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Assessing attempt at the impossible in South African criminal law*

1. Introduction

An inquiry into attempt liability may be justified on two grounds. First, the area of attempt liability raises very significant issues for criminal law theory in general. To quote Hall, writing in the context of American law:[1]

> Whoever has speculated on criminal attempt will agree that the problem is as fascinating as it is intricate. At every least step it intrigues and cajoles; like *la belle dame sans merci*, when solution seems just within reach, it eludes the zealous pursuer, leaving him to despair ever of enjoying the sweet fruit of discovery. For criminal attempt involves the very foundations of criminal liability; before one can conclude even a preliminary analysis, an appraising eye must be cast over almost the entire penal law — the definitions, the types of crime, the nature of the "act", the sanctions — in order to unravel any thread of reason that can be discovered in the apparently unreasoned conglomeration of case and statute law, and exhibited doctrine.

Thus attempt liability is worthy of our attention as it is compellingly interesting and challenging for anyone with an interest in substantive criminal law doctrine.

Second, it is necessary to examine this area of law since the legal rules governing it are rather unclear in certain significant aspects as regards the species of attempt liability relating to attempt at the impossible, and it is hoped that by highlighting these aspects it will be possible to bring some clarity.[2]

2. The leading case of *Davies*

It seems that in the early cases dealing with attempt at the impossible, no firm principle was applied, in the absence of any detailed Appellate Division consideration of this area of the law.[3] Apparently, a test emerged in a number

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1 Hall 1940: 789 (cited by Duff 1996: ix).

2 Justice simply cannot be done to the richness and complexity of the debate into the nature of attempt liability in a note of this brevity. Readers who wish to delve far deeper into the theoretical aspects involved will benefit from engaging with Duff's excellent analysis of such issues. Of necessity, the scope of the inquiry which follows is similarly restricted.

3 De Wet & Swanepoel 1949: 125; Pittman 1950: 58; Burchell 1956: 361; Tselentis & Friedman 1969: 69. In cases such as *Töpken and Skelly* 1 Buch AC 471; *Maarman*

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of provincial division decisions based on the distinction between cases of absolute impossibility, where the quality of the means used or of the person or object to which the criminal purpose was directed was such as to render the crime absolutely impossible to commit, and cases of *relative* impossibility, where the attempt had failed due to fortuitous circumstances, rather than that the result was impossible to attain.[4] Thus the conduct of a person using a toy pistol to kill someone (in the belief that the pistol was real), or shooting at a tree trunk believing it to be human, was regarded as constituting *absolute* impossibility. On the other hand, the conduct of one using a real unloaded pistol (believing it to be loaded), or shooting at a bed believing it to be occupied, was regarded as amounting to *relative* impossibility. Where there was absolute impossibility, no liability would ensue, whereas where there was relative impossibility, there would be liability for attempt. It is clear that this test is founded on objective considerations.[5]

As early as 1949, De Wet and Swanepoel argued in favour of a subjective approach to impossibility,[6] finding support in the Roman-Dutch law writers, although they stressed that in ascertaining liability for attempt at the impossible there would still have to be an assessment whether the accused was in the stage of preparation or execution.

In 1956, in the case of *Davies*,[7] the Appellate Division finally had the opportunity to address the issue directly. The court, in hearing an appeal against a conviction for attempting to procure an abortion, had to decide whether such a conviction was possible if the foetus which was caused to be aborted was already dead. Schreiner JA, who delivered the majority judgment on behalf of the court, held that the conviction for attempted abortion was sound. In the course of his judgment, Schreiner JA stated that in considering the distinction between an objective approach, concerned with danger to community interests, and a subjective approach, focusing on the liability of the individual accused

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5 EDC 331, *Abrahams* (1907) 24 SC 157 and *Seane* 1924 TPD 668 the courts, adopting an objective approach, did not accept that an attempt at the impossible led to liability. In contrast, a subjective approach was adopted in cases such as *Freestone* 1913 TPD 758, *Stewart* 1922 EDL 117, *Mtetwa* 1930 NPD 285, *Claassen* 1936 CPD 28, *Levin* 1938 TPD 178, L 1946 AD 190, *Kumalo* 1952 (2) SA 389 (T), and *R* 1954 (2) SA 134 (N) where the courts held that liability could follow such an attempt. The Appellate Division adverted briefly to the issue, without any definitive discussion, in *Parker and Allen* 1917 AD 552 and *Chipangu* 1939 AD 266.

