Michigan Law Review

Volume 33 | Issue 8

1935

CRIMINAL LAW AND PROCEDURE -ATTEMPT TO COMMIT MURDER

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Recommended Citation
CRIMINAL LAW AND PROCEDURE -ATTEMPT TO COMMIT MURDER, 33 MICH. L. REV. 1266 (1935).
Available at: https://repository.law.umich.edu/mlr/vol33/iss8/21

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CRIMINAL LAW AND PROCEDURE — ATTEMPT TO COMMIT MURDER — The accused had repeatedly threatened to kill one Albert Jeans. Subsequently the accused, armed with a rifle, was seen to approach a number of men among whom was Jeans working in a field. The workmen saw him pause, apparently load the rifle, and proceed toward Jeans. When about two hundred yards from Jeans, he was intercepted by one of the workmen who took the rifle from him, the accused offering no resistance. The rifle was found to be loaded. The court *held* that there was sufficient evidence of overt acts on the part of the defendant to constitute an attempt to murder Albert Jeans, as distinguished from mere preparation therefore. *People v. Miller*, (Cal. App. 1934) 35 Pac. (2d) 549.

For a man to make up his mind to commit a crime, and to make preparations to commit it is not an attempt; he must go further than mere preparation, and do some act directly tending to a carrying out of his unlawful intent.[1] To make the act an indictable attempt it must go so far that it would result in the crime unless frustrated by extraneous circumstances; in other words, the act must be a potential cause as distinguished from a condition.[2] There is no iron clad rule by which one may determine what is a cause and what a condition; and the cases offer very little help.[3] It is a question of degree, and the "degree

[1] CLARK and MARSHALL, LAW OF CRIMES, 3rd ed., sec. 124 (1927).
[2] 1 WHARTON, CRIMINAL LAW, 12th ed., sec. 220 (1932).
[3] 21 KY. L. J. 195-198 (1933).

of proximity held sufficient may vary with the circumstances, including among other things, the apprehension which the particular crime is calculated to excite."[4] The following four decisions will help to illustrate this statement. Elopement by the accused with his niece, and his request to one of the witnesses to go for a magistrate to perform the ceremony was held to be not an attempt to contract an incestuous marriage.[5] A complaint which charged that the accused, a married man, "[with intent to commit adultery] did by invitation by word of mouth and by laying on of hands . . . upon the said Vina Green . . . did solicit . . . said Vina Green . . . to have sexual intercourse with him" was held not to state sufficient facts to constitute an attempt to commit adultery.[6] Yet, where authorities were informed of a conspiracy to kidnap, and then arrested the conspirators while on their way to the intended victim's home, the defendants were held guilty of attempt to kidnap.[7] And again, where the accused had agreed to bomb a railroad, and was arrested while on his way to meet his accomplice before carrying out the deed, it was held there was sufficient evidence to prove an attempt to obstruct a railroad.[8] These cases serve to show how widely the courts differ as to the degree of proximity which is necessary; and how futile would be any attempt to draw an analogy between the cases.[9] It would be desirable were the courts to follow the language in *People v. Miller*, viz.: "the courts should not destroy the practical and common sense administration of the law with subtleties as to what constitutes preparation and what an act done toward the commission of a crime."[10] Practical and common sense administration of law presumably means effective protection of society against anti-social activity. But cases decided in the past ten years show no such tendency. There is just as wide a variety of decisions as ever, the courts apparently giving weight to the seriousness of the particular crime involved.[11]

J. J. D.

[4] Commonwealth v. Peaslee, 177 Mass. 267 at 272, 59 N. E. 55 (1901).

[5] People v. Murray, 14 Cal. 159 (1859). The court said: "The attempt is the direct movement toward the commission after the preparations are made. To illustrate: a party may purchase and load a gun with the declared intention of shooting his neighbor; but until some movement is made *to use the weapon upon the person of his intended victim*, there is only preparation and not an attempt." (Italics the writer's.) Under this language, the court in the principal case might well have found that defendant's acts constituted mere preparation.

[6] Cole v. State, 14 Okla. Cr. 18 at 19, 166 Pac. 1115, L. R. A. 1918A 94 (1917).

[7] People v. Lombard, 131 Cal. App. 525, 21 Pac. (2d) 955 (1933).

[8] People v. Stites, 75 Cal. 570, 17 Pac. 693 (1888).

[9] 24 J. CRIM. L. 964 (1934).

[10] (Cal. App. 1934) 35 Pac. (2d) 549 at 553.

[11] See Coffee v. State, 39 Ga. App. 664, 148 S. E. 303 (1929); Tharpe v. State, 219 Ala. 431, 122 So. 699 (1929); State v. Lourie, (Mo. Sup. Ct. 1928) 12 S. W. (2d) 43; Becker v. State, 45 Okla. Cr. 350, 283 Pac. 796 (1929); People v. Gilbert, 86 Cal. App. 8, 260 Pac. 558 (1927); Dill v. State, 149 Miss. 167, 115 So. 203 (1928); People v. Rizzo, 246 N. Y. 334, 158 N. E. 888, 55 A. L. R. 711 (1927).