



### BNS - INCHOATE OFFENCE (Incomplete offence)

- In inchoate crime, all the requirements of offence are not fulfilled, yet the actor is punished. It arises in three situations namely; attempt, conspiracy and abetment.
- A person is punished for an **attempt** when he has taken any step after preparation which is proximately connected with the commission.
- **Conspiracy** deals with an exchange of common mens rea between two or more persons. **Abetment** covers various scenarios where one person influences the other person via instigation, conspiracy or aid.

*A) ABETMENT (S-45-60)*

*B) CONSPIRACY (S – 61)*

*C) ATTEMPT (S – 62)*

#### **A) ABETMENT (S-45-60)**

- There can be no abetment without intention or knowledge. However, mere knowledge of offence being committed by others is not covered by the definition of abetment.
- **As a general rule**, for the offence of abetment, it is not required that the abetted offence should actually be committed.
- An act of abetment may take place in one or more of the following ways:
  - (1) Instigation, (2) Conspiracy, or (3) Intentional aid.
- It is not necessary that a person instigated must be known to the instigator.
- A person who abets to do an offence is equally liable for the offence which is done by the person who was abetted.

### S- 45. Abetment of a thing. – Essential ingredients

- ❖ **Instigating** any person to commit an offence, **or**
- ❖ **Engaging** any person in a **conspiracy** to commit an offence and overt act is done in pursuance of conspiracy, **or**
- ❖ Intentionally **aiding** a person to commit an offence.

**Exp 1 :** If a person **willful misrepresentation** or willful concealment of a material fact that they are bound to disclose, and this causes or tries to cause something to happen, they are considered to have **encouraged that act**.

**Exp 2: Aid :** Anyone who, before or during the act, does something to make it **easier for the act** to happen (in order to facilitate the commission of that act), is considered to have **helped in doing that act**.



### 3 modes of Abetment ;

#### **1. Abetment by Instigation (Clause 1, Section 45 BNS ) :**

(a) A person is said to '**instigate another to do an act**', when he actively suggests him to do an act by any means of words, direct or indirect. The word 'instigate' means to provoke, incite, urge or encourage to do an act.

(b) Instigation can be further done by **willful concealment** of a material fact which is bound to be disclosed. Instigation can also be done through post, telegram, phone, etc.

**Example** : A with a warrant from court is to apprehend B. C willfully representing to A that D is B and caused his apprehension. Here C abets by instigation the apprehension of D.

- A person instigates with intention to incite or encourage doing of an act by another.
- Instigation involves a physical act or omission as well as a mental act.
- Advice per se or permission is not instigation rather it requires some active suggestion or stimulation.
- Advice can become instigation only if it is found that it was an advice which was meant actively to suggest or stimulate the commission of an offence.
- The act of causing humiliation is not instigation.
- There is no instigation unless it is communicated to the author of the act in some form.
- Instigation may be personal or through a letter or a third party.
- The instigation may be direct or indirect, but in either case it is necessary to show that the mind of person instigated was affected thereby.

## **2. Abetment by Conspiracy (Clause 2, Section 45 BNS) :**

In order to **constitute abetment by conspiracy** 4 things are essential:

1. There must be at least two persons,
2. They must 'engage' in the commission of an act, (agreement)
3. An act or omission must take place in pursuance of that conspiracy, and
4. That act or omission must have taken place 'in order to the doing of that thing'. All these elements must combine to constitute abetment by conspiracy.

- ❖ To constitute conspiracy, there must be at least two persons engaged therein and it must be proved that there was another person engaged beside the accused and if one of the two persons charged is acquitted, the conviction of the other for conspiracy cannot stand.
- ❖ It is **not necessary** that the abettor should **concert the offence** with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.
- ❖ It is **not necessary** that all the conspirators should be **equally informed** of all the details of the scheme. But there must be mutual consent to a common purpose.
- ❖ It is also **not necessary** that all persons should have **joined** in the scheme from the **first**, but those who come in at a later stage are equally guilty, provided the agreement is proved.

**Illustration:** If A and B conspire to rob C, and B not only robs but even kill C, A cannot be said to abet the killing unless it can be said that A must have foreseen (predict) it as a probable consequences of the conspiracy.

**Note:** It is important that for abetment by conspiracy, **not only** must the person abetting engage in a conspiracy, but there must be an overt act or illegal omission in furtherance of the conspiracy and for doing of the thing abetted.

If a conspirator withdraws from the conspiracy before the offence which is the object thereof is effected by the other parties thereto, he is not liable.

