CRIMINAL: ATTEMPT

I

The problems involved in the law of criminal attempt are intricate. The confusion arises, because courts are doing inconsistent things with similar fact situations and also because courts are attempting to apply the same rule to utterly dissimilar situations.[1] The problem has eluded solution so far. Perhaps the principal reason for this is that its history has been neglected.[2] A brief historical survey of the law of criminal attempt may thus be useful in the formulation of this problem.[3]

Initially, the repression of attempts is to be found as an exercise of criminal policy [4] in the measures adopted by the Star Chamber. The English Common Law did not have any law of criminal attempt till the 18th century.[5] The influence of the Star Chamber is evident on common law in this regard.[6] The doctrine of attempt originated in England in *Rex* v. *Scofield*,[7] a case of attempted arson and was finally

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1. Arnold T.W.,—Attempt in Criminal law, 40 Yale L.J. 53.

2. Hall, *General Principles of Criminal law* 553 (2nd Ed.). Prof. Hall explains Social and psychological factors have had great influence upon the law of criminal attempt, especially in determining the relevant harm or at least, what was regarded as sufficiently harmful to warrant penalisation. The legal history also disclosed that there is an irreducible element of experience in law that cannot be persuasively dissolved in logical analysis and which penal theory must somehow take into account". *Id.* 553.

3. For an analysis of the law of criminal attempt in historical perspective, See Hall, *op. cit.*, 553; Holdsworth, *History of English law*, Vol. V., p. 200, Sayre, "Criminal Attempts" 41 Harvard Law Review, 821.

4. Kenny: *Outlines of Criminal law*, (17th Ed. by Turner) 89 "The Romans punished attempts to commit ordinary crimes occasionally and by a smaller penalty but in atrocious crimes emphasis was laid on intent rather than on actual harm." (Hall, *op. cit.*, 559).

5. Pollock & Maitland, *History of English law*, Vol. 2, 508. In (1784 the doctrine of criminal attempts originated in the case of *Rex* v. *Scofield* (Perkins, cases on Criminal law & Procedure, p. 283).

6. Holdsworth, *History of English law*, Vol. V. 201. Sayre, Criminal Attempts—(41 Har. Law Review) however rejects the view that the Star Chamber doctrine was taken over by the common law courts.

7. *Rex* v. *Scofield* (1784) Cald. (387), Perkins, Cases on Criminal law and Procedure, 283. In this case Lord Mansfield observed :

formulated in *Rex* v. *Higgins*,[8] which concerned solicitation[9] to steal certain goods. In *Scofield's* case overt behaviour was held to be a criminal attempt but the *Higgins* case went further in establishing criminality on a lesser degree of overt behaviour *viz.*, solicitation. These cases provide an important clue to the necessity of development of the law of criminal attempts, namely that the standard technique of 'assault plus aggravation', a species of attempt, in common law could not be literally applied to check all kinds of harm. This suggests that harmful tendencies of aggravated nature were to be made punishable as criminal attempt and this remains the underlying policy of the law even today.[9a]

II

The Indian Penal Code, besides, dealing with the law of criminal attempts in a specific and general way,[9b] contemplates provisions to arrest criminality in incipient stages too.[10] The Code deals with attempt in three different ways *viz.*,

(i) In some cases the commission of an offence and the attempt to commit it, are dealt with in the same section, the extent of punishment being the same for both.[11]

(ii) The second way of dealing with attempts is exemplified by Sections 307, 308, 393 Indian Penal Code: In these sections attempts for committing specific offences are dealt with side by side with the offences themselves, but separate punishments are provided for the attempts and for the offences.

(iii) the third mode is embodied in S. 511 which is a general provision designed to cover cases falling outside the above two categories.

The commission of a crime goes through three processes *viz.*, (i) conceiving an intention to commit a crime, (2) preparation for its committal (3) and an attempt to commit it. Generally, the first two stages are not punishable but once an act enters into the third stage

"When an act is done the law judges, not only of the act done, but of the intent with which it is done, and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable".

