



BNS - ATTEMPT (S - 62)

- The law of attempt lacks clarity due to lack of precise definition. There is a very thin line of difference between preparation and attempt and each case has to be decided on the basis of the given facts because the law doesn't provide concrete definition of either of the terms.
- An attempt to commit an offence means an act done in execution of criminal design which is more than a mere preparation. It does not mean a commission of crime.
- Attempt is a stage after preparation and there cannot be a rigid formula to determine when preparation stops and attempt begins. The test to determine when the stage of preparation stops and stage of attempt begins is a test of a reasonable man i.e. when will a reasonable man deem that his preparation is over and one more act on his part will result in the commission of the offence.

In order to constitute 'an attempt'—

- ❖ There must be an intention to commit a particular offence,
- ❖ Some act must have been done towards the commission of the offence and,
- ❖ Such act must be proximate to the intended result.

The BNS deals with attempt to commit offences in 4 ways. It treats 'attempt' in the following manners:-

1. The commission of offence and attempt to commit offence are dealt in **same section** and the extent of **punishment** prescribed **is same** for both. For example:

- (i) Offences against the State [Sections 147, 151, 153 and 158];
- (ii) Abetting mutiny [Section 159];
- (iii); Offences against public tranquility [Sections 195(2) and 196]
- (iv) Offences against public justice [Sections 233, 235, 237 and 250];
- (v) Offences related to extortion, robbery and dacoity [Sections 308(3), 308(4), 308(6), 310(1) and 311]; and
- (vi) Criminal trespass [Section 331(8)].

2. Attempt to commit specific offence are dealt **separately** and **separate punishments are provided**. For example:

- (i) Attempt to commit murder [Section 109];
- (ii) Attempt to commit culpable homicide not amounting to murder [Section 110];
- (iii) Attempt to commit an organized crime [Section 111(3)];
- (iv) Attempt to commit a terrorist act [Section 113(4)];
- (v) Attempt to commit robbery [Section 309(5)]; and
- (vi) Attempt to commit robbery or dacoity when armed with deadly weapon [Section 312].

3. Attempt to commit suicide to compel or restrain exercise of lawful power [Section 226]

4. Attempt to commit offences for which no specific punishment is provided in Bharatiya Nyaya Sanhita [Section 62].

In **Abhaynand Mishra Vs. State of Bihar**, AIR 1961 SC 1698, Supreme Court held that the person commits the offence of attempt when -

- He intends to commit that offence;
- Having made preparations and with the intention to commit the offence does an act towards its commission;
- Such act need not be penultimate (next-to-last) act towards the commission of offence but must be an act during the course of committing the offence.

Tests for Understanding Attempt

There are several test which tries to explain attempt of an offence. The prominent among those are **impossibility test and proximity test**:

Impossibility Test

- It denotes that even if an offender tries to commit an act which is impossible for any reason, he may be held liable for attempt.
- Impossibility may be factual or legal. Factual impossibility arises when the perpetrator lacks the requisite knowledge or skills for executing a particular act.
- **For instance**, X will be held liable for attempt to commit theft if he thrust his hand in the pocket of Y with the intention to commit theft but finds nothing. (Illustration (b) of Section 62)

Proximity Test

- Proximity Rule provides that an act constitutes attempt if the offender has **completed all the important steps necessary to constitute the offence but the** consequence which is the essential element of offence has not taken place because of external circumstances, want of skill etc.,.

- An act or omission must be proximate and not too remote to the accomplishment of the desired consequences. Act or Omission includes series of acts or series of omissions or partly act, partly omission.
- **This rule examines** that how close was the defendant to complete that offence. It is the rule that analyses the act left to be done and not what already has been done.

For applying the test of proximity, the last act of the accused need not be the one he intended to do but that was legally necessary for him to do for achieving the contemplated result.

In **Abhaynand Mishra Vs. State of Bihar**, 1967, the accused falsely represented himself as graduate and applied in the university for the post graduate exam by attaching fake certificates. The university accepted the document and gave him the permission to take exam after remission of exam fees. The accused submitted the fees along with his photographs and the university issued the admit card. Later on, the university came to know about the fake documents. He was charged for the offence of cheating. One of the contentions of the **defence was that the act of applying for the exam was the stage of preparation** because the applicant never attempted to take the exam. The accused was held liable for an attempt to cheat. The Court explained that attempt need not be the penultimate act before actual commission of the offence. A person may be charged for attempt if he has made preparation with the intention of committing an offence followed by any act towards its commission. The determination of attempt to commit an offence is a question of fact.

The courts have applied the above principle in subsequent cases

In State of **Maharashtra Vs. Mohd. Yakub**, (1980) 3 SCC 57 Supreme Court held that some act must be done towards the commission of offence and such act must be 'proximate' to the intended result. Proximity need not be in relation to time and action but in relation to intention. The act or a series of acts, in

order to be designated as an attempt to commit an offence, must be sufficiently proximate to the accomplishment of the intended substantive offence.

Other test - Doctrine of Locus Poenitentiae

- The doctrine of locus Poenitentiae refers to possibility of person who having made preparation to commit an offence **changes his mind at the end** and take a step back at the last moment.
- If the person, gives up the idea of committing a crime before the criminal act is carried out, it will be a preparation and not an attempt. Hence no legal liability will be imposed.

For example, X intending to murder Z by purchases the poison and mixes it in food of Z. But at this stage X does not give the food to Z. X is not guilty of attempt to murder because there is still an opportunity to withdraw. It may happen that X may change the mind and does not give the food to Z.