THE GUILTY MIND

In the entire field of criminal law there is no more important doctrine than that of *mens rea.* The fundamental principle of English criminal jurisprudence, to use a maxim which has been familiar to lawyers following the common law for several centuries, is "*actus non facit reum nisi mens sit rea.*" Yet it is today still uncertain what the courts in practice will hold constitutes a guilty mind and when they will dispense with the requirement.[1] At common law the doctrine of *mens rea* is virtually unchallenged though statutes may in exceptional cases [2] dispense with mens rea and impose liability for the mere commission of the forbidden act. However, since the turn of the last century the principle that every crime needs *mens rea* has been persistently assailed, and this development has caused considerable concern. A learned writer observes [3] " Perhaps I may be permitted to voice the hope that whatever the deficiencies of this study it will at least direct attention to the serious danger of the criminal law falling into disrepute if both the legislature and courts allow statutory offences to be administered with scant regard for the doctrine of *mens rea* ". The legislative attitude towards the concept of *mens rea* and the judicial practice in emphasising its importance in Indian criminal law deserve careful consideration.

The substantive criminal law of our country is to be found in the Indian Penal Code and several local and special laws.[4] The Penal Code constitutes the general penal law [5] of the country and it is the

1. Prevezer, "*English Criminal Law reform and the American Model Penal Code*" (1958) Current Legal Problems, at p. 74.

2. "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out *mens rea*, as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind". per Goddard, L. J., in *Brend* v. *Wood*, (1946) 62 T.L.R. 462 at 463.

3. J. L. J. Edwards in his preface to "*Mens rea in Statutory Offences*", (1955). at pp. XIII-XIV.

4. "Unlike in England all offences in India excepting contempts of the courts of record like the Supreme Court and the High Courts are statutory". M. C. Setalvad, *The Common Law in India*, p. 139.

5. See Preamble to the Penal Code; "The general criminal law of the land is to be found in Act XLV of 1860 which received the assent of the Governor-General in Council on the 6th of October, 1860". *Joti Prasad Gupta* v. *Emperor* (1931) 53 All. 642 at p. 648.

sole authority in regard to the general conditions of liability, the definitions of specific offences in the code, and the conditions of exemptions from liability. Section 2 of the Penal Code reads: "Every person shall be liable to punishment *under this Code and not otherwise* for every act or omission contrary to the provisions thereof of which he shall be guilty within India". The treatment of the concept of *mens rea* under the Penal Code is best stated in the words of M. C. Setalvad,[6] "What the Indian Code seems to have done is to incorporate into the common law crime the *mens rea* needed for that particular crime so that the guilty intention is generally to be gathered not from the common law but from the statute itself. This may be regarded as a modification of the common law worked into the Code by Macaulay and his colleagues to make it suit Indian conditions. By adopting this course they have also avoided the doubt and obscurity which have not infrequently arisen in regard to the *mens rea* required for certain common law crimes like homicide, assault and false imprisonment. It has been pointed out that the English system in which changes in the law are made gradually by judicial decisions has often created a situation in which old and new doctrines have been employed in the course of the same period according as the judges are inclined one way or the other, giving rise to conflicting principles with puzzling results. Such uncertainty cannot exist in India as the necessary guilty mind is indicated in the statutory definition of the crimes". Not only have the framers of the Code incorporated into the definition of the crime the *mens rea* required, they have further given effect to the doctrine of *mens rea* by providing in Chapter IV of the Code for exemption from liability in certain circumstances which are incompatible with the existence of a guilty mind.[7] The provisions of Chapter IV govern not merely every offence under the Penal Code[8] but offences under all other laws (local and special) as well.[9]

Considering the exhaustive provision thus made for the requirement of *mens rea* it is not surprising that the view is held that the

6. Setalvad, *The Common Law in India*, p. 139.

7. See Ch. IV of the Penal Code where the following among other general defences are provided for; Mistake, Ss. 76-79; Accident S. 80; Choice of evils S. 81; Infancy, Ss. 82-83; Insanity, S. 84; Intoxication Ss. 85-86; and Coercion S. 94.

8. See S. 6 of the Code, "Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General exceptions' though those exceptions are not repeated in such definition, penal provision or illustration."