4 Lansdown, Hoal & Lansdown 1957: 139. See further, on this distinction, Tselentis & Friedman 1969: 68. For an example of a conviction on the basis of the classification of the accused's conduct as only 'relatively impossible', see *Chipangu*.

5 As Fletcher 1978: 138-9 states objectivists favour a minimalist approach to liability, which in this context means 'being sympathetic to claims of impossibility as a bar to liability'. On the other hand, subjectivists favour a maximalist approach to liability, and thus 'tend to…reject the relevance of impossibility'.

6 De Wet & Swanepoel 1949: 127, who further point out that the law relating to attempt liability is based on, and has developed from the phrase '*dolus pro facto accipitur*' ('intent is taken as the act') found in D. 48.8.7. A subjective approach was also adopted in s83 of the Native Territories Penal Code (Act 24 of 1886 (C)).

7 *Davies* 1956 (3) SA 52 (A).

('moral guilt'), the latter should be followed.[8] Thus the objective assessment of degree of impossibility founding the distinction between absolute and relative impossibility was rejected as 'logically unsatisfactory'.[9] Instead, it was held, the focus is on 'the only essential fact: that he thought that he could achieve his purpose, but was mistaken'.[10] The crux of the judgment of Schreiner JA is found at 64A-B:

> To sum up, then, it seems that on principle the fact that an accused's criminal purpose cannot be achieved, whether because the means are, in the existing or in all conceivable circumstances, inadequate, or because the object is, in the existing or in all conceivable circumstances, unattainable, does not prevent his endeavour from amounting to an attempt.

The decision was based on comparative developments and writings in Anglo-American law, rather than old authorities.[11] In contrast, Steyn JA's dissenting decision found support for an objective approach to attempt at the impossible in Roman-Dutch law.[12]

It is significant that in relation to 'widely irrelevant' endeavours — such as trying to kill someone by incantation or prayers — and faced with the temptation to introduce objective considerations to exclude these instances from liability, Schreiner JA grasped the nettle, and insisted that a subjective approach should apply.[13] However, Reynolds JA in a separate concurring judgment pointed out that intention alone was insufficient for liability, and that the accused had to be in the state of execution, which would inevitably require an assessment of the accused's conduct.[14] Nevertheless, the effect of the entirely subjective approach in *Davies* is that conduct can be objectively innocent and still lead to liability for attempt.[15]

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8 *Davies*: 61D-F.

9 *Davies*: 62C.

10 Davies: 62H.

11 See *Davies*: 61A-C, where, having dismissed the utility of the old authorities, Schreiner JA has regard to writers discussing American law, English law and Continental (Dutch, French and German) sources.

12 See *Davies*: 66G-72H. However, De Wet & Swanepoel 1960: 152 criticize the judgment of Steyn JA on this point, as not always distinguishing clearly between the principle that thought alone is not a crime (*cogitatio crimen non est*) and attempt. Schreiner JA was unpersuaded by any resort to the old authorities — see *Davies*: 59H-60H. For a similar attitude to the old authorities, see *Claassen* 1936 CPD 28 at 33.

13 *Davies*: 63E-64A. A similar approach may be found in the stark reasoning of De Wet & Swanepoel 1949: 127, to the effect that in principle there is no distinction between shooting at and missing someone, and trying to kill him with a magic spell. In both instances there would be intent to kill, and in both instances the victim is unharmed. Further support for this approach may be found in Christie 2000: 219.

14 *Davies*: 75A-C. See also De Wet 1985: 174.

15 Thus one could be liable for attempted theft for stealing one's own umbrella with theftuous intent, or for firing a water pistol at a scarecrow with murderous intent. The latter example is marshalled by Steyn JA (*Davies*: 72G-H) in his attempt to indicate the difficulties with an entirely subjective approach. However, as Burchell

The principle that factual impossibility does not negate liability for attempt was held to be subject to two 'cautionary observations' by Schreiner JA: that if what the accused was aiming to achieve was not a crime, an endeavour to achieve it could not, because by a mistake of law he thought that his act was criminal, constitute an attempt to commit a crime; and that the language of the statute may preclude attempt liability.[16] The latter qualification has been applied, apparently without difficulty, in the case law,[17] and thus, for the balance of this note, the focus of the discussion will be on the content of the first qualification.

