ATTEMPTED HOMICIDE AND APPLICATION DIFFICULTY IN THE PANAMANIAN CRIMINAL PROCESS

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DOI: 10.37594/cathedra.n16.549

Reception date: 12/09/2021 Revision date: 15/10/2021 Acceptance date: 21/10/2021

ABSTRACT

Our Political Constitution of the Republic of Panama protects many fundamental guarantees as a protected legal asset, one of which is life, in this article we will find the imperfect way to carry out the Crime of Homicide, that is, its degree of attempt. Exposing important aspects for the materialization and how it is applied in our Panamanian criminal legislation, first of all; see the difficulty that this entails when carrying out an objective investigation, under the parameters of the criminal conduct itself considered a crime (typicity, unlawfulness, and guilt).

Keywords: Legal good, Crime, Homicide, Criminal Legislation, Conduct, Objective Investigation, Degree of Attempt.

Definition of Attempt

«In principle we speak of impossible crime when the agent has the will to execute a legal type, wants to generate a criminal result, is convinced of being able to achieve it as planned and performs all acts aimed at that end, but the consummation of the offense is impossible due to the inidoneous nature of the means employed, the object or the passive subject towards which the action is directed.» (Torres, 2019, p. 77)

Our Penal Code emphasizes in Articles 48 and 49, of the same an emphasis on the imperfect form of realization of the Crime, expressing the following:

"Article 48. There is an attempt when the execution of the crime is initiated through suitable acts aimed at its consummation, but this does not occur for reasons beyond the control of the agent.

Article 49. If the agent voluntarily desists from the execution of the crime or prevents

the result from occurring, he is criminally liable only if the acts carried out constitute another crime." (Pujol, 2015, p. 9)

What is important, is that every attempt proves not to have been adequate to consummate the crime; actions that were initially capable of consummation can be distinguished, although they are then insufficient due to circumstances beyond the agent's control arising before, during or after the performance of all the acts that were foreseeable to the active subject for the execution of the crime; and those that appear as incapable of injury from the first moment.

The Ecuadorian Organic Integral Code defines attempt as: *"Attempt is the execution that fails to be consummated or whose result is not achieved due to circumstances beyond the perpetrator's control, despite the fact that the perpetrator fraudulently initiates the execution of the criminal offense through suitable acts leading unequivocally to the commission of a crime. In this case, the person will be liable for attempt and the applicable penalty will be from one to two thirds of that which would have been applicable if the crime had been consummated".*

CARRARA says, when referring to attempt: *"any external act that by its nature leads unequivocally to a criminal result, and that the Agent directs with explicit will to that result, but to which this does not follow, nor the injury of a superior or equivalent right to the one to be violated".*

For FRANZ VON LISZT, the attempt of a crime is:
"The manifestation of will directed to the execution of the deed.
- There is an attempt, in the first place, when the manifestation of the will directed to the production of the result (that is, undertaken in the belief that the result will occur) remains without effect.
- But there is also an attempt when one of the essential circumstances constituting the act has not existed or has not been produced (abstraction made of the result), whose existence or production had been assumed by the author".

ZAFFARONI explained well in relation to the Crime in Degree of Attempt, and it is explained in the present book that: *"the conduct that is between preparation and consummation, being clearly determinable the limit that separates it from consummation, but being extremely problematic with respect to the preparatory acts".* (Torres G. E., 2020, págs. 36-37)

On the other hand, the Legal Dictionary - Theoretical Practice, the term as *"There is punishable attempt when the resolution to commit a crime is externalized by performing in part or totally the*

executive acts that should produce the result, or omitting those that should avoid it, if the latter is not consummated for reasons beyond the agent's control." (Morales, 2017, p. 809) Similarly, the Legal Dictionary. -Similarly, the Legal Dictionary, 6th Edition, defines the term as: "principle of execution of a crime by external acts that are not sufficient for the act to be carried out, without the voluntary desistance of the guilty party..." (Casado, 2009, p. 796).

