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IMPOSSIBLE ATTEMPTS AND THE PUNISHMENT OF INTENT

Han Fang Guan v Public Prosecutor

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This comment reviews the new "two-stage framework" developed by the Singapore Court of Appeal in the case of *Han Fang Guan v Public Prosecutor* for impossible attempts under the *Misuse of Drugs Act*. The new framework clarifies the law and it is suggested that the approach should be adopted for all other criminal laws as well.

I. INTRODUCTION

Much ink has been spilt by judges, academics and philosophers on when a person can be held criminally liable for attempting to do something which is impossible to achieve in the given circumstances. This is true in the case of Singapore as well where the issue has been assessed in depth by no less than three Chief Justices in the last two decades: *Chua Kian Kok v Public Prosecutor*;[1] *Public Prosecutor v Mas Swan Adnan*;[2] and now *Han Fang Guan v Public Prosecutor*.[3]

In *Han Fang Guan*, the latest case in the trio, the Singapore Court of Appeal ("SGCA") took the opportunity to once again emphasise that a subjective approach to the accused's conduct should be taken when considering their liability for an impossible attempt.[4] In doing so, it developed a "two-stage framework"[5] based on

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1 [1999] 1 SLR (R) 826 (HC) [*Chua Kian Kok*] [Yong Pung How CJ heard the appeal from the Magistrate's Court].

2 [2012] 3 SLR 527 (CA) [*Mas Swan*] [Chan Sek Keong CJ delivered the judgment of the SGCA; the other members of the court were Andrew Phang and VK Rajah JJA].

3 [2020] 1 SLR 649 (CA) [*Han Fang Guan*] [Sundaresh Menon CJ delivered the judgment of the SGCA; the other members of the court were Andrew Phang and Steven Chong JJA].

4 In an earlier case, *Law Society of Singapore v Bay Puay Joo Lilian* [2008] 2 SLR (R) 316 (HC) at para 44, it was already stated very plainly and succinctly that:

> . . . the law does not preclude an attempt to do something which is impossible. The essence of an attempt is the *intention* to commit the offence.
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> . . .
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> The illustrations [to s 511 of the *Penal Code*] show clearly that the non-existence of the subject matter of an offence does not preclude an attempt to commit it…

5 *Han Fang Guan*, *supra* note 3 at para 108.

"first principles"[6]. This comment evaluates the court's decision and suggests that this approach should be used for all laws imposing criminal liability for attempts and not just for cases under the *Misuse of Drugs Act*.[7]

II. Facts of the Case

In *Han Fang Guan*, the appellant ("Han") was jointly tried with Khor Chong Seng ("Khor") for offences under the *MDA*. Khor was apprehended by Central Narcotics Bureau ("CNB") officers upon entering Singapore at the Woodlands Checkpoint and found to be in possession of seven bundles of controlled drugs.[8] Khor agreed to assist the CNB officers in identifying the intended recipients of the drugs, and his conversations with the Malaysian drug supplier and intended drug recipients were subsequently recorded.

These conversations showed that Khor was instructed by the drug supplier to deliver one of the bundles of drugs to Han. Khor and Han arranged to meet at a certain location in Singapore where CNB officers arrested Han.

The trial judge did not believe Han's allegation that he did not order any diamorphine and that he only ordered 100g of ketamine and 25g of Ice. Han was consequently convicted of attempting to possess one packet containing not less than 18.62g of diamorphine for the purpose of trafficking.[9] Since he did not meet the sentencing criteria under section 33B of the *MDA*, the mandatory death penalty was imposed on him.[10]

However, on appeal to the SGCA, the court found that there was reasonable doubt as to whether there was indeed a "mix-up" such that Han's drug order was not in the consignment that Khor transported to Singapore. If that was the case, Han could not be said to have intended to possess the diamorphine contained in the bundle. His appeal was therefore allowed and the Prosecution was invited to make submissions on whether the charge should be amended to attempting to possess 100g of ketamine and 25g of Ice instead.[11] In coming to its conclusion, the court noted that Han could not possibly consummate "the primary offence of possessing those other drugs for the purpose of trafficking, given that Khor never had any bundles containing the amount of ketamine and Ice allegedly ordered by Han".[12] Hence, an analysis of liability for impossible attempts was required.

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6 *Ibid* at para 104.

7 (Cap 185, 2008 Rev Ed Sing) [*MDA*].

