

### THEME 1: ATTEMPT

**LO1: Explain the need for punishing incomplete crimes with reference to the THEORIES OF PUNISHMENT**

#### RATIONALE

The reason for punishing this anticipatory conduct must be found rather in the **relative theories of punishment**, and more especially in the *preventive and reformative theories*.

The police are better able to uphold the law and protect the community if they may apprehend criminals who have as yet committed only acts which normally precede the commission of crime.

Maintenance of law and order would suffer seriously if police were unable to intervene when they saw people preparing to commit crimes, but could take action against them only once the harm had been done.

The reason for the application of the *reformative theory* in this connection is that people who commit these anticipatory crimes are as much of a danger to society as those who have completed a crime, and therefore are in need of *reformative treatment*

**LO2: Summarise the rules relating to the REQUIREMENTS for punishing an attempt to commit a crime**

~ Mere intention to commit a crime is not punishable

~ One is liable once they have committed an act - once a resolve to commit a crime manifests itself in some conduct

~ **HOWEVER**, there does not have to be completed crime before X may be guilty of attempt.

#### SUMMARY OF RULES RELATING TO ATTEMPTS

### THEME 1: ATTEMPT (cont)

1) A person is guilty of attempting to commit a crime if, intending to commit that crime, she *unlawfully* engages in conduct that is not merely preparatory but has reached at least the commencement of the execution of the intended crime

2) A person is guilty of attempting to commit a crime even though:

~ The commission of the crime is impossible, if it would have been possible in the *factual circumstances* which she believes exist.

~ She voluntarily withdraws from its commission after her conduct has reached the commencement of the execution of the intended crime

**LO3: Discuss the four forms of attempt & indicate whether a subjective or objective approach is followed with each form.**

#### COMPLETED ATTEMPT

X has done everything she can to commit the crime

#### INTERRUPTED ATTEMPT

X's actions are interrupted

#### ATTEMPT TO COMMIT THE IMPOSSIBLE

It is impossible for X to *commit or complete the crime*

#### VOLUNTARY WITHDRAWAL

X of her own accord abandons her *PLAN OF ACTION*

#### SUBJECTIVE & OBJECTIVE APPROACHES

##### Subjective approach

Place all emphasis on X's intention - converting her evil thoughts into actions

##### Objective approach

Mere intention is not enough

*To determine liability for attempt to commit the impossible, our law adopts a subjective approach*

### THEME 1: ATTEMPT (cont)

Liability for **interrupted** is determined its **OBJECTIVE APPROACH**

An **OBJECTIVE APPROACH** is also applicable if X voluntarily withdraws from her criminal scheme

#### COMPLETED ATTEMPT

If X has done everything she set out to do in order to commit the crime, but the crime is not completed, she is then *guilty of attempt*

**LO4: Indicate when a person's conduct is no longer an "act of preparation" but has reached the "commencement of the execution or consummation" stage on relation to interrupted attempt**

X's activities are interrupted before she can succeed in completing the crime.

Courts have developed a objective criteria for differentiating between *punishable & non-punishable* attempts

*The criterion provides a distinction between:*

~ Acts of preparation

~ One of execution or consummation

If what X did was merely a preparation for the crime, there is no attempt

~ if the acts were more than acts of preparation & were in fact acts of consummation, *X is guilty of attempt*

**Material Facts in Deciding whether there was a "commencement of the consummation":**

~ X's physical proximity to the object or scene of the crime

~ Interval of time between the moment when X was caught and expected completion of crime

### THEME 1: ATTEMPT (cont)

~ The question of what natural course of events was likely to have been and whether X was likely in control of events

~ Whether X still had the opportunity/time to change her mind about going ahead with the crime

*how courts distinguish between an act of preparation (whether X is not guilty of attempt) and an act of consummation (in which X is guilty of attempt)*

#### A) MERE ACTS OF PREPARATION

X merely prepares the poison which means to administer to Y later when she gets apprehended

#### B) ACTS OF CONSUMMATION

1) X qualifies to be convicted of attempt

2) X, trying to escape from custody, breaks the glass and wooden frame of the window in her cell

3) X, trying to break into a house, puts a key into a door

**LO7: Identify the 3 REASONS why conduct would constitute an attempt to commit the impossible**

#### ATTEMPT TO COMMIT THE IMPOSSIBLE

The action is no longer merely an act of preparation but has passed the boundary line separating the 'COMMENCEMENT OF THE CONSUMMATION'

(1) X uses the wrong means to achieve her aim

(2) X lacks the qualities required in the definition of the crime to commit the crime

(3) X intending to kill Y, shoots at Y while Y is lying in her bed. Unknown to X, Y has already died from a heart attack before the shots were fired.

