CASE COMMENT

THE LAW OF ATTEMPT

TSEHAI WADA*

Salient Facts [1]

Case No. One[2]

Respondents were charged for an attempt to hijack an airplane in domestic flight at the Dire Dawa Airport. Both respondents [as members or sympathizers of an armed opposition group] travelled from Addis Ababa to Dire Dawa with the intention to hijack a plane in domestic flight and demand the release of other comrades in arms who were in detention. Though it is not known where they acquired the arms, Respondent No. One had a bomb, a fuse, and a knife concealed in his shoe/s' sole while being apprehended at the security check point, which is quite a few meters away from where the plane was parking to take its next flight. Respondent No. Two, who is charged for unauthorized possession of arms, was sitting in the airplane while his friend was apprehended and the reason for his arrest was that his photograph was found in one of the bags belonging to Respondent No. One and it was presumed that they had conspired to commit the crime together.

The First Instance Court acquitted both respondents on the ground that the acts done by Respondent No. One do not amount to attempt [put differently, they amount to preparatory acts which are not in principle punishable] and that Respondent No. Two did not carry any weapon at the relevant time.

The Prosecutor lodged this appeal contending that all acts done by the respondents amount to attempt, while the defence counsel argued in defence that in order that the acts be considered as attempt, there needs to be a direct movement in the air plane. Thus, whatever is done before this, amount to preparation but not attempt.

The Supreme Court reversed the lower court's decision on the following grounds:

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* Assistant Professor, Faculty of Law, AAU.

[1] Note – an abridged form of part of this comment relating to Case No. Two was published in Duke House Newsletter No 1 , 1st Year and this was a one time in-house students' journal. This comment is, however much different from the previous one.

[2] Criminal Appeal File No.18/87, decided by The Federal Supreme Court, Criminal Bench. In the case, the Appellant was the Central Prosecutor and Respondents were: Ato Lemma Hunde and Lieutenant Benti Dinegde. Justices of the Supreme Court were: Abate Yimer, Menbere Tsehai Tadesse and Mekuria Endeshaw.

- Though unlawful possession of arms is a crime by itself, an attempt to pass such items through the checkpoint and then into the plane is not an easy task. From the reasonable person's point of view, a person who attempts to pass these items through such a narrow and dangerous pass has a firm intention which cannot be reversed.
- Respondents were apprehended after having meticulously done all these acts so as to enter into the airplane and these certainly confirm their firm decision to realize their plan which they had admitted to do against the plane. This certainty is manifested when seen in light of the proximity of the acts in terms of time and place.
- As far as space proximity is concerned, Respondent No. Two had managed to enter into the plane that was intended to be hijacked and Respondent No. One was near the plane. The time was when the plane was readying to take off and the pilot and passengers who could have been taken as hostages were on board.
- These indicate that had the respondents not been apprehended at the checkpoint, a condition had been created whereby they were very close to realize their plan.
- Concluding that the acts done against a civil air craft amount to preparation, defeats the purpose of the law which is to prevent the commission of crimes beforehand, i.e. nipping such designs in the bud. There is a possibility that if respondents get the plane with its pilot, they could have done what they want in a short span of time.
- Regarding the case of Respondent No. Two, as he had admitted that he had conspired with the other appellant to hijack the plane, it cannot be concluded that he had not assisted in the collection of the items – to be used in the crime.

Thus the lower court's decision is reversed.

Case No Two[3]

The appellant was charged for attempted homicide -in the first degree – in that he, with other three accomplices: had organized a killer squad, transported arms such as pistols with silencers, flammable bomb materials from Ethiopia to East Germany and then to West Germany, with a view to kill a number of opposition parties' members residing there. The appellant appears to be a facilitator of the crime for his involvement was that of communicating with the Minister of the then Ministry of Security rather than doing any other overt act to accomplish the criminal design. The other participants though not parties in this case, took all the necessary materials to their hotel and started to check whether they are functioning well but found that one of the timers was malfunctioning.

[3] Criminal Appeal File No.1324, decided by the Federal Supreme Court. In the case, the Appellant was, Captain Melaku Rufael and the Respondent was the Special Prosecutor. The Justices were, Tegene Getaneh, Desta Gebru and Asegid Gashaw.

They attempted to buy a replacement but this cannot be achieved, for shops were closed. In their attempt to repair the timer, the explosive went off without killing anyone except for property damage sustained by the hotel in which they were lodging at the time.