3. Attempt at the legally impossible

Before addressing the content of the first qualification, it may be noted that the clarity which the *Davies* case brought to this area of the law was generally welcomed by the writers,[18] and that it has been the leading case in South African criminal law as regards attempt at the impossible ever since.[19] This is not to say that the courts have always applied the rules set out in *Davies* consistently,[20] but the Appellate Division has confirmed its authority, at least in relation to attempt at the factually impossible, in the cases of *W*,[21] and *Ndlovu*.[22] At the very least, it appears that the effect of the first qualification set out in the *Davies* case is that an attempt at a non-existent or *putative* crime (such as adultery or sodomy) would be regarded as falling within this exception, would be regarded as 'legally impossible', and would not incur liability.[23]

One case which has however given rise to some difficulty proceeded from the Appellate Division itself: the case of *Palmos*.[24] In this case the accused, a pharmacist, obtained large quantities of medicine from representatives of pharmaceutical companies, for which he paid the representatives. Although the representatives were authorised to give away small quantities of product

points out (1956: 364), this approach is consistent with principle. As De Wet & Swanepoel 1960: 152 state, were one to adopt an objective approach, then only a completed attempt at an achievable purpose could be held to be criminal.

16 *Davies*: 64B-D.

17 See *Kantor* 1969 (1) SA 457 (RA): 458H-461A; *Frames (Cape Town) (Pty) Ltd* 1995 (8) BCLR 981 (C): 993G-I. See further De Wet & Swanepoel 1960: 151.

18 De Wet & Swanepoel 1960: 151; Burchell & Hunt 1970: 385; Snyman 1984: 235.

19 For cases in which the approach in Davies was explicitly followed, see e.g. *Pachai* 1962 (4) SA 246 (T); *Shongwe* 1966 (1) SA 390 (SR, AD); *Ndlovu* 1982 (2) SA 202 (T); *Madikela* 1993 (2) SACR 403 (B).

20 See, for example, the cases of *Keyter* 1960 (1) PH H188 (T) and A 1962 (4) SA 679 (E). In both these cases, it is submitted, the court confused factual and legal impossibility. See discussion in Burchell and Hunt 1970: 389-391, and in respect of the *A* case, the persuasive critical discussion in Schmidt 1963: 139.

21 1976 (1) SA 1 (A). This case dealt with the attempted rape of a corpse.

22 1984 (3) SA 23 (A). This case dealt with the attempted murder of a corpse. For an approving comment on this case, see Du Plessis 1985: 396.

23 As is evident from the discussion which follows, this is common cause amongst the writers.

24 1979 (2) SA 82 (A).

to pharmacists as samples, to give large quantities to a single pharmacist in return for cash or goods was distinctly irregular. The accused was found guilty of attempted theft in the trial court. The verdict was not theft, because it could not be established that the representatives had actually stolen the goods from their respective companies, but because the court found that the accused believed that the goods were stolen, it held that he had intention to steal, and applying the legal reasoning in Davies, based on a subjective test, the accused was convicted of attempted theft.

On further appeal to the Appellate Division, it was held that intent to steal could not be established beyond reasonable doubt,[25] and thus the conviction was set aside. It is unfortunate that the court did not stop at this point. However, the court went on to state that even if it was held that the appellant had intent to steal, he would still be acquitted, as his conduct at most amounted to the commission of a 'putative crime', rather than a mere error as to an essential element of the crime of theft.[26] The difficulty with this conclusion is manifest. Surely it is incorrect to hold that the mistaken belief of Palmos that the goods had been stolen constituted a mistake relating to the existence of a crime?[27] Theft is, after all, a legally recognized crime.

However, the effect of this confusion was to expose the significant differences of opinion regarding the interpretation of the first qualification in *Davies*, holding that attempt at the legally impossible would not give rise to criminal liability. The views of the writers thus fall to be briefly summarised.

Van Oosten is of the view that the term 'putative crime' refers to a crime that does not exist.[28] In his view, attempt at such a crime does not give rise to any liability, as opposed to attempt at the factually impossible or an attempt which relates to a mistake as to the elements of an existing crime.[29] De Wet takes the same approach as Van Oosten, stating that there would only be no liability where there was an attempt at a non-existing crime.[30] However, De Wet presents a confused picture, as in a subsequent discussion of the case law, he states that if one appropriates a *res nullius*, then this would not be an attempt, but a simple case of a putative crime.[31] It is evident that theft is not a putative crime.

