

## **PREPARATORY LEGAL ASPECTS OF CRIMINAL TRIAL**

**Justice Irshad Hussain\***

We all know that the adversarial system of trial prevalent in India was brought in vogue in India by the English. This system in ancient India was not known and the Judge took an active role in eliciting truth as in the continental system. The theory of the common law that justice can be dispensed by giving each party full opportunity to present his own case was the development of the common law in England. Civil and Criminal Procedure Codes in India and the Law of Evidence enacted in the later half of the nineteenth century are in conformity with this common law doctrine. In the adversary system of trial the Judge is supposed to perform the duty impartially, maintaining the balance between the two adversaries and ensure that the proper procedure is being followed. The duty cast on the Judge is to render his decision at the end of the trial and it is not open to the Judge to consider matters extraneous to the evidence or let his personal knowledge come into play.

Criminal law concerns with the protection of life, liberty and property of an individual. In fact criminal law is narrower than morality and this has been the reason that no attempt has ever been made to treat every moral defect as crime. The idea of crime involves some defect, gross undeniable injury to someone where some definite overt act is necessary. None is liable to be punished for ingratitude, hard-heartedness, absence of natural affection, habitual idleness, sensuality and pride. Law is concerned with relationship between the individuals rather than with the individual excellence of their characters. According to Austin's definition 'crime is an act or omission which the law punishes.' According to Blackstone 'a crime is a violation of public rights and duties due to the whole community.' Broadly speaking a crime presents all of the following three characteristics:-

- (1) that it is a harm brought about by human conduct which the State (Sovereign power) desires to prevent;

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- (2) that among the measures of prevention is the threat of punishment to the potential wrong doer;
- (3) that legal proceedings of particular nature are initiated to take a decision as to whether the person accused did, in fact, cause the harm and is held liable for punishment provided thereto.

Section-40 of the Indian Penal Code (Act 45 of 1860) states that an offence denotes a thing which may be punishable by the Code. An ideal criminal justice system is one which is able to reach out to every individual, who has committed a crime and after affording a fair trial to those accused is able to punish each one of them while ensuring that no innocent person is convicted. Acquittal of a guilty person is as much failure of criminal justice system as conviction of an innocent person. It is therefore vital that criminal trials are held and conducted skillfully and methodically according to the procedure established and the trial Judge should be conversant with the legal process and be able to communicate the same in letter and spirit to do complete justice to the society or the individuals and to avoid miscarriage of justice.

The fundamental principle of criminal law is that there must be wrongful act (*Actus reus*) combined with wrongful intention - *mes rea*. This principle is embodied in the maxim *Actus non facit reum risim mens sit rele* meaning, 'an act does not make one guilty unless the mind is also guilty.'

*Actus reus* connotes an overt act, the physical result of human conduct. For example in an assault case the injury sustained by the victim is the event which is the *Actus reus*. In other words the crime is constituted by the event and not by the activity which caused the event. The intention to cause the injury by assault is called *mens rea*. In order to create a criminal liability the act must be one which is prohibited by law and it is not merely sufficient that there is *mens rea*, the *actus* must be *reus*.

*Mens rea* is motive forced behind the criminal act. There must be a wrongful intention or such condition of mind which may be blame-worthy before a person is made criminally liable. *Mens rea* or guilty intention is sine qua non of a criminal act. Ordinarily, a crime is not committed, if the mind of a person doing the act is innocent. The fact that *mens rea* has been made pivotal to the criminal liability is based on the premise that

every person has the capacity to choose between right and wrong. Once a person makes a choice, he has to take the responsibility for the same. Under the Indian Penal Code guilt in respect of almost all the offences is fastened either on the ground of intention, or knowledge, or reason to believe. All offences under the Indian Penal Code are qualified by one or the other words such as wrongful gain, or wrongful loss (Section 23), dishonestly (Section 24), fraudulently (Section 25), reason to believe (Section 26), criminal knowledge or intention (Section 35), intentional co-operation (Section 37), voluntarily (Section 39), malignantly (Sections 153, 270), wantonly (Section 155). Although the word '*mens rea*' as such is nowhere found in the Penal Code, its spirit and essence is reflected in almost all the provisions of the Code. Intention is a term, which is very difficult to define and this is the reason that it is expressed by words such as 'voluntarily' and 'willfully', 'deliberately', 'deliberate intention', 'with the purpose of' or 'knowingly'. In the Indian Penal Code all these expressions find place in different sections of the Code with reference to the offences defined therein.