The intention of the group was to plant these explosives wrapped in books, at a library and an office wherein the intended victims were supposed to be at the time. Some other explosives intended to be planted under the vehicles belonging to some of the victims were not made use of for the failure in the first attempt.

The lower court convicted and then sentenced the appellant with life sentence and this appeal was lodged to reverse this decision.

Major contents of the appeal are that: the appellant and his accomplices did not start their journey to the library in which the intended victims were supposed to be present, it is not proved that the victims were in the library at the relevant time, the explosive went off at the hotel while the accomplices were adjusting a malfunctioning timer, thus, since they had not adjusted the timer and started their journey to the library, all what they did amount to preparation but not attempt.

The Prosecution responded that the appellant and his accomplices had designed a perfect criminal design, identified the victims as well as their whereabouts, transported the necessary arms and adjusted them for action and all these show that they had done all what they can under the circumstances and all these amount to attempt but not preparation.

The appellate court, in reversing the decision reasoned out that: the explosives went off at the hotel wherein the accused were staying while adjusting the timer but not at the library as alleged by the prosecution. Moreover it was not proved that the victims were in the library at the relevant time. Though it is proved that arms and members of the squad had been transported from Ethiopia to Germany and that the location where the explosives should be placed was chosen and the book to put the explosive was readied, all these are acts done before doing the last decisive act. Per Art.27 of the Penal Code, an act passes the stage of preparation or put differently, execution begins, when the last preparatory act is done. This means, that all things necessary for the commission of the crime should be ready and that the actor should be in a position to say that I have done everything on my part to commit the crime.

In the case at bar, it is proved that the accused had the intention to commit a crime. This mental element alone, however, is not sufficient to convict him of a crime as provided under Art.23 of the code. Moreover, preparation alone is not punishable unless provided expressly. Accordingly, the explosive went off at the hotel where they were lodging before they started their journey to the library. It is not proved that the malfunctioning explosive was repaired or replaced by another. What is known is that the timer was not functioning and that the attempt to replace it could not succeed for shops were closed. Thus since it is not proved that the timer was repaired or replaced, it

is not possible to conclude that acts done before the explosion, have passed beyond the preparatory stage.

Per Art.27/1 of the code, the offence is deemed to be begun when the act performed clearly aims, by way of direct consequence, at its commission. Though it may be said that acts done before the explosion, are acts done to commit the crime, the act that would have brought about criminal liability would have been that act which clearly aims at the homicide that was intended to be done at the library and at the office of one of the intended victims. This thus shows that there were other major acts to be done [before the realization of the design]. What is more, [in order to conclude that the acts amount to attempt], the works to be done on the explosive should have been completed, the malfunctioning timer should have been repaired or replaced, and the arms should have been transported to the library. In order to commit the crime, it should also have been checked that the timer and the explosive function properly and that the explosive was put ready to explode. Thus, we cannot conclude that all acts done before these decisive acts clearly aim by way of direct consequence at the commission of the homicide.

In order to convict the appellant for attempted homicide, the act should have been materially proximate and unequivocal. The acts done till the explosion, when seen in contrast with other decisive acts that remain to be done, however, do not reveal material proximity nor certainty and they did not pass the stage of preparation. This does not, however, mean that in order to conclude that a crime is attempted, one should wait till the last act is done but that it should have been proved with certainty that the crime was to be committed and that [the acts have reached] at a decisive stage.

Accordingly, the appellant is not found liable for the crime charged but found liable for unauthorized possession of arms under Art. 41/1 of Proclamation 214/1974 [E.C.] and thus sentenced to twelve years of rigorous imprisonment.

Major standards[4]

To begin with, it may be said that under Ethiopian law[5], in the strict sense, the legal standards for preparation are: procuring the means and creating conditions for the

[4] The standards are generously taken from Graven, Philippe, *An Introduction to Ethiopian Penal Law*, Haile Selassie University,. 67-80 and Wayne R.LaFave *Substantive Criminal Law*, Current through the 2007 Update, Section 11.4. The 2007 edition is written by David C. Baum Professor of Law Emeritus and Professor Emeritus in the Center for Advanced Study, The University of Illinois.

[5] Relevant articles of the then Penal Code are:

Art. 26. Preparatory acts

commission of an offence [Art.26]. As far as attempt is concerned, the legal requirement is doing an intentional act which clearly aims by way of direct consequences at its commission [Art.27]. This single standard is also known as the standard of "unequivocality or certainty."

