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Insight Theory of Attempt: A Theoretical Review

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ABSTRACT

Attempt falls in the category of inchoate crimes. Punishment is the sole objective of criminal law. Punishment is provided after the commencement of the offence but it in certain cases is dispensed within the mere preparation also. Till date, it has no particular rule to rely on while passing the judgement for this offence of attempt. It is only decided on the facts and circumstances of the case and on some theories of attempt. Attempt has no specific definition and is ambiguous because of which every person interprets it accordingly. "The successful revolutionary is a statesman, the unsuccessful one a criminal."- Erich Fromm.

This paper is an attempt to discuss the insight of section 511 of IPC, which gives power to make attempt punishable under those offences, where the code does not prescribes any punishment for attempt.

Keywords: *Attempt, Inchoate crimes, punishment, stages of crimes, theories of attempt.*

I. INTRODUCTION

Attempt basically means a preparation to achieve something. But in crime, it is an effort to do an act, which goes vain. Attempt has no particularly definition in Indian Penal Code, but section 511, of Indian Penal Code deals with the punishment for attempting to commit offence. Attempt is basically a criminal offence punishable under law because whether the commission of the offence or the attempt, both creates a threat in the minds of the society. The only difference is that the one is completed successfully but the other not due to some personal reasons or external circumstances. The punishment provided in attempt under section 511 is also the half of the punishment awarded because the attempt is not as injurious as it had been after it would have committed.

Attempt is termed under inchoate crimes. An inchoate crime basically means an incomplete crime which begins with a criminal intent but is left unsuccessful. It is though punishable because they are illegal and committed in the furtherance of a crime. There are three inchoate crimes like attempt, conspiracy and aiding and abetting.

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II. TYPES OF CRIMINAL ACTS

Firstly, where the criminal act is pre planned, the person who has to commit, planned it out before handed and then finally committed the Act.

Secondly, the act which is committed in the spur of the moment, out of sudden principles, when it comes to first types of cases meaning, where the criminal act was pre-planned and then preparing resulted into the commission of offence. There are four stages of criminal act, which we call stages of crime- the first stage would start when culprit is designing the idea of commission and the movements he intend to commit . After doing this act, he enters the first stage of crime.

Example-Like, a person who wants to kill someone, enters into the first stage of crime without doing anything over it being done the second stage comes when the culprit does some kind of preparation over that intention in the sense that he intended to kill someone.

Whatever the case maybe for that purpose, anything which is done beyond intend and which moves towards the act, would be assumed within the realm of preparation. The third stage would be that of stage of attempt, where one actually tries to put in motion and actually tries to come at that particular crime where, there had been no external interference .That crime would have been committed . Like for example, A intended to kill B. A goes to the market, purchase a pistol then A goes to the B's house and shoots at B, but the bullet does not hit the victim or the intended victim because of reason beyond A's control. It would be a case of attempt and would be considered to be the third stage of crime. If a person successfully attempts, he would be moving into the fourth stage i.e., the commission of the offence.

III. STAGES OF CRIME

There are four stages of criminal act which are- pre-planned actions, preparation, attempt and finally the commission of the offence. Out of these four stages in a criminal act, preparation is not punishable for most of the criminal offences mentioned in the IPC. However there are some exceptions to this rule. For example section 122- Preparation to wage war against the government. Section 126- Preparation to commit depredation on territories of power at peace with the government of India, section 233 to 235- Making or selling instrument for counterfeiting of coins, section 255 and 257- Making or selling instrument for printing government stamps, section 242,243,259,266,474- possessing counterfeit coins, false weight or measurement and forged documents and section 399- preparation to commit dacoity. These are some sections which make even a preparation punishable but there are very few sections which even make repression punishable because of the gravity of the offence.

Otherwise, the preparation policy is not an offence itself.

