IN THE COURT OF APPEAL [1994] QCA 075

SUPREME COURT OF QUEENSLAND

C.A. No. 154 of 1993

Brisbane

[R. v. Webb]

THE QUEEN

v.

WILLIAM PHILLIP WEBB
(Appellant)

Mr Justice Davies
Mr Justice Pincus
Mr Justice Lee

Judgment delivered 29/03/1994.

Reasons for judgment delivered by Davies and Pincus JJ.A. jointly and Lee J. separately. All agreeing as to the order to be made.

Appeal against conviction dismissed.

CATCHWORDS:Criminal law - attempts - attempt to procure another to unlawfully damage property - ss. 4, 439 and 569 Criminal Code - whether elements of an attempt made out - whether evidence on which a reasonable jury could conclude that the appellant "intended" to commit the offence - whether the appellant manifested his intention by some over act - test to be applied - whether the appellant did an act which was a step towards the commission of the offence.

Counsel: Mr S.E. Herbert Q.C., with him J. Wagner for the Appellant.
Mr D Bullock for the Respondent.

Solicitors: Robertson O'Gorman for the Appellant.
Director of Prosecutions for the Respondent.

Hearing date: 23rd July, 1993.

JOINT JUDGMENT OF PINCUS J.A. AND DAVIES J.A.

Judgment delivered 29/03/94

We have read in draft the reasons of Lee J. The fullness of his Honour's explanation of the facts relieves us of the necessity of setting them out in full detail.

The charge was one of attempting to procure one Scanlan to wilfully and unlawfully damage a tourist vessel, "Queen of the Isles". The only ground of appeal was that the verdict was unsafe and that contention was supported by a number of arguments which it is necessary to discuss. Before doing so, there should be set out some details of recorded conversations which the appellant had with other persons about the vessel, on 14 and 21 August 1991. The latter was that in which the offence was alleged to have been committed. The vessel was owned by a company, Vestavon Pty Ltd, a company of which the appellant was a director.

In the first conversation, one Banner-Smith spoke to the appellant of a "guy" described as a "heavy bloke" to whom the appellant was to be introduced. Banner-Smith told the appellant he would have to pay that person "some money up-front" and the appellant inquired how much that might be and whether "those guys" wanted to be paid off-shore. The appellant asked Banner-Smith in effect whether it was proposed to blow a hole in the side and asked: "Has he got a record?", explaining that if a hole were blown in the side of the vessel, "they'd be the first bloody obvious people...with current records". The appellant said he did not have money to put up-front for a couple of months and that he had to make sure that the premium was paid on

the insurance policy; he spoke of an attempt to engage in some sort of transaction with "ANG" - of which mention is made further below - saying that otherwise there would be no payment from the insurance company. Discussing the financial position, the appellant said in effect that the insurance was for about $1.3M, that Mercantile Credits was owed $750,000 and that an attempt was being made to buy out ANG, which could only be done with Vestavon's approval.

Banner-Smith introduced the appellant to the "heavy bloke" who had been spoken of, who was in fact Det. Insp. Peter Scanlan and a conversation with Scanlan ensued. In the course of that the appellant repeated that he did not have any money up-front and mentioned that it was necessary to check "the situation with the insurance policy"; he added that there was a second mortgage over the ship which was the subject of negotiations "to be brought out...". There was discussion of the amount of money Scanlan was to be paid; he suggested that 10% of the insurance money would do, but the money would have to be paid up-front. The appellant said that he could pay money on 12 September and offered to pay it off-shore. Scanlan mentioned the possibility that people could be killed, to which the appellant replied "Mmm, sure". Scanlan said it was agreed that the appellant wanted it to look like an accident and Banner-Smith suggested that a crank case explosion or something of that nature could be simulated. Webb spoke of guaranteeing Scanlan $25,000 up-front and agreed that he would pay $130,000 in all if Scanlan was prepared to wait "until the insurance comes".

Scanlan left the group and further conversation ensued

between the appellant and Banner-Smith in the course of which the appellant explained that he was "pretty desperate for money" and went into some detail about his financial difficulties.

In the second conversation, that of 21 August 1991, before Scanlan arrived the appellant explained to Banner-Smith that he would only be able to get $2,000 initially, but said that on the 17th (of September) he would have "at least 20". When Scanlan arrived this was repeated and Scanlan inquired about the rest. The appellant indicated that Scanlan would have to wait for the insurance money; he re-affirmed the price, $130,000.

There followed discussion about the method of destroying the boat. Scanlan mentioned that there would be a number of explosive charges, giving rise to a possibility that "some people won't get off". On Scanlan inquiring whether the appellant was quite happy about that the appellant said that he was not. The appellant said that he did not want to pay Scanlan's fee out of the insurance money and it was discussed that $2,000 would be paid that day, $20,000 on 17 September and the rest in "dribs and drabs...by February". There followed discussion about the boats, particularly life boats, on board the vessel. Scanlan left and the appellant inquired whether he was a "copper" or an "ex-copper". Banner-Smith assured the appellant that he trusted Scanlan and the appellant inquired whether Scanlan already had the explosives; the appellant suggested that "they've probably been knocked off from somewhere". The appellant also suggested that "he" - presumably Scanlan - should book a double cabin for Sunday and said the money would "definitely be right".

The second conversation is as we have said that in which the offence charged was alleged to have been committed; but the content of the first conversation throws some light upon the appellant's intention, in engaging in the second. There was, on the face of it, ample evidence on which a jury could be satisfied that the appellant gave Scanlan to understand that he wanted the vessel destroyed and was prepared to pay Scanlan handsomely to achieve that. No doubt a variety of arguments was available on the basis of which the jury might have been persuaded to acquit, but it is not evident that any of them was compelling.

The argument advanced was that the verdict was unsafe, and in support of this basic contention a number of criticisms of the jury's conclusions were put forward. Counsel for the appellant argued that there was not merely an absence of proved motive, but a proved absence of motive. That depended upon the assertion that the vessel was subject to mortgages for sums which would exhaust the insurance payout, so that the sinking of the vessel would produce no advantage for the appellant.

In the recorded conversations, reference is made to this subject and, as has been mentioned above, to the possibility that an arrangement could be made to buy-out a second mortgagee referred to in the conversations as "ANG". The evidence was that the second mortgage was in favour of a company, Angkasa Shipping and Trading Incorporated. There was evidence that the appellant and his estranged wife had engaged in some negotiations which contemplated that the Angkasa mortgage might

be discharged or renegotiated. It was, presumably, that possibility to which the appellant alluded in the recorded conversations when he mentioned an attempt to buy out "ANG", but there was no evidence on which one could form a conclusion as to whether or not that was a practical possibility; if it was not, then, as was argued for the appellant before us, the sinking of the vessel and consequent payment of the amount of the insurance would have produced no surplus. In that event, there may have been no advantage to the appellant, arising from the loss of the vessel.