With regard to preparation, the act of "procuring means" of commission of a crime is clear enough so as not to demand any explanation. On the other hand, the standard of "creating conditions" though vague, may simply be understood as facilitating the commission of the crime but not necessarily going any further.

In addition to t he above standards, authoritative texts on the subject, i.e., law of criminal attempt, acknowledge the presence of other standards. All these standards are discussed here bellow albeit, briefly.

1. **Equivocality/certainty -**

It is often said that preparatory acts are equivocal while acts of attempt are certain. The major point in this regard is determining the intention behind doing an act. This again calls for other standards known as "the *res ipsa* loquitur [facts speak for themselves] and the only reasonable inference". Accordingly, under the first test the act done should show by itself the intent behind and under the latter, reasonable minds should agree unanimously that the actor did the act with a simple purpose of achieving the criminal design but nothing else.

Acts which are merely designed to prepare or make possible an offence, by procuring the means or creating the conditions for its commission are not punishable unless:

(a) in themselves they constitute an offence defined by law; or
(b) they are expressly constituted a special offence by law by reason of their gravity or the general danger they entail. And

Article27. Attempt

1. Whoever intentionally begins to commit an offence and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the offence shall be guilty of an attempt.

The offence is deemed to be begun when the act performed clearly aims, by way of direct consequence, at its commission.

[Subs 2 and 3 are omitted]

2. Proximity

The common understanding in the law of attempt is that, acts of attempt are proximate, while acts of preparation are remote. It may, however, be easily understood that this standard is subjective for no law sets the exact limit of proximity. As one of the controversial standards, so many other tests are employed to narrow down the disparity that may arise in employing it. These are discussed hereunder:

2.1 - The last proximate act - this test demands that the actor should do everything that he believes necessary to bring about the intended result[6].

2.2 - Obtaining the indispensable element – this test demands the acquisition of means of commission such as ballot in the case of illegal voting or deadly weapon in the case of assault.

2.3- Physical proximity – under this test, the emphasis is not so much upon what is done as upon what remains to be done and the time and place at which the intended crime is supposed to occur take on a considerable importance. In this regard, it is suggested that account must be taken of "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result.

3. The probability of desistance

Under this test, the act must be one in which in the ordinary course of events would result in the commission of the targeted crime except for the intervention of some extraneous factor and that the defendant's conduct must pass that point where most men, holding the same intention would think better of their conduct and desist[7].

4. Substantial Step

This standard is also known as the Model Penal Code's[8] standard and its main contents are that: conduct cannot constitute a substantial step unless it is strongly corroborative of the actor's criminal purpose; the emphasis is upon what the actor has already done rather than what remains to be done; liability will be imposed only if some firmness of criminal purpose is shown; and the conduct may be assessed in light of the defendant's statements.

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[6] This test is abandoned at least in the Common Law jurisdiction. See LaFave.

[7] This test is criticized as a highly artificial device and that it lacks an empirical basis. See LaFave.

[8] This is an American model code and it has served as an authority for judicial interpretations and basis for re codification.

Though not discussed in the above style, other standards of attempt are also provided in the seminal work of Philippe Graven and the major standards are the following[9]:

1- **Objective and subjective standards** -

The attempter's liability to punishment is based on objective reasons (creation of abstract, and not concrete, danger) as well as subjective ones (intent to do wrong).The manner of estimating the beginning of execution and, consequently, the field of attempts, vary considerably depending on whether the danger is said to lie in what the attempter does or in what he is..... [pronounce judgment on the act... [objective conception] or on the person who did it [subjective conception].

2. **Irrevocable intent** -

There is a punishable attempt when the acts done show that the doer has an irrevocable criminal intent, when the moral distance between what he did and what he desired to do is so small that, had he been left to himself, he would almost certainly have crossed it.

3. **The point of no return** -

The doer should ...be beyond what might be called the point of no return; he should have taken a decisive step towards the commission of the offence, i.e., a step such that only circumstances beyond his control, and not a change of purpose, would subsequently prevent or have prevented the desired result from being achieved."

4. **Probability of abandonment** -

[Execution begins]...with any act which, in the doer's estimation amounts to a decisive step towards the attainment of his goal....admittedly, even at this stage, the doer may still of his own motion abandon the execution of his design...but, this abandonment is not in the ordinary course of things.

