DOUBLE INCHOATE CRIMES: SERVING A USEFUL PURPOSE OR DOUBLE TROUBLE?

Déry v The Queen; Attorney General of Canada et al, Interveners [2007] 213 CCC (3d) 289 (SCC)

1 Introduction

Inchoate crimes have been categorized by Husak (see "Reasonable Risk Creation and Overinclusive Legislation" 1998 *Buffalo Criminal LR* 599 602-604) as either "complex" inchoate crimes, such as attempt, conspiracy or incitement (the equivalent of which is known as "solicitation" in US law, and "counselling" in Canadian law) and "simple" inchoate crimes such as housebreaking with intent, drunk driving and crimes of possession, where the crime serves as a means to punish an actor before a certain harm has been completed (see Zimmerman "Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act" 2000 *Northern Illinois University LR* 219 228). A combination of inchoate crimes may be referred to as "double inchoate crimes" (see Robbins "Double Inchoate Crimes" 1989 *Harvard Journal on Legislation* 1). Concerns have been expressed about the use of double inchoate crimes to found criminal liability. Whilst a combination of the categories typically does not give rise to difficulties in South African law, and is generally uncontroversial (see, *eg*, Hoctor "Attempted Housebreaking with Intent to Commit a Crime" 2007 *Obiter* 600), the question arises whether a combination of complex inchoate crimes is appropriate, particularly in the light of criticism of such formulations in certain jurisdictions (such as Canada and the United States), and statutory restrictions on certain formulations in others (such as England).

This question will be examined in the light of the recent decision of the Canadian Supreme Court decision of *R v Déry*.

2 Facts

The appellant was convicted, along with another person, by the trial court of attempting to conspire to commit theft and attempting to conspire to possess stolen goods. These convictions arose out of intercepted communications between the appellant, his co-accused and others (flowing from an unrelated police investigation) wherein the possibility of stealing certain stocks of

liquor, which were being stored outdoors in trailers at a warehouse in Quebec City, was discussed. As there was no evidence that either accused had taken any steps to further the theft, or indeed that there was an actual agreement to steal or possess the liquor about which they wrongfully ruminated, the court acquitted them of both conspiracies, but convicted them of both attempts to conspire on the basis that their acts were more than merely preparatory to the conspiracy. The convictions were confirmed on appeal by the Court of Appeal of Quebec. However, this decision was not unanimous, as there was a dissenting judgment by Forget JA which held that attempted conspiracy was not an offence in Canadian law. The appellant then addressed a further appeal to the Supreme Court of Canada, which was required to decide whether there was "any legal basis for concluding that attempt to conspire to commit an indictable offence is a crime in Canada" (par [9]). Given that Canada's criminal law has been codified, there is no scope for a conviction based on the common law, and thus the inquiry amounted to whether attempt to conspire "has until now lain dormant within the statutory confines of the *Criminal Code*, ready to be roused by a proper sounding of its governing provisions" (par [9]).

3 Judgment

Justice Fish made it clear from the outset of his judgment, delivering the verdict of the Court, that the charge of attempt to conspire would not be countenanced, on the grounds that attempt to conspire to commit a substantive offence had never previously been recognized as a crime under Canadian law (par [2]). He declined the invitation to find that this offence nevertheless exists, albeit unacknowledged, in the Criminal Code, stating that "[l]ike Forget JA, I would let sleeping laws lie" (par [10]).

The Court first examined those cases which have dealt with this charge. In *R v Dungey* (1979), 51 CCC (2d) 86 (Ont. C.A.), Dubin JA held that "there is no such offence as attempt to conspire to commit a further substantive offence" (98, cited par [16]), whilst leaving open the question whether there could be an attempt to conspire where conspiracy constitutes a substantive offence. The trial judge in the *Déry* case held that the question whether attempt to conspire to commit a substantive offence had been left open in the *Dungey* case, a view supported by the majority of the Quebec Court of Appeal (see par [18]). Fish J disagreed strongly with this view however, holding that this was "*the very question* answered … in *Dungey* … in the clearest terms" (par [19], emphasis in original), and that the only uncertainty related to whether an attempt can apply where conspiracy is the substantive offence (par [20]). It was further held that the majority of the Court of Appeal's reliance on the case of *R v May* (1984), 13 CCC (3d) 257 (Ont. C.A.) in support of its view was unfounded. In the third decision discussed by the Court, *R v Kotyszyn* (1949), 8 CR 246, 95 CCC 261 (Que. C.A.), there was an *obiter* statement by one of the judges, Gagné JA, which held that an attempt to conspire could constitute a crime, in the following terms (265 CCC, in translation, cited par [28]):

> "Certainly there may be an attempt to conspire. A presents herself at the home of B and suggests to her an agreement to commit an offence. B refuses. There is no conspiracy, but an attempt on the part of A, an attempt which did not succeed. If she succeeded, that is to say, if there had been acquiescence, the offence of attempt disappeared; it is that of conspiracy that is committed."