And so from the above, a number of authors define the term in this way, the imperfect or short of the consummation of the type, in this case in criminal matters. Panama does not escape from this reality, a series of crimes have been perpetrated throughout history in this type of degree, in attempt and that its consummation does not reach the material end, that is to say, there is a reduction of the agent to the commission of the crime.

Legal Right Protected (Life)

Before entering to see the protected legal good in terms of the problematic of the concept, we have a definition of Crime where Jimenez de Asua, expressed that *"the set of rules and legal provisions that regulate the exercise of the punitive and preventive power of the State, establishing the concept of crime as a budget of state action, as well as the responsibility of the active subject and associating to the infringement of the rule a finalist penalty or insurance measures".*

Our Magna Carta, states in Article 17, that the authorities of the Republic are instituted to protect the life, honor and property of nationals wherever they are and foreigners who are under their jurisdiction, thus ensuring the effectiveness of individual and social rights and duties, consistent with what Article 1 of the Panamanian Penal Code states, which is based on respect for human dignity and is not only associated with the particular subject, life, but other legal property that are affected.

In the development of this article we will see how the very important juridical good, which is life, is affected in the degree of attempt, as ratified in Article 4 of the American Convention on Human Rights, on the right to life.

Now, this legal right protected in our Criminal Code is framed within the Second Book that deals precisely with CRIMES, that is to say, what can be affected and that goes against the Law, developed in Articles 131, 132, 132-A, 132-B, which deals precisely with HOMICIDES in its first section and in this particular case in a fraudulent manner. The Code defines as Homicide, whoever causes the death of another, will have a sanction and this sanction is higher than ten years of imprisonment.

Now, the term has been defined in many ways. The Legal Dictionary - Theoretical Practical, defines it as: *"Death caused to a human being by another",* (Morales, 2017, p. 441) beyond that, it defines that to apply the corresponding sanctions the following circumstances must be seen:

a) "That the death is due to the alterations caused by the injury in the organ or organs concerned, some of its immediate consequences or some complications inevitably determined by the same injury and that could not be fought, either because they are incurable, or because the necessary resources are not available.
b) That, if the corpse of the deceased is found, two experts declare, after performing the autopsy, when necessary, that the injury was mortal, subject to the rules contained in this item and in the CPP.
c) When the corpse is not found or for another reason the autopsy is not performed, it will suffice that the experts, in view of data that are in the case, declare that the death was the result of the inferred injuries." (Morales, 2017, p. 441)

Also in a simple way, the term homicide is defined as: *"A crime committed by a person who, having the intention to kill, kills someone".* (Casado, 2009, p. 433).

Criminal Attempt from the point of view of the Objective and Subjective Theory

The Objective Theory arises as a result of the application to the attempt of the dominant liberal ideas during the first half of the last century. Liberal ideology attributes to the State, conceived as a product of the social contract, by virtue of which each individual for reasons of utility yields a part of his freedom, the role of legitimate depositary and administrator of the sum of conceived freedoms. To the State, which possesses its own sphere of power, corresponds the function of guaranteeing the life in community of the citizens, without entering into the sphere of individual freedom, which each one possesses.

It is precisely the function of law to establish a secure boundary between the sphere of power possessed by the State, as well as the surveillance of the boundaries between the spheres of power of individuals. From this it follows that the injury to the law can consist only in the objective injury of one of the subjective interests or rights belonging to the individual, and the intervention of the State through punishment can only be justified if such injury has occurred.

The subjective moments of the action are of interest insofar as they allow the imputation of this injury of the right to the staff's guilt. To base unlawfulness on elements of a subjective nature would imply for the objective theory a confusion of Law, which deals with the external

sphere of the individual, with Morality, which corresponds to the internal sphere, giving rise to a reprehensible Criminal Law of the will.