5. **Mental and material proximity**

Given the fact that the criminal law in general and the law of attempt are highly influenced by the concept of subjectivity, the mental rather than the material proximity is the decisive factor in judging whether or not an act amounts to attempt or preparation and that if a person has formed an irrevocable intent to commit a crime, how close he would be to causing harm if everything went according to his plan, is

[9] Note that some of the following standards are very similar to the above. They are discussed here for the sake of comprehensiveness only.

immaterial. He may be found guilty of an attempt even though many movements remain to be made, by himself or another person.

On the ....other hand if one were to require in addition that this act should tend directly or immediately towards the commission of an offence or should speak for itself..., one would undermine the very foundation of the subjective conception. Based on this subjective conception, what matters is the dangerous disposition of the person, but not necessarily material proximity. Accordingly, if objective proximity were a condition for the existence of an attempt, it should logically follow that the execution of an offence is begun only when an act is done which creates a concrete danger.

Testing the cases against the different legal standards

1. **Under the standard of Equivocality** – equivocal acts do not speak for themselves. Thus, such acts may or may not indicate a criminal design. Such is the case when one buys a box of matches or a knife which may be used for innocent as well as criminal ends. Moreover, this standard compels one to infer into the purpose behind doing the act and if the only reasonable inference is that the act was done to commit a criminal act, then this should amount to attempt.

Under normal circumstances a civil passenger does not carry the types of items mentioned in Case No. One. The items mentioned in Case No. Two are also deadly and there is no reason why anyone should transport and store them at such places like hotels, except to commit a crime. No reasonable mind will conclude that the possession of these items can be for an innocent purpose. Thus, in the absence of any other [innocent] motive to possess such dangerous items at these places, the lower court in Case No. One and the appellate court in Case No. Two, should have decided that acts done by the defendants [in the first instance court][10] amount to attempt and convict them accordingly[11].

2. Under the standard of proximity – This standard as shown above makes use of three tests namely, the last proximate act, acquiring the indispensable instrument and physical proximity. It appears that in Case No. Two the appellate court has based its

[10] Note – respondents in case No. One and appellant in case No. Two are mentioned as defendants hereunder.

[11] It is interesting to note here that, in a similar case to Case No. One, in the US, in the case, United States V Brown, 305 (W.D.Tex.1969), a person with a gun in his pocket, who checked in at the airline ticket counter and took a seat in the departure lounge, had been found guilty of an attempted offence of boarding an aircraft while carrying a concealed weapon. See LaFave at Foot Note 16.

decision mainly based on the standard of the last proximate act, though it seems to contradict this by stating that "This does not, however, mean that in order to conclude that a crime is attempted, one should wait till the last act is done but that it should have been proved with certainty that the crime was to be committed and that [the acts have reached] at a decisive stage." However, as indicated above this is an outdated test. It is also very dangerous to argue that a criminal should be allowed to do the last act before the law takes its own course.

In both cases, defendants had acquired the indispensable instruments, which were the items they intended to use and they did not need other instruments under the circumstances. Thus, their acts till they were apprehended meet this criterion and they should have been convicted under this test alone.

Though physical proximity is a subjective standard, it may be argued that acts done by defendants are by far significant compared with what remains to be done by them. Travelling all the way from Addis Ababa to Dire Dawa – more than 500 Kms. then to the airport and the checkpoint is not comparable with the distance between the checkpoint and run way where the plane was taxing – probably 300 or so meters. In Case No. Two too, the distance covered – AA to W. Germany - is quite substantial compared to the distance between the hotel and the library. It should also be noted that taking the seriousness of the crimes intended and the seriousness of apprehension, this standard should be applied restrictively. Thus since both the intended crimes were serious crimes the defendants should have been found guilty of attempt. Mention should also be made here regarding the difference between mental and material proximity. Accordingly, when intention is known, material proximity is immaterial. In both cases it was admitted that appellants had the intention to commit the intended crimes. Thus, let alone the last acts done by them till arrest, any other move beyond acquisition of the items should have made them criminally liable.

3. Under the probability of desistance standard – This standard focuses on the internal determination of each actor. In both cases the defendants were not ordinary criminals but political activists and hardened security personnel. Moreover, they could not achieve their intended results due to external factors beyond their control [i.e. arrest at the check point and explosion at the hotel] but not change of mind and it was unlikely that they would have abandoned their design out of any other cause. Thus, they should have been found liable for attempt. The objective and subjective standard can also supplement this argument, for given their personal backgrounds [i.e., political activists and security personnel], the defendants were more likely to persist in their criminal path unlike in the case of other individuals who commit crimes for other personal purposes.