#### PUTATIVE CRIME

*a crime that does not exist, but which X believes it does*

### THEME 1: ATTEMPT (cont)

In *Davies*, the court formulated 2 **EXCEPTIONS** to the general rule that 'attempt' to commit the impossible is punishable.

(1) a statutory crime may exclude liability for attempt in circumstances that would be impossible to achieve the criminal aim

(2) If what the accused was aiming to achieve was not a crime an endeavor to achieve it could not

~ By mistake of law, he thought that his act was criminal, constitute an attempt to commit a crime.

#### VOLUNTARY WITHDRAWAL

~ There is no punishable attempt if X voluntarily withdraws from her criminal plan of action, before the conduct constitute the commencement of the consummation

~ Question is whether a withdrawal after this stage but before completion of the crime constitutes a defence to a charge of *attempt*

~ Voluntary withdrawal after the commencement of the consummation is no defence

**THEREFORE** X will be guilty of attempt

#### Criticism of Punishment

Withdrawal takes place after the first harm has already been done.

~ the attempt ought to be punishable

~ the position is different if X withdraws before having conflicted any harm or damage

#### INTENTION

A person can be guilty of attempt to commit a crime if only she had the intention to commit that particular crime.

### THEME 1: ATTEMPT (cont)

'**Intention**' bears the same meaning as intention to commit the completed crime and *dolus eventualis* is therefore sufficient

Neglect attempt is notionally impossible:

~ *one cannot attempt, intend to be negligent*

**THEREFORE** there is no such thing as 'attempt to commit culpable homicide'

#### PUNISHMENT

A lesser punishment is usually imposed for attempt than for the completed crime

From the **RETRIBUTIVE THEORY OF PUNISHMENT** - either no harm or less harm has been caused.

### THEME 2: CONSPIRACY

**LO10: Define the crime conspiracy as contained in S18(2)(A) OF RIOTOUS ASSEMBLIES ACT 17 OF 1956**

#### PROHIBITION OF CONSPIRACY

~ Punishable into **section 18(2)(a) of Riotous Assemblies Act 17 of 1956**

~ The crime of conspiracy is not limited to acts relating to riotous assemblies

~ The definition is wide enough to cover conspiracy to commit any crime

#### PURPOSE OF PROHIBITION

Conspiracy is the consideration that the mere agreement by a number of people to commit a crime, even though the conspiracy is not executed, creates a danger to society

*the will of many people to commit a crime is a greater potential danger than the will of a single person to commit a crime*

#### SUCCESSFUL CONSPIRACY



### THEME 2: CONSPIRACY (cont)

~ **S18(2)(a)** does not differentiate between a successful conspiracy, and one not followed by any further step towards the commission of the crime.

~ It is possible to charge and convict a person of contravening this provision even if the crime envisaged has in fact later been committed

*there is an absolute prohibition on the state to charge someone with conspiracy if the main crime has in fact been committed.*

#### THE ACT

- a) the actual entering into an agreement
- b) implied conspiracy
- c) mere knowledge is not enough
- d) umbrella spoke conspiracy
- e) chain conspiracy
- f) direct communication between all conspirators not required
- g) general aspects of the act of conspiracy

#### INTENTION

Intention may be divided into **2 COMPONENTS**:

(1) X must have the intention to conspire with another, and

(2) she must intend to commit a crime or assist in its commission

*If X sells Y an article knowing full well that Y will use it to commit a crime, her mere knowledge will not constitute conspiracy*

#### PUNISHMENT

ITO **s18(2) of the Riotous Assemblies Act 17 of 1956**, the conspirator is liable to the same punishment as the person convicted of committing the crime

*a lighter punishment ought to be imposed for conspiracy than the main crime*

### THEME 3: INCITEMENT

#### PROHIBITION OF INCITEMENT

~ incitement to commit is punishable ito **\*s18(2) of the Riotous Assemblies Act 17 of 1956**

~ the section speaks of 'incites, instigation, commands or procures' which will be referred to as **'incitement'**

#### SUCCESSFUL & UNSUCCESSFUL INCITEMENT

The crime is formulated widely, liability for incitement is not only depended on *whether Y had committed the crime*

A person ought to only be charged with contravening **s18(2)(b)** if the incitement has been **unsuccessful**

If the incitement has been successful, X may be **charged as co-perpetrator/accomplice** to the commission of the main crime.

