

Determining the *Actus Reus* of Attempt: Legal Issues and Options

Uduak Alphonsus Ikono

University of Uyo, Nigeria

Abstract:-The criminal law does not punish people merely for intending to commit a crime, but it may punish attempt aimed at carrying out such a crime because the conduct constituting the attempt may be as guilty if it fails to achieve its purpose as though it had been successful. Criminal attempt is a generic name for inchoate offences which though short of completion are crimes of their own right. The rationale for criminal attempt is for the prevention of crime. Although a crime of its own, criminal attempt is confronted with many problems. This paper examines the law of attempt, noting the inherent problems associated with it especially the difficulties in determining what constitutes the *actus reus* of attempt. The paper canvasses *inter alia* for a reenactment of criminal attempt with a delimiting general rule vesting in the courts discretion on arriving at what constitutes the *actus reus*.

Keywords: *Actus reus* of attempt, determining, issues, legal, options

INTRODUCTION

The purpose of crime prevention would be defeated if a man intending to commit a crime were held to be innocent until he had in fact committed the offence intended. Mere intention is not a crime. However, where a man begins to put his intention into execution by means adapted to the fulfillment of that intention, he may be guilty of a crime even though the main offence is not actually committed. This type of offence is usually called “inchoate” or “preliminary” offence.¹ An inchoate offence is committed even though the substantive offence is not consummated and no harm results. A person may be convicted of an inchoate offence even when the main offence was not completed or where there was an intervening act or involuntary obstruction.²

There are other offences that are considered as inchoate in nature due to the fact that they punish conduct that may be preparatory to the commission of other offences. They are often termed precursors offences³ in the sense that they are crimes in themselves even if the offence they were intended to bring about is not completed. They include such crimes as the crime of burglary in *Section 411 of the Criminal*

Code (breaking and entering a structure with intent to commit a felony therein), which is an attempt to commit some other crime, and assault which is an attempt to commit battery.⁴ In this scholarship, although general interest is on inchoate offences main focus is on attempt.

Inchoate Offences

The term ‘inchoate’ as used in ordinary sense means just beginning to form and therefore not clear or developed.⁵ The common law has evolved three general offences which are usually referred to as ‘inchoate’ or ‘preliminary’ offences. These offences are conspiracy, incitement and attempt. Expatiating on the nature of these offences, Ashworth⁶ submits that: “A principal feature of these crimes is that they are committed even though they are substantive offences (i.e. the offence it was intended to bring about is not completed and no harm results) An attempt fails, a conspiracy comes to nothing, and words of incitement are ignored – in all these instances there may be liability for the inchoate crime.”

Conspiracy is a combination between two or more persons, formed for the aim of committing, by their joint efforts, some unlawful or criminal act which is lawful in itself, but becomes unlawful when done by the combined action of the parties, or for the purpose of using criminal means for the commission of an act in itself unlawful.⁷ Justification for a crime of conspiracy is largely preventive,⁸ since it allows the law enforcement agents and the court to nip crime in the bud by timely intervening before an envisaged harm is done. The statutory provisions for the crime of conspiracy can be found in *Sections 516 and 517 of the Criminal Code*.⁹ For an offence of conspiracy to be established, certain requirements must be met. Accordingly, there must be at least two persons involved¹⁰; there must be an agreement between two or more

⁴See Section 252 of the Criminal Code.

⁵Oxford Advanced Learner’s Dictionary, 7th ed., p.754.

⁶A. Ashworth, *Principles of Criminal Law*, New York, Oxford University Press, 1995, p.442.

⁷*Obiakor v. The State* (2002) 6 SCNJ 193; *Obasanjo-Bello v. FRN* (2011) 10 NLWR (pt. 1256) 602; *Jimoh v. The State* (2012) 3 NWLR (pt. 1286) 144.

⁸I. Dennis, “Rationale of Criminal Conspiracy,” *Law Quarterly Journal* (1977) 93 (39) in A. Ashworth, *Principles of Criminal Law*, op. cit, p.453.

⁹See also Section 95 of the Panel Code, Cap. P. 3 Laws of the Federation of Nigeria 2004, which has a similar provision.

¹⁰*The State v. Osaba* (2004) 21 WRN 113 pp. 117. In that case, the court, per Omege, J.C.A. held that where one of the parties pretends to enter into an agreement with the other to commit a crime only to build up

¹Y. Bamgbose and S.Akinbiyi, *Criminal Law in Nigeria*, Ibadan, Evans Brothers Nig. Ltd, 2015, p. 120.

²Ibid, p. 135.

³For instance, Sections 417 (1) and 514 of the Criminal Code, Cap. 77 Laws of the Federation of Nigeria, 1990 (hereinafter referred to as the Criminal Code) punish intention only without the requirement of overt acts as stipulated under Section 4.

persons¹¹; the agreement between the conspirators must be to carry out an unlawful act or a lawful act in an unlawful means¹²; the agreement must therefore be to effect illegality and a criminal purpose,¹³ and the offence must be capable of being proved vide circumstantial evidence.¹⁴

Incitement is the second of the trinity of inchoate offences developed by the common law. The basis for the law of incitement is that any person who instigates or encourages another person to commit an offence should be liable to conviction, for the reason that he or she is guilty of an offence, and because such liability – as it obtains in inchoate offences – is aimed at preventing crime. The offence of incitement is committed whether or not the persons incited responded by committing the offence in question. Where the persons incited responds by committing the offence concerned, the inciter becomes an accomplice to that crime, and is criminally liable to conviction for counseling the offence.¹⁵ The Nigerian Criminal Code provides for specific types of incitement, such as incitement to mutiny, sedition, disobedience or desertion by the military or the police,¹⁶ incitement of the public servants to certain acts of corruption,¹⁷ and instigating the invasion of Nigeria.¹⁸ It is noteworthy that in certain types of incitement, it is required that the incitement be addressed to a particular class of persons. *Section 44 of the Criminal Code* requires that incitement be addressed to the police or military. In *R. v. Enahoro*,¹⁹ the court held that in the offence of inciting policemen to mutiny under *Section 44 (a)*, it was sufficient that the accused addressed an audience, comprising a number of police officers.

Attempt, which forms the fulcrum of this study, is one of the three inchoate offences, and into which we now turn.

Attempt

Attempt generally is an overt act that is done with the intent to commit a crime but falls short of completing the crime.²⁰ It is immaterial that the offence was not completed or that it was voluntarily abandoned thereafter or that it was unknown to the accused the commission of the crime was

impossible. Ikpang,²¹ elucidates that “although every attempt is done with intent to commit a crime... every act done with this intent is not an attempt, for it may be too remote from the completed offence to give rise to criminal liability.” It therefore means that not every act of the accused is capable of constituting an attempt for a crime. Attempt is classified as an offence which, though the offender only tries to commit that main offence without actually doing the act or completing it, yet attracts punishment as though it were a full crime. In *Commonwealth v. Easan*,²² an attempt is defined as an overt act done in pursuance of intent to do a specific thing; tending to the end but falling short of the complete accomplishment of it. Illuminating the characteristic of these offences, Ashworth notes that a principal feature of these crimes is that they are committed even though the substantive offence is not completed, and even where no resultant harm is done.²³

Ashworth’s illustration of the foregoing may suffice in a hypothetical case. X goes to Y’s house with the intention of burning it down. With X is a can of petrol, a box of matches, and some paper with which X wants to set the house ablaze. Suddenly, the police arrest X before he can complete his criminal intent. In this case, X is criminally liable for attempt. That is generally the picture in demonstrating the nature of the law of attempt. It is against the background of the above scenario that the law of attempt is described as an intent combined with the act falling short of the thing intended.²⁴ While Garner²⁵ defines attempt as an overt act that is done with the intent to commit a crime but that falls short of completing the crime; he further submits that it is an endeavour to do an act carried beyond mere preparation but short of execution.²⁶

Rationale for Attempt

Generally, the rationale for criminal punishment is to ensure that people who violate rules of group existence are punished. However, the dilemma is, must the enforcement agents wait until an intending criminal consummates his or her criminal intention before a criminal punishment is brought against him or her?²⁷ It is against this legal backdrop that the

incriminating evidence against the other, conspiracy cannot be established. See also *Brown v. The State* (2012) 3 NWLR (pt. 1287) 207.