### **3. Abetment by Intentionally Aiding (Clause 3, Section 45 BNS) :**

- **Intention to aid** the commission of offence is the gist of offence of abetment by aid. An act which merely amounts to aiding the commission of an offence is not an abetment. In order to amount to abetment by aid, the aid must be given **with the intention to aid the commission of the offence.**

- The **mere giving of the aid** will not make the act of abetment an offence if the person who gave the aid did not know that an offence was being committed or contemplated.
- A person is said to intentionally **aid** the commission of offence when he renders assistance by doing an act or omitting to do an act. **As a general rule**, for the offence of abetment, it is not required that the abetted offence should actually be committed. However, in case of abetment by intentional aid, it is essential that the abetted offence should actually be committed and further it is also to be proved that:

(a) Offence abetted was committed with the help of aid provided.

(b) That aid facilitates the commission of the offence.

#### **S- 46. Abettor**

Abettor is a person **who abets**

- ✓ The commission of an **offence** or
- ✓ The commission of an **act** which would be an offence if committed by a person capable by law.

#### **Circumstances when the abetment amounts to an offence:**

(EXP :1) Abetment of illegal omission is also an offence

(EXP :2) The effect of abetment is immaterial

(EXP :3) Person abetted need not be capable or having mens rea

(EXP :4) Abetment of abetment is also an offence

(EXP :5) Abettor need not concert (plan) with the person executing the act abetted

**(EXP :1) Abetment of illegal omission** is also an offence

For example, a police constable will be guilty of an illegal omission of his duty by **not interfering in a fight** whereas a private individual cannot be held guilty of such offence.

- ✓ **Note:** Mere silence is not necessarily an illegal omission. Simply doing nothing is not an act, and unless there is a duty to do something, it cannot be said that it is an illegal omission.
- ✓ The act **or** omission must take place either prior to or at the time of, the commission of offence. There can be no abetment of an offence after it has been committed.

#### **(EXP :2) The effect of abetment is immaterial**

**Example:** 'A' instigates B to murder 'C'. 'B' refuses to do so. 'A' is guilty of abetting 'B' to commit murder.

A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

#### **(EXP :3) Person abetted need not be capable or having mens rea**

**For example,** 'A' with a guilty intention, abets a child to commit an act which would be an offence, if committed by a person capable by law to commit an offence. Here 'A' is guilty of abetment of the offence. In this case the child is not capable by law to commit an offence but still 'A' will be guilty of abetment.

#### **(EXP :4) Abetment of abetment is also an offence**

**For example,** 'A' instigates 'B' to instigate 'C' to murder Z. 'B' accordingly, instigates C to murder 'Z' and 'C' commits the offence. In this case 'A' is also liable to be punished for abetment.

#### **(EXP :5) Abettor need not concert (plan) with the person executing the act abetted**

**For example**, Ram makes a plan with Mohan to kill Raju. It was decided that Ram will give the poison. Mohan explains the plan to Ravi who arranges the poison and delivers it to Mohan. Ram gave the poison and Raju dies in consequence. Here, Ravi has committed the offence although he did not conspire with Ram he engaged himself in the conspiracy to kill Raju.

#### **(S -47) Abetment in India for offences outside India**

Section 47 of BNS provides that a person abets an offence who, in India, abets the commission of any act without and beyond India which would constitute an offence if committed in India.

**For example**, 'A', in India, instigates 'B', a foreigner in Nepal, to commit a murder in Nepal. 'A' is guilty of abetting murder.

#### **(S -48) Abetment outside India for offence in India**

**For example**, 'A', in Nepal, instigates 'B' to commit a murder in India, 'A' is guilty of abetting murder. This provision is introduced for the first time in BNS, 2023.

**Note :** Sec 107: Abetment of suicide of child or person of unsound mind.

Sec 108 : Abetment of suicide.

#### **S- 51. Liability of abettor when one act abetted and different act done.**

- ❖ Act is abetted and a **different act** is done.
- ❖ The abettor shall be liable for the act done in the **same manner** and to the same extent as if he had directly abetted.

**Exp:** The different act done was a probable consequence of that abetment, **not a distinct act**.

#### **S- 54. Abettor present when offence is committed.**

1. There is a prior abetment for the wrongdoing.



2. Abettor is present when the actus reus takes place, however takes no active part in its doing.
3. Offence is committed in consequence of abetment. **Abettor shall be deemed to have committed the offence.**

**Note :** The use of the expression “shall be deemed to have committed” creates a legal fiction which means that even though the abettor himself does not commit the act or the offence, the law shall presume that the same has been done or committed by him.