8 Khor was convicted of importing not less than 57.05g of diamorphine into Singapore. However, since he satisfied the requirements under s 33B(2) of the *MDA*, *ibid*, he was sentenced to life imprisonment and the mandatory minimum of 15 strokes of the cane. See *Public Prosecutor v Khor Chong Seng* [2018] SGHC 219 at paras 4, 101 [*Khor Chong Seng*].

9 This was only an attempt to traffic drugs because the drugs were in CNB's possession at the time and there was no intention by CNB to deliver the drugs to him.

10 *Khor Chong Seng*, *supra* note 8 at paras 4, 102. The authorities are urged to amend the *MDA*, *supra* note 7, to limit the sentence to imprisonment of up to 20 years (with fine or caning) instead of the mandatory death sentence where it is only an attempt to commit the capital offence. This is the default position under s 512 of the *Penal Code* (Cap 224, 2008 Rev Ed Sing) [*Penal Code*] for attempts to commit capital offences where no express provision is made otherwise.

11 *Han Fang Guan*, *supra* note 3 at para 118.

12 *Ibid* at para 57.

III. Reasoning of the Court of Appeal

The SGCA noted that the provision on attempted offences under the *MDA* is silent on the issue of impossible attempts.[13] Section 12 of the *MDA* reads:

> Any person who abets the commission of or who attempts to commit or does any act preparatory to, or in furtherance of, the commission of any offence under this Act shall be guilty of that offence and shall be liable on conviction to the punishment provided for that offence.

The court noted that "the common law position at the time of the enactment of s 12 [of the *MDA*] *was not uniform among all the common law jurisdictions*".[14] Furthermore, if the provision is to be interpreted in the same way as section 511 of the *Penal Code*, this would mean that Indian authorities on the *Indian Penal Code* "ought, at least in theory, to be potentially more persuasive than the English approach".[15] The Indian authorities, as noted by the court, distinguished between situations where the accused's conduct failed to result in the primary offence by focusing on whether the failure was due to a factor independent of the accused or because of a factor intrinsic to the accused.[16] Under these Indian authorities, there will be no criminal liability for an attempted offence if the reason for the failure is due to the accused's ineptitude. This was not a position favoured by the court.[17]

In addition, the court noted that there was nothing in the main text of section 511 of the *Penal Code* about impossible attempts.[18] It is only in the two accompanying illustrations which suggest that liability should follow, but both illustrations dealt with factual impossibility. Hence, "reading these illustrations widely to cover all forms of impossible attempts would seem illogical since, if that had been the legislative intent, it could easily have been much more clearly expressed".[19]

The SGCA therefore held that the proper approach was for the court to decide the issue of impossible attempts from "first principles" rather than to trace the law back to the time when section 12 of the *MDA* or its predecessors were passed.[20] The resolution of impossible attempt cases should also not be based on the classification of the type of impossibility such as "physical impossibility" and "inept-offender impossibility".[21]

According to these "first principles", there should be no distinction between failures to commit the primary offence arising from factors independent of the accused (such as intervention of a third party) or not (such as inadequacy of their

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[13] *Ibid* at para 102.

[14] *Ibid*.

[15] *Ibid* at para 103.

[16] *Ibid* at paras 91-97.

[17] *Ibid* at para 98(a).

[18] *Ibid* at para 105. The case occurred before amendments to the *Penal Code*, *supra* note 10, by the *Criminal Law Reform Act 2019* (Act No. 15 of 2019) [*Criminal Law Reform Act 2019*] came into force. See the *Penal Code*, s 511(3) and its illustrations (a)-(d).

[19] *Han Fang Guan*, *ibid*.

[20] *Ibid* at para 104.