¹¹ *Oshov. The State* (2012) 8 NWLR (pt. 1302) 243; *Abidumv. The State* (2012) 7 NWLR (pt. 1299) 209.

¹² *Olusegun Haruna & Orsv. The State* (1972) 819 SC 174. pp. 200 – 201.

¹³ In *Keneth Clark & Anor. V. The State* (1986) 4 NWLR (pt. 35) 381, Kolawole J.C.A. reiterated that “the essential ingredient of the offence of conspiracy or the gist of the offence lies in the engagement and association to do an unlawful thing which is forbidden by law.” See also *R. v. Adebajon* (1935) 2 WACA 315; *R. v. Clayton* (1943) 33 Cr. App R. 133.

¹⁴ *Kim v. The State* (1991) 11 NWLR (pt. 175) 622; *Kalu v. The State* (1993) 6 NWLR (pt. 300) 385 at 396.

¹⁵ A. Ashworth, *Principles of Criminal Law*, op. cit. p. 453.

¹⁶ Sections 44 – 46 of the Criminal Code.

¹⁷ Section 404 (3) of the Criminal Code

¹⁸ Section 38 of the Criminal Code.

¹⁹ (1947) 12 W.A.C.A. 194

²⁰ B. A. Garner, *Black’s Law Dictionary*, 9th ed., Minnesota, Thomson West, 2004, p. 146.

²¹ A. Ikpang, “A Critical Analysis of Attempted Rape in Nigeria,” *University of Uyo Law Journal* (2016) 9, p.2.

²² 190 pa 10, 21, 22, 23 A 374.

²³ A. Ashworth, *Principles of Criminal Law*, op. cit. p. 442.

²⁴ Y. Bangboye and S. Akinbiyi, *Criminal Law in Nigeria*, op. cit. p. 134.

²⁵ B. A. Garner, *Black’s Law Dictionary*, 6th ed., Minnesota, Thomson West, p. 310.

²⁶ *Ibid*, 9th ed. p. 146.

²⁷ Without this rule, Elliott and Quinn have argued, the police would often be confronted with the dilemma of choosing between preventing an offence from being committed and prosecuting the offender. It would be ridiculous, for instance, if they knew a bank robbery was being planned, and had to stand by and wait until it was finished before a robber could be punished for any offence. In addition, the person would have had the *mens rea* for the commission of the offence, and it was merely bad luck that he or she did not complete the crime, for example, if a planned robbery did not take place because the robber’s car broke down. See C. Elliot and F. Quinn, *Criminal Law*, 4th ed., Edinburg, Pearson Education Ltd, 2002, p. 85. See also *R. v. Robinson* (1915) 2 KB 342. *C. R. and Comer v. Bloomfield* (1971) C. I. R. 230.

law of attempt is a strong societal instrument that averts crime. In general, criminal liability requires both culpability and harm. A, B, C may appear culpable, but they have caused no harm. Why, then, should the criminal law be involved where harm does not occur? The answer lies in the fact that it is concerned not merely with the occurrence of harm but also with its prevention.²⁸

Distinction between Attempt to Commit an Offence and Completed Crime

A distinction may be made between attempt to commit an offence and completed offence. The provision of Section 4 of the Criminal Code makes the distinction clearer. By this provision three major elements are required for the offence of attempt to be established, namely:

- (i) presence of an intent to commit a crime;
- (ii) manifestation of the intention by some overt act; and
- (iii) failure to consummate the commission of the crime.

Thus, for an offence of attempt to be committed, intention, expression of the intent by clear act, and failure to complete the commission of the substantive offence are required elements. What therefore makes attempt radically different from consummated crime is incompleteness of the main offence. Also, though consummated crime is as punishable as attempt, an area of divergence between the two is that whereas the former crime attracts more punishment the latter attracts less.²⁹ It must also be noted that in the law of attempt, the intent required is the real or specific intent to commit the offence charged. It is necessary for the prosecution to specifically prove the intent of the accused person, otherwise no attempt is said to be committed. The test of attempt is illustrated by Turner in thus: "The prosecution must prove that the steps taken by the accused must have reached the point when they indicate beyond reasonable doubt what was the end to which they were directed."³⁰

Examples to support this point may be very helpful. In *R. v. Ogunu*,³¹ the accused who was a handcuffed prisoner was guilty of attempting to escape when he broke the handcuff. In *Awosikav. I. G. P.*,³² the accused was a car salesman, and was entitled to commission on cars sold through him. Payment procedure was that the accused prepared a voucher for his entitlement and after approval by the Sales Manager and the Chief Accountant it was presented to the cashier for payment. He prepared a voucher, forged on

it the signature of the Sales Manager, and presented to the Chief Account. Dissatisfied by the latter, who wanted to see the Sales Manager personally, the accused seized the voucher and ran away, destroying part of it. Upon his apprehension, he was convicted of attempting to steal the amount on the voucher.

In consummated crime the reverse is the case. That is to say there is no condition for proof of specific intent. For instance, offences of burglary, house-breaking, or other theft-related offences, can be completed with any of the required intent.³³ In such offences the prosecution need not specifically prove that the accused intended to steal a particular thing. It is sufficient to show that the accused wanted to steal something, and he need not show with certainty what the accused wanted to steal.³⁴ Furthermore, offences like murder can be committed recklessly or ignorantly. Nevertheless, it is not possible to be guilty of attempted murder by a reckless act. Specific intent to kill is a prerequisite. The case is *R. v. Albert*³⁵ is illustrative.

Mens Rea of Attempt

It has been submitted, and rightly so, that for a charge of criminal attempt to be sustained "intent becomes the principal ingredient of the crime."³⁶ In criminal attempt, the state of mind or *mens rea* is the actual purpose or intent to achieve the desired result, so that negligence or recklessness on the part of the accused is not material. It means therefore that the prosecution must prove the accused's intention to commit the specific offence he or she is alleged to have attempted to commit. In other words, it must be shown that the accused intended to cause the proscribed harm, and had knowledge of the facts and circumstances. The word 'attempt' which means 'trying' to achieve and not merely acting recklessly or negligently or ignorantly, shows the importance of proof of intent in criminal attempt. Accordingly, if the person acted negligently, recklessly, or ignorantly, the element of intent is lacking, and attempted criminal liability does not suffice.³⁷ For example, if A gave B a glass of water to drink believing to be poison, A would be guilty of attempted murder,³⁸ but if he intended to commit what he thought was an offence but actually was not, he would not be guilty of an attempt to commit an offence.³⁹

³³ *Cook (1964) 84 CAR 9.*

³⁴ Sections 410 and 411 of the Criminal Code. See also *R. v. Apesi (1961) W.N.L.R 125.*

³⁵ (1960) *W.N.L.R. 31 (F.S.C.)*. In that case, the appellant was charged for murder. Evidence adduced amply supported the charge but the court, without expressly establishing that there was intent to kill, found out that the appellant inflicted a serious wound with intent to cause grievous harm. Appeal by the appellant on the ground of miscarriage of justice was disallowed, holding that in a case of murder actual intent to kill must be proved, although if death results intent to cause grievous harm will be sufficient to sustain a charge of murder.

³⁶ Per Lord Goddard CJ, in *Whybrow (1951) 35 Cr App R 141*, at 147.

³⁷ *Garner v. Ackeroyd (1952) 2 All E.R. 306*

³⁸ G. Williams, *Textbook of Criminal Law*, 2nd ed., London, Stevens, 1983, p. 618.

³⁹ *Ibid.*

²⁸ A. Ashworth, *Principles of Criminal Law*, op. cit. p. 443.

²⁹ See Sections 4, 509 and 512 of the Criminal Code. The punishment for attempt may also vary according to whether the attempt committed was a felony punishable with death or 14 years imprisonment, or any other kind of felony, a misdemeanor or a simple offence.

