow Airport carrying the harmless powder. On those facts, and if the above analysis is correct, then D2 is not guilty of an "attempt at evasion" under section 170(2)(b),[33] but he would be guilty of an attempt to commit a s.170 offence pursuant to s.1 of the 1981 Act. D1 – whose purpose was only to obtain money by deception from D2 – would not be guilty as a joint principal in the attempt (i.e. in the sense that each participant must have the same *mens rea*) because D1, unlike D2, did not intend to evade the prohibition on importation. However, D1 will be liable if he counselled or procured D2's attempt.[34]

Whether s.170(2) CEMA is subject to s.3 of the Criminal Attempts Act 1981

37. Note that section 19 of the Misuse of Drugs Act 1971, as originally enacted, creates an offence of attempting to commit an offence under that Act. Section 19 in its unamended form continues to apply in Scotland:

> "It is an offence for a person [*to attempt to commit an offence under any other provision of this Act or*] to incite *[or attempt to incite]* another to commit such an offence."

38. Part 1 of the schedule to the Criminal Attempts Act 1981 amended section 19 of the MDA 1971 by deleting references to "attempt" in so far as the Misuse of Drugs Act applies to England and Wales. The section was amended in order to bring attempts to commit a MDA offence under the scheme of the Criminal Attempts Act 1981 Act (in England and Wales).

39. It is to be noted that no such amendment was made to section 170(2) CEMA by the 1981 Act. Section 3 of the 1981 Act provides:

> *3. Offences of attempt under other enactments*
>
> (1) Subsections (2) to (5) below shall have effect, subject to subsection (6) below and to any inconsistent provision in any other enactment, for the purpose of determining whether a person is guilty of an attempt under a special statutory provision.
>
> (2) For the purposes of this Act an attempt under a special statutory provision is an offence which -
>
> (a) is created by an enactment other than section 1 above, including an enactment passed after this Act; and
>
> (b) is expressed as an offence of attempting to commit another offence (in this section referred to as "the relevant full offence").
>
> (3) A person is guilty of an attempt under a special statutory provision if, with intent to commit the relevant full offence, he does an act which is more than merely preparatory to the commission of that offence.

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[33] There was never a stage when prohibited goods were handled as part of D2's smuggling plan.

[34] It has been assumed that D1 has not aided and abetted D2; but in cases where the concepts of aiding and abetting are relevant, consider *O'Brien* [1995] Crim LR 734: and see *Dunnington* (1984) 78 Cr.App.R. 171 and the commentary to that case at [1984] Crim.L.R. 98.

(4) A person may be guilty of an attempt under a special statutory provision even though the facts are such that the commission of the relevant full offence is impossible.
(5) 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 the relevant full 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 (3) above, he shall be regarded as having had an intent to commit that offence.
(6) Subsections (2) to (5) above shall not have effect in relation to an act done before the commencement of this Act.

40. It is submitted that section 3 of the 1981 Act does not apply to section 170 CEMA because the "attempt" in section 170 is not an attempt "to commit *another* offence" [emphasis supplied]. On the contrary, an "attempt at evasion" – as discussed above - is merely one way to commit the full section 170 offence: see the House of Lords decision in *Latif and Shahzad* on this point.

41. In *Qadir and Khan*, the Court of Appeal referred to s.3 of the 1981 Act and said:

> "Section 1(1) of the Criminal Attempts Act 1981 makes provision in terms which we have already quoted. That definition seeks a mid way course, which is somewhat, but it may be thought not much, more helpful; it is an effort to define the nature of an attempt or the moment at which it takes place. It appears to mean that the attempt begins at the moment when the defendant embarks on the crime proper, as opposed to taking steps rightly regarded as merely preparatory.
> It is by no means clear that the definition provided in the Criminal Attempts Act applies to the concept of attempt as it appears in section 170(2) of the 1979 Act in the words 'attempt at evasion'. That is because section 3 of the 1981 Act deals with the question of 'Offences of attempt under other enactments'….
> Those subsections apply the statutory definition of attempt to statutory offences "expressed as an offence of attempting to commit another crime": see subsection 3(2)(b).
> That is not strictly the position in relation to section 170(2), which creates the substantive crime of being knowingly concerned in an attempt at evasion. While in reality it may amount to much the same thing, it is not the same thing….Nonetheless, whether the word "attempt" in section 170(2) of the 1979 Act is to be construed in the sense of the statutory definition in the 1981 Act, or some test involving a similar but not necessary identical formula, seems to us unnecessary to be decided in this case."

