

1971 Present: H. N. G. Fernando, C.J., and de Kretser, J.

CITY CARRIERS LTD., Appellant, and THE ATTORNEY-GENERAL, Respondent

*S. C. 396/67 (F)—D. C. Trincomalee, 8099*

*Criminal law—Attempt to commit an offence—Difference between attempt and preparation—Attempt to commit offence of unlawful exportation of goods—Quantum of evidence—Forfeiture of vehicle under Customs Ordinance, s. 125.*

When a lorry was transporting packages of cardamons to a pre-arranged point of the coast of Trincomalee it was seized by the Police about 1/4th mile away from the pre-arranged point. There was evidence that a boat intended for the transport of the goods arrived at the pre-arranged point and that a Director of the plaintiff-Company, which owned the lorry, had participated in a conspiracy to export the cardamons illegally from Ceylon.

*Held*, that there was sufficient evidence of an attempt (as distinct from preparation) by the plaintiff-Company to commit the offence of unlawful exportation. The lorry was therefore liable to be confiscated by the Collector of Customs in terms of section 125 of the Customs Ordinance.

APPEAL from a judgment of the District Court, Trincomalee.

*S. Nadesan, Q.C.*, with *S. Sharvananda*, for the plaintiff-appellant.

*Noel Tittawella*, Senior Crown Counsel, for the defendant-respondent.

*Cur. adv. vult.*

May 7, 1971. H. N. G. FERNANDO, C.J.—

The findings of fact reached by the District Judge in this action have not been challenged in appeal. Upon the facts as so found and the inferences arising therefrom, it was established—

- (a) that the Naval authorities at Trincomalee, acting on suspicion of a proposed smuggling operation authorised an Army Sergeant to make contact with persons engaged in the proposed operation;
- (b) that the Sergeant was met by some persons, and that an arrangement was made for goods to be brought on the night of 25th May 1966 to a pre-arranged point of the coast of Trincomalee, to be taken out from that point;
- (c) that in accordance with the arrangements made, one of the persons concerned met the Army Sergeant at a Coast Watching Point at 11.15 p.m. on the night of 25th May and informed the Sergeant that a lorry containing the goods had been brought to the neighbourhood;

- (d) that because of some delay in the arrival of the Sergeant's superior officer, the Sergeant directed that the lorry be kept concealed until 1 a.m. ;
- (e) that a boat intended for the transport of the goods arrived at the pre-arranged point on the coast ;
- (f) that a lorry containing cardamons in packages prepared for export was found and seized by other officers about 1/4th mile away from the pre-arranged point ;
- (g) that a Director (one M. I. Rauff) of the plaintiff-Company, which owned the lorry, had participated in the conspiracy to export the cardamons illegally from Ceylon.

On these facts the learned District Judge has held that the lorry had been used in an attempt to smuggle the cardamons out of Ceylon. The only question raised in this appeal is whether there had been in law such an attempt.

The learned District Judge has relied upon the judgment of Lord Parker C.J., in the recent English case of *Davey v. Lee*,<sup>1</sup> in which the following principles were stated :—

“ What amounts to an attempt has been described variously in the authorities, and, for my part, I prefer to adopt the definition given in Stephen's Digest of Criminal Law (5th Edn. 1894), art. 50, where it says that—

‘An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.’

As a general statement that seems to me to be right, though it does not help to define the point of time at which the series of acts begins. That, as Stephen said, depends on the facts of each case. A helpful definition is given in para. 4104 in Archbold's Pleading, Evidence and Practice (36th Edn.), where it is stated in this form :

‘It is submitted that the *actus reus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime.’ ”

Both Lord Parker and Lord Justice Diplock accepted as correct the principles suggested in Archbold, but did not enter into any further discussion of the law regarding attempts.

<sup>1</sup> (1967) 2 A. E. R. 423.

It will be seen that the test provided by Stephen's definition appears to be more strict than that suggested in Archbold. The test is whether a particular act "forms part of the series of acts which would constitute the actual commission of an offence", and it is certainly not easy to determine which acts do form part of the series. According to the definition in Archbold, an act will be in the series if it is "a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it."

It was submitted in this appeal that the definition in Archbold is not consistent with Stephen's definition, and it does seem at first sight that different Judges may take different views as to whether a particular act is "immediately connected" with the commission of an offence.

It is therefore necessary to examine the application in practice of the test formulated by Stephen's Digest.

That definition requires a Court to suppose that there is no interruption of a series of acts which constitute the commission of an intended offence, and then to inquire whether any of those acts has actually been committed. It seems to me that in applying this test a Court must consider not so much the acts which generally constitute the elements of the particular offence, but rather the acts which in the case actually before it would have been committed if there had been no interruption.

In the instant case, apart from the acts actually proved, it is clear that but for the seizure of the lorry the packages of cardamons would have been taken out of Ceylon in the boat which was brought for that purpose to the pre-arranged point on the coast. The series of acts actually committed would then have included all those acts which I have already listed, *plus* the further act that the packages were taken out of territorial waters in the boat.