9. See Sec. 40 Para 2, Penal Code.

common law doctrine of *mens rea*, as an independent doctrine has no application to offences under the Code. Mayne says, [10] "Under the Penal Code such a maxim is wholly out of place. Every offence is defined, and the definition states not only what the accused must have done, but the state of his mind with regard to the act when he was doing it. It must have been done knowingly, voluntarily, fraudulently, dishonestly or the like.....".[11] Nevertheless judges have in some cases, [12] in interpreting the provisions of the Penal Code, relied upon an independent doctrine of *mens rea* by referring to English authorities, and postulating that the section in the Penal Code cannot be construed differently from the analogous provision in English law. In *Pantham Venkayya In re*, [13] the accused who was prosecuted for personation at an election pleaded that he honestly believed that he could vote twice as his name appeard at two places in the electoral list. After referring to the English case *R.* v. *Stepney* (4 O'Malley and Hard Castle p. 34), the court observed "He (the lower court) should have seen whether upon the evidence the petitioner was able to bring himself within any of the exceptions in the Penal Code. This he has not

10. Mayne, *Criminal Law of India*, Edn. 4, p. 9 See also *In Re Kasiraja* A.I.R. 1953 Mad. 156 at p. 158; *Daljit Singh* v. *Emperor* A.I.R. 1937 Nagpur 274 at p. 279.

11. Ratanlal observes, "*The maxim actus non facit reum, nisi mens sit rea* has, however, no application to the offences under the Code; because the definitions of various offences contain expressly a proposition as to the state of mind of the accused." Ratanlal, *Law of Crimes*, 19th Edn. p. 148; "So far as the Indian Penal Code is concerned, every offence under it virtually imports the idea of criminal intent or *mens rea*. Intent denotes all those states of mind which the statute creating the offence in question regards as necessary that an accused must have in order to fix the guilt on him. But no question of mens rea arises where the Legislature has omitted to prescribe a particular mental condition as an ingredient of an offence because the presumption is that the omission is intentional". Gour, *Penal Law of India*, 6th Edn. (1955) Vol. I, p. 297.; "In a sense therefore it may be said that the maxim "*actus non facit reum nisi mens sit rea*" has as, a maxim, no application to the offences under the Code. By specifying the varying guilty intention for each offence the Code has in effect built the maxim into each of its definitions and given it statutory effect. Where the Code omits to indicate a particular guilty intent the presumption having regard to the general frame of definitions would be that the omission must be intentional. In such cases it would perhaps not be possible to import the maxim in arriving at a conclusion whether the person charged with the particular offence has been guilty." Setalvad, *The Common Law in India*, pp. 140-141.

12. *Pantham Venkayya In re*, 53 Mad. 444; *Kochu Muhammad Ismail* v. *Kadija Umma*, A.I.R. 1959 Ker. 151; See also *C. T. Prim* v. *The State*, A.I.R. 1961 Cal. 177.

13. 53 Mad. 444 at p. 448. See also *State of Orissa* v. *Gokul Barik*, A.I.R. 1959 Orissa 97, where a similar view is adopted that a corrupt motive is necessary to attract liability under Sec. 171-D, Indian Penal Code; See also *The State* v. *Siddhanath Gangaram* A.I.R. 1956 Madhya Bharat 241.

done. Quite apart from this, we are unable to say that the intention of the offender in the commission of this crime is any different in India to what it is in England. There can be no question whatever that the legislature in introducing the new Chapter IX-A into the Code exactly copied the English Statute law with regard to offences relating to elections and we see no reason for saying that whereas in England the corrupt intention of the voter is to be considered here it is immaterial.....".

Again, in *Kochu Muhammad Kunju Ismail* v. *Mohmmed Kadja Umma* [14] the accused was prosecuted for Bigamy under Sec. 494 of the Penal Code. The accused had taken legal opinion that she could effectively divorce her husband under the Personal law applicable to her, went through the formalities thereof, gave notice to the husband, waited for some time and then married another. The court expressed the view that her belief that she was free to marry again would negative criminal intent or knowledge on her part and that that was a good ground for acquitting her. The court relied on the English authorities, *Reg.* v. *Tolson* (23 Q.B.D. 168, C.C.R.) and *R.* v. *Dolman,* (1949, 1 All E.R. 813) and an earlier decision of the Kerala High Court in *Janakiamma* v. *Padmanabhan Nair* (1954 Ker. L.T. 977). It was observed in the last mentioned case, " In prosecution under Sec. 494 the accused's criminal intention in the act complained of against him is of greater importance than the question of any civil right as between himself and the complainant. Criminal intention or guilty knowledge must be made out against the accused before the act complained of can be held to constitute a penal offence."

