

THE INDIAN LAW INSTITUTE, NEW DELHI
KARNATAK UNIVERSITY

Seminar on "Criminal Law" at Dharwar
(Dec.17-22, 1978)

CRIME AND CORPORATIONS

by

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The legal fiction of corporate personality has achieved the advantages of continuity and permanence and unity in multiplicity and diversity and created a very useful unit of business. The coveted principle of its limited liability made a lion and a lamb, a tiger and a cow and an elephant and a squirrel drink water from the same pond at the same time. The importance of the word 'limited' can be seen when Lord Bramwell who is the author of the concept is reported to have said with all enthusiasm after the Bill is passed 'write it on my tombstone'.¹ Because of these advantages vast amounts of capital and resources necessary for giant industries could be pooled up. This conferred a great boon and gave a good boost to the commercial prosperity of the nation. Large commercial companies and statutory corporations came into being in the vanguard of civilization. They could easily adjust themselves in those areas of law where the objects of those laws are certain and definite. To illustrate, the object of law of contracts is to see what a man has been lead to expect shall come to pass and what has been promised to him shall be performed. These legal phantoms also had expectations and promises and they are also entitled to expect the performance of promises made to them. Again the object of law of property is to see that what a man has acquired should be retained and enjoyed by him and a corporation also needed its property to be retained by it for its enjoyment. But they presented a problem in the area of criminal law which does not have a single end. The object of this paper is to see how far corporations are recognised in the area of criminal law.

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1. The Times - December, 1855.

The ends of criminal law are four in number, namely, deterrence, prevention, retribution and reformation. For achieving these ends different kinds of punitive sanctions have been provided. The sanctions recognised in the criminal law of India at the present time are i) death penalty ii) imprisonment and iii) fine. The question how far these sanctions are adequate to achieve the ends is irrelevant to our present purpose; but it may at once be said that these ends have been fixed at a time when criminologists and penologists revivited their attention to the first two objects of deterrence and prevention and the later two being of recent origin. The probation and correctional institutions relate to these recent ends; The scope of the present enquiry is how far these artificial persons can be fitted in the area of criminal law? In this respect two questions arise namely i) how far it can be caught in the net of criminal law and ii) how much of the criminal law can be used by the company?

i) CAPACITY OF A CORPORATION TO BE A COMPLAINANT:

Broadly speaking a corporation has a legal personality and in the eye of law it is a person section 11 I.P.C. goes a step further than the jurisprudential concept where only an incorporated company is regarded as a person while section 11 I.P.C. defines a 'person' as including any company or association, or body of persons whether incorporated or not. This is only an inclusive definition. It includes artificial persons. But a corporation by its very nature cannot be a victim in many crimes. It has no body to be kicked and no sex to be wooed and it is doubtful whether it has a reputation? Therefore a corporation cannot sue in respect of an imputation of murder, hurt, rape, kidnapping incest or adultery because these crimes cannot be guilty of corruption, although the individual members composing it may. 2 In Mayor Aldermen and Citizen of Manchester vs. Williams the complaint was that the accused charged the corporation with corrupt practices. Dismissing the complaint Day J observed "A corporation may sue for a libel affecting property, not for one merely affecting personal reputation. The present case falls within the latter class". 3 So a corporation does not have personal reputation and if an imputation has the effect of or is calculated to injure its business reputation it may take action by proving that special damage. 4

2. Metropolitan Sabcob Own Bus Co. vs. Hawkins 4 Hrn 90.
3. 1891 (1) BD 94
4. See South Felton Coal Co. vs. N.E. News Association 1894 (1) BD 133.