³⁰ Turner, *Modern Approach to Criminal Law*, p. 278 in C.O. Okonkwo and Naish, *Criminal Law in Nigeria*, 2nd ed., London, Sweet and Maxwell, 1980, p. 188.

³¹ (1944) 10 WACA 220.

³² (1968) 2 All N.L.R 336.

The primacy of the requirement for the proof of mental state as a prerequisite for attempted criminal liability is seen against the background of the repeated use of the word 'intention' in the *Criminal Code*, which provides that:

When a person intending to commit an offence begins to put his intention into execution by means adapted to its fulfillment, and manifests his intentions by some overt acts, but does not fulfill his intention to such an extent as to commit the offence, he is said to commit the offence.⁴⁰

In the above provision the repeated use of the words 'intention' and 'intending' lay emphasis on the prerequisite of intent. The import of intention in the law of attempt is supported by the saying that there is no liability without fault. Buttressing this deeply rooted principle of law, Nuhu⁴¹ submits: "...this implies that for a person to be criminally liable there must be "volition" and "intention." to commit the offence. The presumption of innocence as encapsulated under the *Constitution of the Federal Republic of Nigeria 1999* presumes that an accused person is innocent until proven guilty".

A number of Nigerian cases may be used to demonstrate the place of *mens rea* in criminal attempt. In *R. v. Offiong*,⁴² the accused person was charged with rape. He had entered a lady's room without an invitation. He undressed himself and expressed a desire for sexual intercourse with her, but did not get hold of her. There was no proof that *Offiong* wanted to rape the woman without her consent. While the court observed that those acts fell short of an attempt to commit rape, it held that what transpired fell within the realm of preparation, and did not constitute an attempt. They were merely acts which indicated that the accused wanted to have and had made preparations to have connection with the complainant. In *Ozuloke v. The State*,⁴³ the accused met a girl of about eight years on the road, took her into a bush, stuffed bread into her mouth to gag her, and covered her eyes. He further poured acid into her body, cut off her ear, and poured acid into her eyes. He left her unconscious, and bolted away. Evidence showed that the accused had a knife on him with which he cut the girl's ear. The child was discovered unconscious the following day, and taken to the hospital. The court of first instance sentenced the accused to twenty-five years of imprisonment having found him guilty of attempted murder. On appeal, the Supreme Court held inter alia that the intent required to sustain the proof of attempted murder was lacking, and until such intent was proved, the charge would not be sustained. The honourable court further maintained that if the appellant carried a knife, nothing would have prevented

him if he minded to cut her throat, therefore, an intention to kill is not a necessary inference from the facts proved. The conviction or the charge of murder could not therefore stand. Still on the presence of intent as a requirement for criminal attempt, in *R. v. Anofi Seidu*,⁴⁴ the accused was charged with defilement of a girl under the age of eleven.⁴⁵ The prosecution's evidence showed that the girl was seen sitting on the laps of the accused, who was wiping her thighs with a cloth soiled with human semen. The girl's private part was examined. Human semen but no blood was found. They could not decipher whether the hymeneal rupture and the conditions of the outer parts of the girl's vagina were recent. It was held that the accused was not guilty of attempted rape. Rather, evidence showed that he only obtained some form of sexual satisfaction without penetration. Thus, he could only be guilty of indecent assault. In *Merit v. Common-wealth*,⁴⁶ the court emphasized the importance of *mens rea* in proof of attempted crime and its liability in this way: "While a person may be guilty of murder though there was no intent to kill, he cannot be guilty of an 'attempt' to commit murder unless he has a specific intent to kill."

The law of attempt to commit a crime requires that an accused must act "with the intent to commit an offence." 'Intent' as used in this context must be distinguished from motive. 'Intent' is "decision to bring about a certain consequence or as the aim."⁴⁷ On the whole, section 4 of the *Criminal Code* requires the proof of intent "to commit an offence," thus *mens rea* or guilty mind or proof of intent is necessary in the proof of criminal attempt. However, attempted crime cannot be committed recklessly or negligently.

Actual Attempt by Overt Acts

Section 4 of the *Criminal Code* provides to the effect that an attempt should also result from doing an act in furtherance of the unlawful intention. The words "manifests his intentions by some 'overt acts,'" as used by the drafters of section 4 are worth examining. Since "manifest" means "to show something clearly" or "to appear or become noticeable,"⁴⁸ then an attempt is only possible where the accused demonstrates his or her intention in a very clear or noticeable manner, hence overt acts. The accused must have begun to put his/her intention into execution, manifesting that intention by some overt act. The overt act depends on the circumstances of each case. In some cases it may be the last of the series of overt acts because up to that point it may not be clear whether the accused was up to commit a particular offence charged, or some other offence. Conversely, it may be the last act where the act is unequivocally an attempt to commit the particular offence in question and no other.

⁴⁰ Section 4.

⁴¹ S. A. Nuhu, "Criminal Responsibility: An Appraisal of Elements and Standards of Criminal Accountability," *Abuja Journal of Public and International Law* (2011 and 2012) 2 and 3, p. 187.

⁴² (1963) 3 W.A.C.A 83.

⁴³ (1965) MNL 125.

⁴⁴ (1960) W.N.L.R 32.

⁴⁵ See Section 218 of the Criminal Code.

⁴⁶ 164 Va 653, 180 S. E. 395 (1935)

⁴⁷ Law Commission in England, Report, No. 102 (1980), p. 217.

⁴⁸ Oxford Advanced Learner's Dictionary, 7th ed, p. 898.

Some difficulties may arise when trying to decipher overt act in relation to attempt in some cases. This is so because not all acts are preliminary to an attempt. Suppose A begins to load his gun aimed at B which is the only evidence, it is not without difficulty to ascertain whether A's overt act is intended to kill, to wound, or merely to frighten B. Since it is uncertain where to pin the attempt to, for he could not be convicted of attempted murder or attempted wounding, assault might suffice.⁴⁹ Although overt act is a fundamental requirement for the commission of an attempt, the act must not be remote from, but immediately connected with it. Parker B, in *R. v. Eagleton*⁵⁰ said:

Some act is required and we do not think that all acts towards committing a misdemeanor are 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 are.

Actus Reus of Attempt

In order to make proper analysis of the *actus reus* of attempt, a reproduction of the statute creating the offence in Nigeria is pertinent. *The Criminal Code* provides:

When a person intending to commit an offence begins to put his intention into execution by means adapted to its fulfillment, and manifests his intentions by some overt acts, but does not fulfill his intention to such an extent as to commit the offence, he is said to commit the offence.⁵¹

Determining the *actus reus* of attempt could be a daunting task for the prosecution. This problem is attributed to the fact that the act that must be established as constituting the *actus reus* in attempt does not only seem vague but difficult.⁵² It should be recalled that *section 4* requires three elements for the *actus reus* of attempt, namely:

- (i) That the accused has begun to put his intention into execution by means adapted to its fulfillment;
- (ii) That he has not fulfilled his intention to such an extent as to commit the offence;
- (iii) That his intention be made manifest by some overt act.

⁴⁹ See *R. v. Seidu* (1960) W.N.L.R. 32

⁵⁰ (1855) 6 Cox C.C. 599.

⁵¹ *Section 4*.

⁵² Knowing when exactly in a series of act the accused has put his intention into execution by means adapted to its fulfillment and when he has manifested his intention in an overt act often pose a problem. This is where the problem with criminal attempt manifests itself. There is no generally accepted rule to be applied in knowing where to draw the line in determining the *actus reus*.

