

National Security (Legislative Provisions) Bill :

**“doing any act with intent to prejudice
the position of the PRC in the war”**

This paper discusses –

- (1) the extent to which assisting a public enemy at war requires active conduct; and
- (2) the meaning of “with intent to”.

I. Assisting a public enemy

2. The offence of assisting a public enemy at war with the PRC could only be committed “by doing any act” with intent to prejudice the position of the PRC in the war.
3. Where an offence includes a verb that implies active conduct, the courts generally do not stretch the meaning of that verb to include omissions. Since the word “assist” implies active conduct, it is likely to be construed as not including omissions.
4. Such a construction is reinforced by the requirement of “doing any act”. A reference to the doing of an act will not normally be taken to include an omission to do the act. For example –
 - (1) the former offence of doing any act with intent to impede the apprehension or prosecution of someone who has committed an arrestable offence did not include an omission;
 - (2) it has been held that the words “does acts”, in modern legislation, are to be strictly construed and are not satisfied by proof of an omission.

II. The meaning of “with intent to”

Ulterior intent

5. Offences are frequently so defined that the mental element includes an intention to produce some further consequence beyond the prohibited act itself. For examples, burglary consists of entering a building as a trespasser with the intention of committing one of a number of specified offences. The actual commission of one of those offences is no part of the prohibited act of burglary, which is complete as soon as the entry to the building takes place.
6. In such cases, the additional intent required is commonly known as an “ulterior intent”. Where an ulterior intent is required, recklessness as to such a result is not enough. It must be proved that the person intended it.
7. A person intends a certain result if –
 - (1) it is his purpose to achieve that result; or
 - (2) he knows that the result is a virtually certain consequence of his acts.
8. The question whether a person has such an intention as a predominant or a secondary consideration when carrying out his actions is immaterial. For example, a person may enter a building as a trespassor primarily to shelter from the rain, and may intend to steal things only as a secondary consideration. The person nevertheless commits the offence of burglary.

Motive

9. Ulterior intent is different from motive. Where an offence includes an ulterior intent, it must be proved that the accused had such an intent. Motive generally refers to some consideration that forms no part of the offence. A person’s motive is what induces him to act in a certain way e.g. revenge, greed, ambition.
10. Motive is not relevant to guilt or innocence. However, it may be relevant as evidence, since if the prosecution can prove the defendant had a motive for committing the crime that may make it more likely that he

did in fact commit it. Motive is also important in respect of sentencing e.g. a person who acted with a good motive may receive a lighter sentence than one who did not.

Application to treason

11. The above principles would apply to the proposed offence of assisting a public enemy at war as follows.
 - (1) It would not be sufficient merely to prove that a person intentionally assisted an enemy.
 - (2) The prosecution would also need to prove that –
 - (a) the person's purpose in giving such assistance was to prejudice the position of the PRC in the war; or
 - (b) the person knew that such prejudice was a virtually certain consequence of his acts.
 - (3) The person's motive for his actions (e.g. hatred of his country or desire for world peace) would be irrelevant to his guilt or innocence, but might be relevant as evidence of what he had done or in sentencing.

Department of Justice
April 2003