The Criminal Attempts Act 1981

42. Section 1 of the 1981 Act provides as follows:

1. Attempting to commit an offence
(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.
(1A) Subject to section 8 of the Computer Misuse Act 1990 (relevance of external law), if this subsection applies to an act, what the person doing it had in view shall be treated as an offence to which this section applies.
(1B) Subsection (1A) above applies to an act if -
(a) it is done in England and Wales; and
(b) it would fall within subsection (1) above as more than merely preparatory to the commission of an offence under section 3 of the Computer Misuse Act 1990 but for the fact that the offence, if completed, would not be an offence triable in England and Wales.
(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) or5(1) (accepting or agreeing to accept consideration for not disclosing information about an arrestable offence) of the Criminal Law Act 1967.

[Subss. (1A) and(1B) were inserted by the Computer Misuse Act 1990,s.7(3).]

Acts factually and legally impossible to commit, and imaginary crimes

43. A distinction is often made between crimes that are *factually* impossible to commit and those that are *legally* impossible to commit. In *Dynar*,[35] the Supreme Court of Canada gave a detailed, reasoned, judgment that had regard to the case of *Shivpuri* and s.1 of the CAA 1981. The Court held that the conventional distinction between factual and legal impossibility is not tenable: the only relevant distinction (specifically for purposes of s.24(1) of the Canadian Criminal Code) is between *imaginary crimes* and attempts to do the *factually impossible*.

44. This author has previously commentated that "legal impossibility" concerns cases where D's belief, even if it had been true, would not, and could not, constitute in law an offence.[36] The Supreme Court of Canada describes such cases as "imaginary crimes". It is submitted that *Taaffe*,[37] illustrates an 'imaginary crime'. Taaffe imported 3.7kgs of cannabis believing (a) that the goods comprised a quantity of money and (b) that currency was prohibited from importation. The House of Lords upheld the reasoning of the Court of Appeal[38] that principle that a man must be judged upon the facts as he believed them to be was an accepted principle of the criminal law when the state of a man's mind and his knowledge were ingredients of the offence with which he was charged. It is important to stress that T was charged with evading the prohibition on importation contrary to s.170(2) of CEMA and not with an "attempt at evasion" contrary to that subsection but, for the reasons set out below, it is submitted that on those facts the result would be the same.

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35 [1997] 2 SCR 462.

36 It is recognised that the expression "legal impossibility" tends to be used to deal with cases where e.g. D believed he was importing sugar but it was actually cocaine; or where D believes goods to be stolen when in fact they are not: see [1984] Crim.L.R. 584, "*The Criminal Attempts Act and Attempting the Impossible*", Brian Hogan. Mr Hogan argued that if one takes the offence of handling stolen goods contrary to section 22 of the Theft Act as an example, this is "an offence which can be committed and attempted. But we come back to the fundamental difficulty that there is no offence known to law of handling non-stolen goods believing them to be stolen and, *a fortiori*, there can be no attempt to commit that non-offence".
He added that the word 'offence' in s.1 "can only refer to something that is an offence under the law and the Act has done nothing to alter the substantive criminal law".
The thrust of Mr Hogan's argument was (if this author has understood the points correctly) that "[where]…the Act has gone astray is in assuming that the legal impossibility problem is one of *mens rea* when it is in truth a problem of *actus reus*".
The current state of the law appears to be to reject Mr Hogan's line of reasoning and that the problem of the would-be handler is answered by saying that D did not attempt to commit a non-offence, but that D intended to commit an offence known to law being an intention based on the facts as he believed them to be.