Fish J held however, that this statement mistakenly conflated the crime of counselling and attempt to conspire, since by emphasizing offer rather than acquiescence, the focus was on "enticing into crime", which is criminalized by counselling (par [29]). The term "counsel" for the purposes of the crime of counselling includes "procure, solicit or incite" (s 22(3) of the Canadian Criminal Code).

Noting the definition accorded the *actus reus* of counselling in *R v Hamilton* [2005] 2 SCR 432, 2005 SCC 47, 198 CCC (3d) 1, 255 DLR (4th) 283 – the "deliberate encouragement or active inducement of the commission of a criminal offence" – Fish J emphasized that the relatively high threshold of this crime is an essential safeguard against potential overbreadth, and that the *actus reus* for attempted conspiracy proposed *in casu* was much broader in scope (par [31]-[32]). The Court proceeded to distinguish the Canadian approach to conspiracy liability from that of the United States, where a unilateral conspiracy suffices for liability (par [33]-[35]). Finding support in other jurisdictions with a common legal heritage (par [38]: England, United States, Australia and New Zealand), and distinguishing cases from Fiji and East Africa (where, the Court held, attempt to conspire has "served essentially as a stand-in for counselling or incitement" (par [39]), as well as South Africa (where, the Court held that attempt to conspire has functioned as "a means to capture unilateral conspirators" in *Harris v R* 1927 NPD 330 (par [39]), the Court concluded that this was not an appropriate case to recognize attempt to conspire in relation to unilateral conspiracies (par [37], emphasis in original):

> "This is not a case with only one willing party. Nor was there *any* agreement, bogus *or* bona fide, for Mr Déry to join. The appeal turns entirely on whether criminal liability attaches to fruitless discussions in contemplation of a substantive crime that is never committed, nor even attempted, by any of the parties to the discussions. I am satisfied that it does not."

The Court then proceeded to examine further the arguments relating to liability for attempted conspiracy. These will be traversed below.

4 Policy issues

The use of double inchoate crimes has been criticized as a "logical absurdity" in a number of US cases (see *Allen v People* 175 Colo. 113 115, 485 P. 2d 886 888-9 (1971); *Hutchinson v State* 315 So. 2d 546 549 (Fla. Dist. Ct. App. 1975); *Gentry v State* 422 So. 2d 1072 (Fla. App. 1982) affirmed 437 So. 2d 1097 (Fla. 1983); *Green v State* 82 Ga. App. 402 405, 61 SE 2d 293 (1950); and *People v Banks* 51 Mich. App. 685 690, 216 NW

2d 461 463 (1974)), following the rhetoric in the most influential decision espousing such criticism, the Georgia Supreme Court decision of *Wilson v State* 53 Ga. 205 (1874). In this case it was held (206) that:

> "The refinement and metaphysical acumen that can see a tangible idea in the words attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity."

A similar sentiment was expressed in *Allen v People* (*supra* 117):

> "Perhaps philosophers or metaphysicians can intend to attempt to act, but ordinary people intend to act, not to attempt to act."

The logical absurdity argument rests on two pillars. First, that double inchoate crimes allow for the possibility of liability being based on mere acts of preparation (Robbins 1989 *Harvard Journal on Legislation* 65), thus going beyond what an attempt statute would allow. Second, that offenders do not attempt to attempt a crime, attempt to conspire to commit a crime, or attempt to incite a crime, but instead attempt to commit a completed offence (Zimmerman 2000 *Northern Illinois University LR* 238).

A further criticism of double inchoate constructions (Zimmerman 2000 *Northern Illinois University LR* 239) is that these may infringe the principle of legality, in that penal provisions ought not to be formulated vaguely or nebulously, so that it is difficult to understand what the provision requires of the individual (this principle, known as *ius certum*, is discussed by Snyman *Criminal Law* 4ed (2002) 46). As Snyman points out, such formulations may infringe the right to a fair trial protected in section 35(3) of the South African Constitution, 1996, and in particular section 35(3)(*a*), which provides that every accused person has the right to be informed of a charge with sufficient detail to answer it (Snyman 46). Moreover, double inchoate crimes have been criticised for being cumbersome and unnecessary (Robbins 1989 *Harvard Journal on Legislation* 80ff), and for over-extending the moral limits of the criminal law, resulting in over-criminalisation (Zimmerman 2000 *Northern Illinois University LR* 247), with all its attendant problems (see Burchell *Principles of Criminal Law* 3ed (2005) 58ff for discussion).

