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Paper :

Module : Criminal Law

22-Attempts in Criminal Law

ज्ञान-विज्ञान विमुक्तये

Quadrant I- Description of the Module

Description of Module	
Subject Name	Law
Paper Name	Criminal Law
Module Name/Title	Attempt in Criminal Law
Module Id	
Pre-requisites	The module is designed for beginners in Criminal Law but also requires a student to have a basic understanding of an offence under the Indian Penal Code as well as concepts of actus reus and mens rea
Objectives	To introduce students to the concept of Attempt To discuss the various elements of Attempt, their complexities and facets To provide an insight into the significant case-studies in the area of Attempt
Key Words	Attempt, Proximity, Equivocality, *actus reus,mens rea,* Inchoate, Anticipatory Crimes, Preliminary Crimes

Quadrant II: E-text

Introduction

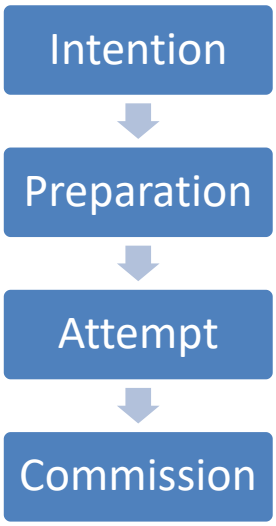
The purpose of this module is to introduce students to the concept of Attempt in the Law of Crimes. The current module discusses the law relating to attempt exhaustively. Attempt is an inchoate offence and has been covered under section 511 of the Indian Penal Code (IPC), although nowhere does the statute define the term. Thereafter it lays down various tests for distinguishing attempt from other stages of crime, discusses how it is treated under the Indian Penal Code and finally analyses judicial trends in this sphere. References to attempt have been made in several sections of the IPC in connection with specific offences.

Stages in the Commission of Crime:

Generally, a crime is said to be committed after passing through four successive stages: Intention, Preparation, Attempt and Commission.[1] The first stage is where an individual

[1] KI Vibhute,*PSA Pillai's Criminal Law* (Lexis Nexis Butterworths Wadhwa 2011)246

forms an intention before indulging in the *actus reus* leading to the commission of the crime.[2]Intention per se is not punishable.[3] The second stage is one where an individual initiates the commission of an offence by arranging means and methods necessary for the commission of the offence.[4] For instance, purchasing a knife for committing murder, or guns to be used for a robbery qualify as Preparation. As a general rule, culpability is not attached to the stage of preparation. But this general rule is subject to exceptions in case of grave offences or offences having the potential to destroy public order/peace at a greater level. For instance, preparation to commit the offence of dacoity is punishable under the Indian Penal Code. While the first two[5] stages are not penalised in criminal law, the third and fourth stages invite liability. The third stage, i.e., Attempt precedes the fourth and final stage, i.e. Commission. The Indian Penal Code does not provide a general definition of attempt although under section 511, it talks about punishment for attempt.



4 Stages in the Commission of Crime

Attempt as an Inchoate Offence:

Like incitement and conspiracy, Attempt is an inchoate offence in Criminal Law. The term "inchoate" means "undeveloped, "just begun", "incipient", "in an initial or early stage",[6] Inchoate offences cannot be understood in isolation and must be read in conjunction with

[2] R.C.Nigam, *Law of Crimes in India* (Asia Publishing House) 111
[3] ibid
[4] ibid
[5] Under the Indian Penal Code, Preparation is punishable in exceptional situations only, such as preparation to wage war against state, preparation to commit terrorism, preparation to commit dacoity, predation to commit offences of counterfeiting of currencies, etc.

[6] David Ormerod, *Smith and Hogan Criminal Law* (Oxford University Press 2008) 379

substantive offences.[7] For instance, a conspiracy can be understood only in the context of the offence which is conspired, like a conspiracy to commit robbery, theft, dacoity or murder. A characteristic feature of these offences is that they are committed even if the substantive offence does not reach a stage of completion and no consequence ensues.[8] However, some scholars disagree with the usage of the term "inchoate" because according to them, offences like conspiracy, attempt and incitement are complete in themselves although they form steps in the process of reaching an end, i.e. actual commission.[9] Therefore, alternatively, inchoate offences are also called "Anticipatory Crimes" or "Preliminary offences."[10]

The problem associated with penalising inchoate offences is that liability is attached to an act which is very remotely connected with the exact harmful consequence contemplated under a specific substantive offence.[11] While that is true, it is also correct to state that inchoate offences may have harmful consequences on several occasions, although the quantum of harm may not be the same as under an accomplished offence.[12] The *actus reus* for inchoate offences covers a very wide range of behaviour and therefore, emphasis has to be placed on the *mens rea* to determine liability in such cases.[13]