In *C. T. Prim* v. *The State* [15] where the accused was prosecuted for an offence under S. 292 Penal Code (possession of obscene matter) the Court expressed the view that without guilty knowledge liability would not arise.

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14. A.I.R. 1959 Ker. 151. The decision is open to the following objections. For one thing the English law on this point as to the defence of mistake (relating to the dissolution of the former marriage) is not free from doubt. In *R.* v. *Wheat and Stocks* (1921, 2 K.B. 119) such a defence was negatived (See also Edward, *Mens rea in Bigamy,* (1949) Current Legal Problems, p. 59) In *Reg.* v. *Sambhu Raghu* (1. Bom. 347) the court declared that a bona fide belief that the consent of the caste had dissolved the prior marriage and made the second marriage valid did not constitute a valid defence; For another, the propriety of relying on English authorities in dealing with the plea of mistake and not on the provisions of the Penal Code relating to that defence, is open to grave objection (see note 17 below.)

15. A.I.R. 1961 Cal. 177.

The effect of such rulings is (i) an incorporation by case law of an additional ingredient into the definition contained in the section,[16] and (ii) the plea of bonafide mistake is sought to be applied independently of the provisions governing that defence in Chapter IV of the Penal Code [17] by relying upon the common law doctrine and enlarging the defence in some cases. Further, as a result of such rulings the common law doctrine is engrafted upon the provisions of the Penal Code as a rule of interpretation whenever deemed necessary.[18] This would seem to be inconsistent with the scheme of the Code which purports to be itself the general penal law of the country laying down general principles.

Applying the common law doctrine of *mens rea*, as an interpretative principle while dealing with offences under the Penal Code, and relying on English authorities for that purpose, really means that the scheme of the Code in regard to the mental element in criminal responsibility

16. "In order to constitute an offence under Sec. 171-D *it is necessary to prove* that the accused in doing that act with which he is charged was actuated by corrupt motive" *State of Orissa* v. *Gokul Barik*, 1959 A.I.R. Orissa 97. This is reminiscent of the view of Denman, J. "I think there is still to be added to the offence of personation a corrupt intention, and where the corrupt intention is absent the offence of personation cannot have been committed" (*R* v. *Stepney* 4 O' Malley and Hardcastle p. 34 at p. 46.) However, this would be contrary to the principle that where the framers of the Code have omitted *mens rea* in the definition the omission must be deemed to be intentional. It was observed in *Legal Remembrancer of Bengal* v. *Ambika Charan* (1946) 2 Cal. 127. "If in any case the Indian Legislature has omitted to prescribe a particular mental condition the presumption is that the omission is intentional. In such a case the doctrine of mens rea is not applicable". See also note 11 supra.

17. Reliance upon English authorities in matters dealt with in the Penal Code is strongly disapproved in a full bench case of the Madras High Court thus, "...If the act complained of comes within both the definitions, the offence has been committed unless there are other sections in the code which provide an excuse for, or defence to what would be a crime. The Indian Penal Code defines the offence and also states what matters will afford a defence and therefore it may be said that the code deals specifically with the question and it follows that the court is not entitled to invoke the common law of England in the matter at all" per Schwabe, C. J., *Gopalanaidu and another* v. *The Emperor*, 46 Mad. 605. (F.B.) See further *Satishchandra Chakravarthy* v. *Ramdayal*, 48 Cal. 388 where it is laid down that the Penal Code is exhaustive with regard to matters dealt with by the code and that the rules of English law cannot apply; See also Sec. 2 of the Code.

18. "We may mention at once that we consider that very different conditions prevail in the two countries. Here in this country where we have got definite statutes we have to follow the same. The rules of the common law of England or the legal maxims embodying certain judicial principles, however wholesome they may be cannot be engrafted upon the Indian Penal Code". *Jyoti Prasad Gupta* v. *The Emperor*, 53 All. 642, at p. 651.

is not properly appreciated. While the specific *mens rea* found in the definitions of particular offences gives effect to the doctrine in a positive way the general exceptions in Ch. IV like mistake, accident etc., emphasise—in a negative way—the same doctrine *i.e.*, that where there is no *mens rea* there can be no criminal liability. The general exceptions (based upon absence of mens rea) are but the enunciation of the doctrine of mens rea in a statutory form and there can be no justification for deriving inspiration from English law. However in the context of the defence of mistake the suggestion may be considered whether simple ignorance [18a] in matters of fact as distinguished from mistake of fact may not also be accepted as a valid defence. Needless to say that this simple ignorance also like mistake of fact should have occurred inspite of reasonable care and caution.