37 (1984) 78 Cr.App.R. 301.

38 Which reasoning the House of Lords found "compelling": see *Taaffe* Court of Appeal (1983) 77 Cr.App.R. 82.

45. In *Dynar*, the Supreme Court of Canada said[39] with respect to s.24 of the Canadian Criminal Code:[40]

> "….the conventional distinction between factual and legal impossibility is not tenable. The only relevant distinction for purposes of s.24(1) of the Criminal Code is between imaginary crimes and attempts to do the factually impossible. The criminal law of Canada recognizes no middle category called 'legal impossibility'.
>
> 60…an attempt to do the factually impossible is considered to be one whose completion is thwarted by mere happenstance. In theory at least, an accused who attempts to do the factually impossible could succeed but for the intervention of some fortuity. A legally impossible attempt, by contrast, is considered to be one which, even if it were completed, still would not be a crime. One scholar has described impossible attempts in these terms:
>
> > Three main forms of impossibility have set the framework for contemporary debate. First, there is impossibility due to inadequate means (Type I). For example, A tries to kill B by shooting at him from too great a distance or by administering too small a dose of poison; C tries to break into a house without the equipment which would be necessary to force the windows or doors. . . .
> >
> > The second form of impossibility arises where an actor is prevented from completing the offence because some element of its *actus reus* cannot be brought within the criminal design (Type II). For example, A tries to kill B by shooting him when he is asleep in bed, but in fact B has already died of natural causes; C tries to steal money from a safe which is empty. . . .
> >
> > The third form of impossibility arises where the actor's design is completed but the offence is still not committed because some element of the *actus reus* is missing (Type III). For example, A may take possession of property believing it to have been stolen when it has not been; B may smuggle a substance for reward believing it to be a narcotic when it is sugar. . . .
> >
> > (Colvin, supra, at pp. 355-56.)[41]
>
> 61 According to Professor Colvin, factually impossible attempts are those that fall into either of the first two categories. Legally impossible attempts are those that fall into the third category.
>
> 62 Colvin's schema appears attractive. But in fact it draws distinctions that do not stand up on closer inspection. There is no legally relevant difference between the pickpocket who reaches into the empty pocket and the man who takes his own umbrella from a stand believing it to be some other person's umbrella. Both have the *mens rea* of a thief. The first intends to take a wallet that he believes is not his own. The second intends to take an umbrella that he believes is not his own. Each takes some steps in the direction of consummating his design. And each is thwarted by a defect in the attendant circumstances, by an objective reality over which he has no control: the first by the absence of a wallet, the second by the accident of owning the thing that he seeks to steal. It is true that the latter seems to consummate his design and still not to complete an offence; but the semblance is misleading. The truth is that the second man does not consummate his design, because his intention is not simply to take the particular umbrella that he takes, but to take an umbrella that is not his own. That this man's design is premised on a mistaken understanding of the facts does not make it any less his design. A mistaken belief cannot be eliminated from the description of a person's mental state simply because it is mistaken.
>
> 63 If it were otherwise, the effect would be to eliminate from our criminal law the defence of mistaken belief. If mistaken beliefs did not form part of an actor's intent -- if an actor's intent were merely to do what he in fact does -- then a man who honestly but mistakenly believed that a woman had consented to have sexual relations with him and who on that basis actually had sexual relations with that woman, would have no defence to the crime of sexual assault. His

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39 [1997] 2 SCR 462; Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. (delivered by Cory and Iacobucci JJ).

40 24(1) "Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence."

41 This is a reference to: Colvin, Eric. *Principles of Criminal Law*, 2nd ed. Scarborough, Ont.: Thomson Professional Publishing Canada, 1991.

