

Attempted Murder: Code s 306(2)¹

The defendant is charged with the attempted murder of (insert name). Any person who attempts unlawfully to kill another is guilty of a crime.² Unlawful simply means not authorised, justified or excused by law. In this case there are no issues to suggest authorisation, justification or excuse.

The Code defines an “attempt” in the following way:³

“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.”

In order to establish the charge, the prosecution must prove beyond reasonable doubt that :⁴

1. the defendant had an intention to kill at the requisite time,
2. the defendant put the intention to kill into execution by means adapted to its fulfilment,
3. the defendant manifested the intention to kill by some overt act.

As to the first issue, it is an essential element of the offence that the defendant had an intent to kill (insert name of victim) at the time of or during the relevant act

¹ The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992 so a serious organised crime circumstance of aggravation is applicable.

² Section 306(a) *Code*. As to attempted murder where the defendant did or omitted to do an act which it was his or her duty to do, which act or omission was of such a nature as to be likely to endanger human life: see s 306(b) *Code*. Note that s 538 *Code* provides for a reduction in punishment where a person convicted of attempted murder, voluntarily desists from prosecuting the attempt. As to the application of s 538 in the case of an attempted murder conviction see *R v Witchard* [2005] 1 Qd R 428.

³ See s 4 *Code*. There is conflict in the authorities as to the applicability of the s 4 definition to those offences in the *Code* of which an attempt is an element of the offence. In *R v Leavitt* [1985] 1 Qd R 343, the Court of Criminal Appeal held that s 4 does not apply to offences in the *Code* in which an attempt is an element of the offence. In *R v O’Neill* [1996] 2 Qd R 326 at 431-432, Dowsett J observed that the s 4 definition does apply to the offence of attempted murder in s 306. Although the remarks are obiter, the editors of Carter’s *Criminal Law of Queensland* cite *O’Neill* as authority for the proposition that the s 4 definition applies to s 306. The question remains unsettled, possibly because reference to the s 4 definition as opposed to the term in ordinary usage is unlikely to produce a different outcome. In *Leavitt* the phrase used by Andrews CJ (345) in eschewing the s 4 definition was “meaning by action to achieve a particular result” (Williams J to similar effect at 347).

⁴ See *Barbeler v The Queen* [1977] Qd R 80 as to the components to an attempt charge.

or acts inflicted on the victim.⁵ Anything less than an intent to cause death is insufficient. It is not sufficient, for example, that the defendant was recklessly indifferent as to whether (insert name of victim) lived or not, nor is it sufficient on a charge of attempted murder that the defendant intended to do grievous bodily harm.⁶

Intention is a state of mind.⁷ It is necessarily a matter of inference whether a person had an intent to kill. As I have mentioned, you may draw inferences only from the proven facts. There must be a logical and rational connection between the facts as you find them and any inference you draw. Importantly, if more than one inference is reasonably open, that is, an inference adverse to the defendant (i.e. one pointing to his guilt), and an inference in his favour (i.e. one consistent with innocence) you must give the defendant the benefit of the inference in his favour. Therefore, you must be satisfied beyond reasonable doubt that the inference of an intention to kill (insert name of victim) is the only reasonable inference open on the evidence which you accept.

If you are not satisfied beyond reasonable doubt that there was an intent to kill, the offence of attempted murder cannot be established and you must find the defendant not guilty of the charge. On the other hand, if you come to the conclusion beyond reasonable doubt that the defendant had an intent to kill at the relevant time, the element of intent will have been proved.

The second element of the offence is that the defendant must put his intention to kill into execution by means adapted to its fulfilment. This simply means that the defendant began to carry out his intention to kill in a way suitable to bring about what he intended to achieve. Where a person is physically attacked, the phrase “by means adapted to its fulfilment”, basically requires you to ask whether the means was such as to be capable of killing someone. For example, stabbing

⁵ See *Alister v The Queen* (1984) 154 CLR 404; *Knight v The Queen* (1992) 175 CLR 495; *Cutter v The Queen* (1997) 143 ALR 498.

⁶ Where there is a live issue as to whether the defendant’s intent was to cause grievous bodily harm rather than to kill, the trial judge should explain to the jury what grievous bodily harm is, rather than risk leaving it with the impression that it is no more than an intention to hurt: *R v Rogers* [2013] QCA 52.

⁷ An elaboration as to the meaning of the word “intention” should be avoided: see *R v Willmot (No 2)* [1985] 2 Qd R 413; *Cutter v The Queen* (1997) 143 ALR 498. See also the direction on “Intention” and the discussion in *R v Glebow* [2002] QCA 442.

someone with a knife (adapt according to facts of the case) may be a means adapted to the fulfilment of an intention to kill. ⁸

The third element is that there must be a manifestation of the intention to kill by some overt act. That simply means that there was some act that, if an observer had been standing by, the observer could have seen.

The concept of attempted murder is really, in a nutshell, that someone unlawfully attacks or does something else to another person, intending to kill them and using means capable of doing so, but fails.

The case against the defendant is that intending to kill (insert name), he (insert details).

⁸ But see s 4(3) of the Code (it is immaterial that by reason of circumstances not known to the offender it is impossible to commit the offence)