Meaning of Attempt:

Although the term "attempt" has not been defined in the Indian Penal Code, scholars have tried to define the term in various ways. ***Stephen*** indentified the following elements in his definition of "attempt"[14]:

a. Doing of an act in furtherance of an intention to commit a specific crime
b. Such act should form part of a series of acts, which taken together and if uninterrupted, would lead to actual commission
c. Impossibility of actual commission of a crime does not have an impact on acts qualifying as attempts if the aforementioned conditions are satisfied
d. An attempt can be made even if the offender voluntarily desists from committing a crime[15]

Likewise***, Halsbury*** identifies the following elements in the definition of attempt[16]:

a. An overt act immediately connected with the commission of the offence
b. Such act should be done in furtherance of a guilty mind

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[7] Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 1999) 436
[8] ibid
[9] KI Vibhute (n1) 251
[10] ibid
[11] Ormerod (n6) 379
[12] Ormerod n(11)
[13] ibid
[14] Nigam (n3) 115
[15] ibid
[16] Nigam (n3) 118

c. The overt act should form part of a series of acts, which in the absence of interruption or frustration would end in the commission of the actual offence

Similarly, **Andrew Ashworth** demarcates the following two elements of Attempt:

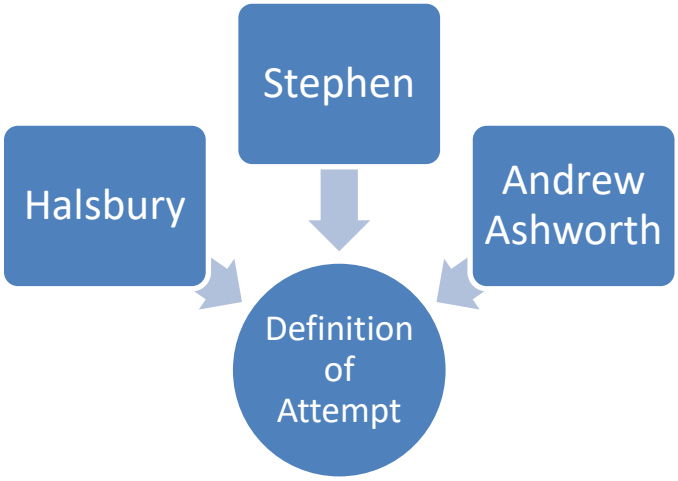
a. The Fault element[17], which refers to the guilty mind / intention of the offender
b. The Conduct element[18], which refers to the minimum conduct necessary to qualify as Attempt

Attempt has also been defined as "a direct movement towards the commission of a crime".[19] It is a step ahead of preparation directed towards the actual commission of the offence.

The above definitions reveal the following characteristics of attempt[20]:

a. An intention to commit the offence
b. An act that qualifies as the *actus reus* of the offence
c. Failure in the accomplishment of the offence

An analysis of the above definitions suggests that intention to commit an offence is the first requisite for incurring liability for attempt. One must note that the common thread linking the third and the fourth (Attempt and Commission) stages in an offence is Intention. The *mens rea* for attempt is the same as that of an accomplished offence. The *actus reus* for attempt is doing something in furtherance of an evil intention with the objective of executing the crime contemplated.[21] However, it is also necessary that the crime, although intended and designed to be accomplished is not actually committed.



[17] Andrew Ashworth (n7) 443
[18] ibid
[19] Vibhute n(1)
[20] See n(16)
[21] Vibhute n(1) 250

The Beginning and Culmination of Attempt:

A very challenging part in the theory of attempt is identification of the specific point at which the offender crosses the stage of Preparation and steps into the stage of Attempt. In other words, although we understand that attempt refers to an action or a course of action which is more than preparatory[22], at what point of time does the offender do something which can be labelled as 'more than preparatory'? Further, there may be situations where attempt and preparation may appear to blend into each other, and then the issue becomes even more complicated. Whether an act has reached the stage of attempt or was 'merely preparatory'[23] becomes a greater debate in cases where an attempt has been interrupted at some level.[24]

Smith and Hogan point out that emphasis has to be laid on the word "merely" to distinguish between acts that are preparatory and those that qualify as attempt.[25] They explain the point further by stating that acts cease to be "merely preparatory" when the accused is engaged in the commission of the offence which he is attempting.[26] So, the ultimate test would be to determine whether the accused is engaged in the execution of the crime.[27] So, for instance, they refer to the case of a person who may be accused of attempted rape even when he has not physically attempted penile penetration.[28] An analysis of the points made by Smith and Hogan suggest that for identifying whether an act constitutes an offence it is necessary to identify the nature of the offence one is aiming to commit and based on that, the nature of acts must be identified which can be marked out as more than preparatory.[29] What acts would qualify as merely preparatory in an offence is a question of fact.[30]