8. *Rex* v. *Higgins* 102 E.R. 269 (1801).

9. Incitement, conspiracy and attempt were intermingled with each other till the 18th century, Kenny, *op. cit.* p. 87.

9a. Hall *op. cit.* p. 559.

9b. Section 511, I.P.C.

10. Sections 122, 126, I.P.C.; Ss. 233, 234, 235, I.P.C.; Possession of counterfeit coins, false weights and forged documents etc.

11. *e.g.*, Ss. 121, 124-A, 161, 391. I.P.C.

criminal liability arises. Thus an attempt to commit a crime forms part of a series of acts. The reason why the first two stages in the series, that of mental determination and that of preparation are not punished is that they are too remote from the completion of the crime whereas the stage of attempt takes the offender very close to a successful completion of the crime. The problem for the law to decide is whether that stage when he ought to be punished has been reached. As to when a preparation ceases and attempt begins is a difficult problem to solve. However, much will depend upon the facts and circumstances of the case, but four different approaches have been worked out with a view to laying down a uniform test of general applicability to determine the dividing line between preparation and attempt.

(i) *Proximity rule*: The rule as enunciated by Prof. Glanville Williams has been stated thus, "it seems that the act of the accused is necessarily proximate if, though it is not the last act that he intended to do, it is the last that it is legally necessary for him to do if the result desired by him is afterwards brought about without further conduct on his part."[12] The rule is a combination of principles laid down in a number of decided cases *e.g.*, an act of attempt must be sufficiently proximate to the crime intended,[13] it should not be remotely leading towards the commission of an offence,[14] it must contribute an antepenultimate act[15] and that the act done should place the accused into a relation with his intended victim.[16]

(ii) *Doctrine of locus penitentiae*: Whether there has been an attempt or not is to be determined in consideration of the doctrine of *locus penitentiae*. Abandonment is a defence if further action is freely and voluntarily abandoned before the act is put in process of final execution.[17]

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12. Williams G., *Criminal Law* (General Part), 481.

13. *Op. cit.* Williams G., Criminal Law (General Part), p. 477 "It seems to be a question for the judge whether the act charged as the attempt satisfied this requirement."

14. *Eagleton* (1855) 169 E.R., at 835, See *Hope* v. *Brown* (1954) 1 W.L.R. 250. See Russell on *Crimes*, (11th Ed. by Turner) p. 190.

15. *Linneker* (1906) 2 K.B. 99.

16. *White*(1910) 2 K.B.,124; *Linneker* (1906) 2 K.B. 99, *Vreones* (1891) 1 Q.B. 360, See *Emp.* v. *Raghunath*, 1941 Oudh 3; *Mac C Rea* 15 All. 173. In *Robinson*, (1915) 2 K.B. 342 the accused had only made preparations by staging a fake roberry and had not placed himself in relation to the intended victim by not going further towards the commission of fraud.

17. See Inbau and Sowle, *Cases and Comments on Criminal Justice* (1960) p. 411; *In re Bavaji*, A.I.R. 1950 Mad. 44, 45; *In re Narayanaswamy Pillai*. A.I.R 1932

(iii) *Equivocality theory*: Suggests that an act is proximate if, and only, if, it indicates beyond reasonable doubt what is the end towards which it is directed.[18] The *actus reus* of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of that specific crime and the doing of such act cannot reasonably be regarded as having any other purpose than the commission of that specific crime." [19] In other words, acts must be unequivocally referable to the commission of crimes and must speak for themselves.[20] This theory has found its application in courts in Newzealand.[21]

Prof. Williams, however, is of the opinion that a strict application of the test would acquit many undoubted criminals.

