

CRIMINAL LAW RELATING TO INCHOATE OFFENCES – AN ANALYSIS

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Abstract: Indian Penal Code (IPC) 1860 contains punishments for two categories of offences viz, inchoate offences and specific offences. Inchoate offences are preliminary offences or incomplete offences, where the accused moves a step forward to commit the offense. If the accused succeeds, it is a completed offence. If he fails in accomplishing his criminal objective, the act is called an inchoate offence. The act is prior to the commission of the offence. Three types of inchoate offences are defined under IPC – Abetment, Criminal conspiracy and Attempt. The defenses can also be resorted to escape from criminal liability for these offences. Since the objectives of criminal law are to detect and prevent crime, the preliminary offences are being punished as it is well said that prevention is better than cure. Further a stitch in one saves nine. (@GeorgieProRadio . Sep 23, 2020)

Key words: Offence, Inchoate offence, Defense, Abetment, Abettor, Conspiracy, Attempt, Mens Rea and Actus Reus

Research Methodology:

Statement of Problem:

Will criminalization of inchoate offences prevent actual commission of offences?

Objectives of research:

To analyse in depth the provisions of IPC for inchoate offences

To find out the guilty mind behind these offences for the purpose of punishing the offender

The author is interested to focus on inchoate offences with relevant case law. Further, the article provides effective conclusion and suggestions in this regard to achieve the twin objectives of criminal law as to prevention and detention of crime and to keep peace and social order in the country at large.

Data Collection:

The author has adopted a Doctrinal approach, where the data is collected from secondary sources: Books, journals and research articles both from print and electronic media.

Coverage and scope:

An analysis of inchoate offences is made with relevant case law to understand the mens rea of the accused in order to curb the criminal act at the primary stage itself.

INTRODUCTION

The historical evolution of inchoate offences dates back to the 16th century in England, where the Jurists opined that attempt to commit an offence must be punishable. In the 18th century, some more offences were included in the preliminary offences. In the 19th century intention was also considered as an inchoate offence. Further, Hackings and Black stone opined that conspiracy is to be considered as a Specific wrong.

Indian Penal Code, 1860 provided different punishments for different crimes under various sections. The code has classified inchoate offences and specific offences under different sections and provided punishments for these offences either in the same section of offence or under a separate section. Inchoate offences are also called as preliminary or incomplete offences. These offences are of peculiar nature, wherein the offender moves forward to commit a criminal act. But fails to commit that criminal act, which actually he intends. These crimes are called inchoate or preliminary

offence because the offenders in each one of these crimes are responsible for accomplishing a specific offence as *re Maragatham and another*. IPC has been drafted in order to prevent and detect the crime/ offence. Crime requires two elements i.e. mens rea, (the guilty intention) and Actus Reus (criminal act) as the two important elements.

If any one of the elements is missing, there will be no offence and the accused will not be punished. Criminal act is easily detected prima facie, but the mens rea/guilty intention is very difficult to establish. It can be ascertained from the facts and circumstances of the case. Hence circumstantial evidence rather than direct evidence plays an important role in gathering the guilty mind of the accused. If that guilty mind is detected prior to the commission of the offence along with an act leading to the commission of offence at the primary instance itself, and punished accordingly, i.e. If the offence before being committed, is prevented in the primary instance itself, the society will be protected more effectively. With this aim, inchoate acts are defined and punished separately under IPC.

Inchoate offences are classified into three types viz., Abetment, Criminal Conspiracy and Attempt. These offences can be dealt with as follows:

ABETMENT

Section 107 to 120 of IPC contain provisions relating to *abetment*. Section 107 of IPC defines abetment in the following acts;

1. **Abetment by instigation:** i.e., if a person encourages or instigates any person to commit an offence. It is an indirect way of committing an offence.

*In Queen V Mohit*¹, when a woman proceeds towards the dead body of her husband in order to commit Sati, some people around her chanted Ram, Ram, all the people who were chanting Ram, Ram were found to be guilty of abetment. Here the Abetment was to encourage her to commit Sati.

2. **Abetment by conspiracy:** If a person comes to an agreement with one or more persons in a conspiracy to commit an offence or

3. **Abetment by Aid:** If a person intentionally facilitates any person in the commission of the offence. Offence includes illegal act or illegal omission.