In the consummated crime, the action that has caused the result is punished; in the attempted crime, the action causally adequate to produce it, that is, the dangerous action, is punished. Bearing in mind that the dangerousness for the protected legal good is what underlies the punishment of the attempt of the crime, only those actions that include a danger for it, that is, a possibility of injury, will be punishable and not those that, on the contrary, are not dangerous from the objective point of view although the will of the perpetrator to commit the crime has been fully manifested. (Trepat, 2008, pp. 5-6).

According to subjective theories, the basis for the punishment of attempt lies in the subjectively manifested will of the perpetrator to commit a crime. That is, in the will of the perpetrator contrary to the law.

Punishable appears from this conception, the infraction of the criminal norm from the point of view of the perpetrator, that is, any conduct that, according to his representation, contravenes a criminal law mandate or prohibition.

The subjective basis of attempt has, as has been explained, much more historical tradition than the objective basis; however, its ideological basis is not, as in the former, unitary. (Trepat, 2008, p. 12).

Problems in the Application of the Crime of Attempted Homicide in Panama.

Having made the above overview, we have observed how, from the moment of its conceptualization, a critical analysis has emerged regarding the objective and subjective theories, in terms of the application of the imperfect form of the commission of the crime of homicide.

> *"In order to settle the controversy, it is necessary to differentiate both institutions (attempt, voluntary desistance) considered as imperfect forms of the commission of the crime, by our legislation. The basic difference lies in the fact that, in the attempt, the crime is not completed by actions beyond the will of the active subject and in the voluntary desistance, the actions are not produced by the own will of the active subject.*
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> *The doctrinal analysis of the institution of attempt and voluntary desistance leads us to consider what is stated by the Panamanian authors Dr. AURA E. GUERRA DE*

VILLALAZ and GRETEL VILLALAZ DE ALLEN, when they consider that there are certain requirements for voluntary desistance to be configured which are: "that the perfection or consummation depends on the will of the author and that the acts of execution do not integrate the elements of a specific criminal type".

On the other hand, for attempt, they state that the will to carry out the punishable act, the beginning or commencement of execution, the adequacy of the means and the non-consummation of the crime must be joined". (Imperfect Form of the Accomplishment of the Crime, 2015)

The doctrine has called frustrated crime or finished attempt, that which occurs when *"all the acts necessary for consummation are carried out, but this is not achieved due to circumstances beyond the control of the agent"* (ARENAS, Antonio Vicente. Comments to the Colombian Penal Code, general part, fifth edition, Editorial Temis, Bogotá, 1990, volume I, p. 81).

While CARRARA defines the crime of injury as *"any act that causes to the body of another a physical damage or pain, or a disturbance in the mind; provided that it is executed without intent to kill, and without lethal result"* or *"any damage to the human person that does not destroy his life nor is aimed at destroying it".* (Quoted by ARENAS, Antonio Vicente. Comments to the Colombian Criminal Code, Volume II, Special Part, Temis Editorial., Bogotá 1991, p. 457).

In the case at hand, as indicated by the Prosecutor's Office, this Chamber qualified the crime imputed to Mr. BERBEY as attempted homicide, as can be seen in the resolution of December 2, 1993, where it indicated:

"... These testimonies make it clear that the action undertaken by the accused had the firm purpose of causing harm to the physical integrity of Judge Pereira, with serious danger to her life, a result effectively obtained since the report rendered by the forensic doctor states that the offended party 'presents an entrance orifice of a firearm projectile, which presents tapering and measures 0.6 cms. in diameter at the level of the 8th right intercostal space', as it is also stated that 'if it endangered the life' of the victim (f. 11). In light of these verifications, the Chamber shares the qualification made by the a-quo when it frames the conduct of the accused Berbey in the criminal type of attempted homicide".

However, the appellant argues that according to the provisions of Law 53, even if there is a previous qualification of attempted homicide, the competence to hear it belongs to the police sphere, since this - Article 175 of the Judicial Code - is the most favorable provision for the defendant. The Chamber disagrees with the interpretation of the mentioned provision formulated by the appellants, for the following reasons.