[21] *Ibid* at paras 106, 112. In any case, it was held in *Chua Kian Kok*, *supra* note 1 at para 47 that criminal liability will follow in both of these categories as well as in cases of "legal impossibility".

tools).[22] Where the accused has done all that they intended to do but the primary offence is still not consummated (for example, stabbing a bolster mistakenly thinking that it was the intended victim), they should be judged by the criminality of the intended act and not what was in fact carried out.[23] Thus, the accused's culpability is not judged by the reason as to why they were prevented from committing the offence. Underlying this approach is the belief that such persons are not only deserving of punishment (retribution), but should also be discouraged from such offences in the future (deterrence).[24]

Furthermore, the correct approach with regard to impossible attempts is to apply a "two-stage framework that examines the intention of the accused person and whether there were sufficient acts that manifested that intention and the embarkation towards its consummation".[25] At the first stage, the question is whether the accused specifically intended to commit a criminal act. For example, the intended act would be criminal if that act is taking an umbrella which they believe to belong to another. Where the "specific intention" is *not* to commit a criminal act under Singapore law, then the analysis ends. Thus, cases of "no-offence impossibility" (or "non-criminality of the intended offence" as described in *Chua Kian Kok*[26]) will not give rise to criminal liability.[27]

At the second stage, the inquiry asks whether there were sufficient acts by the accused person in furtherance of the "specific intention" to commit the criminal act found in the first stage.[28] Criminal liability will follow if "there were sufficient acts to reasonably corroborate the presence of that intention and demonstrate substantial movement towards its fulfilment".[29] In this way, mere guilty intentions will not be punished.[30]

IV. Comment and Critique

The approach taken in *Han Fang Guan* can be contrasted with the approach in *Mas Swan*, where it was held that the elements for attempt liability under section 12 of the *MDA* should be interpreted in accordance with section 511 of the *Penal Code* and the common law at the time the provision was enacted. This is because there was nothing in the wording of the provision or origins of the *MDA* to suggest that a different approach should be taken.[31] The SGCA in *Han Fang Guan* pointed out

22 *Han Fang Guan*, *ibid* at para 106.
23 *Ibid* at para 107.
24 *Ibid* at para 109, citing *Mas Swan*, *supra* note 2 at para 41.
25 *Han Fang Guan*, *ibid* at para 108.
26 *Chua Kian Kok*, *supra* note 1 at para 43.
27 *Han Fang Guan*, *supra* note 3 at para 108(a)(ii).
28 *Ibid* at para 108(b).
29 *Ibid*. "Corroborate the intention" may sound like the "unequivocality" test for the physical element in attempts. See Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 3d ed (Singapore: LexisNexis, 2018) at para 36.21 [Yeo, Morgan & Chan, *Criminal Law*]. However, it is submitted that when this is coupled with the requirement for "substantial movement", it is more in the nature of the "substantial step" test. See Yeo, Morgan & Chan, *Criminal Law* at para 36.22.
30 *Han Fang Guan*, *supra* note 3 at para 107.
31 *Mas Swan*, *supra* note 2 at paras 37, 41.

that not only was there no uniformity in the common law but also that cases from the *Indian Penal Code* took a different stance.[32]

It is submitted that the "first principles" approach in *Han Fang Guan* is a much better and more flexible approach to adopt. It would doubtlessly hamstring legal development if we need to apply the law on attempts from a bygone era when interpreting what section 511 should mean today.[33]

In addition, the SGCA in *Han Fang Guan* made three interesting points concerning implications of its "two-stage framework". First, the court clearly stipulated that the accused will only be liable for an attempt if they had the "specific *intent* to commit a recognised offence coupled with sufficient acts in furtherance of that intention".[34] An example given to illustrate this is where the accused has sex with a girl over the age of 16 in the mistaken belief that she is under that age:[35]

> If … he was indifferent to the actual age of the girl even if he mistakenly believed she might be underage, he would not be liable for attempting to commit statutory rape. Conversely, if the evidence demonstrates that he specifically targeted the girl because he thought she was under the age of 16 and would not have sex with her otherwise, then he would be liable. This distinction would be justifiable on the basis of deterrence because the accused person in the latter situation would demonstrably be a danger to underage girls, which is precisely the danger that the applicable provisions are meant to protect against. He would also be morally culpable and deserving of punishment in specifically intending to target a protected group of individuals.[36]

This clarification is extremely useful and is in line with earlier case law which has explained that the requisite fault element for attempt liability is "intention" and nothing less.[37] The re-enacted section 511(1) of the *Penal Code* also now clearly states that a person is only liable for attempting "to commit an offence punishable by this Code or by any other written law" if they have "the intention of committing that offence". According to the new section 26C(1) of the *Penal Code*, a person does something intentionally when they do so "deliberately".[38] In other words, a

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32 *Han Fang Guan*, *supra* note 3 at paras 91, 102.