This is not to say, however, that there was a proved absence of motive. It could not be suggested that the financial arrangements relating to and connected with the vessel "Queen of the Isles" were proved completely enough to enable one to be confident as to whether or not the proposed sinking would bring a real advantage to the appellant. One difficulty was that the appellant gave no evidence himself; no doubt he might well have been able to explain at least what he saw as the likely effect on his own finances of the sinking of the vessel.

In the state in which the evidence was left, it seems to us inescapable that there was doubt whether the sinking of the vessel would have assisted the appellant's financial position, but the Crown did not have to prove that it would do so, and the doubt we have mentioned did not entitle the appellant to an acquittal.

A second, and related, point made on behalf of the appellant was that, so it was contended, there was merely a

conditional or contingent attempt to procure Scanlan to sink the vessel. This was so, it was argued, because the appellant made it plain that he had no interest in the vessel being sunk until the problem with the second mortgage was dealt with. It is true that in the conversation of 14 August 1991 the appellant indicated that he wanted nothing done until an arrangement had been made with "ANG". However, in the second conversation, that of 21 August, which is the subject of the charge, there was no suggestion that the arrangements then being discussed could not be put into effect until the second mortgage was got rid of or renegotiated. Towards the end of that conversation the appellant spoke to Banner-Smith on the basis that the sinking was to be done quite soon. He suggested to Banner-Smith that "he" - apparently meaning Scanlan - should book a cabin on the vessel "for Sunday". That conversation occurred on a Wednesday, so that the appellant's intention then appeared to be that the vessel would be sunk in four days time. The only contingency affecting the proposal to sink the vessel spoken of in that conversation of 21 August 1991 was the obtaining of "the money" by which, perhaps, was meant the payment of $2,000 which had been mentioned earlier in the conversation. The appellant said in the conversation of 21 August 1991 that the "money will definitely be right", that it was expected that night or first thing in the morning.

Next, it was argued for the appellant that in discussing the sinking with Scanlan he was merely "playing along" with Scanlan. Reference was made to some evidence suggesting that the appellant was a man who was inclined to agree with what people said to him, even if his true state of mind was

otherwise. One can understand that a jury might have been concerned about the question whether the appellant's attempts to make arrangements to get the vessel sunk were genuine. They might, perhaps, have thought that the plot seemed rather fanciful and particularly noticed that the appellant paid Scanlan nothing, although he spoke of doing so. In these circumstances it might not have been perverse to acquit the appellant, but this is a long way from concluding that the jury acted unreasonably in taking the recorded conversations at face value.

It should be added that there were other pieces of evidence which might have encouraged the jury to think that the appellant was serious about wanting the vessel destroyed. Banner-Smith said that in 1990 the appellant suggested to him that the vessel could be run over a reef to cause damage and produce an insurance claim, and a similar proposal was mentioned to another witness, Claude-Maree Binet, in 1991. According to Banner-Smith the appellant spoke to him in 1991, before the recorded conversations referred to above, about sinking or damaging the vessel to obtain the insurance. It was those approaches which led to the involvement of Scanlan; Banner-Smith disclosed them to the police and it was arranged that Scanlan would pretend to be a person who was willing to achieve the destruction of the vessel. But it is unnecessary to go into the details of those earlier discussions, since in our opinion there was enough in the recorded conversations to justify a view, to the requisite standard, that the appellant was serious and not merely "playing along" when he expressed himself to Banner-Smith and to Scanlan as wishing Scanlan to sink the vessel to obtain the insurance

money.

We agree that the appeal should be dismissed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

C.A. No. 154 of 1993

Brisbane

Before the Court of Appeal

Davis J.A.

Pincus J.A.

Lee J.

[R. v Webb]

THE QUEEN

v.

WILLIAM PHILLIP WEBB
(Appellant)

JUDGMENT - W C LEE J

Judgment delivered 29/03/1994

The appellant was convicted on 21 April 1993 following a trial on the following charge brought pursuant to s. 539 and s. 469 of the Criminal Code:

"That on the 21st day of August 1991 at Brisbane in the State of Queensland you attempted to procure one Peter Charles Scanlan to wilfully and unlawfully damage a vessel namely the `Queen of the Isles' in the waters between Cairns and Thursday Island in Queensland or outside of Queensland which act if it had been done by the said Peter Charles Scanlan would have been an offence under the laws of Queensland."

He had been arraigned on an indictment which also contained two circumstances of aggravation:

"AND THAT you intended thereby to destroy or render useless the said vessel.

AND FURTHER THAT the said damage was to be caused by the explosion of an explosive substance when several persons would be in the said vessel."

Following submissions by defence counsel at the close of the Crown case, the learned trial Judge ruled that those

circumstances could not be the subject of the charge, as a result of which the Crown Prosecutor sought an amendment to the indictment by deleting them. That aspect is the subject of the case stated by the learned trial Judge pursuant to s. 668B of the Criminal Code which was heard at the same time as this appeal and is the subject of separate reasons.

There was no issue that the alleged act, had it been done, would have occurred outside Queensland. It would have occurred within Queensland territorial waters and the trial Judge directed the jury accordingly. The appellant was sentenced to eight months' imprisonment. He did not give or call evidence.

The only ground of appeal relied upon was that the conviction was unsafe and unsatisfactory in the following particulars:

"(1)The Crown case proved absence of motive;

(2)On the evidence, the likelihood of the formation by the Appellant of the necessary intent was tenuous in the extreme; and

(3)On the evidence, no relevant intention as necessary to constitute the offence was established as being manifested by any overt act or statement."

On the appeal, it was submitted on behalf of the appellant that the jury should have had a reasonable doubt for the following reasons:

"(a)The plan was as grandiose as it was clumsy; no reasonable person could expect it to succeed;

(b)Nor could anyone expect the aftermath of such a bombing to fail to include the most careful scrutiny of the bombing itself, as well as one's own circumstances;

(c)One would be suspected not merely of insurance fraud, but murder;

(d)The appellant would not benefit from the offence;

(e)The appellant never did any of the things necessary for the bombing to go ahead, despite ample opportunity."

The Court is therefore required to survey the evidence and form an opinion as to whether the jury acting reasonably should have been left with a reasonable doubt as to the appellant's guilt or whether the jury, acting reasonably, were entitled to find that guilt was established beyond reasonable doubt. The evidence included tape recordings of a conversation between the appellant, one Michael James Banner-Smith and one Peter Charles Scanlan (a detective sergeant of the Queensland Police Force posing as a criminal boat bomber and hitman) at the Great Northern Hotel Newcastle on 14 August 1991, and a conversation between the same parties at the Crest Hotel Brisbane on 21 August 1991. Transcripts of these recordings were provided and both Scanlan and Banner-Smith gave evidence at trial.

