



Limits of Punishing Attempt to Commit an Offence: Some theoretical Discourse

Girjesh Shukla

Symbiosis Law School, Noida, A Constituent of Symbiosis International University Pune, India.

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ABSTRACT

Indian criminal courts have always troubled with idea of punishing 'attempts' of crime. The troubled water which includes offence and attempt to commit such offence are so inter-woven that any attempt to separate them is not only difficult but also theoretically dangerous. The question of defining attempt is not that simple, particularly offence attempt to commit rape. The limits of theories prescribing explanations for punishing attempts are miserably failed when they are applied on offence of attempt to commit rape. The work is to explore the limits of these theories and how due lack of such theories often blunders are committed by courts including apex court of this country.

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Introduction

Once the Supreme Court of India has observed and aptly that while deciding the question of defining any attempt to commit an offence it is to be borne in mind that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible.¹ Whenever court need to examine the issue of punishing any attempt to commit an offence, the safest way would be to examine facts and thereby making conclusion about state of mind. No conviction should be allowed on the basis of conjecture or surmise.

Till recent, the idea of punishing such attempt were either decided on the case basis or going into the facts by examining maximum possible evidences for making it sure to what was undoubtable things going in the mind of accused. Recently the Supreme Court of India in *Pandharinath vs. State of Maharashtra*² convicted the accused under section 376/511 of Indian Penal Code, 1860. The whole case is an interesting example of application of general principles of criminal jurisprudence and procedure. It also reflects the casual behavior of trial courts during trial and also appreciation of evidence.

In this case prosecutrix, a working woman lodge First Information Report that accused-appellant committed rape with her. According to prosecution story prosecutrix was appointed as maid servant at his house with some money, meals and residence facility. One night, as per FIR, at about 2.30 - 3.00 a.m. the complainant found that somebody is touching her head and hence she gave jerk to the hand. When she again felt that somebody is touching her body she got up. She found that the accused-appellant was sitting near her bed whereupon she shouted. Immediately, the accused-appellant gagged her mouth and lifted her cloth (petticoat and removed the undergarments of

the prosecutrix) and committed sexual intercourse. On hearing her cries, a person came into the room and when he came to know about incident he gave a slap on the face of accused-appellant.

After completion of the investigation, charge sheet was filed against the accused- appellant under Section 376 of the IPC. Both, prosecutrix and accused-appellant were sent for medical examination. During the course of the trial, 9 witnesses were examined on behalf of the prosecution. The trial court passed an order of conviction against the appellant holding him guilty of the offence under Section 376 IPC. Interestingly High court, on an appeal against this reversed it and held the appellant guilty under Section 376/511 of the IPC for the offence of attempt to commit rape. The reason behind such reversal was the medical report did not supported alleged rape.

The Supreme Court with following observation dismissed the appeal and held the appellant guilty under 376/511 of IPC:

"We have examined the records of the case. The trial court and the High Court have given a concurrent finding that the appellant is guilty. The trial court was of the view that the appellant is liable to convicted under Section 376 IPC. The High Court, however, held the appellant guilty of the offence under Section 376 IPC read with Section 511 of the IPC. There is no dispute to the basic fact that the prosecutrix was a major and not a minor. Even if we accept the contention of the counsel appearing for the appellant that no offence under Section 376 is proved in the instant case on the basis of the evidence on record, it is definitely a case of commission of the offence of attempting to rape. The prosecutrix has clearly stated in her examination in chief that on waking up she found the accused-appellant sitting near her legs and the accused-appellant removed her under garments and gagged her mouth. Subsequently, the accused-appellant felt sorry for the incident and also apologized for the same. *There is no suggestion in the cross-examination on the part of the accused to the aforesaid statement of the prosecutrix that the accused did not remove her cloth.* She had categorically stated in her

¹ Abhayanand Mishra v. The State Of Bihar AIR 1961 SC 1698

² AIR 2010 SC 1453

examination-in-chief that the accused had removed her clothes. The accused-appellant had also stated that the prosecutrix should forgive him for his acts against which no suggestion was put to the effect that he did not seek such an apology. *If the accused- appellant had removed her clothes and he had not rebutted this statement of the prosecutrix in his examination-in-chief, it is definitely a case of attempt to rape.*³

Thus, it seems that the Supreme Court 'assumed' the offence of 'attempt' to commit rape. This case seems to be decided on the basis of popular perception and decision seems to be devoid of legal reasoning.