The position is almost the same in India. The definition of the word person in section 11 and the provisions of section 499 read with explanation 2 in I.P.C. make it clear that a corporation or a company can be a complainant in the case of offence of defamation. Explanation 2 to section 499 says "it may amount to defamation to make an imputation covering a company or an association or collection of persons as such. In *Maung Chit Tay vs. Maung Tun Lya* the Rangoon High Court observed that a corporation may maintain a prosecution or an action for a libel affecting its property, but not for libel merely affecting personal reputation, as a corporation has no reputation apart from its property or trade.⁵ A similar view was expressed by B.B. Prasad, J that 'having regard to the provisions of section 499 read with explanation 2 and the definition of the word 'person' in section 11, I.P.C. it cannot be said that a complaint for defamation is not maintainable at all by a corporation. But certainly the scope of such a complaint by a corporation is not the same as that by individuals. The Municipal Board per se has hardly a reputation. If the management is good it will be said that the Board is being run efficiently. But if the management is bad there is bound to be accusation of inefficiency or nepotism etc. If a person makes any imputation so as to cause any special injury to the property of the Board then the Board can maintain a complaint under section 500. But where the minority party in the Board attacks the majority party for inefficiency then such an attack does not amount to defamation. Such a case is covered by exceptions 1 and 2 of section 499".⁶ Thus to sum up a corporation has no body to be protected and no mind to be insulted. It has only property and economic quality and to protect those proprietary interests, a corporation can sue and take advantage of the criminal law.

ii) CRIMINAL LIABILITY OF A CORPORATION:

The concept of crime, the then criminal procedure and the punishments in criminal law stood sturdy in the way of bringing the corporation within the net of criminal law. The artificial personality of the corporation was a square peg in a round hole. It was always outside the scope of criminal law before the 19th century. The essential elements of a crime recognised in the fundamental maxim *Actus non facit reum nisi mens sit rea* kept the legal phantom of corporate personality far away from the scope of criminal law. A corporation, being the phantom created by law has neither a body to act nor a mind to be guilty. Kenny observes that 'a corporation, as it had no actual existence, could have no will, and therefore could have no guilty will. And it was further urged that even if legal fiction which gives to a corporation an

5. A.I.R. 1935 Rang. 108.

6. *Municipal Board Canch vs. Ganesh Prasad Chaturvedi*, AIR 1952 All. 114.

imaginary will yet the only activities that could consistently be ascribed to the fictitious will thus created must be such as are connected with the purposes for which it was created to accomplish. If so, it could not compass a crime; for any crime would be necessarily ultra vires. Moreover, a corporation is devoid not only of mind, but also of body, and therefore incapable of the usual criminal punishments." 7 The rule of criminal procedure that an accused cannot be tried in his absence added a further ground to keep the corporation away from criminal law. A corporation devoid of body and mind cannot be guilty of committing an actus reus and cannot have mens rea, and cannot be punished with death or imprisonment, and above all cannot be made to stand in dock without which a criminal trial is not valid.

With the advancement of civilization and rapid industrialisation since the beginning of the nineteenth century the population of these legal persons with absolute criminal immunity increased and posed a potential grave danger to the community. In this context Russel observes, "The modern tendency of the courts, has been towards widening the scope with which criminal proceedings can be brought against institutions which have become so prominent a feature of every day affairs and the point is being reached where what is called for is a comprehensive statement of principles formulated to meet the needs of modern life in granting the fullest possible protection of criminal law to persons exposed to the action of the many powerful associations which surround them." 8 Fortunately by this time, there were developments in the area of criminal law also. It was provided that an accused can be represented by an authorised person at his trial. 9 A slow beginning was made that though a company cannot be made liable for acts of misfeasance, as it cannot do any act by itself due to want of body, it can be made liable for offences involving non-feasance. The first step was that a corporation could be made liable for non-feasance and thus the non-liability of corporation gave way to the idea that they can be made liable to cases of non-feasance. R. vs. Birmingham and Gloucester Railway Co. was a case of non-feasance where Fatterson, J observed "as a general proposition... a corporation may be indicated for breach of duty imposed upon it by law, though not for a felony, or for crimes involving personal violence as for riots or assaults." 10 It was a case of omitting to repair a highway. Soon after this, slowly the hand of criminal law was extended to cases of misfeasance also in R. vs. Great North of England Railway, which was a case of obstruction of a highway where Lord Denning said "The argument is that for a wrongful act, a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming in the first place, that there