The Crown case was that the conversation which occurred at the Crest Hotel Brisbane on 21 August 1991 established the offence. The appellant was arrested immediately after that conversation had concluded. Both counsel referred to the history of the matter commencing in 1990 in order to explain those conversations, each seeking to draw certain conclusions from them. It is therefore necessary to refer to various background facts.

The appellant was a businessman with extensive experience in businesses associated with the recreational usage of ships and the sea. One of his ventures was the operation of the ship, the "Queen of the Isles", out of Cairns for tourist cruises. It was previously called the "Gulf Explorer". The vessel could accommodate up to 100 people. This vessel was purchased by the appellant's company, Vestavon Pty. Ltd. ("Vestavon"). He was a director of that company as was his former wife, Josephine

Annette Tobias-Webb, who also gave evidence. They had separated in September 1990 and a decree nisi for divorce was granted on 30 January 1992. The appellant was also personally the owner of a vessel called the "Struth".

According to the evidence of David James Stokes, the lending manager of the ANZ Bank ("the bank"), the appellant by the company Vestavon had given a mortgage over the "Queen of the Isles" to Mercantile Credits Pty Ltd ("Mercantile Credits"). This was apparently in the sum of $650,000. Vestavon had also given a mortgage debenture to Mercantile Credits. The appellant had also personally given a mortgage over the "Struth" to Mercantile Credits as well as a second mortgage on his own home at Tallai.

Between February to March 1991, the various mortgages and other securities in favour of Mercantile Credits were re-financed by Esanda Finance Ltd ("Esanda"). Apparently they were all in some way connected. The principal security however was that given over the "Queen of the Isles". A further contract provided a $100,000 interest only facility against the security of the "Struth". There was a third facility of a $50,000 advance to assist with the repairs to the "Queen of the Isles". Esanda also obtained a mortgage debenture over Vestavon and a second mortgage over the appellant's home at Tallai. In addition, there were personal guarantees from the appellant and his former wife to secure the whole indebtedness to Esanda.

Mr Stokes said that the bank was supplied with several valuations of the "Queen of the Isles", the final one dated

21 September 1990, being for $1.3 million. He also said that there was a valuation of the "Struth" for about $160,000 by a marine valuer at the time of writing of the loans but that its real value was only $40,000, being the price the bank obtained for it after it was subsequently repossessed and sold. There is no valuation of the appellant's house nor any evidence of the worth of Vestavon. Nor is there any evidence of the complete financial position of the appellant or his former wife or of her company Tobias-Webb Pty. Ltd. ("Tobias"), or of the Webb Family Trust.

There was also a second mortgage already in existence in relation to the "Queen of the Isles" in favour of a company Angkasa Shipping and Trading Incorporated ("Angkasa"). Esanda in March of 1991 concluded an arrangement with Angkasa by way of a deed of priority between Esanda and Angkasa in the sum of $800,000. Peta Gwen Stillgoe, a solicitor and partner in the firm of Messrs Power and Power who were engaged to act for Angkasa on 17 January 1990, gave evidence which confirmed the existence of this second mortgage and other aspects to be referred to later.

Mr Stokes said that the $50,000 loan was a principal and interest loan to be repaid over 60 months. The monthly payments were $1,290.16. The $650,000 loan was interest only for three months followed by 81 payments of principal and interest of $14,201.30 per month. The $100,000 loan secured by the "Struth" was an interest only facility.

In about December 1990 when the appellant and his wife were still on reasonably friendly terms, a charter arrangement was

effectively entered into between Vestavon and Tobias whereby the "Queen of the Isles" was chartered to Tobias. Tobias took over the payments to Esanda. Tobias was to pay Vestavon $15,000 per month, however those sums were in fact paid to Esanda.

The repayment of the $650,000 loan to Esanda was to come principally from the proceeds of the charter agreement which was not formally documented until 1 April 1991. Proceeds from that agreement were also to be used to pay off part of the $50,000 loan with the balance to be repaid by the appellant. The $100,000 loan was also to be repaid by the appellant. It appears that the appellant made the April payment on that loan on 13 May 1991 and made no payments thereafter. As a result of this Esanda issued a letter of demand on 12 August 1991 and subsequently took possession of and sold the vessel for $40,000.

By about 15 August 1991, the loan on "Struth" was $104,126.03 in arrears. The $650,000 loan at that time was $27,601.23 in arrears. An April payment had never been made. No further payments were received until a cheque was issued for $5,000 on 21 August 1991. As at 15 August 1991, the total debt in relation to that $650,000 loan was $677,601.23. As to the $50,000 loan, the arrears were $2,764.54 with a total amount owing at that stage of $51,397. Repayments on that loan had also fallen fairly quickly into arrears.

The result of the foregoing was that as at 15 August 1991, there was nearly $850,000 in all owing to Esanda, including the debt secured on the "Struth". Mr Stokes said that the payment to Esanda of about $850,000 at that time would have caused all

of the securities held by Esanda to be released in full. This included all of the mortgages and the personal guarantees.

In the meantime, the "Queen of the Isles" was insured by Tobias from 17 March 1991 until 17 March 1992 for the sum of $1.3 million by an insurance broker, Alan Douglas Woolley of the firm Lambert T. Bain with N.Z.I. Insurance Ltd. The interest of Esanda was noted on that policy but not the interest of Angkasa. Mr Stokes said that had that vessel been sunk, Esanda would have claimed the total amount of all debts owing to it from the insurance policy proceeds, viz. about $850,000 and on payment of the full debts, all of the securities would have been released including the security on the "Struth".

In the course of initial acquisition by Vestavon of the "Queen of the Isles", the appellant came to know Banner-Smith, a man with experience in seafaring close to the coast. He apparently had an unsavoury past as is clear from the trial Judge's comments to the jury with respect to him. It appears that Banner-Smith and the appellant entered into some business ventures which ended in financial havoc to many people. It appears that in early 1990, according to Banner-Smith and one Claude Maree Andre Binet, a company involving himself and Binet was formed named Co-ordinated Shipping Services Pty Ltd which had chartered the "Queen of the Isles" from Vestavon. That charter lasted until about November 1990. For the purposes of the appeal it is not necessary to consider this aspect of the case in detail. The failure of the business ventures between the appellant and Banner-Smith resulted in bitterness and anger towards each other. They distrusted each other intensely.