Punishing Attempt to Commit Offence—

Thought of a man is not triable, for the devil himself knoweth not the thought of a man.⁴ However, when such intent is expressed in words and can be inferred from his acts, the person can be held criminally responsible.⁵ When such criminal intent passes to the next stage which is known as *preparation* i.e. devising or arranging means or measures necessary for the commission of crime, the same is punishable in exceptional cases keeping in mind public policy.⁶ The third stage in order to commit crime is the stage of attempt to commit offence. It is said to be direct movement towards commission of offence once preparation is over.⁷ The last state is commission of offence itself.⁸ Indian Penal Code, 1860 (hereinafter referred as Code) make 'attempt to commit offence' punishable. The scheme of the Code is devised in such a way that either such attempts are criminalised as part of substantive offence or punished by separate section⁹ or punished under 'residuary clause' of punishment under section 511 of the Code.

Defining Attempt—

In the words of Stephen, an attempt to commit a crime is an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such series of acts begins cannot be defined; but depends upon the circumstances of each particular case. An act done with intent to commit crime, the commission of which, in the manner proposed was, in fact, possible, is an attempt to commit that crime. The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself.¹⁰ To put the matter differently, attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other

words, an attempt consists in the intent to commit a crime, combined with the doing of some act adapted to, but falling short of, its actual commission. It may consequently be defined as an act which if not prevented would have resulted in the full consummation of the offence.

The problem with such a definition is that which is the point at which such a 'series of acts' begins, cannot be defined. It depends upon the circumstances of each particular case. This is the reason that in most of the cases possibility of error cannot be ruled out.

On the definition of attempt, is based on proximity of action towards commission of offence. This line of approach suggests that there must be clear proximity between act/series of acts done towards commission of crime after preparation is over. Baron Parke described the characteristics of an 'attempt' in *Reg. v. Eagleton*¹¹ as "*the mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit but acts immediately connected with it.*" This dictum is considered as the *locus classicus* on the subject and the test of 'proximity' suggested by it has been accepted and applied by English, Courts, though with occasional but audible murmur about the difficulty in determining whether an act is immediate or remote.¹² In fact Lord Goddard C.J. in *Gardner v. Akeroyed*¹³ marked "it is sometimes difficult to determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt". As a general principle, the test of 'the last possible act before the achievement, of the end' would be entirely unacceptable. If that principle be correct, a person who has cocked his gun at another and is about to pull the trigger but is prevented from doing so by the intervention of someone or something cannot be convicted of attempt to murder.

Whether IPC indicate any such proximity, need to be examined. Section 511 of Indian Penal Code, 1860 (hereinafter referred as Code) uses the word 'attempt' in a very large sense. It defines and makes attempts punishable in the following words:

"Whoever attempts to commit an offence punishable by this Code..... 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....."

It seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and though the act does not use the words, it can mean nothing but punishable as an attempt. Most interestingly, it does not say that the *last* act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that 'whosoever in such attempt', obviously using the word in the larger sense, 'does any act, etc., shall be punishable'. The term 'any act' excludes the notion that the final act short of actual commission is alone punishable. Thus it rules out proximity test for

³ *Supra* note 2, para 7

⁴ R. C. Nigam, *Law of Crime in India*, (Vol. 10 Asia Publishing House, New Delhi (1965), p. 112; See also Brian C. J., Y. B. (1477) p. 17

⁵ Expression of words in the form of criminal intimidation is punishable under Indian Penal Code.

⁶ For example preparation to commit offences against currency and preparation for dacoity are punishable under Penal Code.

⁷ *Supra* note 4 at p. 112

⁸ These four stages of crime are discernible only in those cases where premeditation is part of offence. If offence is committed at spur of moment, for instance due to provocation, none of three initial stages mentioned are to be found. See, R. C. Nigam, *supra* note 4

⁹ Such as section 307 & 308 of IPC etc.

¹⁰ Stephen, *Digest of Criminal Law*, (8th Ed.) Art. 29 p. 26

¹¹ [1854] Dea C.C. 515 cited in R. C. Nigam, *Law of Crime in India*, (Vol. 10 Asia Publishing House, New Delhi (1965), p. 112

¹² *State of Maharashtra v. Mohd. Yakub*, (1980) 3 SCC 57

¹³ [1952] 2 All E.R.306

punishing criminal attempts. Does this mean every act indicating towards 'commission of and offence' is an attempt? This question needs to be examined in larger perspective.