*Raj Kumar V State of Himachal Pradesh (8th January 2018)*². A girl of 15 years was raped while in police custody and a constable was sitting outside to keep a watch on the husband of that girl but did not stop the offence, was guilty of abetment by illegal omission.

Therefore, abetment can be understood in three types i.e., Abetment by instigation, Abetment by Conspiracy and Abetment by Aid. *Faguna Kant v State of Assam*³,

Abetment by instigation: A person instead of committing the offence directly by himself, encourages or instigates another person to commit the offence. For example, if A encourages B to murder, whether murder is committed or not A is liable for abetment by instigation. Further if B refuses to commit murder, then also A is liable for abetting B. The person who instigates is called as an Abettor under sec 107 of IPC. It is not necessary the person abetted is capable of committing the offence. Suppose A encourages B a minor to administer a poisonous food to C, and B gives the food to C, whether B knows the fact or not B is liable and whether C dies or not A will be liable for abetment. If the person abetted does not know the intention of the abettor and does the act, the person *abetted* is not punishable but if the person abetted knows the criminal act, and does the act, the abetted person will be liable for the act along with the abettor.

*In Amit Kapoor V Ramesh Chander*⁴, it was held that intentional misstatement or hiding the things for receiving or attempting to receive any material will be considered as abetment by instigation.

*Brijal V Prem Chand*⁵The husband daily demanded dowry from his wife. The frustrated wife, one day

¹3, N.W.P.316

² indiankanoon.org

³AIR 1959 S.C. 673

⁴2013 1 SCC (Cri.) 989

⁵AIR 1989 SC 1661

said that she prefers death to live with him. The husband provoked her by saying that he would be accepting that act. The wife in a heat of anger committed suicide. The Supreme Court convicted him for abetment/instigation of suicide.

IPC provides five explanations to the abetment viz.,

1. If an act abetted is for abetment for omission of a legal act by any person, where, the abettor is not under the duty to do the legal act.

In the following circumstances, the abettor is punishable under explanations two and three:

2. If the act abetted is not committed, still the Abettor is guilty of abetment

3. If the act is committed by the incapable person as per law, like infant, insane or intoxicated, or if the abetted person has the same guilty intention as that of the abettor. ex: If A encourages B to commit an offence, at the same time B also would like to commit the same offence with the same guilty intention, the abettor will be liable.

4. Abetment of abetment is also punishable. *Pritam Singh V State*⁶, If A abets B to abet C to commit an offence, B is liable for abetment of C and A is liable for abetment of abetment of C.

The above provision has been applied in *GundalaReddeppa Naidu v State of A.P.*⁷.

5. In abetment by conspiracy, even though the abettor did not agree with the main offender, still the abettor is liable.

Abetment by Conspiracy:

Conspiracy means agreement between two or more persons to commit an illegal act or commit a legal act in illegal means. It is not necessary that the abettor should concert with the offender. Mere agreement through abetment is enough. *Khalil*⁸, For example, if A and B conspire together to abet C to commit an offence, A and B are punishable for Abetment by Conspiracy.

⁶AIR 1954 P & H 228

⁷2005 CriLJ4702

⁸(1901) 28 Cal 797

Abetment by Aid:

It is abetment by facilitating a person abetted to commit the offence, for example If A encourages C to kill D, B comes in between and puts a knife in the hands of C, then A will be liable for abetment and B will be liable for abetment by aid. For example if A would like to commit a murder, in the meantime B provides food to A in order to facilitate the offence by A, B will be liable for abetment by Aid.

In *Queen V MohitPandy*⁹, a woman walked in the burial ground to perform Sati, while she was moving towards her husband's dead body, the people around her chanted Ram, Ram. All those persons were held liable for abetment of Sati. Punishments for abetment were provided from sections 109 to 120 depending upon the type of offence committed and its consequence: 1.If the abettor has an intention to abet commission of one offence and the abetted commits the offence with different intentions 2. Act abetted and Act Committed are different, 3.Act abetted and committed are one and the same but consequences are different depending upon the circumstances, punishment for the act as well as the consequence. For Example A has abetted B to grievously hurt C. B has beaten C severely. After suffering, within seven days C dies, A will be liable for the abetment of grievous hurt and murder and B will be liable for grievous hurt and murder, although the abetment and consequent act are for grievous hurt only.