Visser and Maré on the other hand state that 'putative crime' includes both a non-existent crime and a mistake as to the nature of an existing crime.[32] It follows that a mistaken attempt in either of these contexts is excluded from

25 *Palmos*: 94G-H.
26 *Palmos*: 95E-F.
27 See the criticism of the *Palmos* case in Van Oosten 1979: 324ff, De Wet 1985: 174.
28 Van Oosten 1979: 325.
29 Van Oosten 1979: 329.
30 De Wet 1985: 173.
31 De Wet 1985: 174, where the case of *Mnomiya* 1970 (1) SA 66 (N) is discussed.
32 Visser and Maré 1990: 651.

liability. Labuschagne also classifies mistaken attempt at a putative crime and a mistaken attempt to commit an existing crime together.[33]

Snyman's approach has gradually progressed from an uncritical case note on *Palmos*[34] and a rather diffident argument that any ambiguity of interpretation of the first qualification in *R v Davies* must redound in favour of the accused.[35] In contrast, in his latest writing, Snyman clearly states that the accused's mistake in the *Palmos* case was a mistake as to the nature of the goods, i.e. factual impossibility,[36] and that the distinction must be drawn between attempt at the factually impossible, which leads to liability, and attempt at a putative crime, which he defines as a mistake as to the existence of a crime or the legal nature of one of its definitional elements, which would not found liability.[37]

Lastly, the views of Professors Exton Burchell and Jonathan Burchell may be examined. In his case note on *Davies*,[38] and in the first edition of *South African Criminal Law and Procedure (Vol I: General Principles)*, published in 1970,[39] Exton Burchell clearly states his position using the following example:[40]

> A, intending to steal, traps an animal *ferae naturae*. Whether A is guilty of attempted theft depends upon his intention and the type of mistake which he made. If he wrongly thought that an animal *ferae naturae* could be stolen and had this intention his mistake would be one of law and he would not be guilty of attempted theft since the crime intended was legally non-existent. The result would be otherwise, however, if he merely made a mistake of fact in thinking that the animal in question had been domesticated. It follows … that an endeavour can be an attempt even though the accused obtained the result that he desired and that result was not a substantive crime. The argument that if the physical act intended is not a crime the attempt to do it cannot be criminal is valid therefore only when the attempt is legally impossible judged by the act which the accused intended and taking the circumstances as he supposed them to be' (my emphasis).

This statement appeared in succeeding editions of this work,[41] and can be found in the third edition of Jonathan Burchell's *Principles of Criminal Law*.[42] And why not? It is a crisp, clear example which shows that a mistake as to one

33 Labuschagne 1980: 122, where it is pointed out that both cases relate to 'die generaliserende kant van die misdaad of strafregsnorm', i.e. both impact on whether conduct, along with a particular mental state, can be regarded as criminal.
34 Snyman 1979: 180. Furthermore, Snyman simply refers to Van Oosten's views on Palmos in the first edition of his textbook, (1984: 239n78).
35 Snyman 1984: 238-9.
36 Snyman 2002: 288n52.
37 Snyman 2002: 288.
38 EM Burchell 1956: 364.
39 Burchell and Hunt 1970: 388.
40 The example apparently derives from the American case of *Johnson* (1933) 312 Pa. 140, 167 Atl. 344, 89 ALR 333, cited by Williams 1961: 645.
41 Burchell, Milton and Burchell 1983: 464; Burchell 1997: 354.
42 Burchell 2005: 638. The statement also appears in previous editions of this work: Burchell and Milton 1991: 379; Burchell and Milton 1997: 442.

of the elements of a crime amounts to an attempt at the legally impossible, and thus will not give rise to liability. Unfortunately, the need to explain the decision in *Palmos* muddied the water in the second edition of *South African Criminal Law and Procedure*, published in 1982, where we find the following statement:[43]

> It seems now clear from Corbett JA's reference in *Palmos* to a mistake giving rise to a putative crime and the weight of juristic opinion that for an attempt to be excusable on the ground of legal impossibility the accused must have endeavoured to commit a legally non-existent offence, i.e. he must have been mistaken as to the existence of the offence itself and not merely in respect of some aspect of a legally recognized offence.