But this further act could not have been done unless the packages of cardamons had actually been brought in the lorry for the purpose of being loaded into the boat at the pre-arranged point on the coast. It seems to me that because the bringing of goods to the coast was in this case an essential step in the smuggling operation, the act of having so brought them did form a part of the series of acts which would in this case constitute the offence of unlawful exportation.

Diplock L.J., in his brief judgment in *Darcy v. Lee* emphasizes the need for a common sense approach to the question under consideration. If from the nature and purpose of some act actually done, it is apparent in common sense that the doing of further acts towards the commission of an offence is imminent, and that the further acts were not done only because of some interruption, then, in the language of the definition suggested in Archbold the act actually done is immediately connected with the commission of the offence.

In my opinion, both definitions under consideration contemplate that if the intent of a person to commit a particular offence is established, and if some act is done by him which has necessarily to be done in the course of committing the offence, it would be contrary to common sense to take account of the possibility that he may yet repent and voluntarily abandon a course of action actually commenced. If a husband, who has a strong motive for murdering his wife, mixes a fatal dose of poison in a cup of coffee which he knows will in the ordinary course of events be carried by a servant and consumed by his wife, it is contrary to common-sense to think that he may yet abandon his intention to commit murder.

The act in the case of *Davey v. Lee*, of cutting the protective wires encircling the premises in which a theft was to be committed was an essential step towards the commission of the theft. Neither that act nor the act in the present case of bringing the goods to the vicinity of the pre-arranged point of loading into a boat, is comparable to the mere procuring of wire-cutting instruments or the mere procuring of a boat.

In the familiar example of procuring a weapon with intent to commit an assault, the commission of the assault is not shown to be imminent by reason of the fact that the person intending the assault has procured a weapon. The purchase of a weapon is no doubt an act; but such an act only establishes a person's possession of the weapon, and there can be no doubt that the possession of a weapon with intent to commit some offence is not an act done in the commission of the offence. If the persons who planned the smuggling operation had only arranged for a lorry to be available to convey the packages to the coast at Trincomalee and for a boat to be available to take the packages out of Ceylon, they would have been in the same position as an intending assailant who procures a weapon. But in fact both the lorry and the boat were actually used, in that the lorry conveyed the packages to the vicinity of a pre-arranged point and the boat was brought to that point in readiness to take away the packages. These were acts directly connected with the commission of the contemplated offence, for in the circumstances they were essential acts but for the doing of which the offence could not have been committed.

For those reasons, I entirely agree with the learned District Judge that on the facts as found there was an attempt to commit the offence of unlawful exportation. The plaintiff Company, whose Director actively participated in that attempt, must abide by the forfeiture of the Company's lorry. The appeal is dismissed with costs.

DE KRETZER, J.—

The facts are fully set out in the judgment of My Lord the Chief Justice, whose judgment I have had the advantage of perusing. I agree that this appeal must be dismissed with costs. The appeal turns on the question whether the learned District Judge was right in his conclusion that the lorry 22 Sri 9758, belonging to the plaintiff company was used in

an attempt to illegally export 117 boxes of cardamons and therefore correctly confiscated in terms of section 125 of the Customs Ordinance by the Collector of Customs.

The conveyance by lorry from Colombo to Trincomalee of boxes of cardamons is by itself an equivocal act and where an act alleged to constitute an attempt to commit a crime is equivocal it has been laid down in *Jones v. Brooks*<sup>1</sup> "that evidence of the intention of the defendant is relevant in order to establish towards what object the Act was directed. Once the intention of the defendant has been found, it still remains for the prosecution to prove that the act itself was sufficiently proximate to amount to an attempt to commit the crime."

In the instant case Nadesan Q.C. confined himself to the submission that, accepting all the evidence led by the defendant it established no more than preparation to export the cardamons illegally.

Applying the test first suggested by Mr. J. W. Cecil Turner in his article found in volume 4 of the English Studies in Criminal Science at page 274 quoted with approval by Lord Parker in *Davy v. Lee*<sup>2</sup> which reads as follows:—

"The *actus reus* of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of that specific crime, and the doing of such act cannot reasonably be regarded as having any other purpose than the commission of that specific crime", to the proved facts of this case it appears to me that they fall amply within that definition.

The failure of the plaintiff to give an explanation which would be peculiarly within his knowledge as to why the lorry with an incomplete record sheet D4 and laden with cardamons intended for export illegally came to be found within 40 yards of the sea shore at Kelarawa in Trincomalee, in my opinion plays a large part in a common sense determination of whether the use of the lorry can be reasonably regarded as having been used for any other purpose.

It appears to me that once the point to which these cardamons were to be taken on the sea-shore was fixed and they were loaded for that purpose into the lorry the stage of preparation for the offence was over. The fact that the cardamons had to change the vehicle in which they were travelling from lorry to boat, from boat to ship to get them to their country of destination made no difference in the matter. They were on their way. In other words there was direct movement towards the commission of the offence and that clearly is an attempt. The appeal is dismissed with costs.

*Appeal dismissed.*

<sup>1</sup> 52 *Criminal Appeal Reports* (1968).  
100—K 5883 (8/71)

<sup>2</sup> (1967) 2 *A. E. R.* 425.