Relevant case law in this regard:

in *HardhanEmperor V Faiyaz Hussain*¹⁰ a Zamindar lent his house to a Police officer. The Police officer while investigating an offence of theft used the house to torture the suspects. This fact was known to the Zamindar. Therefore, he was guilty of abetment by aid.

In *MathuralaAdi Reddy V state of Hyderabad*¹¹ it was held that if the abettor was present in the scene of offence, both the abettor and abetted are punished equally.

⁹ ibid

¹⁰(1966) 16 Awn194

¹¹AIR 1956 SC 177

*FagunaKanthNath v State of Assam*¹² it was held that if the offender is acquitted, the abettor who aids the offence also will be acquitted, also affirmed *Chakravarty v Union of India*¹³

*W/O Ram Malana and others V State of Bombay and another*¹⁴ In this case the priest who performed the marriage of a person, while that person's wife is alive, the Priest was held guilty of abetment of the marriage.

*GalluSah v State of Bihar*¹⁵ in this case B encouraged A to set fire to a hut. A committed the offence.9 under sec 436). B was acquitted because of insufficient evidence, But B was convicted for the offence of abetting the offence under sec 436 read with sec 109

*Director of public Prospecion for Northern Ireland v Maxwell*¹⁶. It was held that If a person abets another to commit an offence not knowing the actual nature of the offence, but he has prior knowledge that the other who has been about to commit an act of similar kind, he is liable for abetment.

*Shri Ram v State of U.P*¹⁷

The servant of a house kept the door open in order to facilitate a theft. But the theft is not committed. It was held that the servant is not liable for abetment by aid because "active complicity is the gist of the offence of abetment by aid", which was lacking in this case.

Criminal Conspiracy:

Criminal Conspiracy is defined under sec 120A and its punishment in 120B. Conspiracy means coming to an agreement by two or more persons 1. To commit an illegal act or 2. To do a legal act by illegal means in furtherance of conspiracy.

¹²(1959) 11 M.L.J, 18 (SC)

¹³AIR 1990 SC 1210

¹⁴AIR 1960 Bombay 393

¹⁵AIR 1958 SC 813

¹⁶(1978) 3 All E.R. 1140 (H.L)

¹⁷1975 SC 175

Agreement is the gist of the subject matter of conspiracy.

In *Devendra Pal Singh V NCT, Delhi*¹⁸; it was held by SC that in order to constitute Criminal conspiracy, four elements must be present i.e. 1. There should be an object or purpose, 2 Plan for achieving the purpose, 3. Agreement between two or more persons, 4. An overt act must be committed in pursuance of the agreement.

*Saju V State of Kerala*¹⁹; it was held that in order to convict a person under 120B of IPC for criminal Conspiracy, it must be established that the person knowingly enters into the agreement for the commission of offence.

It is not necessary that all the conspirators know each other. For example, A and B conspire together to do an illegal act, C conspired with B the Commission of the same act. It is not necessary that A and C know each other. It is also not necessary that all the conspirators must be present at the scene. But it is essential that all the conspirators must know full details of the conspiracy as held in *R.K.Dalmia V Delhi Administration*²⁰. But an act in pursuance of conspiracy must be done and not the actual offence. For example, A, B, C, D conspired together to kill Z by giving poisonous food, A prepared the plan as to the allotment of work, B collects poison, C mixes poison in the food and D administers the food to Z. The intention of all the conspirators is to kill Z but in the meantime a cat eats the food and dies. All the conspirators will be punished for conspiracy and common intention under sec 120B r/w sec34 even though the actual offence of murder of Z is not committed. In *Bimbardhar Pradhan V State of Orissa*²¹, it was held that if a person was engaged in criminal conspiracy for committing an offence and if that offence is not committed, then that person may be acquitted for the offence, but still, he will be liable for criminal conspiracy, just like the abetment.

¹⁸AIR 2002 SC 1161

¹⁹AIR 2001 SC 175

²⁰AIR 1962 SC 182

²¹AIR 1956 SC 469

The above judgment is affirmed in the case of *Yogesh alias Sachin Jagdish V State of Maharashtra*,²²

*Topan Das V State of Bombay*²³In a joint trial of criminal conspiracy acquittal of one of the accused will lead to the acquittal of all other conspirators.

