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“Dharma is to protect the Needy”

Article on
Analysis of Mens Rea in the offence of rape

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ABSTRACT

Mens rea and actus reus both form an important part in the subject of criminal law. It is easy to prove actus reus in a crime but it's equally difficult to prove the guilty mind of a person accused of a certain crime. To tackle this, the Indian Penal Code uses words like "intentionally", "fraudulently", etc. to describe the mental element of a crime under the IPC. But there aren't any such words used under section 375 which describes rape as an offence. So this study aims to describe various stages of crime and the position of accused under each and further will describe the position of mens rea under IPC. Further, this paper will analyse the application of mens rea under the section of rape, considering that there isn't any such words used in section 375 which specifically describes guilty intention of the accused. Finally, after analyzing mens rea with rape, this research study will recommend some changes which can be made to the existing rape laws to make it even better and justified.

Keywords – Rape, Indian Penal Code, Mens rea, section 375, crime.

INTRODUCTION

“Criminal law can be defined as a body of specific rules regarding human conduct which has been promulgated by political authority, which applies uniformly to all members of the classes to which the rules refer, which are enforced by punishment administered by the state.”¹

The essence of criminal law lies in the maxim- “*actus non facit reum nisi mens sit rea*”, that is, an act doesn’t declare anyone guilty of it until there is a criminal intent to do so. Joel Prentiss Bishop, who was an American lawyer and legal treatise writer, writes that “There can be no crime large or small, without an evil mind. It is, therefore, a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.”²

The word “crime” is borrowed from the Latin word “*krimos*”, which means to “accuse”.³ Crime is those acts which are against the social order, which deserves to be condemned by society at large. The definition of the word crime as per the Collins dictionary means that “an illegal action or activity for which a person can be punished by law”. The effects of the mens rea have changed according to the needs of society. In the ancient period, there was no concept of mens rea. The liability of a wrongdoer was absolute and the intention because of which the person committed the act was ignored.⁴ But, as time changed, the concept of mens rea evolved which is now used to determine the criminal liability of the accused. And nowadays, an accused can be held criminally liable provided that the principle of mens rea is satisfied, that is, the person should have a criminal intention or guilty mind at the time of the commission of an act.

There are two parts of a crime, “actus reus” and “mens rea”. The latter is the “guilty mind” that one should possess while committing a crime and the former describes the action taken by the wrongdoer to commit a crime. Apart from this, the commission of a crime involves four stages, firstly, an intention to commit a crime, then preparing to commit that crime, and then, the attempt to commit it. If the attempt is successful, then the person will have committed the offence, that is, accomplished it. But if he fails to achieve it, then the crime will be restricted to the attempt to

¹ Abdul Hasanat, The Criminal Law of India, (1940) 51 (JS0 41).

² Criminal law, 9th edition, (1930) 287.

³ Gaurav Garg, An analytical study of general defences in the absence of mens rea in changing social condition, Jiwaji university, Gwalior (2017).

⁴ Hasanat, *Supra* note 1.

commit it. To make a person criminally liable for an offence under the IPC, the act by him must be done voluntarily. An act committed involuntarily by a person will not make him liable.

In the four stages of crime, the first two stages talk exclusively about mens rea, which is the mental state of a person. Last two stages are those where the application of actus reus is involved. In the Indian penal code, all the provisions relating to an act talks about the mens rea part of a crime. Not explicitly though, but through words like fraudulently, corruptly, rashly, negligently, and so on.

In this research paper, the author will discuss stages of crime, further talking about mens rea under Indian Penal code and words denoting it with the help of various landmark judgements. Finally, the author will be discussing the concept of mens rea in rape cases while providing various cases concerning it, along with some suggestions of changes which can be made to existing rape laws in the country.

RESEARCH OBJECTIVES

This research study aims to achieve the following objective:

- To discuss the concept of actus reus and mens rea under criminal law.
- To discuss the stages of crime.
- To highlight the importance of mens rea in the stages of crime.
- To highlight mens rea in the IPC.
- To analyse the concept of mens rea in the case of rape.