They had previously formed an offshore company called Oceana Shipping Corporation Limited ("Oceana Shipping") which was incorporated in Port Villa, Vanuatu. In January of 1990, Messrs Power and Power, solicitors of Brisbane, received instructions to act on behalf of Angkasa in relation to the purchase and charter party agreement with respect to a vessel, the "Angkasa Jaya", which came to be known as the "Oceana Trader". The parties to that agreement were Angkasa and Oceana Shipping. It was to endure for six months and was to expire on 2 August 1990 when Oceana Shipping was to purchase the vessel for US$1 million. If it did not, Angkasa was entitled to take possession of it and sell it, whereupon Oceana Shipping was to make good any deficiency between the sale price achieved and the US$1 million.

A mortgage dated 29 January 1990 was taken out to secure the above agreement. The parties to that agreement were Vestavon and Angkasa. As indicated above, there was a second mortgage taken out by Angkasa over the "Queen of the Isles". There was also a guarantee and indemnity given at the same time to Angkasa by Vestavon in its own right and as trustee for the Webb Family Trust. There were no personal guarantees taken from the appellant or his then wife.

The business venture operated by the appellant and Banner-Smith ended in disaster. The "Oceana Trader" was arrested on 3 November 1990 as a result of action by creditors, Alexander Watt Pty Ltd and Wills Shipping Pty Ltd. At the time of the arrest there were a number of creditors in respect of the vessel. The master and crew had a claim of something slightly

less than $400,000. Alexander Watt Pty Ltd and Wills Shipping Pty Ltd had claims each of about $200,000. Brisbane Gateway Terminals had a claim as well as a claim by a ships repairer, United Ships Repairs in the order of $25,000. Trans Ocean Trading were also owed $22,000.

There were a number of orders made in relation to that ship by the Federal Court in its Admiralty Jurisdiction. There was an order of 4 February 1991 to have the ship valued and an order to sell the ship. There was also an order of 5 June 1991 allowing the ship to be sold by private treaty as long as it was for a sum not less than US$800,000. There was an order of 5 July 1991 in relation to the terms of sale to Osgood Holdings, a proposed purchaser of the vessel. There was a further order of 26 August 1991 and yet a further order of 29 October 1991 for a sale at US$650,000 to LSE Technology Pty. Ltd. and related companies. That sale eventually went through, but the owner Angkasa got nothing from the sale. All of the proceeds went to pay a sum of about $250,000 involved in the cost of arrest and looking after the vessel. The balance went to pay part only of the debt incurred by the master and crew.

As at 21 August 1991 the mortgage held by Angkasa over the "Queen of the Isles" had not crystallised. Ms Stillgoe of Power and Power said that the liabilities which were guaranteed and were subject to the mortgage had not yet been ascertained so that no specific sum could then be called upon. She agreed in cross-examination that if the sum was calculated as at the date of the trial, the debt would crystallise at more than A$1.5 million, based upon the conversion of US$1 million to

Australian currency plus some interest. She did not agree with the proposition that as at August 1991, it was obvious that the debt due from Vestavon to Angkasa was going to be in the order of A$1 million or more but she did state that the situation was "certainly not looking good at that stage". It appears that the debt totalled in the order of $900,000. Ms Stillgoe was aware of the second mortgage held by Angkasa over the "Queen of the Isles" at the time she first received instructions and she was also aware of the arrangement with Esanda with respect to the deed of priority between Esanda and Angkasa in the sum of $800,000. Ms Stillgoe said that she would certainly have taken all legal steps to protect any insurance moneys resulting from a successful claim until the debt could have been crystallised. By reason of the securities given to Angkasa by Vestavon, the company of which the appellant and his wife were directors, they were faced with a huge debt which had not in fact been discharged or released as at August 1991.

According to Banner-Smith, the appellant in the latter part of 1990 suggested to him that in view of their then financial difficulties, Banner-Smith might care to run the "Queen of the Isles" over a reef causing sufficient damage as to write-off the ship for an insurance claim. Banner-Smith said he declined. He also said that on a number of later occasions, the appellant raised the same matter and received the same negative response. Their joint business ventures largely ceased around late 1990 and Banner-Smith moved to different places, amongst them Melbourne where he ran an escort agency. There was no further contact between them until about July or August 1991.

Binet gave evidence. She knew the appellant for 15 years and she also knew Banner-Smith since 1988. She was previously in a defacto relationship with him but had since parted company. She met the appellant in Vanuatu and on coming to Australia, worked as his secretary and became involved in a business venture in relation to the "Queen of the Isles". She said that prior to November 1990 the appellant approached her when mention was made of getting themselves out of financial trouble. She said it was suggested by him that maybe the "Queen" could be run up against a reef. At that time they were in a lot of financial trouble with a lot of creditors pressing. She said that the appellant mentioned that "there was probably a way of getting out of our financial difficulties and, you know, maybe it was better just to get rid of the ship". Furthermore, she said that "he suggested that maybe Michael could take it out on the reef". She said that she regarded the appellant's remarks as a joke and not in any way serious.

In about July 1991, the appellant's estranged wife entered into negotiations with him over the ownership of the "Queen of the Isles" which had been effectively chartered to Tobias from about December 1990. They met on 18 July 1991. The appellant expressed pessimism about his financial future and said he might have to go on the dole. They discussed securing the sale of the "Queen of the Isles" from Vestavon to Tobias. That transaction required the approval of Esanda and Vestavon, and also required appropriate arrangements to be made with Angkasa which had the substantial second mortgage over the vessel. The appellant said that he would hand the vessel back to Esanda because the second

mortgagee Angkasa had continued to be a problem because it was a non-crystallised debt. His former wife told him that she did not want to do that and later made an offer that she would take over the "Queen of the Isles" with the mortgage on that vessel, but not the vessel "Struth" or the non-crystallised Angkasa debt. She said that once she had the appellant's agreement she would enter into negotiations with Angkasa to try to somehow relieve herself of the second mortgage.

On 12 August 1991, the appellant's wife sent him a letter to have Vestavon transfer its interest in the "Queen of the Isles" to Tobias on the basis that she would take over the mortgage on that vessel alone. She wanted nothing else. There was no money offered to him. He declined that offer. By the end of August 1991, the transaction proposed between Vestavon and Tobias had not proceeded and no arrangements had been made by Angkasa to release the second mortgage over the vessel.

Given that as at August 1991 the total debt to Esanda was in the order of $850,000 with all payments on the various securities well in arrears, including the securities held over the "Queen of the Isles", the "Struth", Vestavon, and the appellant's home, and that the appellant and his former wife faced considerable liabilities pursuant to their personal guarantees, and given also that there was a substantial second mortgage over the vessel the "Queen of the Isles" held by Angkasa, the appellant's position at that time looked very bleak indeed. In addition, he was in a difficult situation in relation to his estranged wife whom he did not trust.