It also needs to be impressed that *mens rea* is not a unitary concept. Depending on the nature of the crime *mens rea* may be present or existence of intention in some cases, the requirement of knowledge in some and negligence in some other. The negligence is the failure of a person to act with the standard of care expected of a reasonable or a prudent person.

Chapter IV (Sections 76 to 106) deals with general exceptions, wherein acts otherwise would constitute offences ceased to be so under certain circumstances set out in the various sections. Therefore, these exceptions are in itself a recognition of the principle of *mens rea*.

For framing of a charge of an offence under the Penal Code, the traditional rule of existence of *mens rea* is to be followed (See also Sections 211 to 216 of the Code of Criminal Procedure). It need to be stated here that this traditional rule that *mens rea* is an essential element of an offence is not without its exception. In the last few decades social or public welfare laws have been so drafted that the law makes the mere omission or commission of acts punishable. In other words no *mens rea* is required. Such acts are termed as 'strict liability' or sometimes 'absolute liability offences'. Enactments for instances to be referred are:-

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- (a) Factories Act and other Labour Legislations.
- (b) Prevention of Food Adulteration Act.
- (c) Essential Commodities Act.
- (d) Motor Vehicles Act.
- (e) Negotiable Instruments Act etc.

Example of 'strict liability offences' may be found in the Indian Penal Code such as Section 292 which makes the sale, hiring, distributing, publicly exhibiting, importing, exporting etc. of obscene books, pamphlets, writings, drawings etc. offence.

Every person accused of a crime is presumed to be innocent unless and until proved guilty by the evidence adduced by the prosecution or the complainant. The burden of proving the guilt of the accused rests solely and entirely on the prosecution and this burden does not shift. Generally an accused cannot be asked to bring his innocence but when the element of *mens rea* exists in the statutes; the prosecution only has to prove that the accused committed certain wrongful act. The presumption is always rebuttable one, that is, the accused person shall be given an opportunity to prove that the person had committed certain acts, but it was done innocently and without any criminal intent (see Section 8-A of Dowry Prohibition Act).

An offence that has been committed generally divided into four distinct and successive stages:-

- (1) intention of commit it;
- (2) preparation;
- (3) attempt to commit; and
- (4) the actual commission of the offence;

In criminal law, the first two stages of intention and preparation are generally not made punishable. Law does not as a rule punish individuals for evil thing or intention. It is impossible for anyone to be able to look into breast of criminals to ascertain and prove the evil intentions. Further, it is always possible for a person to give up his evil intentions or designs. It is based on these considerations that a principle of law has come to be evolved which make only those intentions punishable that are accompanied

by some overt act aimed towards achieving the intention. On the same ground preparation, as a general principle, is not made punishable. It is quite possible that the person, who originally had the intention to commit an offence, gives it up and do not go ahead with the preparation. It is when an act has gone beyond the stages of preparation towards achieving the intention that the law of attempt begins and criminal liability covers the act committed.

While preparation to commit an offence is not generally defined to be an offence but special variety of acts are defined to be offences although they may constitute preparation to commit those offences. For example under Section 122 I.P.C. collecting men, arms and ammuniton to prepare to wage war against the government of India; under Section 126 I.P.C. committing depredations on territories of any power in alliance or with the peace with the government of India; under Sections 233, 235 and 257 I.P.C. making or selling or being in possession of instrument for counterfeiting coins or government stamps; under Sections 242, 243, 259 and 262 I.P.C. the possession of counterfeit coin, government stamps, false weight or measures and under Section 399 I.P.C. making preparation to commit dacoity have been made punishable, offences.

The I.P.C. does not clearly define the 'attempt'. However it makes provision covering the categories of acts amounting to an offence to attempt to commit an offence. For example attempt to commit suicide under Section 309 I.P.C. and another category relates to attempt to commit the offences, in which no specific punishment has been provided in I.P.P. (Section 511 I.P.C.).

Thus, the above introductory concepts have to be taken note thereof while cognizance of offence is taken and to proceed with the criminal trials/cases according to the procedure provided under code of Criminal Procedure and any other enactment.

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