RESEARCH QUESTIONS

- What constitutes a crime?
- What are the stages of crime?
- What is the role of mens rea in the stages of crime?
- How is mens rea highlighted in the provisions of the Indian Penal Code?
- What's the position of mens rea in the offence of rape?

METHODOLOGY OF RESEARCH

The author has adopted the “qualitative doctrinal research methodology” for this research study. It involves a theoretical study wherein the sources of information are secondary, such as commentaries, the information given by government data, etc. The research work is purely doctrinal and descriptive. The author referred and scrutinised various research papers, journals, articles, and commentaries. The author also cited various landmark judgments from different courts at places where it is required. Along with this, the author has also made extensive use of online databases such as SCC, Lexis Nexis, Hein online, etc. to find relevant cases and articles for the research topic.

STAGES OF CRIME

Criminal law is a set of rules and statutes which describe what shouldn't be done by an individual living in a society. The reason is that if the prohibited things are done, then it would be detrimental for public safety and welfare. It describes sanctions to be imposed for the commissioning of the acts prohibited. In India, the same is given under the Indian Penal Code, 1860.

Earlier during the ancient times, an individual would be punished if an act prohibited is done by him, not considering his intentions to do so. Animals were also no exceptions to it. That is, punishments would be inflicted even on animals if the act was done by it, for example, a was killed as it kicked a man. This is mainly because back then, the idea of criminal law was based on retribution. Considering this, if at all an individual does an act which is prohibited accidentally; he would be punished as if he had done that intentionally.

But nowadays, the performance of an act alone wouldn't make an individual guilty. Thanks to the constant evolution of criminal law, the intention behind doing an act has also got a bigger role to play to decide the criminal liability of the accused. Considering this to decide whether an accused would be criminally liable for an act, there have been four stages of crime established. Those are as follows:

- Intention.

- Preparation
- Attempt
- Commission

1. Intention

The fundamental rule of criminal law is based on a Latin maxim “Actus non facit reum nisi mens sit rea”. In layman terms, it means that an act committed by an accused will not be considered to be a criminal act until it is done with a guilty intention. The intention is the first stage of crime wherein a person just desires to commit an act. The accused is not prosecuted at this stage because just an intention to commit a crime which is not followed by an act doesn't constitute an offence. Moreover, it is very difficult to assess and prove the intention of a person. The term is difficult to define. Even in the Indian Penal Code, the intention to commit acts mentioned in it is not explicitly defining intention. It is expressed by using words like “voluntarily”, “with the purpose of”, “knowingly”, etc. The accused would be proven guilty only if it is proved that there was an evil intention behind the act committed by him. But the burden of proof is on the prosecution to show to the court that there are sufficient grounds to conclude that intention existed.

In the **Ramachandra Gujar case**⁵, the court held that “intention can be only inferred from the conduct of a person and the probable effect of such conduct must be taken into account as well.”

Similarly, in the case of **State of Maharashtra vs. M.H. George**⁶, the Supreme Court held that “criminal intention is a psychological fact which needs to be proved even with regards to offences under special acts unless it's specifically ruled out or ruled out by necessary implication.”

Supreme Court ruled in the case of **Hari Mohan Mandal vs. State of Jharkhand**⁷ that “*it is not essential that bodily injury capable of causing death should have been inflicted. Intention to kill or knowledge that death will be caused is a question of fact which will be subject matter of trial.*”

⁵ (1937) 39 BOM LR 1184.

⁶ AIR 1965 SC 722.

⁷ 2004 (1) SCC 220.

2. Preparation

Preparation means arranging all the necessary measures to carry out the intended crime. It is the second stage so far as the commission of a crime is concerned. Intention followed by mere preparation doesn't constitute a crime, one of the reasons being that the prosecution had often failed to prove the preparations made by the accused of committing a particular crime. However, there are few exceptions to this rule, like section 122 of IPC, which describes the preparation of war against the government, wherein even preparation of a crime to be committed is punishable under the Indian Penal Code.