Incontrovertibly, when an offence is completed or consummated, the accused cannot be punished for attempted crime. Distinction between attempt and consummated crime has already been noted. That leaves us with the requirement in *Section 4(ii)* above. But the question that may arise is: When can an accused in (ii) above be said to have actually put his intention into execution by means adapted to its fulfillment and that intention has been manifested in overt acts? Here lies one of the inherent problems of attempt: determining how far someone has to go towards committing an offence before his or her act becomes criminal is a besetting issue. Applying the rule in *section 4*, Okonkwo and Naish⁵³ give an illustration that may help diminish but not eliminate the dilemma in (ii) above, i.e., that the accused has begun to put his intention into execution by means adapted to its fulfillment. A recap of the notional illustration is appropriate. X forms intention of killing Y. He leaves his village by boarding a lorry to a nearby city to buy the poison. He enters a shop, buys the poison, returns to the village, and invites Y to his house. He washes a glass of water, pours a drink, pours the poison, and hands it to Y, who takes it, drinks it, and later dies. If X is arrested at any of the stages making up a series of that hypothetical case, at what stage will it be safe to say that X has committed an attempt? Or at what stage will he be said to have manifested his intention by some overt acts? Assuming that he has reached the last stage, the issue of attempt does not arise. At that stage the offence is completed. It therefore becomes difficult to say that X begins to execute his intent at the time of the purchase of the poison, or the washing of the glass, or the mixing of the drink and poison.

Under the Nigerian *Criminal Code*, the cases so far decided did not lay down guiding principles to be used in applying the provision of *Section 4*. As noted by the learned authors Okonkwo and Naish,⁵⁴ the Nigerian courts have never yet in cases which have come before them given explanation to the law of attempt formula contained in *Section 4 of the Criminal Code*; rather, they have been satisfied to decide cases which come before them on the basis of common sense. Thus, in *R. v. Oluwa*,⁵⁵ a court clerk accepted a cow and promised to influence the court to obtain the donor's acquittal on a criminal charge. The court held that the mere promise does not constitute the attempt to subvert justice. In *R. v. Ajani*,⁵⁶ the receipt of money for the purpose of making counterfeit coins was not sufficient to constitute an attempt "to make or begin to make any counterfeit gold or silver coin" under *Section 147 of the Criminal Code*. In the above two cases, the court reasoned that the accused had not begun to put their intention into execution by means adapted to its fulfillment. Neither the mere promise in *Oluwa* was a means adapted to the influencing of the court nor the receipt of payment in *Ajani* was a means adapted to beginning to make

⁵³ C. O. Okonkwo and Naish, op. cit, p.186.

⁵⁴ *Ibid*, p.184.

⁵⁵ (1943) 9W.A.C.A. 30.

⁵⁶ (1936) 3W.A.C.A. 3.

counterfeit. On the contrary, in *R. v. George*,⁵⁷ the mere posting of a letter procuring another to forge currency notes, was, on English authority,⁵⁸ held to constitute an attempt. In *R. v. Ogunogun*,⁵⁹ a handcuffed prisoner was guilty of attempting to escape when he broke the handcuff. In *George*, the letter was a means adapted to procuring forgery, and in *Ogunogun*, the breaking of the handcuff was a means adapted to escape.

Determining the Actus Reus of Criminal Attempt

Prior to the enactment of the *Criminal Attempts Act of 1981*, the common law flirted with various tests to determine the *actus reus* of attempt. One of these was the “equivocality test” under which an accused had to take sufficient steps towards the crime for his actions clearly and obviously to show that his purpose was to commit the crime.⁶⁰ This test has been described as the test which gave attempts very narrow escape.⁶¹ In *Orijav. I.G.P.* (supra), Smith J. observed that equivocality test is more practical than that in *Eagleton*. The prosecution must prove that the steps taken by the accused must have reached the point when they indicated beyond any reasonable doubt what the end to which such steps were directed was. Salmond⁶² had earlier applied of the equivocality test when he was a judge in New Zealand. Subsequently, the theory was canvassed for and adopted in England. According to Salmond,

An attempt is an attempt of such a nature that it is itself evidence of the criminal intent upon its face – *Res ipsa loquitur*. An act on the other hand which is innocent is not a criminal attempt and cannot be punishable by evidence *aliunde* as in the purpose in which it is done.

It is interesting to note that due to the inherent inadequacy of the equivocality test, it was rejected by the English and New Zealand Courts. Its defect was seen in many instances one of which was where an overt act could show unquestionable criminal intent but was not sufficiently proximate to constitute a crime.⁶³ In *Cambell & Bradley v. Ward*,⁶⁴ A was moving towards his car when he saw B running out of the front seat of A’s car to a waiting car. In the waiting car were two accomplices. A pulled B out of the car, and the trio were arrested. The two accomplices confessed that B was attempting to steal a car battery, adding that he had tried several cars. They were convicted for attempting to steal a battery. On appeal, it was held that A’s conduct was not sufficiently proximate to and equivocal in order to constitute

an attempt.⁶⁵ In New Zealand, the test was replaced by a legislation which provided to the effect that acts done or omitted with intention to commit offence may constitute an attempt if they were immediately or proximately connected with the intended offence, whether or not there was any act unequivocal by showing the intent to commit that offence.⁶⁶

An alternative test to equivocality test, favoured by the *United States of American Penal Code of 1962*⁶⁷ and suggested by the law commission of the United Kingdom, was the “substantial step test.” Drafters of the *American Penal Code* may have had this test in mind when they included the words in the legislation: “An attempt or omission constituting a substantial step in a course of conduct planned to culminate in ... commission of a crime.”⁶⁸ Emphasis of this test seems to be placed on the significance of what the defendant has substantially done. *Section 5.01(2) of the American Penal Code of 1962 Code* further provides that an act cannot constitute a substantial step otherwise it is strongly corroborated by the criminal purpose of the accused. The focus of this test was on the action having to be sufficient to provide evidence of the defendant’s intention. One of the challenges associated with this test which led to its rejection was that it would have amounted to casting the net of liability too wide in the sequence of actions.⁶⁹ However, Williams⁷⁰ has advocated the introduction of the test.

Stephen’s “series of acts” test was yet another common law test under which *actus reus* of attempt could be determined. It was important under this test to determine whether the defendant had committed an act which was one of the series of acts that would lead to the crime contemplated if not interrupted. This test proved unsatisfactory and too imprecise, and could lead to imposition of liability at an intolerably premature stage.

Under the last act test, an accused is only guilty of an attempt when he has actually carried out the last act towards the commission of the offence. The test has been criticized as being very defective both in theory and in practice.⁷¹ In *R. v. Chellingworth*,⁷² the accused person was found in the premises after he had threatened to burn a house situated therein. He had with him a half-empty tin of petrol after he had sprinkled the fuel on the walls of the house. It was held that mere preparation does not amount to attempted arson. The last act test is meant to show the seriousness of the accused’s intent as well as deter him so as to avoid liability even to the last possible moment. It appears that this test would fail to achieve the purpose for which the law of attempt, namely prevention of crime in the society was meant. For example, if

⁵⁷ (1936) 3 W.A.C.A. 31.

⁵⁸ *R. v. Cope* (1924) Cr. App.

⁵⁹ (1944) 10 W.A.C.A. 220.

⁶⁰ *J. Davey v. Lee* (1968) 1 Q.B. 366, 371.

⁶¹ J.C. Smith, *Criminal Law*, Britain, Butterworths, 2002, p. 278.

⁶² J. Salmond, *Jurisprudence*, 7th ed., 1924, p. 248 in C. O. Okonkwo and Naish, op. cit., p188.

⁶³ (Mackie (1957) W.L.L.R. 669.

⁶⁴ (1955) N.Z.L.R. 471.

⁶⁵ See also *Brooks v. Brooks* (1963) 32 Cr. App. R. 6114.

⁶⁶ Section 72 (3) Crimes Act. 1961 N. Z.

⁶⁷ Section 5.01 (1) (c).

⁶⁸ *ibid.*

⁶⁹ Law Com. No. 102 (1980), Para 2.32.

⁷⁰ G. Williams, “Wrong Turning in Law of Turning in the Law of Attempt,” *Crimes Law Report* (1990), p.416.

⁷¹ *R. v. Williams* (1955) C.L.R. 293.

⁷² (1954) QWN 35.

A draws a gun and aims at B even with an intention to murder B, A will not be guilty of attempt because he has not fulfilled the last test act – pulling the trigger. The defect of this test can be seen against the preventive purpose of attempt. Thus, to wait for the accused person to pull the trigger may not only be too late but dangerous. By then the accused would have completed the commission of the substantive crime for which the attempt charged is purportedly brought against him.

