The Borderline between Conditional Intent and Impossibility

Two problems which have been exercising the minds of judges in recent years concern the areas of criminal law which have come to be known as conditional intent and impossible attempts. The first of these so-called doctrines came to a head in Re Attorney-General’s References (No. 1 and 2 of 1979). 1

It used to be thought 2 that if the accused took up an article and examined it to see whether or not it was worth stealing, then in no circumstances was he guilty. So, for example, if a person entered a flat with an intent to steal only things which he thought were worth stealing, he was not guilty of burglary. 3 Similarly, if the accused entered a home not “with an intent to steal money” but “with an intent to steal any money which he found and which was worth stealing,” he was to be acquitted of burglary. 4 The retreat from the wider effects of this principle was signalled by Lord Scarman who explained that the proposition was to be read as meaning that the propositus is not guilty of theft or of attempted theft where he is undecided as to whether he should take an object. The retreat became a rout in Walkington 6: the defendant is to be convicted of burglary even if there is to his mind nothing on the premises worth taking provided that he has made up his mind to steal. This approach was adopted in the References.

These two cases were joined for the purpose of a reference under s.36(1) Criminal Justice Act 1972. 7 In Reference (No.1) 8 a grocer heard his back door open and close at eleven o’clock one evening and he caught the accused as he

1. (1979) 3 W.L.R. 577; 3 All E.R. 143. Hereafter the Reffrences. According to the Law Commission’s memorandum submitted to the Court: “conditional intent” is used here to describe any state of mind falling short of an intention permanently to deprive a person of property of his which property at the time of the intention is specific and identifiable in the mind of the accused. It means that the accused does not know what he is going to steal but intends that he will steal whatever he finds of value or worthwhile stealing.” The Court disapproved of any other use of this.


6. (1979) 1 W.L.R. 1169. Even before this case at least one Crown Court judge was turning against Greenhoff: see Wynn & Salkeld 21-22 February 1979 at Liverpool before H.H. Judge Bingham.

7. It is interesting to note that there could be an appeal to the House of Lords under s.36(3) of the Act and that appeal need not concern a point of law of general public importance, though in practice it would presumably always do so. Moreover, it is uncertain whether a hypothetical judgment on a reference contributes a binding or persuasive precedent. It seems that prosecutors, dissatisfied with Haughton v. Smith (1975) A.C. 476, are trying to find ways of mitigating its impact by using the 1972 Act: see Attorney-General’s Reference (No. 1 of 1974) (Q.B.) 744 which distinguished Smith.

8. A close reading of the report reveals the name of the accused.
was going up the stairs. The accused said: "I was just going to take something." He was charged with burglary contrary to s.9(1)(a) Theft Act 1968, entering premises as a trespasser with intent to steal. In Reference (No.2) the accused was caught trying to force a stick between the door of some french windows and the frame. When arrested, he said: "I wasn't going to do any damage in the house, only see if there was anything lying around." He was charged with attempting to enter the house, with intent to steal. Both defendants were found not guilty; The Attorney-General referred the cases to the Court of Appeal, which held that, if a person is charged with burglary or attempted burglary, the prosecution does not have to prove an intention to steal any specific objects where the accused enters the building or part of it as a trespasser intending to steal something worth stealing. That is, it is not part of the crimes of burglary and attempted burglary that the accused must have it in his mind to take some defined object before he puts his foot on the premises, provided that he has decided to steal. Indeed, it may be said that this is how Parliament has defined burglary.

Insofar as the judgment touches on theft, attempted theft and loitering with intent, which were said to fall within this principle, it is obiter, but two cases decided immediately after the References by the same judges sitting as a Divisional Court do hold thus. In Scudder v. Barrett, the accused was seen tampering with an article in the bag of a Swedish tourist. On arrest he said: "I ain't nicked nothing." The prosecution conceded that, following Easom and Husseyn, the accused could not be convicted of attempted theft of property unknown. The Appeal court held they were bound by the Reference cases and so sent the case back to the magistrates with a direction to continue. The court seems to say, obiter, that the same rule applies to theft. In Miles v Clovis the accused were charged with loitering with intent to commit an arrestable crime, contrary to s.4 Vagrancy Act, 1824, as amended. They were seen putting their hands out to reach into women's bags. The justices, relying principally on Husseyn, ruled that there was no case to answer. The Court of Appeal held that on this charge the prosecution did not need to prove that the accused had formed the intention to steal a specific object.

The References will be of importance in practice: (A) A charge of attempting to steal a named object will fail if the prosecution cannot prove the intention to

9. S.9(1)(b) of the Theft Act says "steals or attempts to steal anything" while s.9(2) covers "stealing anything."
10. (1979) 3 W.L.R. 591 (note). Not in the All England Reports, which means that (1979) 3 All.E.R. at 153d makes little sense. The transcript is in line with the W.L.R.
12. Supra, n.2.
14. The question will now be left for the jury, not as previously dealt with at the stage of counsel's submission of no case to answer.