3. Attempt

An individual is guilty of attempting to commit a crime if it is attempted to commit it and conducts an act that is a major step towards the commission of the crime, but not the actual commission of a crime. An attempt is a clear step towards a crime being committed. It is often referred to as a 'preliminary crime.'

Section 23 of IPC deals with "attempt to commit offences" and provides punishment for the same. The essentials of the attempt are as follows:

- Evil intention.
- An act done towards the offence.
- The act done shouldn't constitute a commission of the act in question.

There isn't much of a difference between the commission of a crime and an attempt towards a crime. So, to distinguish between the same, there have been several tests laid down by the court.

- **The proximity tests.**

This test measures the accused's progress towards a certain offence by scrutinizing how close the defendant is to completing the offence. It measures what is to be done towards completion, and doesn't consider what is already done.

The offence of attempt is explained by the Supreme Court in the **Sudhir Kumar Mukherjee's⁸** and **Abyanand Mishra's⁹** case by saying that:

“A person commits the offence of attempt to commit a particular offence” when-

- “There’s an intention to commit an offence.”
- “He having prepared with the intention to commit the offence does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during committing that offence.”
- **Locus Poenitentiae test**

It is a Latin term which means the opportunity to withdraw. It means that an act will amount to preparation if a man willfully gives up carrying out an act further. If this happens, then the act done by the accused would be confined within the preparation and hence, wouldn’t be liable for preparation.

- **Impossibility test.**

An attempt would fall in the domain of an impossible attempt provided that the following conditions are met:

- There was an intention to commit the offence.
- Preparation was duly done.
- The completion of the offence was made impossible because of certain facts not known to him or maybe because the circumstances were beyond his control.

In the case of **Asagarali Pradhani v. Emperor¹⁰**, the act done by the appellant was not an “act done towards the commission of the offence” and therefore, he could not be convicted.

- **The Unequivocality test:**

This test is based on the principle "Res Ipsa Locquitor," which means that things speak for themselves. If the actions of a person, in itself indicates that the person intends to commit a crime

⁸ (1974) 3 SCC 357.

⁹ AIR 1961 SC 1698

¹⁰ (1934) ILR 61, 64.

unmistakably and beyond a reasonable doubt, the action is a criminal attempt to commit that crime. According to this test, the act of the accused clearly shows his intention to carry out the criminal object.

4. Accomplishment

This is the last stage in the commission of an offence. If it is found that an accused has completed his attempt to commit a crime, he would be liable for his actions. But if the attempt is unsuccessful, then the accused would be liable for attempt only.

In the case of **R. vs. Scofield**¹¹, the accused lit a candle and placed it into a flammable material in a house with the intent to burn it down. But the fire never disseminated. The court held that the accused is guilty of committing mischief.

MENS REA UNDER IPC

It has been argued that the concept of mens rea in the India Penal Code is not explicitly and wholly out of place.¹² But, the mens rea element is mentioned in each crime under the IPC. Not explicitly though, but through words such as fraudulently, knowingly, etc. Hence, the state of mind, which is an important element in criminal law, has been well taken care of in the Indian Penal Code as well. IPC deals with criminal intention in two following ways as mentioned below:

1. In some offences, words like fraudulently, dishonestly, voluntarily, intentionally, etc. have been used to define the criminal intent of the accused. Such words are used because the offences under which it is mentioned cannot be done by an innocent person. For instance, Sedition in section 124-A, Waging war against the government which is described in section 121 of IPC.
2. Secondly, chapter IV (section 76 to 106) of IPC deals with general exceptions describing those circumstances wherein it can be presumed the absence of criminal intent.

As mentioned earlier, IPC nowhere uses the word mens rea but denotes the criminal intent through words like fraudulently, dishonestly, voluntarily, etc. Use of each would be discussed below:

¹¹ Cald. 397 (1784).

¹² Supra note 3.

¶ Fraudulently:

The literal meaning of fraud is “willful, misstatement about the material fact of a thing”¹³. Even though the meaning of fraud isn’t defined under IPC, it does defines the meaning of “fraudulently”¹⁴, which is “A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise”. In the Indian legal system, the meaning of “fraud” is defined under section 17 of the Indian Contract Act, 1872.