On the other hand, use of double inchoate constructions has been justified on the grounds of judicial efficiency, as these formulations allow for easier convictions and provide the prosecutor with a tool for plea-bargaining (Zimmerman 2000 *Northern Illinois University LR* 245-246). Moreover, the need for liability in this form derives from the predictive and preventive purposes of inchoate liability, along with the deterrent value of such crimes (Robbins 1989 *Harvard Journal on Legislation* 116). There are consequently weighty policy considerations underpinning the need for double inchoate crimes.

5 Double inchoate criminal liability in other jurisdictions

Though the scope of this note does not permit a more detailed analysis, it is useful to allude briefly to the extent to which double inchoate criminality is permitted in jurisdictions other than South Africa. In relation to Scots law, Christie (*Gordon's Criminal Law* Vol I 3ed (2000) #6.71) notes that although a charge of attempt to commit an attempt to commit a crime would involve "an infinite regress", and would thus be unacceptable, charges of attempted conspiracy (usually referred to as incitement – Christie #6.71), and attempted incitement (see Christie #6.78) would indeed be permissible. With regard to English law, section 1(4) of the Criminal Attempts Act 1981 specifically prohibits attempted conspiracy (apparently because of conspiracy's remoteness from any substantive offence – see Simester and Sullivan *Criminal Law Theory and Doctrine* (2001) 296). However, attempted incitement is not specifically prohibited (see Card *Card, Cross and Jones Criminal Law* 15ed (2001) #17.54), and thus the common law rules allowing such a construction apparently still apply (Simester and Sullivan 296). Conspiracy to conspire, conspiracy to attempt, and conspiracy to incite are also possible charges (Simester and Sullivan 267). Moreover, whilst a charge of incitement to conspire has been disallowed in terms of the Criminal Law Act of 1977, charges of incitement to incite or incitement to attempt remain feasible constructions (Simester and Sullivan 260).

Robbins's analysis of US decisions reveals an antipathy towards constructions of attempt to attempt (1989 *Harvard Journal on Legislation* 37-38) and attempt to conspire (1989 *Harvard Journal on Legislation* 55, although Robbins suggests that this construction may nevertheless be useful, 55-57). On the other hand, conspiracy to attempt has been used on a number of occasions (1989 *Harvard Journal on Legislation* 58-62), and the attempt to solicit construction, as provided for in the Model Penal Code, is "consistent with a subjective theory of inchoate criminality" and has been adopted in some states (1989 *Harvard Journal on Legislation* 114; see *State v Lee* 804 P.2d 1208 (Or.Ct.App. 1991); Time "Solicitation to Commit Crime" in Wright and Miller (eds) *Encyclopedia of Criminology* Vol 3 (2005) 1560 1561).

As the *Déry* case reveals, there is general antipathy towards double inchoate crimes in Canada. This is nowhere more clearly articulated than by Stuart (*Canadian Criminal Law* 4ed (2001) 704), in a passage worthy of quoting in full:

> "It is logically possible to arrive at preposterously wide definitions of offences by combining the present incomplete offences. Why not attempting to attempt, a conspiracy to attempt, counselling an attempt, and so on? That the general principles of defining each incomplete offence would be applied to situations surely never imagined, suggests that the criminal sanction should not be extended at all to combinations of incomplete offences. The nature of criminal responsibility in respect of offences not yet committed is already wide enough.

> In practice police and prosecutors rarely resort to such linguistic acrobatics. Academic fantasies should not become part of the criminal law."

This approach is adopted in *Déry* by Fish J in the particular context of attempted conspiracy, and the discussion in the judgment is specifically directed at this double inchoate crime, and the unsuitability of recognising such liability in Canadian law. Particularly, Fish J reasoned that such an extension of liability would be inappropriate in relation to the crime of conspiracy, where the legislature has provided for an earlier intervention of the criminal law "because of the increased danger represented by a cohort of wrongdoers acting in concert" (par [44]). This early intervention is justified by the commitment of the parties to a prohibited act, in the form of the agreement. On the other hand, Fish J stated that where someone acts alone, overt acts are required to disclose the criminal intention of the actor, and thus a later intervention is necessary (par [48]). Thus allowing a double inchoate construction of attempted conspiracy would unjustifiably extend the ambit of criminal liability (par [47]):

> "[I]t has never been the goal of the criminal law to catch all crime 'in the egg' … In this sense, conspiracies are criminalized when hatched. And they can only be hatched by agreement."