7. Kenny - Outlines a Criminal Law p.70.
8. Russel on crime, Vol. I p. 104 (1958 ed).
9. See The Criminal Institute Act, 1925 and The Magistrate Act, 1952.
10. 1842 (3) QB 223.

is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. Many occurrences may be easily conceived, full of annoyance and danger to the public, and involving blame in some individual or some corporation of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards." 11 These developments have been ably summed up and reaffirmed in *Pharmaceutical Society vs. London Supply Association* where Cockburn C.J. observed "although it is true that a corporation cannot be indicted for treason or felony it was established by the case of *R. v. Birmingham* etc. By that an incorporated company might be indicted for nonfeasance in omitting to perform a statutory duty imposed by the statute.... It was further held in *R. v. G.N. of England* etc. that an incorporated company could be indicted for misfeasance - as in cutting through and obstructing a highway." 12

By about this time the idea of absolute or strict liability and vicarious liability were well established in law of torts. In both the cases the want of mens rea on the part of the indicted person would be no defence. Therefore, the hitherto claimed immunity on the ground that since a company, or any other body corporate body, is a legal abstraction without a real mind of its own, did not apply. Slowly the area of criminal law was extended to cases of vicarious liability. In a number of cases, the courts were prepared to allow a company to be prosecuted for offences committed by its employees where the statute creating the offence could properly be construed as imposing vicarious liability upon the company as employer. The locus classicus on the question whether by application of the principle of vicarious liability a corporation can be convicted of offences involving mental element is in *R. vs. I.C.B. Hawley Co. Ltd.* 13 In that case the company was charged for conspiracy along with its managing director and others, the fraud of the director being imputed to the company. In dealing with such cases, in the area of application of corporate criminality on the basis of vicarious liability the judicial ingenuity has invented the 'alter ego' doctrine and identified the mind of the employee of the company with that of the company itself. By this doctrine the law permits to attribute the mental state of those who in fact control and determine management to the company itself as being its 'director of mind or will.' The mens rea of a company's ordinary servants or agents will not suffice for this purpose, since the company is not being called to answer simply on the principle of respondeat superior.

11. 1846 9 QB 315.

12. 4 QB 313.

13. 1944 KB 55.

In Re Haulage it was observed that the question whether the mental state of the directors or other officers, collectively or individually, can be attributed to the company as its own act must depend on the nature of the charge." 14

On this basis companies have been convicted of crimes involving dishonesty whether created by statute 15 or by common law 16 conduct after the occurrence of the irregularities may supply grounds for inferring that persons in control of a coy (and consequently the coy itself) had knowledge or means of knowledge at the time of the irregularities. 17 The person need not be in an exalted position. Thus in Moore v. Bresler Ltd. a coy was convicted of an offence requiring proof of an intention to deceive where those responsible were its secretary or a branch Manager. In that case the company was convicted of making false tax returns with intent to deceive although its managers, who actually made the returns, intended to defraud not only the tax authorities but also the company. What had happened was that the managers sold some stocks of the company and embezzled the proceeds and then made the false returns in respect of purchase tax. The court convicting the company observed that in making returns they were acting as officers of the company and within the scope of their authority and that the company was therefore responsible. 18 However when a statute speaks of 'actual offender' and 'employer of principal' the company cannot be treated as 'actual offender.' 19 Further on a charge of conspiracy it was held that a company could not conspire with its sole director who was the directing mind of the company. 20 "It is not every 'responsible agent' or 'high executive' or 'manager of the Housing Department' or 'agent acting on behalf of a coy' who can by his actions make the company criminally responsible. It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself. It is often a difficult question to decide whether or not the person concerned is in a sufficiently responsible position to involve the company in liability for the acts in question according to the law as laid down by the authorities." 21 Further the position is not completely free from dissent. Dr. Welsh said

14. See Supra.
15. D.P.F. v. Kent and Sursen Contractors Ltd. 1944(1) KB 146.
16. R. vs. I.C.R. Haulage Co. Ltd., Supra.
17. Knowels Transport v. Russel 1975 R TR 87.
18. 1944 2 All. Eng. Rep. 515.
19. Medias Ltd. v. Preston 1957 2 AB 380.
20. R. vs. Mc. Dowell 1966(1) C 233 - C.F.R. v. Robert Miller Contracts Ltd. 1970(2) QB 54 (CA).
21. R. vs. Andrewes Weatherfoil Ltd. 1972(1) WLR 119 at 121 citing Lord Reid in Tesco Supermarkets Ltd. vs. Macclesfield 1971 (2) WLR 1166.