Because he was personally in arrears with the "Struth" loan, a letter to exercise the power of sale had been sent to him by Esanda on 12 August 1991. He came to see Mr Stokes on 20 August 1991 and said he would be able to pay about half the arrears prior to the end of the month and the other half soon after. He also inquired about how the security over the vessels attached to the various loans and told Esanda that he had a contract and that he would be able to pay the whole of the arrears of $4,126.03 if that contract was fulfilled by 31 August 1991. As indicated, he did not do so and Esanda subsequently took possession of the "Struth" and sold it for $40,000.

In the meantime, according to Banner-Smith, the appellant had contacted him again expressing interest in the destruction and/or insurance fraud centred around the "Queen of the Isles". According to Banner-Smith, the appellant said "he just wanted it sunk so he could claim insurance". The appellant allegedly said that if he did not do something soon his estranged wife would obtain the vessel and he would get nothing. In August 1991, Banner-Smith said that the appellant spoke to him again about sinking the ship for the insurance and asked Banner-Smith to either do it or find someone who would do the job for him.

As a result of that conversation, Banner-Smith visited a solicitor in Taree and consulted the firm about the appellant's suggestions. Binet said that she accompanied him on that occasion and waited outside. When Banner-Smith came out she said that he told her that he had set the appellant up and that he would get a reward from the insurance company.

In any event, this meeting apparently led to contact with the Australian Federal Police and the Queensland Police. The result was that Banner-Smith pretended to willingly facilitate the vessel's destruction. He introduced the appellant to Scanlan as a boat bomber and a hitman at the hotel in Newcastle on 14 August 1991. He described Scanlan to the appellant as a "heavy" and "a man who did not muck around". He conveyed the impression that Scanlan would not take too lightly to anyone who reneged on a deal. Scanlan confirmed this approach at the meeting on the 14 August 1991. Scanlan was to pretend that he would sink the ship. This meeting was recorded. Thereafter relevant conversations and events were largely if not wholly recorded.

It is clear that prior arrangements had been entered into between the appellant and Banner-Smith for Banner-Smith to introduce him to a bomber or hitman for the purpose of discussing the proposed destruction of the vessel. There can be no doubt that at that meeting, the appellant discussed in some detail the question of the destruction of the "Queen of the Isles". He recognised that if destruction occurred, someone could die as a result. The possible use of explosives and gelignite was discussed. Scanlan promised to do a very professional job. Ways and means were discussed of sinking the boat to make it look like an accident. Discussions occurred about the need for the appellant to supply Scanlan with some technical diagrammatic material concerning the ship's "general arrangements" including a document setting out structural as well as other features important to an intending bomber on such

matters as to where to place the explosives for the most effective result. The appellant was to provide this information.

Scanlan made it clear at that meeting that he would do nothing unless he got money up front and that he would be most unhappy if the appellant reneged on any deal. A total fee of 10 percent of the proposed insurance claim of $1.3 million was Scanlan's fee for the job ($130,000). The appellant said that there was about $750,000 owing on the vessel (excluding the money owing with respect to the "Struth"), which would provide a surplus of above $500,000 providing the mortgage to Angkasa was cleared. The appellant said that his wife knew nothing about the proposal to destroy the vessel. He said that he would be unlikely to be able to raise the money until about the middle of September 1991. He said that he was pretty desperate for money and that his former wife was trying to "back door" him.

Notwithstanding the considerable detail discussed in relation to the actual destruction of the vessel and the provision of money to Scanlan, the appellant made it clear that at that stage he wanted no final commitment between himself on the one hand and Scanlan and Banner-Smith on the other. He had to be certain that his former wife had paid the insurance premium and that she had arranged for the release or discharge of the mortgage to Angkasa. This would involve discreet inquiries on his behalf. He said that it would be no use whatever for the transaction to go ahead unless he was sure he got something back out of the deal and this could only be done if the vessel had been insured and Angkasa's mortgage released

or otherwise discharged before any bombing occurred. It is strange that he made the reservation about the release of Angkasa's mortgage, particularly because he had refused to transfer the vessel from Vestavon to Tobias, which his wife apparently said was necessary before she would enter into negotiations with Angkasa for the release of that mortgage.

It is difficult to see why the appellant's statements made during that interview, quite apart from statements Banner-Smith and Binet said were made to them in 1990 and statements Banner-Smith said were made to him by the appellant later, did not then indicate an intention by the appellant that the vessel be destroyed for the purpose of making an insurance claim and an intention to procure someone to do the actual job. As indicated, he and his companies were in a parlous position in addition to his fear about the intentions of his former wife. He apparently was anxious to keep the vessel "Struth" as may be inferred by his subsequent visit on 20 August 1991 to Esanda where he promised Mr Stokes certain payments in the foreseeable future which he ultimately did not make. The statements made on 14 August 1991 assisted in throwing light on his later statements.

Arrangements were made for a further meeting which occurred in Brisbane on 21 August 1991 at the Crest Hotel. That tape has been played. The appellant freely discussed where the ballast was situated on the ship and showed Banner-Smith some documents as to the design of the ship. These were not the full "general arrangements" referred to at the previous meeting but they did give information useful to a bomber of the ship. Banner-Smith

said "That's okay" and Scanlan accepted them as adequate. He told Banner-Smith that he did not have the money, that he could obtain $2,000 either that evening or at the latest the next day, and that by mid-September he would have "at least $20,000". After some discussion over the design of the ship with Scanlan, the appellant said he was happy to go ahead with the arrangement and that he would have the cash to Banner-Smith that night namely $2,000 with at least $20,000 by mid-September 1991 with the remainder to be paid when the insurance was eventually paid out. There was a firm agreement that Scanlan's fee was to be in total $130,000. The appellant affirmed that all of the money would be paid by February 1992 whether the insurance was paid or not and that he did not want to pay Scanlan and Banner-Smith from the insurance money because of the suspicion it might cause but rather from other funds he had off-shore. The appellant made it clear that the job should be done properly and that if the $2,000 he promised was not there that day it would definitely be there the next day. Scanlan assured him that it would be a good job and that there would not be any problems. The appellant said to Scanlan to make sure the job was done properly and that everything was sabotaged in order to ensure that they were paid, meaning by the insurance company.

During the discussion, the fact that loss of life was likely to occur was again mentioned. Discussion also occurred around the type of explosive charge and timing device and as to where the destruction might occur. The appellant was asked about lifeboats on the vessel. He affirmed that there were adequate lifeboats available and described them. Scanlan said

that he was reasonably happy and as happy as he could be in the circumstances. Scanlan also said that he was thinking of doing the job the following Sunday and the appellant said that they should consider booking a double cabin for Sunday's cruise, no doubt for the purpose of being on the vessel in order to do the job. The appellant warned that Banner-Smith should not go to Cairns and that he should have an alibi which should be made watertight as his ex-wife could cause trouble.