Shaw V Director of Public Prosecutions,²⁴ in this case the publisher of a booklet named "The ladies Directory" was punished for conspiracy to corrupt public morals, by earning income through advertising the prostitutes under the sexual offences Act, 1956 and Publishing obscene articles.

Agreement to commit an offence is the basis for criminal conspiracy. If agreement is reached between the persons, it is enough to punish them as held in *Surendra Mohan Basu V SarojRanjan*,²⁵. Further in *Suman Sood v State of Rajasthan*,²⁶, it was held direct evidence in criminal conspiracy generally not available. Therefore, resort must be, to collect the circumstantial evidence to decide such cases.

Liability of a company as a conspirator: in *Motorola Inc V. Union of India*,²⁷, it was held that a company is a juristic person and not an ordinary human being. Therefore, a company is not punishable for criminal conspiracy.

Criminal Attempt:

Attempt is contained in section 511 of IPC, which is the last section. Attempt is specified in various contexts in IPC like an inchoate offence, stages of offence and general offences and under specific offences.

Attempt as an inchoate offence: an attempt to commit an offence is direct movement towards the commission of crime. As per Cockburn, C.J., if the

²²(2009) 1 SCC (Cri.) 51.

²³AIR 1956 SC 33

²⁴(1961) 2 All ER 446 (H.L)

²⁵AIR 1961 Cal 461

²⁶(2007) 2 SCC 637

²⁷ (2004) CrLJ 1576 (Bombay)

attempt is successful, then it can be said that an offence is committed (Huda, S.S., The Principles of law of Crimes in British India,²⁸) an attempt includes mens rea and actus reus to constitute a crime. Although it is a failure act, it is punishable as a preliminary offence.

It is absolutely *In re Maragatham and another*²⁹ "The devil himself knoweth not the thought of a man and so difficult to define the contemplation in the mind of an individual and punish him for the idea in his head " The difficulty in ascertaining the guilty intention of a person was described as ...The devil doesn't know the thinking of a man and it is very difficult to find out the intention of a person and impose punishment for his guilty mind. As per Huda, Attempt has been covered under four types viz.,

1. Attempt and Punishment for an offence are defined in the same section,
2. Offence and attempt are specified in the same section, but the punishments are provided under different sections,
3. Attempt to commit suicide⁶⁺ the State, head of a State, sedition etc.

If the punishment for an Attempt to commit offence is not provided in any specific section along with the offence, then referenced must be had to provisions under section 511 under IPC

As per K.D. Gour, Attempt is of four kinds i.e.

1. Attempt to commit offence in general under sec 511 of IPC,
2. Attempt to commit offences punishable with death sentence, like murder,
3. Attempt to commit suicide and
4. Attempt to commit offences against State, Head of the State, Sedition.

If the punishment for an offence and the Attempt are provided specifically in one section or in different sections, no need to refer to sec 511.

²⁸(T.I.I. 1902) P. 41

²⁹AIR 1961 Mad .498

Otherwise, punishment under sec 511 of IPC must be referred to, for those attempts. The punishment may be full punishment for the offence, or one half or one fourth of the punishment for an offence, as the case may be depending on the attempt for an offence has been committed.

Attempt in the context of stages of offence is provided as the third stage of crime. The stages of crime are four in number - intention, preparation, attempt and commission of an act. Some offences are punishable at the preparation stage itself, like waging war, dacoity all offences are punished at the attempt stage, if caught. An overt act is necessary for punishment of an Attempt.

*In Malkait Singh V State of Punjab*³⁰The Supreme court made a distinction between preparation and attempt and held that preparation is making all the arrangements for commission of the crime, whereas an attempt is moving a step forward to commit the crime. The attempt contains sufficient mens rea, but the crime could not be accomplished.

*In State of Maharashtra V Md., Yakub*³¹Justice Sarkaria held that the test of overt act, proximate to the offence, is sufficient for punishment. The same has been held in *State of Maharashtra V Balram Bama Patil*³² and in *Hari Kishan V Sukhbir Singh*³³ Further, it is necessary to apply this test in anti-social activities like offences under customs Act, FERA etc. to curb the offence at the initial stage of attempt. It is applicable in cases coming under Essential Commodities Act, Fertilizer (movement Control) order.