**Example :** Ravi and Suresh plan to rob a bank. Ravi provides Suresh with the necessary tools and a detailed plan on how to execute the robbery. On the day of the robbery, Ravi accompanies Suresh to the bank but stays outside to keep watch. Suresh goes inside and commits the robbery. According to Section 54 of BNS 2023, Ravi, who is present at the scene, will be deemed to have committed the robbery along with Suresh, even though he did not physically enter the bank.

## **B) CONSPIRACY (S – 61)**

Conspiracy is when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means.

The main **ingredients** of section 61 are as follows:

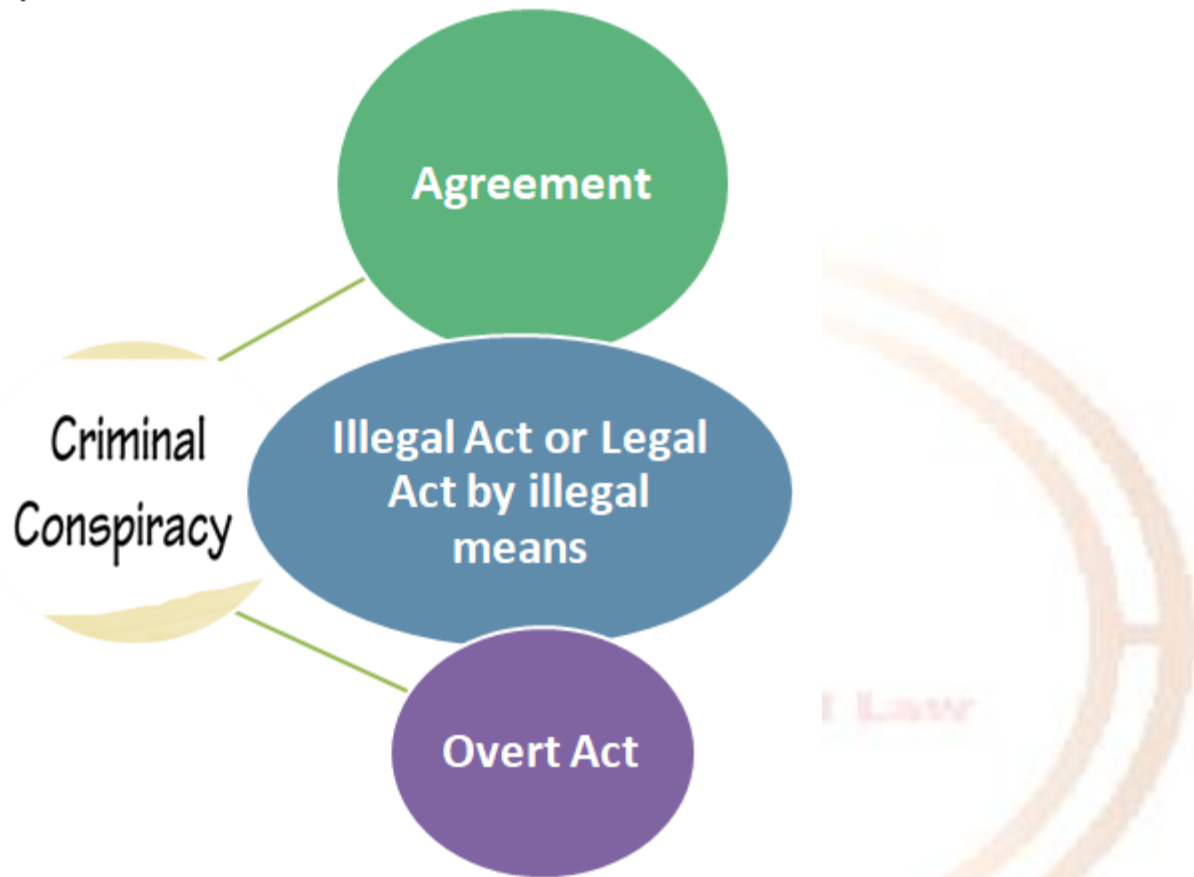
- ❖ There should be two or more persons;
- ❖ There should be an agreement with the **common object** between them;
- ❖ The agreement must be to do or cause to be done;
  - i) an illegal act or
  - ii) an act which may not be illegal by illegal means.

Here, the word illegal means is that everything which is either an offence or prohibited by law, or furnishes ground for a civil action. It is defined in section



2(15) of the Sanhita. So, even conspiracy to commit **civil wrong will be covered in section 61** provided an overt act is done in pursuance of conspiracy.

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### Nature of Section 61

- The agreement can be either explicit or implicit.
- Each conspirator need not participate in every detail of the conspiracy; they may have different roles and responsibilities.
- The act need not be committed to establish the offence of conspiracy; the agreement itself is punishable.
- Agreement itself is actus reus and hence punishable.