Over a period of time, courts have tried to come up with various tests to determine whether a particular act amounts only to preparation or attempt.[31] Some of the important tests are as follows:

Test of Proximity:

The test of proximity was developed on the premise that an act will qualify as an attempt if it is found to be proximate to the commission of the complete offence.[32] Proximity commonly suggests nearness or closeness to something. On several occasions, this test has been used to identify whether a course of action or conduct will qualify as an attempt. Glanville Williams observes that an act is considered to be proximate if it is the last act that was legally necessary for the offender to do although it may not have been the last act that he intended to do.[33] An illustration of this principle can be found in the case of *R.v.Taylor*.[34] In

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[22] Vibhute n (1)248
[23] Ormerod n (6) 389
[24] Vibhute (n1) 257
[25] See n (23)
[26] ibid
[27] ibid
[28] Ormerod n(6) 389
[29] Ibid
[30] Ibid
[31] Vibhute n(1) 258
[32] Ormerod n(6) 391
[33] Vibhute n(1) 259

this case, the court fixed liability on the offender who had lighted the matchstick to set fire to a stack of hay but extinguished it as soon as he realised that he was being watched.[35]

One of the earlier tests in the principle of proximity is the "Rubicon test" developed and followed in the cases of *Widdowson*[36] *and Stonehouse*[37], where courts followed the principle that an act is said to be an attempt if it is immediately connected with the commission of the offence.[38] The test was later rejected in *Guffeler*[39] followed by the case of *Jones*[40] where the accused was indicted for attempted murder despite his argument that he had only got into the victim's car and pointed a loaded gun at him and there were a minimum of three other acts to do before he could commit the offence, i.e. removing the safety catch, touching the trigger and actually pulling it[41].

In India, the Supreme Court has applied the test of proximity to a number of cases and there has been a lot of argument of whether proximity should be in terms of time, action or intention. One of the leading cases on this point is *State of Maharashtra v. Mohd. Yakub.*[42] In this case, Justice Chinnappa Reddy discussed the theme of the proximity rule by stating that the 'measure of proximity is not in relation to time and action but in relation to **intention**'. However, Justice Sarkaria in the same case suggested that proximity should not be intention-oriented and must rather be measured in terms of actual physical proximity.[43] He stated that in order to qualify as an attempt an act should be 'reasonably proximate to the consummation of the offence.'[44]

Locus Poenitentiae

The doctrine of *locus poenitentiae* is also one of the modalities to determine whether an act can qualify as attempt. The doctrine is based on the idea that it is possible for a person to make preparation to commit a crime and then back out from actual commission due to various reasons, psychological or circumstantial.[45] The Supreme Court of India applied this doctrine in the case of *Malkiat Singh v. State of Punjab.*[46] In this case conviction of appellants was set aside by the Supreme Court on the ground that their acts were only at the stage of preparation. The Court observed that in order to determine whether an overt act amounted to attempt or preparation it was necessary to figure out whether or not the nature of acts was such that if the appellant changed his mind, the act will be completely harmless. [47]If harm does not ensue, then the act will qualify as preparation only and in a case where the actions have the potential to lead to harmful consequences, the act will qualify as

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[34] ibid
[35] ibid
[36] ibid
[37] ibid
[38] See n(32)
[39] ibid
[40] ibid
[41] ibid
[42] Vibhute n(1) 260
[43] See n(42)
[44] State of Maharashtra v. Mohd. Yakub AIR 1980 1111
[45] Vibhute (n1) 262
[46] ibid
[47] Ibid

Attempt. [48] In *Mohd. Yakub's* case, the Supreme Court held that the test of *locus poenipotentiae,* is not to be treated as a general rule and should be limited to a particular context.[49]

Test of Equivocality:

The test of Equivocality suggests that an act will qualify as an attempt only if it unequivocally indicates that the offender intended to commit the offence.[50] The test dwells on the theme that only when one's actions clearly reflect his intention can he be held liable for attempt. There should not be any room for doubt in such cases.

Impossibility and Attempt: A Curious Nexus

An interesting question which has often attracted the attention of scholars is whether there can be an attempt to commit an impossible act. Before we discuss any further, it would be pertinent to mention that impossibility at this point has a very broad denotation and covers all possible factors behind the concept. So, impossibility of an act may be triggered by physical or legal factors or even because of reasons of inefficiency.[51] Initially, impossible acts were not said to qualify as attempts in Common Law.[52]This principle has been captured in detail in the case of *Q. v. Collins*[53] where it was held that if a pickpocket puts his hand in someone's pocket with the intention to steal but finds the pocket empty, he would not be liable for an attempt to commit theft. *R. v. Mc Pherson*[54] and *R v. Dodd* are other cases where the same principle was re-iterated. However, this opinion was reversed in the case of *R v. Brown* by Lord Coleridge and in the case of *R. v. Ring,* the accused was convicted for an attempt to steal from a woman's coat although the coat was empty.[55] In the same case, Rowlatt J, remarked that there is absolutely no linkage between impossibility of actual commission of an offence and a possible attempt made in furtherance of an intention to commit the offence.[56] So, for instance, when A gives a glass of liquor blended with poison to B but the glass falls on the ground and the liquor spills over rendering it impossible for B to consume the poison, nothing would negate liability of A for an attempt to commit murder.