In the case of **Queen Empress vs. Soshi Bhushan**¹⁵, the accused applied for the final class of LLB at Banaras University. He said that he had completed all the previous classes of LLB at Lucknow Canning College. He produced a false certificate to prove the same. But later it was found that the certificate was forged and was held that he acted fraudulently.

¶ Dishonestly:

The meaning of “dishonestly” is defined under section 24 of IPC, which states that an act is dishonestly done when there’s an intention to cause wrongful gain or wrongful gain.

Meaning of “wrongful gain” and “wrongful loss” is defined under section 23 of IPC. A person who gains wrongfully when he either retains or acquires wrongfully and similarly, a wrongful loss means that a person is illegally deprived of his property.¹⁶

In the case of **krishan Kumar vs, union of India**¹⁷, the court ruled that wrongful gain, wrongful retention and wrongful loss includes being deprived or kept out of the property.

There are a few sections given in IPC which jointly use “fraudulently” and “dishonestly”. Those sections are section 209, 246, 247, 415, 421, 422, 423, 424, 464, 471 and 496.

¶ Voluntarily:

¹³ *Id.*

¹⁴ INDIAN PENAL CODE 1860 SEC. 25.

¹⁵ ILR (1891-93) 15 AIR 210.

¹⁶ Supra note 3.

¹⁷ AIR 1959 SC 1390.

The definition of voluntarily is provided under section 39 of Indian Penal code and it is clear from the definition of voluntarily that it also takes into consideration the knowledge and reasonable grounds of belief, apart from intention.

In the case of **Emperor vs. Raghu Nath Rai**¹⁸, the accused who is a Hindu by religion takes away a calf belonging to a Muslim without the consent and knowledge of the latter, so that the calf can be saved from being slaughtered. The accused, even though acted without a criminal intention, was held guilty of theft and rioting.

Apart from these three widely used words to denote mens rea principle in a crime, there are many other words which one may find which denote the mens rea part of a crime. And those are:

- ❑ Corruptly (used in section 196, 198, 200, 219, 220)
- ❑ Malignantly (used in section 153 and section 270)
- ❑ Maliciously (used in section 219, 220, 270)
- ❑ Rash and negligent (used in section 279, 280, 283-289, 304A, 336-338)

MENS REA AND RAPE

Rape is a horrific crime one can think of. Apart from the physical harm which a rape victim will have to deal with, it also continues to haunt the victim mentally in the long term. It has increased sharply in recent times and it has become a national problem.¹⁹ So far as actus reus is concerned, it consists of having non-consensual sexual intercourse with a woman.²⁰ So, to put it in layman terms, a man commits the actus reus part of rape if he is having unlawful sexual intercourse with a woman who is not consenting to it at the time of sexual intercourse.²¹ “Unlawful” in this context means that the intercourse was with a person other than the husband of the victim.

In the Indian Penal Code, rape is defined under section 375 and punishment for the same is defined under section 376. Section 375 provides for seven circumstances under which the act

¹⁸(1892) 15 AII 22.

¹⁹ V.K. Madan & R.K. Sinha, *the Dynamics of Rape in Modern Indian Society*.

²⁰ Smith & Morgan, *Criminal Law* 288 (2nd ed. 1969).

²¹ Cross & Jones, *Introduction to Criminal Law* 177 (9th ed. 1990).

of sexual intercourse between a man and a woman can be considered as rape. But one thing which should be noted amongst all the seven circumstances (the sixth one being a clause related to age, where consent is immaterial), voluntary and free consent is absent on the part of women for sexual intercourse.

Unlike other sections mentioned in IPC, one may notice that there isn't any word mentioned in section 375 which denotes mens rea element of crime like "voluntarily", "intentionally", etc. But, the mental element, even though not expressly mentioned, is an underlying part of this offence. The act of sexual intercourse is on the face of it, an intentional act. If the act of sexual intercourse is proved, then the intention of a person accused to commit it is apparent. Rape is an offence where mens rea and actus reus goes hand in hand. It's unlike other offences against the body, where the criminal intention is followed by actus reus. To get a clear picture of the same, each circumstance will be discussed one after another from the perspective of mens rea.