(iv) *Social Danger Test*: The seriousness of the crime attempted has been one of the criteria in deciding the liability in cases of attempt. If the facts and circumstances of a case lead to the inference that the resultant consequences would have been grave, the crime of attempt is complete. In fact it is the apprehension of social danger which the

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Mad. 507, *Empress* v. *Laxman* (1900) 2 Bom. L.R. 286, *Empress* v. *Vinayak* (1900) 2 Bom. L.R. 234. *In re MacCrea* (1893) 15 All. 173 (Contra) *Riasat Ali* (1881) 7 Cal. 352, *Empress* v. *Ramakka* (1885) 8 Mad. 5 and *Empress* v. *Baku* (1900) 24 Bom. L.R. 287, 291. Repentance expressed by the perpetrator through the voluntary withdrawal from an already criminal attempt coupled with the utmost exertion to oust the harm, never did constitute an exculpation at common law, but, a California court has recognised this policy excuse which is sound and commendable penal policy. (1958. American Survey of Annual Law, 19).

18. Williams: *Criminal Law*, General Pt.—p. 483.

19. Turner—'*Modern Approach to Criminal Law*' p. 279.

20. Turner: Attempts to Commit Crimes, in *Modern Approach to Criminal Law*. Ed. (Davis) p. 280; Salmond, *Jurisprudence* (6th ed.) p. 346.

21. Turner, *Modern Approach to Criminal Law*, p. 280-81. In order to infer that there is only one and one result alone of the act attempted, Prof. Turner has given an example in the following words:

"If the example may be permitted it is as though a cinematograph film, which had so far depicted merely the accused person's acts without stating what was his intention, had been suddenly stopped, and the audience were asked to say to what end those acts were directed. If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain that end. If there is more than one reasonably possible answer, then the accused has not yet done enough".

The test has been further illustrated by way of an imaginary case posed by Prof. Kenny. "If a man takes an umbrella from a stand at his club, meaning to steal it, but finds that it is his own, he commits no crime". The man could not be convicted of an attempt because the facts stated merely present the picture of a man which do not suggest an intention of stealing an umbrella".

particular crime is calculated to excite,[22] that determines liability for an attempt.

The test is very similar to the rule enunciated by Prof. Williams[23] with the difference that *here the consequences of* circumstances and the gravity thereof are inferred from the totality of facts whereas in the latter case a mere fragment of an action, if it is a final link in the chain of penultimate acts, makes a person liable of criminal attempt.[24] It would be incorrect to say that the courts have decided cases with strict reference to one rule or the other. The above tests have been extracted from the decided cases of the courts in the common law system. In cases of attempt the main difficulty arises in drawing a dividing line between the stages of preparation and attempt and it need be examined, if, any one or more of the above tests suggested can serve a useful guide in determining the above problem.

III

The general principles relating to criminal attempts have been laid down in S. 511, Indian Penal Code, which runs as follows :—

" Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and *in such attempt does any act towards the commission of the offence*, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one half of the longest term of imprisonment provided for that offence or with such fine as is provided for the offence or with both."

There is difference of opinion in regard to the language and scope of the section. One view is that certain words in the section seem redundant because the very essence of the idea of an attempt being something done towards the commission of the act attempted to be done, the words " *and in such attempt does any act towards the commission of the offence* " seem superfluous.[25] This view gains strength from the fact that in dealing with attempts in the two other modes mentioned

22. Holmes, *The Common Law* (1881) pp. 68-69, Sayre, 'Criminal Attempts, 41 Harvard Law Review 821, 845; Arnold, Criminal Attempts, 40 Yale L.J. 53, 73.

23. See page 108 (*supra*).

24. The decisions in *Reg.* v. *Ramsaran* 4 N.W.P. 46 and *Reg.* v. *Riasat Ali* (1881) 7 Cal. 352 can be explained with the help of rule (iv) and rule (i) respectively.