The identical passage may be found in the third edition of this work,[44] as well as in the third edition of *Principles of Criminal Law*.[45] However, these two statements, found in the course of the same analysis, are obviously irreconcilable. Further, as has been stated above, the difficulties with the second statement are manifest, in the light of the fact that theft is a legally recognized crime.

The above discussion begs the question — in the light of the divergent views of the content of the first qualification in *Davies*, and the lack of further appeal court authority in point after *Palmos* — what is the law?

4. Conclusion

First, as regards attempt at the *factually impossible*, the law is clear. It is necessary to assess liability for attempt in terms of the facts or circumstances as the actor believes them to be at the time of acting.[46] This way of dealing with the matter is described by Ashworth as the 'fault-centered approach to impossible attempts',[47] and it accords exactly with the subjective approach set out in *Davies*, which remains the governing precedent in South African law in this regard.[48] The rationale for this approach is, in line with legal policy and the legal convictions of the community,[49] that if it is proved that the accused acted with

43 Burchell, Milton and Burchell 1983: 466.
44 Burchell 1997: 355.
45 Burchell 2005: 638. The statement also appears in previous editions of this work: Burchell and Milton 1991: 379; Burchell and Milton 1997: 443.
46 Christie 2000: 220; Ashworth 1999: 469.
47 Ashworth 1999: 469.
48 Apart from the apparent confusion relating to the nature of legal impossibility in Palmos, there is a further unwelcome (it is submitted) perspective which the court expresses in its discussion of the English law, in its praise for the House of Lords decision in *Haughton v Smith* (1973) 3 All ER 1109. In this decision, the House of Lords adopted an objective approach. Subsequently, the Criminal Attempts Act 1981 effectively reversed the decision in this case, and in the case of *Shivpuri* [1987] AC 1 the subjective approach was authoritatively adopted as the standard in English law. There was never an attempt to overrule the Davies case by the court in *Palmos* however.
49 *Ndlovu* (1984): 28D.

intent to commit the offence and that his conduct would constitute the crime if the circumstances had been just as he believed them to be, then he is just as culpable[50] and in general just as dangerous as the accused who successfully consummates the offence.[51]

In respect of attempt at the *legally impossible*, in South Africa we no longer have the difficulty of paying lip service to the maxim that ignorance of the law does not excuse (unlike Common Law jurisdictions). In South Africa, since the Appellate Division decision in *De Blom*,[52] it does. In principle then, if an accused is genuinely mistaken as to the law (and which rational person is going to set out to intentionally commit a crime that is impossible to commit?[53]) he or she ought not to be held liable for attempt of that crime on the basis that *bona fide* mistake of law excludes intention. Thus the first qualification in *Davies* relating to attempt at a putative crime (legal impossibility) should include both mistake as to the existence of a crime and mistake as to the definition of an existing crime.

This is incidentally in line with both the US Model Penal Code[54] and the English Criminal Attempts Act of 1981,[55] both of which adopt a subjective approach to this form of attempt liability. In essence, what these instruments state, and what we need to state in order to be consistent with the leading case of *Davies*, is that there ought not to be liability where the accused's intended acts, even if completed, would not amount to a crime:

> There is no *actus reus* for the act done is lawful. If mens rea means (or includes) an intention to cause or take the risk of causing, a result which the law forbids, there is no mens rea, for the result intended by the [defendant] is not one which the law forbids. A belief that an act is a criminal offence is not *mens rea* or part of it.[56]

It is necessary, in the final analysis, to judge accused persons against the facts as they believe them to be, but against the *law* as it actually is.

50 In *Ndlovu* (1984): 28D-E, Joubert JA states that a person attempting an offence should not simply escape punishment as a result of facts, unknown to him, which rendered it impossible for him to achieve his criminal purpose. Brett 1963: 128-9 raises a similar argument in favour of liability.

51 Schulhofer 1983: 96.

52 1977 (3) SA 513 (A).

53 As Ormerod 2006: 543 succinctly states: 'sane men do not attempt what they know to be impossible'. In any event, as Christie 2000: 218 points out, where the accused knows of the impossibility of what he is 'trying' to do there can be no attempt.

54 MPC §5.01(1)(a). Fletcher 1978: 169 notes that this position has been adopted in all of the American states adopting new penal codes.

55 See discussion in Card 2001: 581, and Ashworth 1999: 470-1.

56 Ormerod 2006: 544.

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