#### PURPOSE & CONSTITUTIONALITY OF PROHIBITION

The reason for prohibition of incitement: *to prevent crime at an early stage before serious damage is done*

The aim:

\*to discourage people who incite others to commit crimes

#### THE CONSTITUTION VS STATUTORY OFFENCE OF INCITEMENT

*In Economic Freedom Fighters v Minister of Justice and Constitutional Development:*

~ the constitutionality of the statutory offence of incitement was unsuccessfully challenged.

~ the basis for the challenge was premised on the offence set out in **s18(2)(b)** that it unjustifiably infringed the right to **FREEDOM OF EXPRESSION** contained **s16 of the Constitution**

### THEME 3: INCITEMENT (cont)

#### the court held as follows:

That while the provision infringes **s16 of the Constitution**,

~ such an infringement is reasonable and justifiable ito the **limitation clause** contained in **s36(1) of the Constitution**

~ the restriction on **FREEDOM OF SPEECH** arising out of this provision, is not wholesale in nature but merely a prevention on influencing the minds of others to commit unlawful acts

#### in applying this analysis

the court returned to the purpose of the prohibition of incitement and;

to ensure that, "we do not live in a society of fear, marked by the threat of acts which have already been determined as undesirable and unlawful"

**HOWEVER, the majority in ECONOMIC FREEDOM FIGHTERS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

The court took a different view, holding that:

~ the infringement on the right to freedom of expression, inherent in the fact that **s18(2)(b)** criminalises incitement to commit any offence was not justifiable

~ the court chose to read in the word "- serious offences"

~ this merely enables the provision to still subsist, until the legislature redrafts it to make it constitutionality compliant.

#### THE ACT OF INCITEMENT

**A) Influencing** another to commit a crime

~ an inciter is one who reaches and seeks to influence the kind of another to the commission of a crime



### THEME 3: INCITEMENT (cont)

\*~ the crime is completed the moment X influences Y in some other way

**B) Ways** in which incitement may be committed

~ incitement may be explicit or implied

**C) Conduct** that does not qualify as incitement

*if X merely describes to Y the pros and cons of a proposed commission*

**D) The concretization** (final steps/stages) requirement

*X's words which he addresses to Y should not be too vague or equivocal*

**a)** the type of crime to be committed by Y must be adequately specified

**b)** X must specify the person, group of persons or object in respect of which the crime should be committed

*what is not required is that X should know the identity of the person or persons incited*

**c)** Incitement by omission not possible

### INTENTION

**a) GENERAL** - incitement *can never* be incited negligently

**b)** X must believe that Y will have the required intention

**c)** Exceeding the limits of the incited crimes

*X's liability for incitement is limited to the incitement contained in her words of incitement*

**d)** Incitement subject to a condition

### INCITEMENT TO COMMIT THE IMPOSSIBLE

X incites Y to put her hand in Z's pocket and steal money from the pocket.

~ X believes that there is money in Z's pocket, but there isn't

### THEME 3: INCITEMENT (cont)

~ This is referred to as incitement to commit theft

### CHAIN INCITEMENT

Incitement is possible if X does not incite Y, to commit the crime herself but engages Y to commit the crime.

### IMPOSSIBLE TO INCITE A PERSON WHO LACKS CRIMINAL CAPACITY

Incitement is only possible in respect of someone who is endowed with criminal capacity.

### RELATIONSHIP BETWEEN INCITEMENT, CONSPIRACY & ATTEMPT

#### 1) Attempt to commit incitement

*x posts a letter to Y in which she incites Y to commit a crime, but the letter is intercepted in the post.*

#### 2) Incitement to attempt

*x gives y a firearm loaded with blank cartridges and asks Y to shoot Z*

#### 3) Overlapping between incitement & attempt

*certain acts of incitement may qualify as attempts to commit the main crime*

#### 4) Overlapping between incitement & conspiracy

\* If x incites y to commit a crime, and Y agrees to do so, conspiracy is present.

### PUNISHMENT

*S18(2)(b) of the Riotous Assemblies Act 17 of 1956* says, if the inciter is found guilty, she is 'liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable'