25. Huda, 'The Principles of Law of Crimes in British India' at p. 50. But according to Ratanlal (The Law of Crimes 19th Ed.) p. 1332, these are the vital words.

above no such qualifying words are used. But there is scarcely any evidence to show that the Indian Penal Code *intended to deal with a different and more limited class of attempts in Sec. 511.*[26]

It appears that the courts in India have been labouring under a confusion with respect to the exact scope of S. 511 Indian Penal Code, that is, whether or not S. 511, Indian Penal Code, is wide enough to include all kinds of attempts punishable under the code, including attempts to murder, specifically provided in S. 307, Indian Penal Code[27] or whether these sections are exclusive of each other. There are, however, conflicting and diverse opinions of different High Courts on this point.

(i) According to the Allahabad High Court, Sec. 511 does not apply to attempts to commit murder which are fully and exclusively provided for by S. 307.[28]

(ii) The Bombay High Court has, however, held otherwise in a case[29] which has been doubted in a later case.[30]

26. Huda ' The Principles of the Law of Crimes in British India, at p. 50(T.L.L.) See also Raju, The Penal Code (1st Ed.) p. 1439.

27. " Whoever does any act with such intention or knowledge, and under such circumstances, that if he by that act caused dealth, he would be guilty of murder, shall be punished with imprisonment of either, description for a term which may extend to ten years, and shall also be liable to fine ; and if hurt is caused to any person by such act, the offender shall be liable either to (imprisonment for life), or to such punishment as is herein before mentioned." (S. 307 (I.P.C.)).

28. *R.* v. *Niddha* (1892) 14 All. 38 ; *Tulsha* (1897) 20 All. 143-Straight, J., thought it necessary, and he decided that under no circumstances could an attempt to commit murder come under Sec. 511. He felt that the words, ' under such circumstances merely meant that the act must be done in such a way and with such ingredients that if it succeeded, and death was caused by it, the legal result would be murder according to Ss. 299 and 300. The learned Judge said :—

" If, a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself."

29. *R.* v. *Cassidy* (1867) 4 B.H.C. (Cr. C.) 17. Couch, C. J., held that in order to constitute an offence under section 307 it was necessary that there must be an act done under such circumstances (i) that death might be caused if the act took effect (ii) that the act complained of must be capable of causing death in the natural and ordinary course of things. If the act was not of that description, a person could not be convicted of an attempt to murder under section 307 though the act was done with the intention of causing death, and was likely, in the belief of the prisoner to cause death.

30. *Vasudeo Balwant Gogte* v. *Emperor* (1932) 34 Bom. L. Rep. 571, Bench of the Bombay High Court expressed dissent from *Cassidy's* case. Beaumont, C. J., observed : at p. 577.

The former chief court of Punjab had laid down that Sec. 511 was in terms much wider than Sec. 307.[31]

(iii) Raju is of the view that Sec. 307 is exhaustive and not narrower than Sec. 511, so far as attempts to commit murder are concerned. But Sec. 511 applies to attempt to commit offences and also to attempt to cause an offence to be committed.[32]

Mayne's view is that cases not covered by Sec. 307 will be covered by Sec. 511 as held in *Cassidy's* case.[33]

"I think what sec. 307 I.P.C. really means is that the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact that act would have amounted to murder in the normal course of events."

31. Per Rattigan, J., in *Jiwan Das* (1904) P.R. No. 30 of 1904; Cr. L.J. 1078. Under S. 307 the act done must...be one *capable of causing "death"*, and it must *also be the last proximate act* necessary to constitute the completed offence; under section 511 the act may be *any act in the course* of the attempt towards commission of the offence.

32. Raju, Penal Code p. 932. According to this view, "the working of S. 511 is wider. S. 511 applies to (A) whoever attempts to commit an offence punishable with imprisonment (B) whoever attempts to cause such an offence to be committed and in such attempt does any act towards the commission of the offence. But so far as attempt to commit murder is concerned, S. 307 is exhaustive."