> intention, on this limited understanding of intention, would have been to sleep with the particular woman with whom he slept; and that particular woman, by hypothesis, is one who did not consent to sleep with him. Substituting the one description ('a woman who did not consent to sleep with him') for the other ('the particular woman with whom he slept'), it would follow that his intention was to sleep with a woman who had not consented to sleep with him. But of course, and as we have already strenuously urged, intention is one thing and the truth is another. Intention has to do with how one sees the world and not necessarily with the reality of the world.
>
> 64 Accordingly, there is no difference between an act thwarted by a 'physical impossibility' and one thwarted 'following completion'. Both are thwarted by an attendant circumstance, by a fact: for example, by the fact of there being no wallet to steal or by the fact of there being no umbrella to steal. The distinction between them is a distinction without a difference. Professor Colvin himself agrees that '[t]he better view is that impossibility of execution is never a defence to inchoate liability in Canada' (p. 358).
>
> 65 There is, however, a relevant difference between a failed attempt to do something that is a crime and an imaginary crime. See Pierre Rainville, '*La gradation de la culpabilité morale et des formes de risque de préjudice dans le cadre de la répression de la tentative*' (1996), 37 C.deD. 909, at pp. 954-55. It is one thing to attempt to steal a wallet, believing such thievery to be a crime, and quite another thing to bring sugar into Canada, believing the importation of sugar to be a crime. In the former case, the would-be thief has the *mens rea* associated with thievery. In the latter case, the would-be smuggler has no *mens rea* known to law. Because s.24(1) clearly provides that it is an element of the offence of attempt to have 'an intent to commit an offence', the latter sort of attempt is not a crime.
>
> 66 Nor should it be. A major purpose of the law of attempt is to discourage the commission of subsequent offences. See Williams' *Textbook of Criminal Law*, *supra*, at pp. 404-5. See also Brown, supra, at p. 232; Eugene Meehan, '*Attempt -- Some Rational Thoughts on its Rationale*' (1976-77), 19 Crim. L.Q. 215, at p. 238; Don Stuart, *Canadian Criminal Law* (3rd ed. 1995), at p.594. But one who attempts to do something that is not a crime or even one who actually does something that is not a crime, believing that what he has done or has attempted to do is a crime, has not displayed any propensity to commit crimes in the future, unless perhaps he has betrayed a vague willingness to break the law. Probably all he has shown is that he might be inclined to do the same sort of thing in the future; and from a societal point of view, that is not a very worrisome prospect, because by hypothesis what he attempted to do is perfectly legal.
>
> 67 Therefore, we conclude that s.24(1) draws no distinction between attempts to do the possible but by inadequate means, attempts to do the physically impossible, and attempts to do something that turns out to be impossible 'following completion'. All are varieties of attempts to do the 'factually impossible' and all are crimes. Only attempts to commit imaginary crimes fall outside the scope of the provision."

Intention to commit an offence, and the effect of *Courtie* [42] on attempts

46. A problem – not yet fully resolved - is what is meant by an "intention to commit an offence"? What must D intend, and what must D know in order to be guilty of an offence contrary to section 1 of the 1981 Act?

47. A person is guilty of *murder* if he/she unlawfully killed V, and intended to kill V, or intended to cause him grievous bodily harm. But a person is only guilty of *attempted murder* if D intended to kill: *Whybrow*.[43] A person is not guilty of attempted murder if he intended to cause grievous bodily harm not caring whether V died, and it is immaterial that only a "miracle" saved V from almost certain death.

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42 [1984] AC 483

43 [1987] Criminal Law Review 759; but consider *Walker and Hayles* [1990] Crim LR 44;

48. As the authors of *Smith and Hogan* point out,[44] the Law Commission "at one time assumed that any distinction between the requirements of *mens rea* as to consequences and circumstances would be unworkable and proposed that intention should be required as to all the elements of the offence" [and see Law Commission No. 102, and No. 143].

49. Had the original Law Commission proposal become law, the effect would surely have been that D could only be guilty of an attempt to commit a section 170 CEMA offence if the prosecution proved that D knew that the venture was designed to evade the prohibition on importation of goods, and (arguably) that the goods were of the kind alleged in the charge (e.g. controlled drugs, explosives, prohibited pornography).

50. But there is a further principle to be considered. In *Courtie*,[45] the House of Lords held that facts that attract different maximum penalties create different offences.