Moreover, it was held that allowing attempted conspiracy would also not be justified in terms of the rationale for attempt (preventing harm "by punishing behaviour that demonstrates a substantial risk of harm"), since an attempt to conspire would at best amount to "a risk that a risk will materialize" (par [50]). This conclusion was further buttressed by the existence of the offence of "counselling an offence not committed" (s 464 of the Canadian Criminal Code, see par [36]), which criminalizes unilateral conspiracies, and the fact that any further extension of criminal liability is in the discretion of the legislator.

Whilst this reasoning applied specifically to the question of whether an attempt to conspire was permissible, it is clear that, in general terms, the court was not amenable to an argument which allowed the provisions governing inchoate liability to be "stacked one upon the other, like building blocks" (par [40]) to establish criminal liability.

6 Double inchoate criminal liability in South African law

Double inchoate constructions, if not common, appear to be generally acceptable in South African law. Snyman notes that "both attempt to commit incitement and attempt to commit conspiracy are possible" (298). The former construction has indeed been approved by the Appellate Division in *S v Nkosiyana* 1966 4 SA 655 (A) (see 659A; 659F), and the possibility of such a construction was also indicated in *R v Joel* 1963 2 SA 205 (SR) 205E-F; and *S v Kellner* 1963 2 SA 436 (A) 442E-F (see also Burchell 640, 650, who also supports this construction). Moreover, a number of cases cite the fact of

the conviction of one Krause for "attempt to solicit to commit the crime of murder" in England (*Ex parte Krause* 1905 TS 221; *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 SA 133 (T) 137G-H; *Incorporated Law Society, Natal v Hassim* 1978 2 SA 285 (N) 291E; and *Natal Law Society v Maqubela* 1986 3 SA 849 (N) 855J). To "attempt to incite" is furthermore criminalized in the context of section 14(1)(d) of the Communal Property Associations Act 26 of 1996, and section 104(13) of the Defence Act 42 of 2002. With regard to attempt to commit a conspiracy, this was regarded as a sound basis for conviction in the case of *Harris v R* 1927 NPD 330 347 (Burchell also endorses this construction (640, 656)). (As noted above, this authority was mentioned, but distinguished, in *Déry* par [39].) Burchell moreover expresses support for both incitement to conspire and incitement to commit an attempt founding criminal liability (650).

On the other hand, in *S v P and J* (1963 4 SA 935 (N) 937 *in fin*-938A), the court seeks to avoid a construction which would amount to "an attempt to attempt" to commit the offence in question. Burchell agrees that "obviously there cannot be an attempted attempt" (640). De Wet (*Strafreg* 4ed (1985) 172) furthermore expresses general reservations about double inchoate constructions consisting of an attempt to commit a further inchoate offence:

> "Ek sou wel saamstem dat poging, deugdelik of ondeugdelik, nie bestaanbaar is nie indien die strafbedreiging gerig is op 'n handeling wat in wese, so nie formeel nie, 'n pogings- of voorpogingshandeling is tot 'n ander misdaad."

7 Concluding remarks

There is a danger in using double inchoate constructions that, in the words of Ashworth (*Principles of Criminal Law* 5ed (2006) 469), "[t]he reach of criminal liability is pushed further and further, without a specific justification or an overall scheme". It is evident that these concerns predominate in the Canadian system, where the Supreme Court in *Déry* expressly found that to establish attempt to conspire liability would undermine the rationales of the inchoate offences of conspiracy and attempt. In addition, any court imposing liability for a double inchoate offence should be aware of the need to do so consistent with the principle of legality, and in particular the right to be informed of a charge with sufficient detail to answer it (s 35(3)(*a*) of the Constitution).

Nevertheless, as evidenced by the use of these constructions in a number of legal systems, they have a useful role to play in the apprehension of potential harm to the community. Just as the punishing of anticipatory conduct by means of single inchoate offences is justified by the preventive and reformative theories of punishment (Burchell 621-622; Snyman 279), so too criminal liability based on double inchoate crimes is justified on this basis. Moreover, such liability is consistent with the prevailing psychological approach to liability in South African law. It may indeed be that constructions such as "attempt to attempt" or "conspire to conspire" may be of limited practical utility. (Simester and Sullivan 267 note regarding the latter

construction that it is hard to envisage a situation where it would not, more straightforwardly, constitute a conspiracy to commit a substantive offence. It is submitted that the same reasoning would apply to the former construction.) Nonetheless, it may be concluded that double inchoate offences play a useful and necessary role (as indicated above, some constructions are particularly beneficial) in supplementing the basic inchoate offences.

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