33. Referring to *Cassidy's* case (1867) 4 Bom. H.C. (Cr. C.) 17, Mayne observes; "Upon this part of the judgment it may be remarked, as to the first reason, that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of murder by a person under transportation for life, which under Sec. 303 is only punishable, and in fact can only be punished with death. *Cases of murder therefore do come within the letter of Sec. 511.* It seems obvious too that those words in Sec. 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation but to exclude the numerous cases which are only punishable with fine. Further, that part of the learned Judge's reasoning would not apply to Sec. 308, which is in *pari materia* with Sec. 307 and worded in the same way, and can hardly admit of different treatment. As to the second reason, it is of course clear that *any attempt, coming under Sec. 511...which is specially provided for elsewhere must be dealt with under the express provision.* For instance, an attempt to wage war against the King must be dealt with under Sec. 121. It is also quite clear that any attempt to commit culpable homicide which falls under Ss. 307 or 308, must be dealt under them and not under sec. 511. What the Bombay case decided was, that an attempt to murder, *which is not an act by which murder could be affected,* came under Sec. 511 because it did not come within section 307. That being so, it fell within the wording of Sec. 511, as being a case 'where no express provision is made by this code for the punishment of such attempt'. According to Mr. Justice Straight, such a case would go wholly unpunished". Mayne 4th Ed. 532.

Shri K. L. Ratan[34] and Dr. Hari Singh Gour[35] are of the view that there is clear distinction between S. 307 and Sec. 511 Indian Penal Code.

IV

Another difficult area in the law relating to criminal attempts is that of impossible attempts. It is true that the criminality of an attempt lies in intention, the *mens rea*, but this *mens rea* must be evidenced by what the accused has actually done towards the attainment of his ultimate objective.[36] Thus the *actus reus* of attempt is reached in such act of performance as first gives *prima facie* evidence of the *mens rea*.[37] But the difficulty arises when the *actus reus* of attempt ultimately does not yield any harm owing to the absence of circumstances or owing to the impossibility of the means chosen. Under English Law, the view which formerly prevailed was that a person cannot be held liable for an attempt to do the impossible.[38] However, this line of decisions was overruled in *R.* v. *Brown*[39] and finally in *R.* v. *Ring*[40]

34. Ratan, *Culpable Homicide*, p. 111. "This criticism that murder is punishable with death as well as transportation for life and therefore can be said to come under Sec. 511 is difficult to follow. S. 511 deals with offences which are punishable with transportation or imprisonment and murder is not one such offence even though it is punishable with death only in the alternative...The reference to the absence of 'an express provision' relates not to a species of attempt not provided for elsewhere in the Code, but to an attempt to commit an offence not provided for in the code. It will be strange indeed to hold that some attempts to commit murder are governed by Sec. 307 and some other by S. 511."

"The third criticism of Mayne that an attempt of the type made by the accused in *Cassidy's* case will go unpunished, will not arise if the view put forward by Straight, J., is accepted. In any event, if the act of the accused does not satisfy the requirement of Sec. 307 it cannot be punished as an attempt to commit murder. It may be that the accused may be found guilty of assault, using criminal force or some other offence under the code."

35. Gour, *Penal Law of India*, (6th Ed.) Vol. III at p. 2448.

"To convict a person of an attempt to murder under Sec. 307 it must be shown that he has done some act with such intention that if by that act he caused death he would be guilty of murder, *i.e.*, the act must have been capable of causing death and if it had not fallen short of its object it would have constituted the offence of murder. But under Sec. 511 it is only necessary to prove an act done in an attempt towards the offence."

36. Kenny: *Outlines of Criminal Law* (Turner 17th Ed. 92).

37. See Archbold's *Pleadings* 33rd Edn. 1954, 1489.

38. In *Collins* (1864) 168 E.R. 1477, attempt to steal from empty pocket was not held to be an attempt; other cases are *R.* v. *M'Pherson*, (1857), 7 Cox 281; *R.* v. *Dodd* (1868), 18 L.T. (N.S.) 89.

39. *R.* v. *Brown* (1889) 24 Q.B.D. 357.