Theories for Defining Attempt—

There are three theories advanced by various jurisdictions to clarify attempt. These theories are not sufficient in themselves to provide sufficient clarity and have their own drawbacks. For their own reasons, they are explained here.

(a) Proximity test: according to proximity test, an act or series of acts must be sufficiently proximate and not remotely connected, to the crime intended. An act of accused is considered proximate, if though it is not the last act that he intended to do, is the last act that was legally necessary for him to do, if the contemplated result is afterwards brought about without further conduct on his part.¹⁴

(b) Doctrine of *Locus Poenitentiae*: this doctrine suggests that if there is a possibility that a person who having made preparation to commit an offence, actually backs out of committing it, owing to change of heart or out of any other type of compulsion or fear. Thus so long as the steps taken by the accused leave room for a reasonable expectation that he might desist or for whatsoever reason, desist from going ahead with the contemplated act, then he will be treated in law, as only being in preparation, and no criminal liability will be fastened to him.¹⁵ This date was ruled out in *State of Maharashtra v. Mohd. Yakub*¹⁶.

(c) The Equivocality Test: this test is continuation of proximity rule.¹⁷ According to this test if the act of accused unequivocally indicates his intention to accomplish the criminal object. If what is done indicates beyond reasonable doubt that the end towards which it is directed, it is an attempt, otherwise it is mere preparation.

Rape law and Attempt to Rape—

Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See *Joseph Lines IC & K 893*). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See *Dr. S.P. Kohli, Civil Surgeon, Ferozepur v. High Court of Punjab and Haryana* thr. Registrar (1979) 1 SCC 212). In rape cases, if the gland of the male organ is covered by smegma, it negates the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be

considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

The plea relating to applicability of Section 376 read with Section 511, IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has

¹⁴ *R v. Taylor*, 1895 IF & F 511, *Malkiat Singh v. State of Punjab*, AIR 1970 SC 713

¹⁵ See, *Re Bavaji*, AIR 1950 Mad 44

¹⁶ (1980) 3 SCC 57

¹⁷ *K. I. Vibhute, PSA Pillai's Criminal Law*, (10th Ed) LexisNexis, p. 263

been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

Application of Section 511 IPC: Some Explanations

Mens rea and *Actus reus* both are necessary constituents for punishing attempt. To constitute the offence of attempt under this section 511 of the Code, there must be an act done with the intention of committing an offence. Two illustrations of the offence of attempt as defined in this section are given in the Code. Both are illustrations of cases in which the offence has been committed. In each, an act done with the intent of committing an offence and immediately enabling the commission of the offence, although it was not an act which constituted a part of the offence and in each the intention of the person making the attempt was frustrated by circumstances independent of his own volition.

From the illustrations it may be inferred that the Legislature did not mean that the act done must be itself an ingredient (so to say) of the offence attempted. Does this mean all such acts which intended towards commission of offence may amount to attempt? Does prosecution need to establish that the act done must be of such a nature which conclusively indicates towards act or series of acts which is going to result in completion of offence? Does this act include even those which in no way would achieve final result or in any possibility cause any harm?

‘Act or series of act’- ‘towards the commission of offence’—

One of the most interesting element of section 511 IPC is that accused in order to be punished for attempt must does ‘any act’ ‘towards the commission of offence’, ‘punishable under the Code’. Since ‘act’ includes ‘series of act’, this aspect needs to be examined. The general principle of interpretation is that when particular statutory provision is explicit and beyond any doubt no interpretation should be given. This concept is applied with much force in penal statutes.

If section 511 provides that only acts done towards commission of an offence punishable by the code would be amounting to attempt to offence what need to be more clear before applying section 511 is that court must recognize which offence was intended. Here intention of accuse towards specific intended offence need to be clearly examined. And if there does a possibility that the accused was grossly negligent then court must ask sufficient proof of various facts constitute alleged offence.