- Conspiracy, if done, is substantive, can be punished even without any overt act.
- It is continuing offence and subsists till it is executed or rescinded by choice.
- It contemplates secrecy. Accordingly, it will be proved by circumstantial evidence and not by direct evidence.
- If conspiracy is not to commit an offence but to commit other illegal act then in that case overt act is required.

### **Agreement per se is an offence**

In State through Superintendent of Police, CBI/SIT **Vs. Nalini**, AIR 1999 SC 2640, (commonly known as **Rajiv Gandhi assassination case**) the Supreme Court laid down the main principles governing the law of conspiracy :

- **Offence of conspiracy is an exception to the general rule that intent alone does not constitute crime.** It is the intention to commit crime that is punishable.
- It is not necessary that all conspirators should agree to the common purpose at the same time.
- Agreement to commit offence in conspiracy per se is an offence.
- Conspiracy is hatched in secrecy. It is rarely possible to prove conspiracy by direct evidence. It is to be inferred from circumstances and the conduct of the accused.
- It is an agreement which is unlawful and not its accomplishment, which is the gist or essence of the offence of conspiracy.
- Where in pursuance of the agreement, the conspirators commit offences individually, **all of them will be liable** for such offences even if some of them have not actively participated in the commission of those offences.

### **Essentials of conspiracy**

In **Mohd. Khalid Vs State of West Bengal**, (2002) 7 SCC 334 Supreme Court summarized the law relating to conspiracy by stating broad essentials:

- (a) An object to be accomplished.
- (b) A **plan or scheme** embodying means to accomplish that object.
- (c) An **agreement or understanding** between two or more persons.
- (d) An **overt act** in pursuance of an agreement (in case of non-offence act).

### **C) ATTEMPT (S – 62)**

- The term 'attempt' has not been defined in the BNS, but ordinarily to constitute an attempt the following elements are necessary.
  - ✓ There must be an intention to commit a particular offence, (**Mens rea**)
  - ✓ Some act must have been done towards the commission of the offence and, (**Actus reus**)
  - ✓ Such act must be proximate to the intended result. & Failure in accomplishment.
- 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.

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 Abhayanand 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.
- **For instance**, X will be held **liable** for attempt to commit theft if he thrust (push suddenly) his hand in the pocket of Y with the intention to commit theft but finds nothing. (Illustration (b) of **Section 62**)

- Impossibility may be factual or legal. Factual impossibility arises when the perpetrator lacks the requisite knowledge or skills for executing a particular act.
- Legal Impossibility arises where commission is not possible due to legal implications (impact or effects of sth). X is the owner and lawful possessor of a property but he is not aware of his right and tries to steal that property. He may be held liable for attempt as technically he cannot commit theft of his own property which is in his possession.

### Proximity Test

- 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.
- Proximity (closest) 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.

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.

### 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.

### **Defences available in Inchoate offence**

**Abandonment** : In this defence, the accused asserts that they voluntarily abandoned the efforts to commit the crime **after planning**. To establish abandonment, the person must show a complete cessation of involvement, attempts to halt the ongoing crime, or efforts to dissuade others involved. For example, if a person plans a burglary, completes the preparation, but decides to abandon the act and reports it to the police, they may use abandonment as a defence.

#### **Impossibility:**

**Legal Impossibility:** Legal impossibility is a defence that occurs when someone is unable to perform the task. For instance, X is the owner and lawful possessor of a property but he is not aware of his right and tries to steal that property. He may be held liable for attempt as technically he cannot commit theft of his own property which is in his possession.

**Factual Impossibility:** The defendant claims that circumstances render the commission of the crime impossible. For example, if a person plans to demolish a property, but it is destroyed by a natural calamity before the act, making the crime impossible. This defence may not be universally accepted, as some courts consider the individual's intention despite the impossibility.

#### **Stage of Preparation:**



- ✓ As a general rule, mere preparation itself does not constitute an offence, and not punishable at the stage of preparation. (Intention alone, or intention combined with preparation, is not enough to commit a crime).
- ✓ Preparation is not punishable because, in the vast majority of cases, the prosecution has been unable to establish that the preparations in question were made in preparation for the commission of the specific crime.
- ✓ It's important to remember that the criminal conduct hasn't yet occurred, thus preparation isn't penalized.

In the following circumstances, the accused can be convicted for his mere preparation to commit offence and they are:

- Preparation to commit waging war against the Government of India S - 149
- Preparation to commit depredation on territories of Power at peace with the Government of India S-154
- Making preparation to commit dacoity. S-310(4)



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