4. Under the standards of irrevocable intent and point of no return – under both standards, what is important is the high degree of determination beyond which a criminal could not desist from going further except from external circumstances but not change of purpose. The physical as well as mental proximity and the personal profiles

of the defendants discussed above amply prove that they have all reached the point of no return and had irrevocable intents to achieve what they were set for. The facts that the hijacking failed due to arrest and the homicide due to the explosion amply prove that the causes for failure were extraneous to defendants but not change of purpose which is not expected of such actors. Thus, they should have been convicted for attempted crimes on these standards too.

5. Under the substantial step standard – this standard, as mentioned above focuses on the quality of the conduct to corroborate the actor's criminal purpose and that the emphasis should be upon what is done than what remains to be done. It is shown above that the only reasonable inference that can be made out of the possession of such deadly weapons at such places is that they are intended to be used for criminal ends but not any imaginable innocent purpose/s. The conducts of the defendants were undoubtedly corroborative of such purposes. Moreover, if more attention is given to what is done than what remains to be done, all acts done before failure were so alarming so as not to give defendants any benefit of doubt. It should be noted here that the whole reasoning of the court in Case No. Two focused on what remains to be done than on what is done. Based on this line of argument, defendants should have been convicted for their attempt to commit those crimes for which they were charged.

6. The articles under which appellants were charged and convicted – Apart from the issues of attempt and preparation, these cases also call for a brief discussion on the relevance of the articles under which the defendants were charged and convicted.

6.1- In Case No. One respondents were charged and convicted for attempted plane hijacking. A closer look at the statements of the decision also shows that they were charged and convicted for robbery. It should, however, be noted that Ethiopian had no any anti - hijacking law at the time when this crime was committed, i.e. in 1986 [E.C] 1994 [G.C.]. The first anti - hijacking law was enacted on February 22, 1996[12]. Under the Penal Code, robbery is a crime against property and has no relevance to the acts done by the respondents. Thus, though it is not clear why this was not raised as an issue, the case should have been rejected for being against the principle of legality provided under Art.2 of the code.

6.2 - In Case No. Two, the appellant was set free on the charge of homicide but found liable for unauthorized possession. Art. 41/1 of the Revised Penal Code No.1981 [under which the appellant was charged] had provided the following:

[12] Offences against the Safety of Aviation Proclamation No.31/96. Note also that the former criminal code did not have any provision that covers this situation and that the current criminal code makes this act punishable under Art. 507. It may further be argued that had it been possible to charge and convict such persons under the robbery provision there was no any need to enact an anti-hijacking law soon after this case.

4. Prohibited traffic in Arms.

Whosoever

(1) apart from offences against the security of the state (Art.4), makes, imports, exports or transports, acquires, receives, stores or hides, offers for sale, puts into circulation or distributes, without special authorization or contrary to law, weapons or ammunitions of any kind is punishable with rigorous imprisonment from five years to twenty five years[13].

It is noted from the facts of the case that the defendant and his accomplices were personnel of the then Ministry of Security and sent abroad for this specific purpose that was ordered and directed by the minister himself. Thus, their acquisition of those weapons employed in the attempt cannot be said to be *unauthorized.* Moreover, the intention behind was not trafficking but, to commit homicide. Thus, if not found liable for the attempt, they should have been set free on this count.

By way of conclusion and in retrospect, given what happened on 9/11, 2001 in the US, one can easily appreciate the seriousness of the danger created and the damage suffered by the acts of passengers armed with non-deadly weapons. Thus for stronger reasons, those deadly items recovered from respondents in Case No One should have given sufficient ground to convict them as charged. The appellant and his accomplices in Case No. Two, had shown their exceptional dangerousness by daring to commit series of crimes in another country and had they had their own way, they would have killed a number of individuals. Given the seriousness of the crimes intended to be committed and the apprehension felt in this regard, defendants should have been convicted of the crimes for which they were charged.

For all the above reasons, the decision of the lower court and the Supreme Court in cases No. one and Two, respectively do not pass muster.

[13] Note that Art. 481 of the Revised Criminal Code defines this act in an almost identical manner though with different ranges of punishment.