

## Chapter 14

***In Khan the Court of Appeal held that Caldwell recklessness is sufficient for a circumstance (or maybe consequence). This is controversial because it indicates that a defendant could be guilty of attempting to commit an offence even though a crucial element of it did not cross the defendant's mind. It also might indicate that in a strict liability offence you can be guilty of attempting it without even thinking of a key element. Is it possible to convict someone of attempted dangerous driving as he reverses out of his drive in a car which (unknown to him) is in a dangerous condition?***

This would appear to be a possible consequence of the decision, although it is unlikely a prosecution would follow. A court may well decide that the reasoning in *Kahn* does not apply to a strict liability offence because that would lead to convictions in cases where there was no *mens rea*. It should also be noted that this question assumes that *Khan* has not been overruled by *Pace and Rogers*.

***Pete plans to have sexual intercourse with Emily. She has told him that she fancies him and Pete believes that this means she would like to have sexual intercourse with him. Pete kisses Emily, which she does not like, but she keeps quiet. When Pete starts to undress her, Emily pushes him away and says 'please stop'. Pete continues to try to undress her and Emily's opposition become more vocal. Pete then is aware that Emily does not want sex and leaves. Has Pete committed any offences?***

There is an offence of a sexual assault, although Pete may be able to claim that he believed that Emily consented to the act. Less straight forward is a charge of attempted rape. One issue would be whether or not Pete has done an act which is more than merely preparatory. The defence may well argue there are simply too many things to be done before the offence to amount to an attempted rape. Even if the *actus reus* is proved the *mens rea* would be problematic as well. The jury would need to decide whether or not Pete's belief in Emily's consent was unreasonable. There would be a further issue whether the reasoning in *Khan* would need to be revisited in the light of the Sexual Offences Act 2003 so that negligent belief in a circumstance could be sufficient for an offence. If *Pace and Rogers* was applied it might be argued that it would need to be shown that Pete intended Emily not to consent, which would be very difficult to prove.

***Anne says to Liu, 'It would be nice if someone would kill Steve'. She knows that Liu will not do so, but she hopes that Liu will ask someone else to do so. Liu later mentions to Robert that Anne would like someone to kill Steve. She believes that Robert will kill Steve, because she knows Robert wants to impress Anne, but hopes that he will not. In fact Steve decides not to kill Robert. What crimes have been committed?***

The issue here is whether there are offences under the Serious Crime Act 2007. It seems that both Anne and Liu can be guilty of a section 44 offence. There is no need to show that the defendant believed that the person encouraged would commit the offence in

question. Liu believes that Robert will kill and so that is sufficient for the mens rea. There is no need to show that any offence was actually committed.