The same principle as stated above has been captured in Section 511 of the Indian Penal Code. A look at illustrations (a) and (b) of section 511 will suggest that the impossibility of an act does not negate liability for attempt, if other essential requirements of the offence have been fulfilled. Thus, if a thief plans to take jewels from a box and in furtherance of his intention to commit theft, opens the box but finds it to be empty, he can still be held liable for

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[48] Ibid 263
[49] ibid
[50] ibid
[51] ibid
[52] Nigam (n2) 120
[53] 9 Cox C.C. 407
[54] D. And B. 197
[55] See n 52
[56] Nigam (n2) 121

attempt to commit theft.[57] So, it is relevant at this juncture to state that even if it is impossible to commit an offence, an attempt at the same offence is possible to take place.[58]

Treatment of Attempt under the Indian Penal Code:

.While attempt to commit certain offences such as – attempt to murder, culpable homicide, etc are treated as distinct offence under IPC, on the other hand secion 511 covers attempt to commit other offences in general. Hence Attempt is separately criminalised under section 511. In addition to this, the provision which provides for criminal liability for attempt to commit suicide has been recently struck down by the State.

Significant Judicial Pronouncements in India on Attempt:

Law relating to attempt has been discussed widely in Indian courts. It would be pertinent to take a look at some principles laid down in Indian cases. In the case of *Queen v. Dayal*[59] Justice Mitter pointed out that for convicting a person of attempt to commit an offence it is not sufficient to discern an "overt act"; it is also equally important to see that the act should have been done in an attempt to commit the offence.[60] In *Narayandas v. West Bengal*[61], the Supreme Court upheld a conviction of the appellant for attempting to commit the offence of carrying undeclared Indian currency outside India without the requisite permit from the Reserve Bank by stating that it was unequivocally established by the facts that his conduct had crossed the stage of preparation.[62]

Another interesting case in point is that of *R.v. Nidha*.[63] In this case, the Allahabad High Court had taken the stance that section 511 would not apply to cases relating to attempt to commit murder as special provisions for the same have been made for the same under section 307 of the Indian Penal Code.[64] This case had an interesting factual matrix where the accused along with another person had fired at the chowkidar who was going to arrest them.[65] The accused had pulled the trigger but there were no gunshots as the cap had exploded.[66] Straight J, held that since section 307 makes exhaustive provisions for attempt to commit murder, the same cannot be covered under section 511.[67] Among other reasons, J. Straight stated that section 511 is a general rule which will apply in cases for which no special provisions have been made in the Indian Penal Code.[68]

Conclusion:

So as to conclude, the law relating to attempt in India presents a fascinating picture and has been the source of many interesting debates. However, the Fifth law Commission has expressed its dissatisfaction over the manner in which section 511 has been placed in the

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[57] Illustration under section 511of IPC
[58] Vibhute (n1)265
[59] (1869) 4 B.L .R.A. Cr. P. 55
[60] Nigam (n2) 128
[61] AIR 1959 SC 1118
[62] Nigam (n2) 135
[63] (1892) 14 All. 38
[64] Nigam (n2)137
[65] Ibid
[66] Ibid
[67] Ibid
[68] Ibid

IPC.[69] The Commission has proposed to introduce section 120 C in the IPC which will carry a definition of the term “Attempt”. The opinion of the Law Commission seems to be justified in this connection as it is high time to have a provision in the IPC which defines the term, rather than just prescribing a method of punishing the act.

Summary

1. Attempt is an inchoate offence and figures as the third stage in the commission of a crime.
2. The most vital elements of Attempt are: intention to commit a crime, doing an act in furtherance of that intention which is more than preparatory and failing to accomplish the crime.
3. The Indian Penal Code has not defined “Attempt” but it has made a general punitive provision under section 511.
4. Section 511 is applicable only where special provision has not been made in the IPC for attempt to commit an offence.
5. It is necessary to distinguish attempt from Preparation and the following tests are largely followed: Equivocality, Proximity and Locus Poenipotentiae.
6. Liability can be fixed for attempting to commit an act which is impossible.

[69] Vibhute(n1) 273