The first clause states against her will. It means that the burden of proof lies on the prosecution to prove that sexual intercourse was against her will. This means that the victim is supposed to show marks of resisting sexual intercourse on her body. If the prosecution can produce such evidence in the court of law, then it can safely be assumed that mens rea was present, that is, the intention of the accused to have sexual intercourse, irrespective of the woman's consent.

In the case of **State of Uttar Pradesh vs. Chottey Lal**²², the accused caught the victim and the accused showed fire-arms to her as she tried to raise the alarm and gagged her mouth and performed forcible intercourse with the prosecutrix. The Court stated here that the words 'against her will' and 'without her permission' can often but certainly overlap the two words in clause I and clause II with distinct connotations and dimensions. The term 'against her will' would generally mean that, despite her resistance and opposition, the intercourse was conducted by a man with a woman.

The second clause describes "without her consent". The burden of proof in this circumstance will fall on the prosecution to produce evidence which will become a firm ground

²² 2011 2 SCC 550.

for the fact that the sexual intercourse was against the will of the victim. Mens rea in this clause is presumably once actus reus is proved.

The third clause says that even if the consent of the victim is obtained by the accused by putting her any other person related to her under the apprehension of death or hurt, the act of sexual intercourse, in this case, will be considered as rape. Again, in this case, the accused is presumed to have mens rea (non-consensual sexual intercourse) because the consent is obtained by the use of force on the victim or anyone closer to her. In the case of **State of Himachal Pradesh vs. Mange Ram**²³, the Supreme Court held that surrendering of the body by prosecutrix under apprehension will not be treated as consensual sexual intercourse.

The Supreme Court held in the case of **State of Maharashtra vs. Prakash**²⁴, that if by beating her husband and threatening to put him in police custody, a police constable and businessman had sexual intercourse with a woman, the act falls under Clause (3) of Section 375 IPC. It is not necessary for the real use of force to occur; a threat to the use of force is appropriate.

Forth clause states that sexual intercourse will be considered rape if the consent is given by the victim believing that she's lawfully married to the accused and the accused knows that he isn't her husband. In this case, mens rea is proved by the fact that the accused had misinformed the victim and made her believe that he's her lawful husband.

It is mentioned under the fifth clause that sexual intercourse would be considered as rape if the women due to unsoundness of mind, isn't able to give consent, or if the accused has obtained the consent of the victim by intoxicating her personally or through someone else. As a consequence of which, she isn't in a position to give consent. What can constitute as mens rea, in this case, is the administration of any "stupefying or unwholesome substance" by the accused to the victim. It is because of the accused's criminal intention, which made him intoxicate the victim and had non-consensual sexual intercourse with the victim.

In the case of **Tulshidas Kanolkar vs. State of Goa**,²⁵ the accused had sexual intercourse with a mentally challenged woman. The mental faculties of the victim were undeveloped. Here the

²³ AIR 2000 SC 2798.

²⁴ AIR 1992 SC 1275.

²⁵ 2003 8 SCC 590.

Supreme Court convicted the accused person and stated that for constituting consent there must be an exercise of intelligence based on knowledge of the significance and moral effect of the act.

The sixth clause talks about the age for consent, which means that if an accused, get involved in sexual intercourse with a girl below the age of eighteen, the act would still be considered as rape as consent from prosecutrix is immaterial in this circumstance. As consent is immaterial, it would also mean that the criminal intention of the accused is immaterial because it would still result in the accused being guilty of rape.

The seventh clause states that when the victim is unable to give consent to sexual intercourse, it would still amount rape. This clause comes into play in a situation when the victim is unable to give consent, maybe because of unconsciousness or because of any other reason. Here, mens rea can be proved if the accused does such an act which would have made the victim unconscious. For instance, adding something in the food or drink of the victim and as a result of which she loses her consciousness and then, the accused have sexual intercourse. This is on the face of it involuntary sexual intercourse and hence is considered as rape.