40. *R.* v. *Ring* (1892) 17 Cox. 491.

wherein it was laid down that impossibility of performance does not *per se* render the attempt guiltless. Under S. 511 of Indian Penal Code also " an attempt is.....possible, even when the offence attempted cannot be committed.....It is possible to attempt to commit an impossible theft, and so offend against the code." [41]

However, the courts have also held that impossible attempts cannot be punished.[42] The rule underlying the impossible attempts is inconsistent with the elements of liability in criminal law. In fact the liability is fastened on the 'intention which becomes fully manifest in such cases. But if such attempts are not brought within the purview of criminal law it will be difficult to discourage their harmful tendencies.[43] The problem of impossible attempts however appears to defy solution and a close examination of the whole matter is therefore called for.[44]

Thus, some of the important aspects of the law of criminal attempts namely, in regard to fixing the dividing line between preparation and attempt, determining the scope of Ss. 511 and 307 Indian

41. Per Birdwood, J., in *Q.E.* v. *Mangesh Jivaji* (1887) 11 Bom. 376, 381.

42. In *Mt. Rupsir Panku* (1895) 9 C.P.L.R. (Cr.) 14, a woman with a view to poison her husband administered to him a substance which was harmless and which could not in any circumstances bring about his death, but which she believed to be poison. It was held that she could not be convicted under this section and S. 328 as the administration of the harmless substance, was not an act towards the administration of a poisonous substance, and that the act which was complete in itself and not constituting an offence could not constitute an attempt to commit an offence.

43. In the words of Butler, J., an American Judge, "It would be novel and startling proposition that a known pickpocket might pass around in a crowd in full view of policeman and even in the room of a police station, and thrust his hands into the pockets of those present with intent to steal, and yet be not liable to arrest or punishment until the policeman has first ascertained that there was in fact money or valuables in some of the pockets." *op. cit.* Huda, The Principles of the Law of Crimes in British India, at p. 55.

44. Two different tests have been suggested by Prof. Sayre and Prof. Hall in this connection.

Sayre says: "If from the point of view of a reasonable man in the same circumstances as the defendant the desired criminal consequence could not be expected to result from the defendant's acts it cannot endanger social interests to allow the defendant to go unpunished, no matter how evil may have been his intentions." Sayre, 'Criminal Attempts', 41 H.L.R. p. 851.

According to Hall, " Attempt is not determined by reference to the actual facts in the external situation.....In sum, the material facts referred to in the definition of criminal attempt are those supposed to exist by a person manifesting the requisite *mens rea*. Here, unlike the above situations there was a mistake of fact, and the crucial issue concerns *mens rea*." Hall, *General Principles of Criminal Law* (Second Ed.) p. 596.

Penal Code[45] and examining the problems relating to impossible attempts, require investigation. A careful examination of these problems may help in the formulation of distinctive criteria governing criminal attempts.

45. The Supreme Court has recently held in *Om Prakash* v *The State of Punjab* (1962 (1) S.C.J. 189) that a person commits the offence under Section 307 when he has an intention to commit murder and in pursuance of that intention does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. The Court rejected the argument that for an act to amount to an offence under S. 511 it need not be the last act and can be the first act towards the commission of the offence, while for an offence under S. 307 it should be the last act which, if effective to cause death, would constitute the offence of an attempt to commit murder and that therefore the ingredients of an offence under S. 307 are materially different from the ingredients of an offence under S. 511. The Court observed "The expression 'whoever attempts to commit an offence' in Section 511 can only mean 'whoever intends to do a certain act with the intent or knowledge necessary for the commission of that offence.' The same is meant by the expression 'whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death he would be guilty of murder' in Sec. 307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The expression 'by that act' does not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time" (at pp. 191-192). The Court further explained that in the cases of attempts to commit murder by fire arms, however, the act amounting to attempt to commit murder is bound to be the only and the last act to be done by the culprit and expressions used in such cases referring to the last act as constituting the attempt are not to be taken as precise expositions of the law though they may be correct in the particular context in which they occur.

The court approved of the ruling in *Emperor* v. *Vasudeo Balwant Gogte* (footnote 30 *supra*) [Ed.]