The proximity test is common law rule propounded by Baron Park in *R.v. Eagleton*⁷³. In that case, the defendant, a baker made a contract with a local soap kitchen to give loaves of bread to the poor. Under the contract, each person who presented Eagleton with a “ticket” was to get a loaf weighing 3.5 pounds. Eagleton turned in the tickets, together with a statement of the number of loaves supplied, to a relieving officer who would credit Eagleton in his books and made a payment. It was afterward discovered that Eagleton provided loaves to the needy weighing much less than the contracted 3.5 pounds, but represented the loaves as being the appropriate loaves. The court held that Eagleton committed attempt to obtain money by false pretences. Eagleton had committed the last act towards the payment of the money, and was convicted of an attempt. B. Park asserted that:

Some act is required and we do not think that all acts are towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not considered as attempts to commit it, but acts immediately connected with it are.

In *Orijav. IGP*,⁷⁴ the appellant was an employee charged with the responsibility of receiving money from customers and issuing receipts in triplicates, one copy to the payer, one copy to the cashier, and the third copy to be kept in his book. The appellant received £7.10s but the copies of the other receipts showed £4s. 9d. The appellant did not pay the money to the cashier. Later on, the sum of £8.125d was found in his drawer. He was convicted of attempt. Justice Smith noted in that case the steps taken in the manifestation of overt act amounting to the commission of criminal attempt thus: “It is not necessarily the last act in every case which proves the attempt. All that is required is an act immediately connected with the particular offence which clearly shows that the offender was intending to commit it.”⁷⁵

In considering divergent methods adopted in solving the difficulty of *actus reus* in the above cases, it bears reiterating that the problem of criminal attempt persists—no general guiding principles to be used in determining the *actus reus*. So far, and as earlier been noted, Nigerian courts seem to apply the rule in *Section 4* based on “common

sense.”⁷⁶ For example, “immediately connected with” is a phrase common with proximity test. Where this test is strictly applied in a crime of murder or arson, for instance, it means a lot of victims would have been killed or had their property destroyed except in cases of failure or ineptitude on the part of the assailant,⁷⁷ thus defeating the purpose of the law of attempt.⁷⁸

Act must be more than merely preparatory

Indeed, there is a considerable gap between acts remotely connected with the commission of attempt and acts closely connected with it. Put it differently, a distinction must be made between steps taken by way of preparation for the commission of a crime and the actual commission of the crime. Where actions are merely preparatory to the commission of a crime they cannot constitute an attempt, but where such actions are beyond preparation, they are capable of constituting an attempt. The difference between preparation and attempt may not be wide as a matter of fact but it is wide as a matter of law.⁷⁹ Consequently, a distinction must be drawn between preparation and attempt, or between acts constituting attempt and acts constituting preparation. In an effort to show that for an act to constitute attempt it must move beyond the bound of preparation, *Section 1 (1) of the Criminal Attempts Act, 1981* provides:

If, with intent to commit an offence to which section applies, a person does an act which is more than mere preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

Section 1 (1) of the U.K.’s Attempts Act 1981 adds that the accused must “do which is more than merely preparatory to the commission of the offence.” Baron Parke in *Eagleton* had earlier stated that “...acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.”⁸⁰ Achike, J.C.A (as he then was) in the case of *Alhaji Yakubu Sanniv. The State*⁸¹ distinguished between preparation and attempt as follows:

...whilst mere preparatory acts do not ordinarily constitute an offence, a proximate act that falls within the definition of ‘attempt’ may constitute an offence quite distinct and separate from the crime which is committed when the crime is consummated. The line between acts of ‘mere preparation’

⁷⁶C. O. Okonkwo and Naish, op. cit, p.184.

⁷⁷ See *R. v. Chellingworth*, (1954) QWN 35, where the police had to wait until the accused struck the match and set the building ablaze before he was arrested so as to secure conviction as well as to avoid being sued by the accused for wrongful arrest.

⁷⁸ A. Ashworth, *Principles of Criminal Law*, op. cit. 443.

⁷⁹ R. M. Perkins and N. B. Ronald, *Criminal Law*, 3rd ed., New York: Foundation Press, 1982, p. 617.

⁸⁰ Supra

⁸¹(1993) 4 NWLR pt. 285 pp. 99 at 119.

⁷³Supra.

⁷⁴(1957) NRNLR 189.

⁷⁵Ibid .

and 'attempt' is thin and often more difficult to draw in practice. Preparation per se does not materialize to an offence, whereas an attempt to commit an offence is an act or acts which culminate in the consummation of the offence otherwise frustrated.

Preparatory acts are remotely connected with the commission of an offence, while attempt is proximate to the commission of the offence. Still on the 'proximate act rule,' Mohammed, J.C.A.⁸² noted: "Actus reus necessary to constitute an attempt is complete if a prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific offence."⁸³

In *Jegedev. The State*,⁸⁴ the appellant was convicted for rape by the High Court. The victim was an eleven year old girl. The Supreme Court held that for an attempt to amount to rape, it must be the very last act before the commission of the offence. In *R. v. Eagleton*,⁸⁵ the 'proximate act rule' does not simply mean the very last act prior to the commission of the offence; it means the act which clearly manifests the intention to commit that offence. In *R. v. Unakanjo*,⁸⁶ the accused had written, but not posted a letter inquiring for a printing machine. It was held that he did not even manifest a firm intention to prepare for forgery. Two English cases of *R. v. Button*⁸⁷ and *R. v. Robinson*⁸⁸ further illustrate the difference between preparation and attempt. In the former case, the accused attended an athletics meeting, filled in the entry form falsely representing that he had never won a race before, and was considered to contest in the current race. However, he could not apply for the prize money he won before he was arrested. He was held guilty of the attempt to obtain by false pretence. Conversely, in the latter case the accused who was a jeweler, tied himself up and pretended that his shop had been burgled. His intention was to collect insurance money, but he was arrested before he had made any claim. It was held that there was no attempt. The court observed that "if he had made a claim of the money from the underwriters or had communicated to them the fact of the pretended burglary... he could have been convicted."⁸⁹ So long the act falls within the confines of preparation only, and can be abandoned before any violation of the law or transgression of the right of others, it does not constitute an attempt. In explaining the gap between preparation and attempt, Salmond illustrates that "I may buy matches with intent to burn a haystack, and yet be clear of attempted arson; but if I go to the stack and there light one of

the matches, my intent has developed into a criminal attempt."⁹⁰

By Section 4 (3) the U.K.'s *Criminal Attempts Act 1981*, determining what constitutes the *actus reus* of attempt seems to be left at the doorstep of the judge in the absence of a generally accepted legal rule for guidance, but such discretion is bound to witness judicial uncertainty. Besides creating room for a likelihood of miscarriage of justice, most attempts must involve a high level of judicial acumen without which the burden of proof will be too heavy a load for the prosecution to prove, and the injustice too harsh for the victim to bear. In the *Geddescase*,⁹¹ for instance, the accused was found lurking in a toilet for a child whom he could falsely imprison. The court held that because this was not more than simple preparation, it did not qualify as "more than merely preparation," and was seen as not yet implementing the plan. Evidence showing that the accused entered the building armed for his evil plan of falsely imprisoning a child should not have been treated with judicial levity, for it is so dangerous to allow a man who lurks in bathrooms to falsely imprison a child in the neighbourhood to go unpunished because of terminology of the *actus reus*.

In the proof of the crime of attempt, it is often argued that the prosecution must prove the qualification that the overt act of the accused must be sufficiently proximate to the intended crime to form one of the natural series of acts which the accused's intent requires for its full execution. Accordingly, to constitute an attempt, the act alleged must be immediately connected with the commission of the particular offence charged, and it must be more than mere preparatory for the commission of that offence charged.