The reason why the legislature finalized attempt as an offence is because of its sense of alarming the society at large that a crime is to be committed. The section which deals with attempt in IPC is section 511 but there is no clear cut definition provided anywhere in the code. Section 511 also does not define as to what attempt is actually and what can be constituted as an attempt. It only provides punishment for attempting to commit offence with one-half of the imprisonment for life. The section is basically talking about a punishment which can be given in certain cases but it nowhere elaborates as what attempt is. Section 511 is more a general section that makes attempt a punishable offence with one-half of the imprisonment for life but now it has to be kept in mind that offences where death penalty or fine is the only punishment which is prescribed by the legislature, section 511 would not come into play as it would only apply to offences which have been described in the IPC but would not be applied to any special or local law.

Third limitation which is mentioned in section 511 could only apply in cases where no express provision has been made by the code. Express provision in the sense means if a mother has been dealt with Section 302 of IPC. Punishment of the same will be dealt with Section 302 attempt to murder it would not attract section 511; it is only for those of offences which have been not explicitly dealt in the code.

IV. RELEVANT CASE LAWS

In **Asgarali Pradhania v. Emperor** [3]it is so happened that the accused made a woman pregnant and suggested her to take a medicine which would lead to miscarriage and brought her red liquid and a packet of powder for consumption. The women tasted the Powder but after founding it salty she spat it out. The man again came to her and finding that she has not consumed that liquid and powder, tries forcibly to administer the liquid to the women. By his act, women cried out loud and some neighbours came, because of which man fled from the scene. On inspection later it was found that the liquid and the Powder both were copper sulphate which in a sense if taken in large quantities, then it can be administered as harmless substance to the women.

The question was whether the woman can be held liable in the case of attempt or not? The court observed that there are four stages in the intent to convert the preparation into a crime. The attempt is the 3rd stage in attempting a crime and is successful in the commission itself. Intention alone or intentions followed by preparation are not self sufficient to constitute

[3] Asgarali Pradhania v. Emperor, AIR 1933 Cal 893.

an attempt but an intention followed by preparation and preparation followed by an attempt towards the commission of the offence is the vital ingredient to bring the case within the ambit of section 511. Further the court held that the accused did not amount to attempt but the condition of the offence of causing miscarriage is a crime. A man intense to administer poison someone and he admitted some copper sulphate to the victim to the intended victim which would not cause any harm to her and it would not amount to an attempt because the basic jurisprudence in which the law of attempt rewards is that the commission of offence must have failed because of the factor which was beyond the control of accused effective which was independent of accused solution which would not be the case in some cases.

Like take an example say Shyam tries to poison Raghu by preparing a glass of poison for Raghu to consume it but Raghu replaces the glass without the knowledge of Shyam. In this scenario Shyam would be held liable for the offence of attempt because the act which was required to be done from his side was done and the commission of offence have been completed but was not successful because of some external intervention or an external factor which was in this case the replacement of Glass by Raghu , something which was beyond the control of the accused, if that is what is making the commission of offence, if that was the hindrance and if that is why, this attempt does not lead to the successful commission of offence then the act would be then the act of attempt but it is something when is one of the act accused himself but would not be counted as attempt.

In **State of Maharashtra v. Mohd. Yakub** [4]is another milestone judgement on attempt or to be more precise the difference between preparation and attempt.

The facts of the cases in brief- Custom officers got a type of a truck and a jeep containing silver while heading towards the seashore and a watch was kept on these two vehicles and when in the middle of the night they stopped at the bridge which was near the sea and started unloading a few bags of silver and gets apprehended by the custom officers. The ship was seen at the distance in sea which disappeared after sometime from the range of the custom officers.

The issue in this case was the act till the point of time that unloading of silver was going on will come in the stage of preparation or attempt?

The court made certain important observations and said that what constitutes attempt is a mixed question of law and fact depending largely on the circumstances of particular case. And a precise and exact definition of attempt is not possible. The theory that elaborates all

[4] State of Maharashtra v. Mohd. Yakub, 1980 AIR 1111, 1980 SCR (2) 1158.

crimes in three stages one when the culprit entertains the idea second when he prepares and he enters into a third stage when he deliberately takes and award step towards the commission of the offence .