33 In *Mas Swan*, *supra* note 2 at paras 26-28, the origins of s 12 of the *MDA*, *supra* note 7, was traced back to s 33 of the *Dangerous Drugs Ordinance 1951* (Ordinance No. 7 of 1951) and s 15 of the *Opium and Chandu Proclamation 1948* (BMA Proclamation No. 43 of 1948). Indeed, "preparatory" conduct concerning illicit drugs was punished from 1925, if not earlier. See s 32A of the *Deleterious Drugs Ordinance*, which was added by the *Deleterious Drugs Amendment Ordinance 1925* (Ordinance No. 6 of 1925).

34 *Han Fang Guan*, *supra* note 3 at para 112 [emphasis in original].

35 This will be an offence under s 376A of the *Penal Code*, *supra* note 10, as well as the *Women's Charter* (Cap 353, 2009 Rev Ed Sing), s 140(1)(i).

36 *Han Fang Guan*, *supra* note 3 at para 111(c).

37 *Chua Kian Kok*, *supra* note 1 at para 31.

38 This provision was added by the *Criminal Law Reform Act 2019*. The *Penal Code*, *supra* note 10, s 26C(2) states that a person causes an *effect* intentionally if they act "(a) with the purpose of causing that effect; or (b) knowing that that effect would be virtually certain (barring an unforeseen intervention) to result". The alternative "knowledge of virtual certainty" limb is set at a high threshold and is meant to cater to situations where the accused recognises that the effect is virtually certain to result but there was no desire to achieve that result. See the *Penal Code Review Committee Report* (August 2018) at 168-171.

person's intent must be understood with regard to the person's perceptions about the nature and purpose of their acts. In the example, the accused can only be guilty of attempting to have sex with an underage girl if he intended—in the sense of his deliberate purpose—that she should be underage. Similarly, in the oft-cited example of a person trying to 'steal' their own umbrella, it would be attempted theft if they intend for the umbrella to belong to another. It is not an attempt if they do not care about the girl's age or the owner of the umbrella.

The illustration used by the SGCA also shows that the accused can only be liable for an attempt if they intend *all* the physical elements of the full offence.[39] Sex with an underage girl is a "strict liability" offence in that the accused need not possess knowledge or belief that the girl is below 16 years old in order to be convicted.[40] Even a reasonable mistake that the girl is 16 years old or above is not a defence.[41] However, the same does not apply to an *attempt* to commit such a strict liability offence. The accused is only liable for an attempt to have sex with an underage girl if he *knew* that she is under 16 years old.[42] Lack of knowledge or indifference to the girl's age is not sufficient.[43]

One suggested improvement is that instead of using the phrase "specific intention", which has a rather technical meaning in English law[44] and has no counterpart in local law,[45] it would be better to avoid it altogether. It would be clearer to say that the fault element required for an attempt is simply an intention—meaning deliberate or purposeful conduct—to commit the substantive offence.

Secondly, the SGCA criticised the use of prosecutorial discretion to systematically sieve out exceptional or extreme cases. The court remarked that resorting to prosecutorial discretion in such cases was:

> unsatisfactory because: (a) the liberty of individuals should not be dependent on discretionary powers when they may be dealt with in a principled way; and (b) the premise of that solution, namely, that extreme cases will be sieved out by the exercise of prosecutorial discretion, has been shown to be false in some instances.[46]

This is no doubt correct. Troublesome cases which require the use of prosecutorial discretion to be filtered out of the criminal justice system can be easily taken care

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39 See also *Chua Kian Kok*, *supra* note 1 at paras 27-33.

40 *Penal Code*, *supra* note 10, s 26H.

41 *Ibid*, s 377D.

42 The same will apply to offences with a fault element less than intention, such as knowledge, rashness or negligence. It is possible to attempt to commit such offences, provided it is done intentionally.

43 Foresight may provide evidence to infer intention, but this is a matter of evidence, which is different from the meaning of intention in substantive criminal law. See *Penal Code*, *supra* note 10, s 26C(4).

44 Under English law, voluntary intoxication is a defence only to crimes of "specific intent" and not crimes of "basic intent". See *DPP v Majewski* [1977] AC 443 (HL). Efforts to discern the difference between the two types of crimes have been fruitless. David Ormerod & Karl Laird, *Smith, Hogan & Ormerod's Criminal Law*, 15th ed (Oxford: Oxford University Press, 2018) at 318 has stated that "a careful scrutiny of the authorities . . . fails to reveal any consistent principle by which specific and basic [intent] are to be distinguished. . . . It is regrettable that the distinction is so obscure that the Law Commission recently felt unable confidently to state what the law was".