For the application of section 511 Supreme Court has clearly opined that something more than preparation is necessary for conviction. For example in *State of Maharashtra vs. Rajendra Jawnmal Gandhi*¹⁸ Supreme Court heavily relied on positive proof of intention to commit offence and only after careful scrutiny of evidence such as injury on private parts, medical proof of semen etc. it came to conclusion of Attempt to rape. Such an approach is not only practical but also seems to reduce possibility of judicial negligence. If approach like the one use in *Pandharinath case* would follow then possibly attempts under section 307 or 308 would also come under same trouble.¹⁹

The observation of the Supreme Court in *Madan Lal vs. State of J & K*²⁰ is very appropriate in this reference. The court state that:

“The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove an offence of an attempt to commit rape has been committed is that the accused has gone beyond the state of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then it is difficult for us to hold that it was a case of merely assault under Section 354 of Indian Penal Code and not an attempt to commit rape under Section 376 read with 511 of Indian Penal Code.”

In *Aman Kumar vs. State of Haryana*,²¹ it was held that an attempt to commit an offence is an act or series of acts, which leads inevitably to the commission of the offence, unless, something, which the doer of the act neither foresaw nor intended, happens to prevent this and an attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but, falling short of actual consummation and possession, except for failure to consummate, all the elements of the substantive crime. In

¹⁸ CRIMINAL APPEAL NOS. 840 & 839 OF 1997; See also *Avtar Singh vs State*, Crl. A. 774 of 2006 decided on 10.12.2010

¹⁹ *State of Maharashtra vs. Balram Bama Patil*, AIR 1983 SC 305

²⁰ JT 1997 (7) SCC 357; See also *Chenthamara v. State of Kerala* (2008 (4) KLT 290)

²¹ Crl.R.P.1361/2002

other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It is further stated by court that in order to find an accused guilty of an attempt with intent to commit rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that, he intended to do so at all events and notwithstanding any resistance on her part.

The Supreme Court in *Santhosh Kumar v. State of M.P.*²² held that “to constitute an offence of rape, it is not necessary that there should be complete penetration of penis without emission of semen and rupture of hymen and partial penetration of penis within the *labia majora* or the *vulva* or *pudenda* with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law.” Even this observation of the court simply suggests that something more than removal of cloth is required for attracting 376/511.

Now let us examine the approach of the Supreme Court in *Pandharinath vs. State of Maharashtra*. The court seems to be reaching on decision of ‘attempt to rape’ only on the ground that prosecutrix was de-cloth from specific portion of the body. No evidence was adduced as to the ‘position’ of accused and also no positive medical report regarding any injury on private part and even other related evidence. Now, if the de-clothing is the only requirement of ‘attempt to rape’ then that will make application of any attempt to commit offences under section 354 and 377 of IPC would be more dubious. Not only this, how and in what conditions such attempt would be deemed to be accomplished would be a troublesome question. One possible, but illogical, conclusion could be drawn from the above said reasoning is that if accuse de-cloth from top of the body, this will amount to offence of outraging modesty of women; if from down portion of body then ‘attempt to rape’ (as done in this case); and if from any other portion of the body excluding the two above mentioned portion of the body (better known to court!) then offence under section 377 of IPC!

This kind of approach would end up in many conflicting judicial pronouncements. Only few months after this decision,

Rajasthan High Court in *Man Singh vs. State*²³ seems to reject such logic. The court, in the absence of any injury on the body and private parts of prosecutrix, reduced sentence of 10 years rigorous imprisonment to 7 years rigorous imprisonment in offence under Section 376/511 IPC. Similarly, Bombay High Court in *Tukaram Govind Yadav vs. State Of Maharashtra*²⁴ refuse to allow conviction under 376/511 in absence of positive medical proff of attempt to rape and took removal of cloths etc. as mere offence under section 354 IPC. Interesting thing is that in this case facts are substantially similar to that of *Pandharinath case*.

Summing Up—

As observed by Justice Patterson in *Rex v. James Llyod*,²⁵ *In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.*

Indian penal Code nowhere defines attempt but this does not mean that every act of ‘attempt’ may be punished on the basis of surmise and conjectures. For the purpose of punishing ‘attempt’ there must be clear and cogent proof of facts constituting offence punishable under the Code and the only question which need to be looked into should be about happening or non happening of something due to which desired result could not be achieved. It may be submitted that such an approach would result into streamlining of attempt cases no any such given guideline shall reduce possibility of judicial negligence in such cases.

²² AIR 2006 SC 3098

²³ Criminal Appeal No.63/2005

²⁴ CRIMINAL APPEAL NO.506 OF 1996

²⁵ (1876) 7 C&P 817