Criminal procedure code under Sec 222 provides that, if an offence has been committed the offender should be punished for the offence as well as the attempt for the offence, whether the attempt is included in the charge sheet or not.

The Supreme court in *State of Maharashtra V Rajendra Jawan Gandhi*³⁴ has convicted the

³⁰ 8th November 1968 indiakanoon.org

³¹ AIR 1980 SC 1111

³² AIR 1983 SC 205

³³ AIR 1985 SC 2127

³⁴ AIR 1997 SC 3986

accused under 376[??] read with sec 511[??] for Rape and Attempt to Rape.

The punishment for attempt for specific offences is provided under Sec 121, 124, 124A, 161, 196, 307 (Attempt to murder), 308 (attempt to culpable homicide), 309 (Attempt to commit suicide) 393 (Robbery) and 511 (attempt to commit all offences including attempt for an offence punishable with death sentence and life imprisonment).

Tests for determining the nature of Attempt:

1. **Proximity test:** The connection between the attempt and offence must be so close that the success will constitute an offence. The test of proximity relates to the intention of the accused and not the time and action. Professor Glanville Williams opined that it can be said that the act of a person is nearer to the offence, if the act is so closely related with the offence intended to be committed but not a final act to constitute an offence.

Relevant cases in which the Proximity rule applied are *Abhayananda Mishra v State*³⁵, *Sudhir Kumar and Shamlal Shah V State of West Bengal*³⁶ **The Doctrine of locus poenitentiae;**

The doctrine means time for repentance. The person, while attempting the offence changes his mind out of repentance or otherwise. This amounts to only preparation and not punishable in all offences.

*and State of Maharashtra V Md. Yakub*³⁷ If A would like to give poisonous food to B and keeps the food within the reach of B, till that extent A is not guilty of attempt, because he may change his mind and remove the food from there. (*Nigam, R.C., Principles of Criminal Law*,³⁸.)

Equivocality test:

³⁵ AIR 1961, SC 1698

³⁶ 1973, SC 2655

³⁷ AIR 1980 SC 1111

³⁸ Vol. I, p.125

The attempt must be such that it must unequivocally and clearly indicate the intention to commit the offence.

Social disorder test:

In order to ascertain the attempt for an offence, the seriousness and apprehension of danger to the society will be taken into account.

The Impossibility Attempt:

If the offence committed is an impossible act the accused will be punished for the guilty mind behind the attempt, held in *R. V Shivpuri*³⁹. Further, if the attempt is made by an infant towards an offence, he will not be punishable, because an infant will come under the defence of incapacity.

Defences for inchoate offences:

1. **Abandonment:** The accused has stopped the abetment during the abetment.

2. **Factual impossibility:** Before the offence is committed, an intervening act (not anticipated by the abettor) made the happening of an act, which act is attempted by the accused.

Conclusion:

From the above analysis, it can be concluded that the provisions under IPC for the punishments are to some extent preventive and deterrent. These provisions are meant to control the dangerous acts, before the actual offence is being committed. Usually criminal cases are reported very less. Even if reported, the case has to go through a lengthy process of Criminal procedure code from the registration of First Information Report (FIR) to the execution of punishment. This is because Indian criminal law presupposes that a criminal case must be proved beyond reasonable doubt and no innocent be punished. If this is the case with the completed offences, the detection and prevention of inchoate offences is a difficult task. Further, only circumstantial evidence will be available to ascertain the mens rea and motive behind the commission of preliminary offences. Hence, the role of police is crucial to find the accused at the primary stage in order to prevent the offence. In this context it can be said that there are sufficient

provisions in IPC for definition and punishment of inchoate offences. But implementation must be effective.

Suggestions:

1. The Criminal procedure mechanism viz., Police, Public Prosecutor, Judiciary and Prison authorities should be aware of the offences which are incomplete and prevent them at the appropriate time. This is useful to protect peace and social order.

2. If the offences at the preliminary stage are curbed to the maximum extent possible, it will reduce crime rate enormously and people live in a conducive environment and have good working conditions.

3. State can concentrate on developmental activities rather spending huge time and money on the resolution of inchoate offences through courts.

4. The Supreme Court must provide suitable guidelines to the judges, while pronouncing judgements regarding the preliminary as well as the specific offences.

³⁹1986 ALI ER 334