Banner-Smith asked the appellant whether he wanted certain papers back and the appellant suggested that Banner-Smith get rid of them. Scanlan said not to worry about it as he would get rid of them. These were obviously the papers and diagrams as to the design of the ship and ballast which had been produced by the appellant at the meeting. Scanlan left the meeting having said that he would wait to hear from Banner-Smith. He affirmed that he would not proceed unless he had the money. The appellant said that he understood that very well. The final statement by Banner-Smith to the appellant was that the appellant was to obtain the $2,000 and then "we'll get the ball rolling". A close listening of this tape indicates that the appellant freely engaged in conversation with Scanlan and Banner-Smith and initiated various aspects himself. There is no noticeable sign of apprehension in his expression.

It should be noted, as submitted by counsel for the Crown, that unlike the qualifications expressed at the meeting on 14 August 1991, there were no reservations expressed at the meeting of 21 August 1991 as to the necessity for Angkasa's mortgage to be paid out or discharged before any bombing

occurred which suggests that the reservation he expressed about it at the meeting of 14 August 1991 may not have been genuine, given that he had not agreed to transfer the vessel to his wife's company before she would negotiate with Angkasa. There was also no reservation as to the necessity of checking whether the insurance premiums had been paid by Tobias. The inference is that the appellant and Banner-Smith well knew that it had been paid. The only matters which were apparently still outstanding was the provision of the ship's "general arrangements" but this did not cause any concern at the later meeting, particularly having regard to the design documents handed by the appellant to Banner-Smith and Scanlan with respect to ballast. These appeared to satisfy them. The other significant factor outstanding was the need for the provision of money "up front".

It is difficult to see any substance in points (a), (b), and (c), referred to at p. 2 of these reasons. Whilst no doubt the whole plan could be described as grandiose and somewhat complex, it is difficult to conclude that no reasonable person could expect it to succeed. There was considerable discussion about the plan at both meetings. It is fanciful to suggest that the jury should have regarded the whole scheme at a ruse or a subterfuge of some kind or that the appellant was merely going along with the arrangements with Banner-Smith and Scanlan, which arrangements he had brought about, because of the suggested fear he may have had of Scanlan. There is no evidence in relation to this, other than what may be inferred from Banner-Smith's

description of him to the appellant and from Scanlan's attitude with regard to payment of the moneys.

It is true that the appellant's former wife said that the appellant had the habit of quite commonly saying "yes" or appearing to agree to plans or suggestions which he had no intention of proceeding with and that Binet said that the appellant often would say "yes" with no intention of going ahead with what he appeared to agree to. He often said "yes" to something he did not agree to. However, the appellant did not give evidence to allow the jury to form an independent assessment and no doubt for this reason, the learned trial Judge stressed to the jury that they should listen carefully to the tapes and to the inflections of voices at each meeting so that they could form a correct impression of the appellant's attitude, manner and temperament for themselves. In any event, it was the appellant who went to considerable trouble with Banner-Smith to meet a criminal hitman for the purposes of destroying the vessel and it is artificial to suggest that the discussions which occurred at the meetings were unreal or not intended to result in the destruction of the vessel. It would have been difficult for the jury to so conclude or to have a reasonable doubt as to the seriousness of the discussions.

As to point (b), even though the aftermath of such a bombing could be the subject of the most careful scrutiny including a marine board of inquiry and, if death resulted, a coronial inquest with investigations into the personal affairs of the appellant, his wife, the various companies and other persons, this could hardly be said to be a basis on which the

jury should have had a reasonable doubt, if they accepted that the whole scheme was a serious one and intended to be carried into effect as they were entitled to conclude. The same could also be said with regard to point (c), namely that there would be suspicion not merely of insurance fraud but murder as well. Statements made at both interviews indicated that the appellant recognised such a consequence as a possible risk of the bombing even though on 21 August 1991 he said, in response to a question by Scanlan, that he was not happy about that.

The main thrust of the argument for the appellant hinged around points (d) and (e), namely that the appellant would not benefit from the offence and that he never did any of things necessary for the bombing to go ahead.

As to point (d), it was argued that the jury should have been left in reasonable doubt as to the relevant intention of the appellant necessary to constitute an attempt because the appellant would not receive any benefit from the offence if carried out. It was said that there was no demonstrated benefit because the Crown case established a "proved absence of motive" and not merely an "absence of proved motive". Reliance was placed on a passage from the judgment of Matthews J. in the Court of Criminal Appeal in The Queen v. Schafer (C.A. No. 357 of 1987, 2 June 1980, unreported), where the Court set aside a conviction of murder based upon a very weak circumstantial case. At p. 11 of his Honour's reasons, his Honour said that against the background of the weak circumstantial evidence relied upon by the Crown, was the fact that "one cannot help being impressed by the complete absence of motive". Whilst recognising that

proof of motive was not necessary to establish a crime, the evidence there demonstrated a proved absence of motive which effectively destroyed the remaining weak circumstantial evidence. His Honour referred to a passage in R. v. Ellwood (1908) 1 Cr.App.R. 181.

The facts relied upon to establish what was said to be a proved absence of motive were said to demonstrate that there was no point in the appellant desiring or intending the bombing to proceed. He would get nothing out of it even if a successful insurance claim resulted because of the debts totalling approximately $850,000 to Esanda (including the debt owing on the "Struth") and the debt owing under the second mortgage to Angkasa approaching $900,000. Those sums would obviously exceed the maximum possible recovery of $1.3 million from a successful insurance claim. It was also said that the appellant would lose his only means of earning a livelihood if the bombing proceeded.

One problem with this submission is that there is no evidence of the appellant's total financial position. It was not known how his total assets compared to his total liabilities. Even though Mr Stokes said that Esanda would be looking for its total debt of close to $850,000 out of any insurance claim, there is no evidence of the value of the appellant's house which was the subject of a second mortgage in favour of Esanda. It might have been valuable and might have been sufficient to discharge Esanda's debts. There is evidence of statements he made at the meeting on 14 August 1991 that he was short of money and flat broke. On the other hand he said that he had off-shore funds out of which he proposed to pay

Scanlan the balance of the $130,000 rather than out of any proceeds of the insurance claim if successful, and indeed, whether the insurance moneys were paid or not. If the jury accepted that statement, it might indicate that he did have other assets off-shore. There is no evidence of the financial position of his former wife who along with the appellant had given personal guarantees to Esanda. Nor was there any evidence of the financial position of Vestavon or Tobias or the Webb Family Trust.