51. As the law now stands, the maximum statutory penalty for importing/exporting a Class A drug is life imprisonment: the maximum term for the unlawful importation/exportation of a Class B or Class C drug is 14 years' imprisonment. If, in a single consignment, drugs of Class A and Class B (or Class C) are imported contrary to s.170 CEMA, two offences have in fact been committed. It is therefore usually inappropriate to charge by way of a single count the unlawful importation of a Class A and a Class B drug.

52. In practice, the effect of *Courtie* is usually procedural (i.e. the indictment might need to include separate counts and not a compendious count). *Courtie* does not mean that where a defendant is charged with the substantive 'evasion' offence under s.170 CEMA, he is to be acquitted if the prosecution fails to prove that he knew that the smuggling venture concerned controlled drugs of a particular Class.[46] The position is different in cases where a defendant is charged with a *conspiracy* to contravene s.170 CEMA. In short, a conspiracy to import cannabis is not a conspiracy to import heroin,[47] but (somewhat illogically) an agreement to import heroin provides D with no defence if the drug imported falls into a different Class that attracts a lower maximum penalty.[48]

53. In *Shivpuri*,[49] Lord Bridge said[50]:

> "…the prosecution'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 section 170 of the Act of 1979 can only be related to the attempted importation of a drug of class A or 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 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."

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44 [*The Criminal Law*, 11th edition; page 403, Professor David Ormerod]
45 (1984) 78 Cr.App.R.292; [1984] AC 483.
46 The House of Lords in Shivpuri make that clear.
47 *Siracusa* (1990) 90 Cr.App.R.340
48 *Patel*, August 7, 1991; unreported; and see *Taylor* [2001] EWCA Crim 1044. This distinction is surely based only on grounds of policy.
49 (1986) 83 Cr.App.R.178
50 at page 186 of the report.

> *I think this submission is strictly correct and that the words "or some other 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 himself tested the powdered substance in question, both before and after the 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 section 2(1) of the Criminal Appeal Act 1968."

54. It should be noted that Shivpuri believed that he was dealing with *heroin or cannabis*. At the time Shivpuri was tried, both heroin (Class A) and cannabis (then Class B) attracted the same maximum penalty for drug smuggling, namely, 14 years' imprisonment (i.e. one offence, applying *Courtie*). Lord Bridge said that the misdirection "occasioned no miscarriage of justice". What would the outcome of the appeal have been had Shivpuri's case proceeded on the footing that S believed he was dealing with a Class C drug?

55. It is to be noted that a large part of the reasoning of Lord Bridge proceeds on the basis that S dealt with a drug of Class A or Class B. Thus, Lord Bridge said (after setting out section 1 of the 1981 Act):

> "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."

56. In *Ellis and Street*,[51] the Court Appeal said:

> "It is difficult to see why Lord Bridge thought it was a technical misdirection because class C drugs are just as surely prohibited as A or B and on *Hussain*, and certainly on *Hennessey*, a mistaken belief that it is a class C drug would be no defence, and therefore no misdirection."

57. In the commentary to that decision, Professor John Smith said:

> "The explanation is surely that, in the passage quoted, Lord Bridge is discussing, not the full offence, but the attempt; and there the *mens rea* requirement is different. The *mens rea* of an offence may be something less than intention to cause the *actus reus* of that offence. But the charge of attempt requires proof under the Criminal Attempts Act 1981 (as indeed it did at common law) of an intention to commit the crime, *i.e.* to cause the *actus reus* of the crime. Murder is an example. An intention to cause serious bodily harm is a sufficient *mens rea*. There is no need to prove an intention to cause the *actus reus* of murder, *i.e.*, death. But on a charge of attempted murder, an intention to cause serious bodily harm will not suffice; there must be an intention to cause death: *Whybrow* (1950) 35 Cr.App.R. 141. Similarly here. If the defendant is charged with knowingly importing the class A drug which he has in fact imported, his intention to import a class C drug is a sufficient *mens rea*. But if he is charged with attempting to import a class A drug, his intention to import a class C drug will not support the conviction. The importation of a class A drug is a different offence from the importation of a class C drug. The defendant does not have the intention to commit the offence he is charged with attempting; and that is fatal to the attempts charge. But, since *Shivpuri*, the defendant could be convicted of attempting to import a class C drug, although the drug he is in fact dealing with is a class A drug. The impossibility of committing the class C offence is no answer to the charge."