How can we make a difference between preparation and attempt?[5] On the basis of **The Proximity Rule**

When the court says reasonable reasonably proximate or when it talks about proximity it is not talking about the time or action the proximity has to be e culminated in relation to intent in other words the act must be wheel with reasonable certainty in relation to the fact and circumstances and intent to commit a particular offence .[6] It must be indicated by the nature, facts and circumstances of the case that it can be reasonably ascertained though not conclusively that the accused wanted to export silver ingots out of the country so the supreme court held that accused had made all preparation and it is only because of the intervention of custom officers that they could not succeed in their attempt and were held according accordingly under section 511. Law of attempt is what is the exact point or exact stage where preparation in an offence and stage of attempt starts there is no clear dividing line between preparation and attempt and IPC being silent on it the same has to be judge on the basis of case in hand. Every case has to be judged according to the facts and circumstances of its own.

V. THEORIES OF ATTEMPT

Courts have taken leverage of devising certain tests to calculate when an attempt begins for and in other words where the act is still in the name of preparation however we proceed towards test.

It's important to underline that when it comes to Section 511,

(A) The Factual Impossibility Test, is not a defence for the offence of attempt but factual impossibility is for the same which was in Asgarali Pradhania's[7] case which clouds the judgement with doubt if you read the illustration 5 and when you will find that it has been clearly mentioned that actual impossibility is written the purview of section 511 and it is only the legal impossibility which has been excluded. So if a man intends to commit murder and thinking that he is in administering poison though not administrative poison which does not result in any harm that person would still be behind the bars as per the illustration mentioned

[5] Regina v. Padala Venkatasami, (1881) I.L.R. 3 Mad.4.
[6] Commonwealth v. Hamel, 91 Mass. App. Ct. 349.
[7] *supra* note 1, at 2.

in section 511. Factual impossibility is not a defence when it comes to criminal liability under attempt.

Factual impossibility basically means the failure of the crime due to any factual or physical condition. In this same, legal impossibility means when the act was fully skilled but did not met the legal requirements of the intended crime, for example- "stealing" one's own umbrella.[8]

The commission of offence of attempt would amount to be proximate when the act is not the last act but was the last act which was to be done from the side of accused what was legally necessary to him to do for the completion of the offence and there was no further actor required on is path for the commission of serving poison to a person. The last act for the commission of the offence would be a victim drinking the poisoned drinks served that would be the last act which was to be done from the side of the accused was the serving of the drink to the victim if that has been done it would qualify as an act of attempt and when we are talking about proximity, we are not talking about proximity in relation of time and action but in relation to intent. In other words the act done should clearly or reasonably go along with the facts and circumstances of the case.

(B) Theory of Repentance Test

Meaning in general parlance, the question that needs to be asked in this test was whether the acts which were done by the accused would be completely harmless if he abandoned or if he changed his mind from there on or if he has time to repent and whatever he has done till that particular time is not a criminal act. In that case, the act done by the accused would only amount to preparation.

Like example, where the person who was going to serve poison to the intended victim. If he procures poison but after procuring it and mixing it in the glass of water, he had a change of heart and he does not served the glass of water to the intended victim or he repented his act and threw away the glass of water. His act till that point of time was harmless and would be counted in preparation only. The condition which is there for application of repentance test was that when the act was abandoned or he had a change of heart. As long as the steps taken by the accused leads that he might on his own accord desist from the act to be attempted. He would still be treated in the stage of preparation that is called the law.[9]

[8] Booth v. State, 398 P. 2d 863, 870 (Okla. Crim. App. 1965).
[9] 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, *id*. at. 559).

The bottom line is the best way to determine whether a given set of acts would constitute attempt or preparation. If the accused changes his mind, the overt act or acts which have already been done by him are completely harmless. It would only amount to preparation but if the overt act is such that if it went uninterrupted then it was only because of circumstances that disabled it to commence into the commission of offence. It would amount to an offence of attempt under the test of repentance.