Abandonment of Attempt

Will an accused person with the requisite intention to commit an offence, whose act has gone beyond mere preparation escape liability if he abandons the act? The accused could nevertheless avoid liability even if his conduct has moved from "mere preparation" into the realm of punishable offence if he has a genuine change of mind, thereby abandoning his plan. Abandonment is an affirmative criminal defence that arises when an accused claims that he has never completed a criminal act because he either abandoned or withdrew from the act prior to it happening.⁹² Abandonment is only required as an affirmative defence, where the abandonment is genuinely voluntary.⁹³ Under some jurisdictions⁹⁴ which recognize abandonment as a

⁸²Supra.

⁸³*Alhaji Yakubu Sanniv. The State* (1993) 4 NWLR (pt. 285) p. 99.

⁸⁴(2001) 7 SCNJ p. 135.

⁸⁵Supra.

⁸⁶(1933) 11.N.L.R 23.

⁸⁷(1900) 2 Q.B. 597.

⁸⁸(1915) 2 K.B. 342.

⁸⁹Supra.

⁹⁰J. Salmond in Glanville L. ed, in Aniedilkpang, "A Critical Analysis of Attempted Rape in Nigeria," (2016), 9, op. cit., p.2.

⁹¹(1996) Crim L. R. 894.

⁹²P. R. Hoebert, "The Abandonment Defence to Criminal Attempt and Other Problems of Individuation" at

<http://scholarhiplaw.berkeley.edu/californialawreview/vol.71/iss2/2>.

Accessed on 9/7/2018.

⁹³New York Penal Code (McKinney, 1975) S. 40. 10(3).

⁹⁴ For instance, New York, California, England and Wales. See also Model Penal Code (MPC Section 5.01(4)) of United State of America.

defence to criminal attempt, proof of genuine voluntary abandonment is of necessity. In the proof of genuine voluntary abandonment, it must be shown that the abandonment was not prompted by the accused's sudden realization that the police or victims have detected the plan or when the accused simply postpones the attempt for a more convenient time. This position of the law is made clearer by the *American Penal Code*⁹⁵ which provides that:

Renunciation of criminal purpose is not voluntary if it is motivated in whole or in part by circumstances not present or apparent at the inception of the actor's course of conduct which increase the probability of detection or apprehension of which make more difficult the accomplishment of the criminal purpose.

In the case of *People v. Staple*,⁹⁶ the accused, a mathematician, while his wife was away in 1967, rented an office on the second floor of a building which was over the mezzanine of a bank. Directly below the mezzanine was the vault of the bank. The accused, who had known the layout of the building, particularly of the place the bank vault was positioned, rented the apartment for the period of 1 month. The Landlord gave the accused 10 days' notice to make some internal repairs and painting prior to the accused's occupation of the building. During the pre-rental period, the accused brought into the office such equipments as drilling tools, two acetylene gas tanks, a blow torch, a blanket and a linoleum rug. Having learnt from a custodian that no one visited the building on Saturdays, the accused drilled two holes into the floor of the office above the mezzanine room on 14 October, 1967. He stopped the drilling and abandoned the closet keys in the premises. The Landlord, who had earlier observed those items, notified the police and handed over the equipment to them. The accused was arrested, and in his written statement, admitted in his confession that he rented the office with intent to burglarize the bank, and that the tools he brought were for the accomplishment of that intent. One of the various issues that were before the court for determination was the issue of whether or not the accused's abandonment was voluntary, which he vehemently contended. The Court noted that in that case there was no proof of any actual interception. However, it could be inferred, the trial judge observed, that the accused became aware that the Landlord had taken control of the office and had handed over the accused's tools to the police. The court held this to be equivalent to interception. The court further observed that the nature of abandonment in a situation of this type, whether voluntary or non-involuntary, is not controlling. Under that circumstance, the relevant issue was to determine whether the acts of the accused had reached such an advanced stage that they could be classified as an attempt. Once that attempt was proved, there would be no exculpatory

abandonment. The court went further to quote a decision in *People v. Camodeca*⁹⁷:

One of the purposes of the criminal law is to protect the society from those who intend to injure it. When it is established that the dependant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime.

In Nigeria, abandonment is not expressly provided for in the section governing criminal attempt. By the provision of *Section 4*, this is a settled position of the law in respect of attempt.⁹⁸ *Section 4 paragraph ii of the Criminal Code* provides that "It is immaterial, except so far as regards punishment, ... whether he desists of his own motion from the further prosecution of his intention." However, voluntary abandonment is for mitigation of punishment as provided in section 512. *Section 512 of the Criminal Code* provides that:

When a person is convicted of attempting to commit an offence, if it is proved that he desisted on his own motion from the further prosecution of his intention without its fulfillment being prevented by circumstances independent of his will, he is liable to one-half only of the punishment to which he would otherwise be liable. If that punishment is imprisonment for life the greatest punishment to which he is liable is imprisonment for seven years.

By virtue of *paragraph iii of Section 4 of the Criminal Code*, it is immaterial that unknown to the accused the commission of the crime was impossible. In other words, it is irrelevant in a conviction for an attempt that by reasons of some circumstances unknown to the accused. It is clear that the voluntary nature of abandonment is essential for mitigation of punishment. Glanville Williams argues in terms of negation of *mens rea*, and submits that "...where the accused has changed... his mind, it would only be just to interpret his previous intention where possible as only half-formed or provisional, and hold it to be an insufficient mens rea..."⁹⁹ Wasik asserts that "any {such} suggestion ... would greatly undermine the law of attempt."¹⁰⁰ In conclusion, Wasik states that abandonment should only be relevant in mitigation of sentence.

⁹⁷ 52 Cal. 2d 142, 147.

⁹⁸ Section 4 of the Criminal Code.

⁹⁹ G. Williams, *Criminal Law: The General Part*, London, Stevens & Sons, 1961, pp. 620-621.

¹⁰⁰ M. Wasik, "Abandoning Criminal Intent," *Crimes Law Report* (1990) 785, pp. 787-8.

⁹⁵ Section 5.01(4).

⁹⁶ 6 Cal. App. 3d 6.1.

Attempting the Impossible

By paragraph iii of Section 4 of the Criminal Code, it is immaterial that unknown to the accused the commission of the crime was impossible. That is to say it is irrelevant in a conviction for an attempt that by reasons of some circumstances unknown to the accused that it would be impossible in fact to commit the offence. The position of section 4 on impossibility of attempt may be illustrated this way: what is the position of the law if A smuggles dried lettuce leaves in the erroneous belief that they are cannabis, or if B puts sugar in C's drink in the belief that it is cyanide, or if D shoots a gun at F in the night believing that it is E that is standing? Despite these seeming impossibilities, section 4 imposes liability on the accused. Accordingly, a man is guilty of attempted stealing if he puts his hands into an empty bag intending to steal from it.¹⁰¹ Similarly, he is guilty of attempted murder if he places poison in a drink with intent to kill, even though such dose has no killing efficacy.¹⁰² As long as he has an intent – a blame worthy one at that – and adapts the means to its fulfillment, liability is imposed irrespective of whether unknown to him it would be impossible to actualize his intent.

It is important to note, however, that the word 'impossibility' as used here refers to physical impossibility. Where it involves legal impossibilities, there can never be attempt. A typical example is where, as provided by law, a child under the age of 7 cannot be criminally responsible for an offence.¹⁰³ Such a child lacks the *mensreato* to be guilty of an offence. Furthermore, an accused who believes because of a mistake of law that a particular conduct constitutes an offence when it is in fact not so, is not be guilty of an attempt if his action is in accordance with his intent. Thus, an accused who intends to smuggle certain goods through the customs believing that they were dutiable, if under the relevant law, these goods are indeed not dutiable. His mistake is entirely one of law, and his attempt to import does not render him liable for an attempt to import goods without paying duty, since he did not have an intent to commit an offence known to law. A mistaken belief as to the physical renders the accused culpable. If, for instance, a pregnant woman in an intention to procure the abortion of her baby takes something which, though would not result in the abortion, she is liable for attempted abortion.