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[51] [1987] Crim L.R.44.

58. Although the passage of Lord Bridge (quoted above) has been doubted, it cannot be lightly disregarded or assumed to be incorrect.

Is the analysis of Lord Bridge in Shivpuri, correct?

59. It is necessary to identify what it is that an accused must "intend" before he can be convicted under s.1 of the 1981 Act of attempting to contravene section 170(2) of CEMA. The Law Commission's original proposal for reform in this area of law has been mentioned, but there has been much debate as to what section 1(1) of the 1981 Act means.

60. In addition to *Smith and Hogan* (11th edition), two invaluable contributions have been made to the debate. Glanville Williams made one in his article "*The Problem of Reckless Attempts*"[52], and Richard Buxton QC (now Lord Justice Buxton) made the other in "*Circumstances, Consequences and Attempted Rape*" in which he responded to Glanville Williams.[53]

61. Mr Buxton QC (as he then was) had no doubt about the meaning of section 1(1) of the 1981 Act:

> "The foregoing are, however, arguments that need only be deployed if the court is in doubt as to what the 1981 Act requires the prosecution to prove as the *mens rea* applicable to a charge of attempt. But on the plain wording of the Act there is no scope for any such doubt. While, as we have said, the phrase 'intent to commit an offence' could be more happily put, it is impossible to interpret it other than as requiring 'intent' as to every element constituting the crime."

62. He added:

> "A court construing the 1981 Act would, therefore, have no ground for requiring of the accused anything other than "intent" as to every element in the completed crime. Since intent includes knowledge (see note 2), the accused's state of mind in regard to the woman's consent in attempted rape must be knowledge that she did not consent, as the Law Commission recommended."

63. However, at least two Divisions of the Court of Appeal have taken a different view. In *Khan and others*,[54] the court considered the two articles mentioned above but concluded (in the context of the offence of rape):

> "In our judgment an acceptable analysis of the offence of rape is as follows: (1) the intention of the offender is to have sexual intercourse with a woman; (2) the offence is committed if, but only if, the circumstances are that: (a) the woman does not consent; AND (b) the defendant knows that she is not consenting or is reckless as to whether she consents.
>
> Precisely the same analysis can be made of the offence of attempted rape: (1) the intention of the offender is to have sexual intercourse with a woman; (2) the offence is committed if, but only if, the circumstances are that: (a) the woman does not consent; AND (b) the defendant knows that she is not consenting or is reckless as to whether she consents.
>
> The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and in attempted rape and the *mens rea* is identical, namely, an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arises; the attempt relates to the physical activity; the mental state of the defendant is the same. A man does not recklessly have sexual intercourse, nor does he recklessly attempt it. Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse. If this is the true analysis, as we

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52 [1983] Crim Law Review 365
53 [1984] Crim.L.R.25
54 (1990) 91 Cr.App.R.29

> believe it is, the attempt does not require any different intention on the part of the accused from that for the full offence of rape. We believe this to be a desirable result which in the instant case did not require the jury to be burdened with different directions as to the accused's state of mind, dependent upon whether the individual achieved or failed to achieve sexual intercourse."

64. The Court added:

> "We recognise, of course, that our reasoning cannot apply to all offences and all attempts. Where, for example, as in causing death by reckless driving or reckless arson, no state of mind other than recklessness is involved in the offence, there can be no attempt to commit it. In our judgment, however, the words 'with intent to commit an offence' to be found in section 1 of the 1981 Act mean, when applied to rape, 'with intent to have sexual intercourse with a woman in circumstances where she does not consent and the defendant knows or could not care less about her absence of consent.' The only 'intent,' giving that word its natural and ordinary meaning, of the rapist is to have sexual intercourse. He commits the offence because of the circumstances in which he manifests that intent - *i.e.* when the woman is not consenting and he either knows it or could not care less about the absence of consent. Accordingly we take the view that in relation to the four appellants the judge was right to give the directions that he did when inviting the jury to consider the charges of attempted rape."