"there can be no justification for the courts to extend to the field of criminal law the doctrine of vicarious liability which was developed in a totally different content of the law of tort."

The Indian judges drew their inspiration from their English brethren and in India also the position is the same. Generally corporation is made liable in strict liability cases where mens rea is not necessary and in cases where the offence is punishable with fine. The earliest reported case in India is Junjab National Bank v. A.R. Gansalays, Bander Inspector, Karachi Port Trust (A.I.R. 1921 Sind 142) where a corporation was made liable for acts requiring no mens rea. Again in Anantha Bandhu v. Corporation of Calcutta (AIR 1952 Cal. 759) the entire law has been reviewed and specifically delineated the scope of corporate criminal liability.

The next important case in the area is state of Maharashtra v. Syndicate Transport Co. (AIR 1964 Bombay 195) where again the question of law regarding the criminal liability of a corporate body for an offence requiring mens rea was reviewed. In that case Manohar, a shareholder of the Syndicate Transport Co., requested Khanka Motors for an advance of Rs. 11,000 to the company for the purchase of a diesel engine and they paid the amount to him stipulating some conditions regarding the security. The conditions were not fulfilled by the company, its managing director and Manohar mainly for offences under sections 420, 406 and 403 of the Indian Penal Code. The trial court discharged the directors and framed charges under section 420 against the company, the managing director and M. The sessions judge in revision proceedings held that the charge against the company should be quashed and reported the matter to the High Court. The High Court after reviewing the whole case law quashing the charges framed against the company observed "The question whether a corporate body should or should not be liable to criminal action resulting from the acts of some individual must depend on the nature of the offence disclosed by the allegations in the complaint or in the charge sheet, the relative position of the officer or agent vis a vis the corporate body and the other relevant facts and circumstances which could show that the corporate body, as such, meant or intended to commit that act. Each case will have necessarily to depend on its own facts which will have to be considered by the Magistrate or judge before deciding whether to proceed against a corporate body or not."

From the foregoing discussion it may be summed up by saying that today, both in England and in India Corporations are held immune from criminal responsibility in the following classes of crimes;

i) Crimes which are not punishable with fines cannot be charged against a corporation i.e., offences punishable with death or imprisonment, which are really serious offences.

ii) A corporation cannot be charged with offences which can be committed only by a person having a physical body like offences of bigamy, adultery or perjury.

iii) Similarly no charge of conspiracy against a corporation is possible when the only human being who broke the law was a director because conspiracy requires not merely two legal persons, but two legal minds.

In this respect it is suggested that new types of punishments may be invented to make the criminal law applicable to these corporations, to make the society safe from the innumerable legal persons. The possible punishments are

- i) In case a corporation commits a serious and heinous offence, it may be made punishable with a compulsory winding up order which should be sparingly used only in extreme cases like death sentence in the case of human beings;
- ii) In the case of offences of ordinary gravity, it may be made punishable with the order of 'black listing the company for varying periods' on the lines of imprisonment for a person for varying periods;
- iii) In the case of offences punishable with fines, even today they are indictable and so there is no difficulty.

Where a corporation is a first offender or where there are extenuating circumstances just as in the case of criminal human being subjected to Parol and Probation, the convicted corporations' activities for varying periods may be subjected to the supervision by Government officers under the company law Board. There are innumerable economic offences for which the corporations may be brought within the purview of criminal law and the above punishments may be prescribed for each of the specific offences according to their gravity.