The learned trial Judge did not suggest a motive to the jury in his summing up. Treatment of the financial position of the appellant and the question of motive was dealt with very shortly at p. 281 to the top of p. 282. His Honour merely referred to the argument by the Crown that the accused would be financially advantaged and that he would be left with "Struth" and no debt. His Honour further told the jury that it was somewhat difficult to see how the appellant would have any financial advantage if in fact he paid the $130,000 for the carrying out of the offence, no doubt given that "Struth" had a value of only about $40,000. This fairly put the defence argument to the jury.

The jury were entitled to infer that the appellant wished to keep "Struth". He had seen Esanda only on 20 August 1991 with the promise to pay the arrears in the foreseeable future. If there was a successful insurance claim of $1.3 million and if Esanda took the whole $850,000 which included the debt owing on the "Struth", then clearly it would be free of encumbrance and remain the appellant's personal property. He had a means of

earning a livelihood with it after a successful bombing of the "Queen of the Isles". Whilst it is difficult to see that he would have gained an actual financial advantage as such if he in fact paid the $130,000 to Scanlan for carrying out the offence, counsel for the Crown submitted that the jury were entitled to regard as a reasonable possibility that the appellant would see the result as giving him "Struth" unencumbered and that he may have had no intention of paying the $130,000 to Scanlan. It was further submitted that the appellant may not have seen the debt to Angkasa as a problem either because he thought it could be negotiated to a manageable sum or because he thought that Angkasa might not be paid at all. These submissions are not fanciful, when the stand is taken that there was on the Crown case actually proved an absence of motive. In any event, it is difficult to see why the jury was not entitled to conclude that the absence of any actual financial advantage to the appellant in no way concerned him, having regard to his total predicament and circumstances.

The learned trial Judge also referred to another possible motive put forward by the prosecutor at the trial namely that the appellant's ex-wife was trying to get the lot and he stood to lose the lot unless he took some definitive action. His Honour nevertheless immediately reminded the jury that in the light of the facts he had briefly recounted, he found it difficult to see what advantage the appellant actually would have got but left it as a matter entirely to the jury. The appellant had expressed concern about his wife's motives on several occasions during the various interviews. Whilst it is

true that there may not have been any financial advantage to him in the end if the bombing took place, the jury were entitled to conclude that his stated desire to prevent his wife from getting the "Queen of the Isles", was a sufficient motive for entering into the arrangement with Scanlan and Banner-Smith. To put it more correctly, the jury were not compelled to conclude that there was in fact a proved absence of motive as submitted on behalf of the appellant.

Another possibility is that persons sometimes commit criminal acts which are pointless or foolish and without any actual motive at all. It may also be that the appellant was heartily sick and tired of all the debts and his matrimonial difficulties. He may simply have wanted to get out of his perceived difficulties in the best way he could and saw no future in continuing any further. His conduct might even have been irrational.

If Esanda took all of the proceeds of a successful insurance claim ($850,000) and Angkasa took the rest ($450,000), the balance of any debt owing to Angkasa was a debt owing by Oceana Shipping or perhaps by Vestavon under the securities given but not a debt owing by the appellant or his former wife personally, because there were no personal guarantees given to Angkasa but only a guarantee and indemnity given by Vestavon as trustee for the Webb Family Trust. It may well be that the appellant took the view that Angkasa would have no further claim against him personally even though it would still be owed a large sum of money after taking what it could from the balance of the insurance claim.

Finally, it should be observed that there was no evidence of the true value of the "Queen of the Isles" or of its ready saleability. There was no evidence of demand for this type of vessel or the state of the market at the relevant time. It might have been worth much less than $1.3 million which was a certain sum expected to accrue from a successful insurance claim, as opposed to the risk of what sum might be produced from a lawful sale which might have taken some time to result. To sell the ship he of course required the consent of his wife who not only was a director of the ship's owner Vestavon, but her company Tobias had the vessel under a charter agreement and she expressed her wish to keep it. Nevertheless, if its true value was less than $1.3 million which might have taken some time to obtain, its immediate destruction, rather than seeking to get his wife's agreement to a delayed sale, might have presented as a more attractive proposition.

It is true that there is no evidence to establish some of the foregoing possibilities but it is nevertheless difficult to see how it could be asserted that there was a proved absence of motive such as to leave the jury in reasonable doubt as to the existence of the relevant intention necessary to constitute an attempt. All reasonable possibilities suggestive of motive would have had to be excluded before such a conclusion was reasonably open. There were no difficulties referred to at the meeting on 21 August 1991 with regard to the mortgage held by Angkasa. The only outstanding matter was the provision of money. He appeared definite that he would have $2,000 by the next morning which he expected to get from a car dealer with

whom he had already arranged to sell his vehicle. The submission on behalf of the Crown that a reasonable jury could approach the matter on the basis of possible motives or merely on the basis that the appellant wanted the job done as recorded on the tape of the conversation on 21 August 1991 has substance. The question of motive was not necessary for them to solve. It was not established that there was in fact a proved absence of motive. This case is quite different to The Queen v. Schafer.

The final point advanced was that the appellant never did any of the things necessary for the bombing to go ahead despite ample opportunity. From this it was also submitted that the jury should have been left in reasonable doubt as to the appellant's intention to procure Scanlan to do the bombing until various things occurred. There were the qualifications expressed on 14 August 1991 namely that he had to be sure that his former wife had in fact cleared the mortgage with Angkasa, that he had to provide the "general arrangements", and that he first had to produce the money up front for Scanlan.

It has already been mentioned that no qualification was expressed at the meeting on 21 August 1991 about the state of the mortgage held by Angkasa even if his stated qualification on 14 August 1991 was genuine. No question was raised as to whether Tobias had paid the insurance premium. It is reasonable to infer that this was no longer an impediment and that all parties knew the policy was effective. It may be expected that the appellant, whose company Vestavon had chartered the vessel to Tobias, would have ensured that the policy was in force and effect, given that Mr Woolley said that the insured parties who

were noted on the policy were Tobias and Vestavon for their respective rights and interests. Reference has already been made to the "general arrangements" which caused no concern at the meeting of 21 August 1991, and to the documents relating to ballast and design of the ship which the appellant in fact supplied to Scanlan on that date which satisfied him. This effectively leaves only the question of the payment of moneys and on Scanlan's insistence that some payment even though only $2,000 be paid "up front" before the bombing could occur.