(C) Impossibility Test

The truth is the impossibility test. An act which is impossible to commit, attempt and so is not culpable. Like example- shooting a shadow, wanting to kill someone by witchcraft would not be counted as attempt in law. As there is no probability of actual commission of the offence. What has to be kept in mind is the impossibility test that his or accused' thought to cause hurt was due to his own act or omission. His act was intrinsically useless, defective or in appropriative[10].

Illustrations from section 511- attempt or trying to steal from empty pocket is counted as an attempt.[11] Trying to break open a box, wherein the accused finds nothing is also counted as attempt. The difference between the two is that for impossibility test to apply to check whether the act was useless act from accuser's side in the illustrations appended. The failure to commit that particular crime was not due to accuser's own act what he was unable to do but due to external circumstances that made it impossible. There is a difference in the impossibility created by the accuser's own acts and the one created by external circumstances ,in case where impossibilities created by the accused or his acts, then would not be counted as an attempt. But if the accused has done everything at his part but due to external interference or due to internal factor intervening the act becomes impossible. It would be a case of attempt.

(D) Social Danger Test

The next test is the Social Danger Test, which is the only reason to punish attempt even though it is not resulted in crime. It is there, where the crimes were aimed towards such kind of acts which alarms the society, which in a sense in it is an inquiry and therefore the moral guilt of the offender is same as if he was successful in the commission. The gravity of crime attempted has been one of the methods in deciding the liability in cases of attempt.[12] In case

[10] *Ibid.*
[11] Queen v. Collins,(1864) 9 Cox. C.C.497.
[12] Pillai's Essays of the Indian Code, K.N. Chandrasekharen Pillai, (2005) The Indian Law Institute.
[11] R v. Khan, (1990) 2 All ER 783.

of Social Danger Test along with the facts and circumstances of the case the intended affect or the apprehension of the said act on the societies also taken into consideration to evaluate whether an act would be counted as an attempt or not, any act which may lead to social repercussion can be best judged through the lens of Social Danger Test.

A question was raised on the offence of rape that how will the offence of attempt be decided in the case of rape. In the judgement, it was held that it will depend upon the recklessness of rape that has arisen in relation to the physical act of the accused. When engaged in the activity of having or attempting to have sexual intercourse, without the consent of the women. Wherein the ambit, the periphery of the facts are also taken into account to ascertain whether an act is an attempt or not and can be broadened as along with the facts and circumstances of the case relevant to social considerations.

(E) Equivocality Test

This test explicitly states that in order to constitute attempt an act must be clearly and unequivocally be indicative of the intention to commit a particular crime. The test suggests that an act is approximate if and only if it indicates beyond reasonable doubt that it was directed towards the commission of the offence. If there can be no two views about the intent from the act which is been committed. It would be counted as an attempt. If a person A, intents to murder B, by firearms. He will be not punished of any act until he does not fires the person, B, and if in the process of firing, anything happens to prevent the effect of shot, the offence of attempt to murder is completed[13]. Under this test, if the only inference which could be drawn without any doubt is that the intent of an act was commission of offence only in that case it would be an attempt otherwise not.

VI. CONCLUSION

This paper, concludes on the note that how attempt is now punishable under Section 511 of Indian Penal Code as after analysing the section we found that how the legislature wanted to make attempt punishable , as they wanted to punish the criminal act, whether if it is successful or not . The intent of legislature while incorporating section 511 was for those provisions where attempting such offence where punishment is not defined. Therefore, section 511 describes the punishment where the act is done by following all the stages of crime, but because of some circumstances not able to succeed, but should be punished as there was a criminal mind as well as a criminal act in attempting such offence. Therefore actus reus and mens rea are the main ingredients of committing a crime.

[13] Om Prakash v. State of Punjab, AIR 1961 SC 1781.