Under the common law, impossibility is classified and discussed in three-fold:

(a) Legal Impossibility

This involves a class of cases where there should be no liability because although the accused has done all that is physically intended to do, yet what he has done is not a crime. Consequently, the accused cannot be guilty. In *Haughton v.*

Smith,¹⁰⁴ the accused was charged with attempting to handle stolen goods. The goods, unknown to him had been recaptured by the police thereby ceasing to be stolen goods when the attempted handling was made; he was held not guilty of attempt. Legal impossibility arises when the intended act, even upon completion, would not amount to a crime.¹⁰⁵

(b) Physical Impossibility

Under legal impossibility, a person would not be guilty of a criminal attempt if he advances over a complete crime which is impossible. In other words, it would be physically impossible for the defendant to commit the complete crime, irrespective of the means he adopts. It is impossible for a person to pick an empty pocket. The case of *Haughton v. Smith* (supra) is a typical example. The accused was held not liable, as it was impossible to commit attempt after the stolen goods had been recovered by the police. In *Partington v. Williams*,¹⁰⁶ the accused removed a wallet from a drawer and looked it over with intention to steal some money. The wallet was empty. Relying on the authority of *Haughton v. Smith*, he was held not guilty. In that case, the court had the reasoning that in such cases liability could not arise because the commission of the substantive offence was in the circumstance not possible. In *D.P.P. v. Nock*,¹⁰⁷ the House of Lords considered the limits of *Haughton v. Smith* in respect of attempt to commit the impossible, and held that liability depended to a large extent on the way in which the particular indictment was framed. Where a charge is made specific, liability may elude the prosecution; but where it is made generally, e.g. the accused is charged for attempted stealing generally, and not to steal a specific thing.

(c) Impossibility through Ineptitude

Impossibility through ineptitude arises where an accused does something inefficient or insufficient towards the commission of an offence. In *Whyte*,¹⁰⁸ the defendant while trying to kill his mother with poison used insufficient quantity of poison. He was convicted for attempted murder. In *Zainab Abidin b Ismail*,¹⁰⁹ despite the fact that the defendant's impotence prevented him from raping a woman, the Brunei court convicted him for attempted rape. The court regarded it as a case of impossibility through ineptitude capable of incurring liability. An English authority¹¹⁰ is of the opinion that there exist some classes of cases where there should be no liability at all. The reason, it opines, is the impossibility is such that it can be inferred that the accused is not "on the job" of putting his intention into executing even though he may

¹⁰⁴ (1974) 3 All E. R. 217

¹⁰⁵ See *Wilson v. State 85 MISSI 687*, where the accused altered the amount in figure on a cheque but not the amount in words. The court held that he was not guilty of attempted forgery because the crime of forgery requires alteration of a material part of the document.

¹⁰⁶ (1975) 62 Cr App. R. 220.

¹⁰⁷ (1978) A.C. 979.

¹⁰⁸ (1910) 2 K. B. 124.

¹⁰⁹ (1987) 2 M. L. J. 174.

¹¹⁰ See *R. v. Osborn* (1920) 84 J.P. 63.

¹⁰¹ *R. v. Ring* (1892) 8 T.L.R. 326.

¹⁰² *R. v. White* (1912) 2 K.B. 124.

¹⁰³ Section 30 of the Criminal Code.

think he is. Thus, where in *R. v. Osborn*,¹¹¹ the accused fired a gun at a free-stump thinking it to be whom he intended to kill or in *B. v. Collins*,¹¹² where the accused took an umbrella believing it to be someone else's, but in fact was his, it would be absurd to convict them of attempted murder and attempted stealing, respectively.

The Criminal Attempts Act 1981 in the U.K. has substantially altered the position of the common law. *Section 1* in its sub-sections provides:

(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

(3) In any case where –

(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but

(b) if the facts of the case had been as he believed them to be, his intention would be so regarded then for the purpose of subsection (1) above he shall be regarded as having an intent to commit that offence.

According to *section 1 (2)*, there can be liability for attempting the impossible, whatever the form of impossibility. *Section 1 (3)* provides that where a person believes the facts to be such that he would be committing an offence, he is to be viewed as having the requisite intention to commit the offence. The House of Lords in *Anderton v. Ryan*¹¹³ had varied the position of the law when it surprisingly upheld on appeal the conviction of the accused for dishonestly attempting to handle a stolen video recorder having believed it was stolen. The House of Lords distinguished between 'objectively innocent acts' and 'Criminal or guilty' acts, distinctions which have led to Clarkson's¹¹⁴ accusation of the Law Lords of ignoring parliament's decision and creating confused distinctions. Subsequently, the House of Lords overruled itself in *R. v. Shivpuri*,¹¹⁵ where the accused thinking he was dealing in prohibited drugs without knowing that the substance in his possession was snuff, and held that in all cases of attempting the impossible there could be criminal liability.

The position of the law of attempting what is impossible in Nigeria is captured by *Section 95 of the Panel Code*¹¹⁶ and *Section 4 (iii) of the Criminal Code*. The intention of the former law can best be illustrated by a situation where X, intending to steal some money from Y's box, breaks open the box and discovers to his chagrin that the box is bare. X has done an act towards the commission of stealing and

consequently is guilty under the Panel Code. In the latter law, by *Section 4 (iii)*, it is "immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence." Owoade¹¹⁷ acknowledges that the nature of impossibility intended by this section is in tandem with what Anglo-American scholars have described as "inherent impossibility." Thus, in *R. v. Odo*,¹¹⁸ the accused placed some charm in the court room with the intention to influence the court to give a favourable judgment in a case contrary to *Section 126 (2) of the Criminal Code* which provides to the effect that any person who attempts, in any way not specifically defined in the Code, to obstruct, prevent or defeat the course of justice is guilty of a misdemeanour punishable with two years' imprisonment. The court convicted the accused albeit his appeal was allowed on other grounds. It was immaterial that the belief of the accused in the potency of the charm was false. Inherent impossibility rule envisages situations where the law provides safeguards against unreasonably dangerous acts.

Punishment for Attempt

Like the principles applied in determining what constitutes the *actus reus* of attempt, there is no generally accepted method of punishing a person guilty of attempt. The method varies from one jurisdiction to another.¹¹⁹ In Nigeria, *Section 509 of the Nigerian Criminal Code* deals with punishment of attempt to commit felonies. It provides that an attempt to commit a felony of such a kind that a person convicted of it is liable to the punishment of death or of imprisonment for a term of fourteen years or upward is guilty of a felony and is liable to seven years imprisonment in the absence of any other punishment provided. Under *Section 320*, attempted murder attracts life imprisonment. *Section 312*, however, reduces punishment for genuine abandonment. It provides that the accused is liable to one-half of the punishment to which he would otherwise be liable. Attempt to commit any acts of felony makes the committer liable to a punishment equal to one-half of the greatest punishment for the consummated offence. While *Sections 510 and 511* provide for punishment of attempt to commit misdemeanor and simple offences, respectively, they also provide punishment for the consummated offences each. Under *the Nigerian Panel Code*,¹²⁰ once it has been established that an accused did commit the offence for which he is charged and is subject to punishment, if no express provision is made either

¹¹⁷ M. A. Owoade, "Contemporary Problems in the Law of Attempt in Nigeria," *Nigerian Law Journal*, (2001) 14(1), p. 10.

¹¹⁸ (1935) 4 W. A. C.A.442.

¹¹⁹ For instance, in England and Wales, attempted murder is an offence under *Section 1(1) of the Criminal Attempts Act 1981* which carries a maximum penalty of life imprisonment (the same as the mandatory sentence for murder). The equivalent legislation for Northern Ireland is under *Section 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983* (No.1120 (N.I.13)). Under *Section 7 of the Old Theft Act 1967* in England, completed crime of theft is punishable with a maximum of seven years imprisonment and attempted theft can also be punished up to a maximum of seven years imprisonment.

¹²⁰ *Section 95*.

¹¹¹ *Supra*

¹¹² (1864) 9 Cox C.C. 497

¹¹³ (1985) A. C. 500(H.L.).

¹¹⁴ C. M. Clarkson, *Understanding Criminal Law*, London, Fontana, 1987, p. 112.