65. In *Attorney-General's reference No. 3 of 1992* the court said:[55]

> "One way of analysing the situation is to say that a defendant, in order to be guilty of an attempt, must be in one of the states of mind required for the commission of the full offence, and did his best, as far as he could, to supply what was missing from the completion of the offence. It is the policy of the law that such people should be punished notwithstanding that in fact the intentions of such a defendant have not been fulfilled."

66. Both cases have been criticised by commentators, but not by an appellate court. The likely reasons for this are (1) that the courts look for rules and concepts that produce (they hope) fair and just results, and (2) that it is desirable that concepts can readily be explained to, and followed by, fact finders (notably juries).

67. Mr Buxton's construction of section 1 of the 1981 Act that "intent" goes to "every element constituting the crime" is straightforward but the court in *Khan* was clearly of the view that such a construction is unduly favourable to an accused. By equating "intent" with the *mens rea* of the full offence the Court was of the view that this achieved a "desirable result"

> "…which in the instant case did not require the jury to be burdened with different directions as the accused's state of mind".[56]

68. It will be seen that in *Dynar*, the Supreme Court of Canada said (by a majority):[57]

> "We have to say that a person intends his act in the circumstances that he knows or believes to exist. This being the rule for consummated crimes, no good reason can be suggested why it should differ for attempts."

69. As stated above, attempted murder is not proved by demonstrating that the defendant had the *mens rea* for murder; and therefore it seems likely that the practical effect will be that "intent" – for the purposes of the 1981 Act - will vary according to the nature and structure of the full offence.

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55 (1994) 98 Cr.App.R. 383

56 (1990) 91 Cr.App.R.29, at page 34.

57 Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ. (delivered by Cory and Iacobucci JJ), [1997] 2 SCR 462 (at para.79).

70. Professor Smith, in his commentary to the House of Lords decision of *Shivpuri*, endeavoured to analyse Lord Hailsham's interpretation of 'intention' for the purposes of the 1981 Act. Professor Smith considered two possible approaches, (1) that intention equals purpose, and (2) that intention depends on external facts.[58] Professor Smith robustly concluded "it would be best if Lord Hailsham's speech were forgotten".

71. A court could reasonably interpret "intent" in one of two ways for the purposes of section 1 of the 1981 Act in cases where a person is charged with attempting to commit a section 170 CEMA offence. First, "intent" equates to the *mens rea* for an 'evasion' offence under section 170. On this footing, the prosecution need only prove that the defendant intended that prohibited goods *of some description* would be imported/exported. The alternative construction is that there must be intention as to purpose. In other words, that D's purpose was to import/export drugs of a kind that attracted a particular maximum penalty. Thus, D would not be guilty under the 1981 Act of attempting to import a Class A drug, if his purpose was to import a Class B or Class C drug. It is submitted that it is in that context that Professor Smith made the remarks he did in his commentary to *Ellis and Street* (see above). If Professor Smith correctly stated the law (his reasoning is supported by passages in the opinion of Lord Bridge in *Shivpuri*) then it follows that a charge under s.1 of the Criminal Attempts Act 1981 will present greater difficulties for prosecutors than a charge brought under s.170(2) CEMA on the basis that D "attempted an evasion".

Conclusion

72. Charging defendants who were jointly engaged in a smuggling venture with a conspiracy to contravene s.170 would avoid some of the aforementioned issues. On the other hand, from the prosecutor's point of view, such a charge might only give rise to other difficulties, for example, proving that D conspired to import a Class A drug if D asserts that he believed he was dealing with cannabis and not cocaine: consider *Siracusa* and the case of *Patel* (above).

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April 2006

[58] [1986] Crim Law Review 536, at page 540.

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