It was submitted on behalf of the appellant that if he truly intended to try to get Scanlan to do the bombing, he would have in fact paid him. It was said that the arrangement was bizarre that a criminal hitman such as Scanlan, would do the proposed horrific act on a payment of only $2,000 out a total of $130,000 with the balance unsecured and to be paid at some uncertain time in the future when Scanlan initially said that he wished to get the money and get out of the country as fast as he could. Alternatively, it was said that the jury should have been left in a reasonable doubt as to the existence of the intention. On the other hand, if Scanlan was the heavy type who did not muck around and would be unhappy with anyone who reneged on a deal, it may be he considered that he had adequate "security" by enforcing payment by other means against a recalcitrant payer.

The question of payment was debated before the trial Judge in the absence of the jury during the course of the summing up at p. 277 and following. Mr Herbert made it clear that he was not submitting to the jury that for a conviction in law, it was

necessary that payment should first occur. His submission was that by looking at the whole of the evidence, what Scanlan was saying was that payment was required and that payment was necessary in order to procure him to do the destruction of the vessel. The learned trial Judge at 286-287 directed the jury that in order to constitute the offence of attempting to procure, it was not necessary that the attempt should result in Scanlan agreeing, nor did it have to result in money being paid over. It was further pointed out to the jury in accordance with Mr Herbert's submissions that if the money was paid over, that would clearly show the appellant's intention and that since money was not paid over and because certain other factors had not occurred, the jury might have some doubt about the appellant's intention. This direction appears to have fairly put the defence case to the jury. No redirection was sought.

The offence is an attempt to procure the bombing of the boat by Scanlan. As the learned trial Judge pointed out to the jury, the appellant was not charged with the offence of actually procuring the bombing. Had that occurred, the appellant would have been guilty as a principal pursuant to s. 7 of the Criminal Code. His Honour directed the jury correctly as to the meaning of the word "procure" and also directed the jury on the meaning of an attempt on two occasions initially and again at the request of the jury for a further direction. No complaint was made during the appeal as to his Honour's directions, nor were any re-directions sought at the trial.

Mr Herbert, whilst asserting that lack of the appropriate intention necessary to constitute a completed attempt was the

main basis of his submissions, (or rather that the jury should have a reasonable doubt as to its existence), agreed that an alternative approach was to regard what occurred at the meeting on 21 August 1991 as a conditional or contingent attempt only which was never completed. This involves a consideration of the third basis on which it was said that the conviction was unsafe and unsatisfactory namely that no relevant intention as necessary to constitute the offence was established as being manifested by any overt act or statement.

The various elements of an attempt are set out in s. 4 of the Criminal Code each of which must be proven beyond reasonable doubt by the Crown. There are three positive elements and one exception:

(1) The appellant must have intended to commit the offence viz. the procuration of the bombing of the ship by Scanlan, and not the offence of bombing of the vessel by himself. This required that he intended that the ship be wilfully and unlawfully damaged by Scanlan.

(2) The appellant must have begun to put that intention into effect by means adapted to its fulfilment.

(3) The appellant must have manifested his intention by some overt act.

(4) The appellant must not have fulfilled his intention to such an extent as to commit the offence namely the actual procuration

of the commission of the offence of bombing the boat. This exception existed.

As to the first requirement, the learned trial Judge correctly directed the jury on the meaning of intention and how it could be ascertained. No redirection was sought. The relevant intention must have existed on 21 August 1991. The jury was entitled to consider all of the circumstances and the evidence, if accepted, of Banner-Smith and Binet of statements made by the appellant to them in the latter part of 1990 and subsequently to Banner-Smith as well as statements made by the appellant on both tape recorded conversations of 14 August 1991 and 21 August 1991. The earlier statements were relevant insofar as they assisted in explaining his statements on 21 August 1991. His Honour correctly stated to the jury what the prosecution had to prove was that at the time and place of the meeting of 21 August 1991, the appellant, intending that the "Queen of the Isles" should be wilfully and unlawfully damaged, attempted to persuade or induce Scanlan to perform that act. The jury were entitled to conclude beyond reasonable doubt that the first element was satisfied.

As to the second element, there is an abundance of evidence of preparation from the meeting of 21 August 1991 alone. The earlier meeting provided a background. Elaborate arrangements were put in place on 21 August 1991. The appellant then confirmed the engagement of a bomber whom he met on a prior occasion and ways and means of putting his intention into effect were discussed in detail. There is clear evidence of this

element which the jury was entitled to accept beyond reasonable doubt.

As to the third element, which is the subject of the third basis on which the ground of appeal was put, it is clear that the actual payment over of money would have been a strong visible manifestation of intention as Mr Herbert submitted before the trial Judge and on the appeal, but it was not contended at the trial or on the appeal that this was an essential last step before the offence of attempt was complete. Nor was it submitted that the statements and acts of the appellant during the meeting of 21 August 1991 were not capable of satisfying this as well as the second requirement. Of particular significance was the handing over of the design documents, his agreement that the plan was to go ahead as close as the following Sunday, and the definite promise of provision of $2,000 that evening or by no later than the next morning.

It is true that there may be difficulty in precisely dividing up the conduct which occurred at one meeting on 21 August 1991 into two categories, some of which satisfied the second element and some the third element, but there is no reason why the acts and statements at the meeting could not properly satisfy both elements. Some assistance may be derived in this regard from the decision of the Full Court in R. v. Munro [1912] Q.W.N. 21.

The distinction between "preparation" and "attempt" was discussed by Stable J. in Wren v. Williams; ex parte The Minister for Justice and Attorney-General [1965] Qd.R. 86 at 100-102 (with whom Wanstall J. agreed). At p. 100 his Honour

said that an attempt is regarded as complete if a person does an act which is a step towards the commission of the specific offence and that act cannot reasonably be regarded as having any other purpose than the commission of that specific offence. At p. 101 his Honour referred to the "last act test" and at p. 102 his Honour adopted a passage from the Court of Criminal Appeal in R. v. White [1910] 2 K.B. 124 as follows:

> "All that can be definitely gathered from the authorities is that to constitute a criminal attempt, the first step along the way of criminal intent is not necessarily sufficient and the final step is not necessarily required. The dividing line between preparation and attempt is to be found somewhere between these two extremes; but as to the method by which it is to be determined the authorities give no clear guidance."

The present case appears to be one of that kind. Each case must be determined on its own particular facts. The jury were perfectly entitled to infer that the appellant had the requisite intention, that he began to put that intention into effect by means adapted to its fulfilment viz. by preparation, and that he manifested his intention in an appropriate overt way by virtue of statements he made in responses to conversations at 21 August 1991 such as agreeing that the plan should proceed as soon as the following Sunday, the definite promise of provision of money, and the handing over of the design documents.

It cannot be said that the jury were not entitled to conclude beyond reasonable doubt that the appellant was guilty of the offence as charged. The three separate bases on which it was said that the conviction was unsafe and unsatisfactory have

not been established. Nor has this ground been otherwise made out. The appeal should be dismissed.