Another aspect that merits consideration in this connection is the tendency in the opposite direction *viz.*, ignoring of the mental element in certain cases. Liability independent of mens rea has been recognised in some degree in the case of major crimes like Bigamy and sexual offences by excluding the mental element in regard to one or the other of the ingredients constituting the crime.[19] This has been done in English Law as a matter of construction of the particular statute. The same crime may be one of strict liability in respect of one element but *may require fault in another.* However as a learned writer [20] points out, "The difficulty is that once it is allowed that *mens rea* is not required as to a particular element in the *actus reus* there is no satisfactory principle by which to distinguish between one element and another. It may seen harmless enough not to insist that the burglar should have *mens rea* as to the time. But where are we to draw the line?". The Courts in India mainly purporting to follow the ruling in Prince's case have

18 a. Prof. Glanville William explains the difference between simple ignorance and mistake thus :

"Now mistake is a kind of ignorance. Every mistake involves ignorance but not *vice versa.* Ignorance is the lack of true knowledge either (1) because the mind is a complete blank or (2) because it is filled with untrue (mistaken) knowledge on a particular subject. The first variety, lack of knowledge without mistaken knowledge, may be called simple ignorance. The second variety, lack of true knowledge coupled with mistaken knowledge is mistake. Ignorance is the genus of which simple ignorance and mistake are the species". Glanville Williams *Criminal Law,* Second Edition. (1961) pp. 151-152 ; See J. C. Smith *'The Guilty mind in Criminal Law'*, 76 L.Q.R. 78, at pp. 83-91 for an illuminating discussion of the plea of simple ignorance.

19. E.g.. *Reg* v. *Prince* (1875) L.R. 2 C.C R. 171. ; See Hall, *General Principles of Criminal Law,* (1960) p. 326 ; The position in regard to Kidnapping, Bigamy and Conspiracy is dealt with by Glanville Williams *'Criminal Law'* at pp. 256-64.

20 J.C. Smith, *The Guilty Mind in Criminal Law.* 76 L.Q.R. 78.

negatived [21] the defence of bonafide mistake as to the age of the minor in prosecutions for kidnapping under S. 361 of the Penal Code, no serious attempt having been made to evaluate the defence of mistake of fact in terms of S. 79, Penal Code. It is a tragedy that some times the Indian Penal Code is called upon to bear the oppressive weight of English case law.

In view of the uncertainty in law resulting from the absence of any satisfactory criteria in the matter of judicial interpretation the suggestion has been made [22] that the definitions of offences be simplified and a general proposition regarding *mens rea* enunciated, which proposition should govern all offences save in those matters where its application is expressly excluded. A notable feature in the American Model Penal Code is that it acknowledges four different kinds of culpability. Article 2 ackowledges purpose, knowledge, recklessness and negligence as the four types of culpability.[23] They apply to all the material elements in every offence, and the material elements may involve the nature of the forbidden act, the attendant circumstances and the result of the conduct.

21. See *Krishna Maharana* v. *Emperor*, 9 Pat 647 ; *Prem Narain* v. *Emperor*, 30 Cr. L.J. 218 ; *Kesar Mal* v. *Emperor*, 33 Cr. L.J. 673 and *Chattan Kunju Kunju* v. The State, A.I.R. 1959 Ker. 197.

22. See J.C. Smith, ' *The Guilty mind in Criminal Law* ' 76 ; L.Q.R. 78, 98-9. The Canadian Criminal Code has tried to solve the difficulty by stating in the section (in the case of Kidnapping) " ...whether or not (the accused) believes that the (female person) if fourteen years of age or more ". Sec. 138, Criminal Code of Canada,1955.

" However merely to use some word such as knowingly or wilfully does not always solve the problem for then as is seen from the case of *R.* v. *Rees* (24 C.R.I. 1956) these words may apply to one element of the actus reus or to the whole actus reus ". Alan W. Mewett, *Criminal Law*, 1948-58 (1958), 36 Can. Bar Review, p. 449.

23. American Law Institute Model Penal Code, Tent. Draft. 4, S. 2.02.