Article 11 of Law 53 of December 12, 1995, which modified Article 175 of the Judicial Code, reads as follows:

> *"**Article 175.** The police authorities shall hear civil, ordinary and executive proceedings, ... and proceedings for intentional or culpable crimes against life and personal integrity, resulting in injuries, when the incapacity does not exceed 30 days." (Emphasis added).*

The crime of injury, contemplated in articles 135 to 139 of our Criminal Code, is located under Title I *"Crimes against Life and Personal Integrity"*, and as well expressed by the doctrine, it has the characteristic of causing physical harm to another person, but without the intention of suppressing life.

Our positive legislation reflects this criterion and thus Chapter II of the aforementioned Title, which regulates the crime of personal injury, states in its first article, Article 135, that whoever *"without intent to kill causes bodily harm to another..."*.

It follows that the factor that determines the difference between a crime of bodily injury and a crime of attempted homicide is the intention with which the actor commits the punishable act; and such intentionality can be determined -with the obvious limitations inherent to the knowledge of the human mind- from the circumstances surrounding the act, the weapon used, the manner in which the weapon was used, the place and quantity of the shots, etc.

The following decision of this Chamber, issued on September 7, 1994, is relevant:

> *"... the crime of personal injury implies the intention to harm or mistreat the physical or psychological integrity of a person, while the purpose of homicide is to suppress the life of someone. The distinction between one and the other crime poses problems when, after putting the life of another person in danger as a result of wounds caused with a suitable weapon, the offended person is not killed, so that the proof of intent is at the mercy of the analysis of the circumstances surrounding the act".*

On another occasion, this Corporation ruled on the issue sub judice in a decision of August 2, 1994, in the following terms:

> *"From the analysis of these testimonies, it is then evident the homicidal spirit of the accused, the exhaustion of his own executive means for the realization of the criminal purpose, which is confirmed by the fact that the first shot fired by the accused was not in the air but in the direction of the victim's head. The accused did not even try to intimidate the victim; it is inescapable the conclusion that he must have foreseen as a probable result of his action even the death of Madrigales Ríos".*

The appellants' claim that the Second Superior Court of Justice does not have jurisdiction to hear the crime of which BERBEY is accused is meaningless, if we take into account that in all criminal legislations the protected legal right par excellence is life and any attempt -even if unsuccessful- to extinguish it is considered a serious violation of the current legal system. For this reason, jurisdiction in these crimes is always assigned to higher courts, such as the Superior Courts of Judicial Districts, and being so, it is unacceptable to think that a crime of this nature - attempted homicide - should be reduced to the administrative justice system. (Preliminary and Special Pronouncement Incident , 1998).

The question in the matter would be, what is the biggest problem in the application of the Crime of Attempted Homicide, is the characterization of some elements, such as the action of committing the act, the imperfect form of its realization, that is to say, there is no consummation of the crime and the serious intention to commit the act, which can very well be interpreted as a crime of intentional personal injury, it is necessary to look for the objective and subjective factual elements to find out if it is a crime of attempted homicide or intentional personal injury, as we have explained in the previous ruling.

For example, if in a fight a person leaves with a cut that endangered his life, but this fight was generated at the moment, that is to say, in the act there was no act of preparation, only of execution, we could find ourselves before a Crime of Malicious Personal Injury, even if it has endangered the life of the victim; However, if this quarrel was generated as a result of previous events, i.e., arguments, threats, or any other situation, we could in some way or another be facing the crime of attempted Homicide, since the action is cut short, as it is not possible to materialize the crime.

This has been the great difficulty in the application of the crimes of Attempted Homicide, which tend to be similar, but not the same as Malicious Personal Injury, which is contemplated in Article 136 and with its aggravating circumstances in Article 137 of the Penal Code.

Finally, in matters of attempt, the regulation is very similar, but changes the way of punishing it, since before the penalty could not be less than 1/3 of the minimum nor more than 2/3 of the maximum and now, according to article 82, it will be punished with a penalty of not less than half (1/2) of the minimum and not more than 2/3 of the maximum, which indicates that the minimum penalty has increased.(Nation, 2016, p. 42).

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