¹¹⁵ (1987) A. C.1 (H.L.).

¹¹⁶ Cap. P. 3 Laws of the Federation of Nigeria 2004.

under the *Panel Code* or any other law, to imprisonment for a term “which may extend to one-half of the longest term provided for that offence or with such fine that is provided for the defence with both.”

It is a rule of criminal procedure act that an accused charged with attempt cannot subsequently be discharged if the full offence is proved. But he may be convicted of the attempt or the full offence. Similarly, if an accused is acquitted of a charge of committing an offence, he cannot afterwards be convicted of attempt to commit that offence. In the same vein, an accused cannot be convicted of a full offence after he has already been convicted of attempt of the same offence. A review of the case of *R. v. Olu*¹²¹ is instructive. In that case, the appellant, a native High Court clerk promised the donor that he would use his position to influence the donor's acquittal having received a cow from the latter person, who was facing a criminal charge before the court, contrary to *Section 155 of the Criminal Code*. The court noted that in the absence of evidence that the accused used his influence as promised, he could not be convicted of the offence charged. The trial court, however, held that the accused's promise to use his influence to manipulate justice constituted an attempt to commit the offence, and the court convicted the appellant. The Appeal Court observed that an attempt to commit the offence, should such attempt be possible it would consist of an “attempt to accept the cow... for inducing...” Furthermore, the court held that a promise to use his influence did not amount to manipulating the tribunal but did not satisfy the wording in *Section 115 of the Criminal Code* in order to warrant a conviction for the substantive offence than it could not warrant the conviction for the attempt. Consequently, the West African Court of Appeal set aside the decision of the lower courts, submitting that the conviction for an attempt should not have been substituted with the conviction for the substantive offence by the appeal court.

Questions are always raised as to whether attempt and completed crimes should attract the same punishment, or if attempt should attract lesser punishment than consummated offence should. Scholars are divided over the answers to such questions based on divergent reasons they have advanced in relation to the social effect of attempt. While Becker¹²² believes that attempts and consummated crimes are equal due to ‘social volatility,’ as a result the two offences pose the same harm and should have equal punishment; Brady¹²³ contends that attempt should attract lesser punishment because absence of harm or less danger occasioning attempt pales into insignificance as against the harm which is as a result of completed crime. Attempt and completed crime under this head are weighed based on the harm associated with each of them. They have also been viewed based on the danger that each of the offences poses. Another School of

Thought places emphasis on culpability of the defendant's intent. The attempter, according to this argument, is as guilty as the committer of a full offence if, having had a blameworthy intention he does everything in his position to cause harm but fails due to some fortuity.¹²⁴

Problems of Attempts and Legal Options

Under the Nigerian Criminal Law, some substantive crimes are in effect attempts to commit other crimes. For instance, the crime of burglary¹²⁵ is an attempt to commit some other crime (felony). Similarly, the crime of assault¹²⁶ is an attempt to commit battery. This is equally applicable to *Section 512 of the Criminal Code*, which provides for various situations of unlawful possession of dangerous or offensive weapons or instruments provided for in subsection (a)-(g). Consequently, the difficulty that often arises is an accused may argue that his conduct merely amounts to an attempt to attempt which reflects the view that any conduct not amounting to an attempt is “mere preparation.”

Similarly, from the above discussion therefore, it is safe to state that there is no general theory of attempt. This problem stems partly from the distinction drawn between “means” that are adapted to the fulfillment of the intention and the “overt act” which manifests the intention by *Section 4 of the Criminal Code*. According to the provisions of the code, the intention may be manifested by an act, not itself a means adapted to the fulfillment of the intention. If, for instance, Uduak writes a letter to Alphonsus cuing him on his intention to kill Ikono, he has begun to manifest his intention by a means not adapted to the fulfillment of his intention. Nevertheless, the court in *Orija v. I.G.P.* appears to confuse the “means” and “overt act” requirements by holding that a clerk's falsification of a firm's receipt book only proved his intention to steal but that “there was no act which manifested his obvious intentions to steal by beginning to put his intentions into execution.” The accused was therefore held not guilty since the law does not punish mere intent. Therefore, there is no gainsaying the fact that Nigerian courts have been faced with problems regarding the requirements of the offence of attempt when it comes to determining what constitutes the *actus reus* of the offence of attempt. The case which clearly illustrates this is *Orija v. I.G.P.* above, where the court appeared to be confused with the “means” and “overt acts” requirements. It is submitted that this case should have been decided otherwise considering the arguments put forward in this essay.

¹²⁴ For detailed discussion on the diverse views of scholars on these theories, see M. Davis, “Why Attempts Deserve Less Punishment than Complete Crimes” *Law & Philosophy*, (1986) 5(1); J. C. Smith, “The Element of Chance in Criminal Liability,” *Crimes Law Report* (1971) 6(3); and S. J. Schulhofer, “Harm and Punishment: a Critique of Emphasis on the Result of Conduct in Criminal Liability” *University of Pennsylvania Law Report*, (1974), 122, p. 1493.

¹²⁵ *Section 411 of the Criminal Code*.

¹²⁶ *Section 262 of the Criminal Code*.

¹²¹ (1943) 9 WACA. 30.

¹²² L. Becker, “Criminal Attempt and the Law of Crime” *Philosophy and Public Affairs*, (1978) 3(263), p. 273.

¹²³ J. Brady, “Punishing Attempts,” *The Monist* (1980), 60 (246), pp. 247 – 9.

Even though it is not as practically easy to distinguish between preparation and attempt, or to make a distinction between acts which constitute preparation and acts which constitute attempt as it is in theory, the Nigerian courts should be more careful in the application of the theories of attempts of foreign jurisdictions as are introduced by the Nigerian courts. This is so because, some of these theories do not do more than frustrate the efforts of the security agents in their arrest of criminals for the purpose of maintaining law and order. The last act test theory is worth reexamining. For instance, if the Police in *R. v. Chellingworth*,¹²⁷ had waited until the accused struck the match and set the building ablaze before arresting him so as to secure conviction and also avoid being sued in turn by the accused for wrongful arrest, it is submitted that this would appear rather unreasonable. Also, *R. v. Robinson*, supra, is a case which shows a clear manifestation of defendant's intention to falsely claim the insurance money for his jewelry but was forestalled by the police's search. He was held not to be guilty of attempt. These cases, rather than serving the object of the law of attempt defeat its purpose. The need to nip crime in the bud is therefore lost. A good law should respond to the needs of the society at all times, but should not be too beneficial to the accused as exemplified by these two cases and a chain of others.

It is submitted therefore that a separate law on attempt should be enacted, and the law should vest in the judge discretion to determine the *actus reus* of attempt. It is also proposed that the law should set general rules to govern the judge's exercise of his discretion. Any requirement short of or in excess of this, for the purpose of conviction, will not only defeat the *raison d'être* for the law of attempt under the criminal code but will also leave the intending criminal with too wide a gap to test his ability to commit certain crimes. Besides, it is proposed that the courts should live up to their judicial responsibility of construing the Code accordingly instead of pegging cases which come before them on English Law because the Code differs from English Law in some respects.¹²⁸

CONCLUSION

This paper has analyzed criminal attempt from both theoretical and practical standpoints. In achieving this, difficulties inherent in the law of attempt have been delineated most especially the problem bedeviling determination of what constitutes the *actus reus* of attempt. In the course of that, it has also made copious references to the law of attempt in other jurisdictions including the United Kingdom and United States of America.

The paper proffered suggestions out of the quagmire of attempt. It recommended inter alia enactment of a separate

law of attempt that would not only vest in the judge discretion in determining what constitutes the *actus reus* of attempt but also guide the judge in the exercise of that discretion based on individual cases that would come before them. The proposed enactment should encompass provisions relating to desistance, impossibility, abandonment and punishment.

¹²⁷Supra.

¹²⁸For instance, whereas Sections 480 and 514 of the Criminal Code punish mere preparation to commit forgery and preparation to commit crimes with explosives, respectively; English Law relying on various theories of attempt may not.