CONCLUSION AND RECOMMENDATIONS

Mens rea is an important element which is to be considered while ascertaining the gravity of the crime committed by the accused. As IPC talks more about punishing the guilty, mens rea plays an important role in deciding the severity of punishment. That's what gave rise to the concept of stages of crime. Subject to exceptions, an accused will not be punished in the first two stages of crime as they talk about the mental state of an accused which is very difficult to ascertain.

The concept of mens rea gave a whole new perspective to criminal law. For instance, in ancient times, if a man was found committing a crime, he would be punished, not considering what caused the accused to commit that crime. Maybe he would have done that under the influence of someone. But now, apart from the act committed, the intention is also given equal importance in modern criminal law.

Talking about rape, after analyzing it with mens rea, it is clear that it's putting the burden of proof on the victim rather than the accused. No doubt that the conviction rate in rape cases is

just 28% (in 2019).²⁶ For instance, as per clause one which says “against her will”, the victim is supposed to submit evidence which proves that the act was done without her consent. She will have to show marks of resistance on her body as evidence for the same. This is burdensome from the perspective of women as it is putting her on trial rather than the accused. If there aren’t any physical injuries, then it is assumed that she consented to the intercourse and hence, the accused is acquitted, not considering his intention. Like in the case of **Sukru Gonda vs. State of Orissa**²⁷, the court believed that at least some scratches or bruises should have been found either on the body of the victim or the accused to consider an act of sexual intercourse as rape. This makes it evident that if at all there aren’t any physical injuries on the victim’s body, the courts would be unwilling to acknowledge the case of rape and assume that there was consent given by the woman. So it would be recommended over here to delete the phrase “against her will” as it is unnecessarily obliging the victim to show marks of struggle.

Another change which can be done in the present rape laws is to remove marital rape as an exemption to section 375. It is known that non-consensual intercourse by a man with a woman hits the woman both emotionally and mentally. And if it is accepted that sexual intercourse between two adults must be with consent, there is no reason why non-consensual sexual intercourse by a husband with his wife shouldn’t be considered as an offense. Sexual intercourse without consent has the same devastating effect on a woman, irrespective of her relationship status. In fact, trust, love, and most importantly, an expectation of respect for the autonomy of decision forms the basis of the relationship between a husband and his wife.

The reason why marital rape was made an exemption to section 375 is based on the age-old belief that the husband cannot be held guilty of rape committed by himself upon his wife, just because of their mutual matrimonial consent and assuming that husband and wife are viewed as a single legal person. This led to marital rape being an exemption in the US and UK, from where India derived most of its laws.

²⁶ Kanu Sarda, *Under 30 percent conviction rate in rape cases in India, says NCRB data*, THE NEW INDIAN EXPRESS (18 Oct. 2020, 7:05 AM) <https://www.newindianexpress.com/nation/2020/oct/03/under-30-percentconviction-rate-in-rape-cases-in-india-says-ncrb-data-2205090.html#:~:text=NEW%20DELHI%3A%20On%20an%20average,accused%2C%20only%2028%20gets%20convicted>.

²⁷ 2004 Cri LJ 1566.

But in 1991, in the UK, the case of **R. vs. R**²⁸ recognized that marital rape as an exemption had no legal basis since sexual intercourse was no longer confined to marriage. As mentioned earlier, sexual intercourse without consent is always detrimental, no matter who the propagator was. The result of this judgment was that consent was assumed to be the basis of investigation, notwithstanding the relationship between the plaintiff and defendant.

Hence, it is apparent that the UK was done away with the exemption of marital rape much earlier. But the same laws in India are still prevalent. The UK has removed this exemption, the country from which India borrowed most of its laws. The reason behind this is that even today in India; wives are considered to be the property of the husband or are seen as being subsumed within the legal personality of the husband. These concepts are now obsolete and should have been done away with.



²⁸ [1992] 1 A.C. 599.