

Attempts

Section 4 of the *Criminal Code* is as follows:

Attempts to commit offences

- (1) *When a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.*
- (2) *It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on the offender's part for completing the commission of the offence, or whether the complete fulfilment of the offender's intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of the offender's intention.*
- (3) *It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.*
- (4) *The same facts may constitute one offence and an attempt to commit another offence.*

That definition in s 4 applies to s 535 of the *Criminal Code* which, by sub-section (1), provides as follows:

Attempts to commit indictable offences

- (1) *If a person attempts to commit a crime, the person commits a crime.*
- (2) *If a person attempts to commit a misdemeanour, the person commits a misdemeanour.*

The definition in s 4 also applies to other provisions of the *Criminal Code*, which provide for an offence constituted by an attempt to do something which is itself another offence. An example is s 306, by which a person who attempts unlawfully to kill another is guilty of a crime, it being an offence to kill another unlawfully: *R v O'Neill* [1996] 2 Qd R 326 at 432 per Dowsett J (Pincus JA agreeing at 422).

The position is different, where there is a provision of the *Criminal Code*, under which it is an offence to attempt to bring about a physical result, which is not itself another offence. An example is s 317 of the *Criminal Code*, considered in *R v Leavitt* [1985] 1 Qd R 343. The distinction between cases of that kind, and cases of, for example, attempted murder, was described in *R v Chong* [2012] QCA 265 at [22] per Holmes JA.

There must be an actual intent to commit an offence; knowledge or foresight of a result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the *Criminal Code*: *Zaburoni v The Queen* (2016) 256 CLR 482 at 490; [2016] HCA 12 at [14]. Where the accused knows that a particular result of his or her conduct is certain, an inference that the accused intended that result may be compelling; but that is a matter for the jury which should not be directed in those terms, but instead told that they must be satisfied that the accused intended to produce the particular result: *Zaburoni* at 490 [15]. Intention and motive are different things in this context: *Zaburoni* at 490 [16].

An intent to cause death is an essential element of the charge of attempted murder: *Cutter v R* (1997) 71 ALJR 638; [\(1997\) 94 A Crim R 152](#).

The defendant must begin to put that intention into execution by means adapted to its fulfilment, and the intention must be manifested by some overt act. There is a well-established distinction between mere preparation to commit an offence and an attempt to commit it: *R v De Silva* [\(2007\) 176 A Crim R 238](#) at 247; [2007] QCA 301 at [27], where it was also said that it is not necessary to establish that the last act possible was done before the defendant could be said to have attempted to commit the offence.

In *R v Williams* [\[1965\] Qd R 86](#), Stable J (at 100), with the agreement of Wantstall J (at 95), said that there is an attempt if there is a step towards the commission of specific crime, and that step could not reasonably be regarded as having any other purpose than the commission of that crime. That was applied in *R v Savins* [\[1996\] QCA 513](#) at [4] and in *De Silva* at [29]-[30] per Holmes JA.

In cases where the particular facts raise the issue, the jury should be directed about the effect of s 4(2) or s 4(3).

A suggested direction is as follows:

The defendant is charged with attempting to [describe the relevant result, such as unlawfully kill V]. Under our law, if a person attempts to [e.g. unlawfully kill another person], he/she or she commits an offence. I will now explain to you what the law means by an “attempt” in this context.

For someone to be attempting to commit a particular offence, that person must intend to commit that offence. [So in this case, for the defendant to have attempted to unlawfully kill V, the defendant must have been acting with the purpose of unlawfully killing that person.] **Someone who is attempting to bring about a certain result must be meaning to do so at the time of engaging in the conduct which the prosecution says was an attempt to commit the offence. This intention on the part of the defendant must be proved by the prosecution, beyond reasonable doubt.**

You then have to consider what the defendant did, when, it is alleged, he/she was attempting to [kill V]. A mere intention to commit an offence does not matter, if the defendant had not started to put his/her intention into effect, by conduct, i.e. some acts or acts by him/her which were directed to achieving the defendant’s purpose. Further, the defendant’s conduct must have been something which, if anyone had been watching it, would have made the defendant’s purpose clear. The prosecution must prove, beyond reasonable doubt, that there was something done by the defendant which was conduct of the kind which I have just described.

Therefore you have to consider the evidence of what the defendant was doing when, the prosecution argues, he/she was attempting to [kill V]. You must be

satisfied, beyond reasonable doubt, that he/she was doing what the prosecution alleges he/she was doing. You then have to consider whether, by that conduct, the defendant had begun to put his/her intention into effect, and whether the conduct would make it clear to someone watching it that the defendant had the purpose which the prosecution alleges.

It is unnecessary for the prosecution to prove that the defendant did everything which he could have done to bring about the intended result.

[Describe the competing arguments, by reference to those elements of an “attempt”.]

[Where appropriate, this might be added: **The argument for the defendant is that what was done/alleged to have been done was, at the most, merely preparation ahead of any attempt to [state the result], so that when the defendant was doing those things, he/she was not then in the process of trying to [state the result]. Our law recognises that merely doing something to prepare for the commission of an offence, is not of itself an attempt to commit the offence. It is for you to assess whether you are satisfied, beyond reasonable doubt, that the defendant’s acts went beyond mere preparation.**]