45 The concept of specific intention with respect to the defence of voluntary intoxication was rejected under s 86(2) of the *Penal Code*, *supra* note 10.

46 *Han Fang Guan*, *supra* note 3 at para 117.

of by the second stage of the "two-stage framework". For example, an accused who intends to cause injury by uttering a meaningless curse[47] or an accused who tries to teleport contents out of a safe by telepathy[48] cannot be liable for attempting to cause hurt or to commit theft simply because the acts cannot be said to be "substantial movement" towards the offence.[49]

Thirdly, the court suggested that a person who voluntarily withdraws from an attempt may not be criminally liable:

> We leave open the situation of an accused person who resiles from his original intention and does not carry it out because of a change of heart. This is because if, as we think is the case, the essence of a criminal attempt is the *intention* to embark on a criminal endeavour, then potentially difficult questions arise where the accused person resiles from that intention.[50]

In support of the court's position, a voluntary withdrawal may show that the accused did not have the intention to complete the crime at the material time. Liability for attempt is based on the intention to commit the full offence, not an intention to attempt to commit it. Furthermore, there is no point in punishing an accused who voluntarily withdraws since they have already been deterred from committing it.[51]

On the other hand, if the accused indeed has the intention to commit the offence and has taken substantial steps towards its consummation, it could be argued that voluntary withdrawal or change of mind by the accused is irrelevant to liability.[52] Culpability for an attempted offence is not dependent on the harm that is done to the victim. It is mainly based on the accused's state of mind. Withdrawal will, at most, be a matter of mitigation of sentence.[53] In other words, voluntary withdrawal only comes into play if the fault and physical elements for attempt liability cannot be satisfied, that is, if there is doubt as to the accused's intent or if the withdrawal comes before substantial steps toward the offence have been taken.

V. Conclusion

The SGCA's decision in *Han Fang Guan* clarifies the approach towards impossible attempts under section 12 of the *MDA*. Since the approach chosen, the "two-stage framework", is based on "first principles", it should be seen as being capable of

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[47] *Ibid* at para 98(e)(i).

[48] *Ibid* at para 65.

[49] *Ibid* at para 108(b). But if the accused did not act alone, charges for abetment or criminal conspiracy to commit hurt or theft may be possible. See the *Penal Code*, *supra* note 10, ss 107, 120A.

[50] *Ibid* at para 106 [emphasis in original].

[51] The emphasis is on *voluntary* withdrawal. If this were not the case, for example if the accused was stopped from committing the crime by others and that is the reason they did not proceed with the plan, the deterrence rationale will still apply.

[52] This is especially so if ineptitude on the part of the accused is irrelevant to criminal liability for attempts. See *Han Fang Guan*, *supra* note 3 at para 98(a).

[53] See the proposal in Yeo, Morgan & Chan, *Criminal Law*, *supra* note 29 at para 36.64 that a court should be required to consider the facts and circumstances of the voluntary abandonment in deciding on the punishment to be imposed.

adoption in all other criminal laws as well.[54] It is after all a policy choice for the court to make (insofar as this is not inconsistent with the express or implied legislative intent of the statute) on whether there ought to be criminal liability in such cases.[55] Legal certainty will be enhanced by having a uniform approach applied to all the different criminal laws which punish attempts.[56]

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[54] There are many laws which do not state what is required for an "attempt" or whether there is liability for an impossible attempt. See for example s 38 of the *Interpretation Act* (Cap 1, 2002 Rev Ed Sing); s 4 of the *Arms Offences Act* (Cap 14, 2008 Rev Ed Sing); s 10 of the *Computer Misuse Act* (Cap 50A, 2007 Rev Ed Sing); s 12 of the *Official Secrets Act* (Cap 213, 2012 Rev Ed Sing); s 30 of the *Prevention of Corruption Act* (Cap 241, 1993 Rev Ed Sing).

[55] *Han Fang Guan*, *supra* note 3 at para 101.

[56] However, there remains inconsistency between ss 307-308 and s 511 of the *Penal Code*, *supra* note 10, which will require legislative amendment. See Yeo, Morgan & Chan, *Criminal Law*, *supra* note 29 at paras 36.54-36.55.