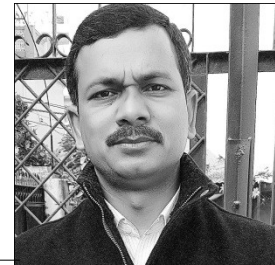


Presumption of *Mens Rea* in Strict Liability Offences?

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1. Foreword

In criminal law, strict liability is defined as offences which do not require mens rea. "Crimes which do not require intention, recklessness or even negligence as to one or more elements in the *actus reus* are known as offences of strict liability."² Muluki Criminal Code 2074, Sec. 29 provisions 'mens rea will not be examined in cases of strict liability offences'; however, the Act has not listed strict liability offences. With this provision, a problem arises in demarking strict liability offences from absolute liability offences. Obviously they are not the same by term itself. Hence, this article tries to throw the light to contextualise Sec 29.

2. Background

Strict liability laws were created under common law in the 19th century to improve working and safety standards in factories. The first case to impose strict liability is said³ to be that of *Woodrow*.⁴ In this British case, D was found guilty of having in his possession adulterated tobacco, although he did not know it was adulterated. The prosecution emphasized the purpose of the statute – it was for the protection of the revenue – and the absence of 'knowingly' or any similar word in the form of the offence.

Another (mis)leading case imposing strict liability was *Pharmaceutical Society of Great Britain v Storkwain* (1986) 2 ALL ER 635. In this case, a pharmacist supplied drugs to a patient who presented a forged doctor's prescription, but was convicted even though the House of Lords accepted that the pharmacist was blameless.

In the context of Nepal, the case of *Tara*⁵ stands as much cited one of strict liability. But, the case does misunderstand the right of presumption of innocence, and is not able to distinguish between strict liability and absolute liability. Nepalese Supreme Court has not developed standard *ratio decidis* in strict liability since the case of *Tara* itself contains a dissenting opinion of a judge over the judgement of two judges in cardinal issues of establishing offence and defining strict liability.

By standard, it is a fundamental principle of criminal law that a person may not be convicted of a crime unless "the prosecution have proved beyond reasonable doubt both (a) *actus reus*, and (b) *mens rea* in relation to the particular *actus reus*"⁶. The principle that a person is not criminally liable for his conduct unless the prescribed state of mind coincides with the prohibited *actus reus*

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² Smith and Hogan, *Criminal Law*, 12th edition (Oxford: Oxford University Press 2008), 150.

³ B. Sayre (1933) 33 Col LR 55. cited from Smith and Hogan, *Criminal Law*, 12th edition (Oxford: Oxford University Press 2008), 151.

⁴ *Reg.v. Woodrow* (1846) 15 M. & W. 404.

⁵ *Tararaj Bhandari (Karki) v Nepal Government*, NKP 2065 (2009), Dec. No. 7974, p. 687, (Full Bench).

⁶ PSA. Pillai's, *Criminal Law*, 10th edition (Nagpur: LexisNexis Butterworths Wadha 2008), 57.

also being present is frequently stated in the form of a Latin maxim: *actus non facit reus nisi mens sit rea*⁷. And, the controversy does also arise whether strict liability offences infringe the presumption of innocence guaranteed!

There are cases⁸, for example, the case of *Sherras*⁹ is usually cited for its reference to the presumption *mens rea* as an essential ingredient in every offence, including strict liability. If is absolute liability offence, there is no question of *mens rea*. However, strict liability is lower in criminal calendar to absolute one. If so, what differentiates them? The point of demarcation is at presumption of *mens rea*, as illustrated below:

Absolute liability offence:	No question of <i>mens rea</i>
Strict liability offence:	Presumption of <i>mens rea</i>
Relative liability offence:	Requires <i>mens rea</i>

3. 'The Principle of Presumption of Innocence' and 'Strict Liability'

Under court of law, it is commonly accepted principle that court cannot criminalize. Courts have no power to create new offences and they have no power to abolish offences. The source of criminal offence is always statute law. So, it is unconvincing to argue that the prosecutor does not need to prove the *mens rea* in the particular *actus reus* of strict liability offences.

It is an unavoidable fact that the principle of presumption of innocence is human rights. It is guaranteed under Article 24 (5) of the Interim Constitution of Nepal, and is widely accepted principle through International Declaration of Human Rights, 1948, the Human Rights Act, 1998¹⁰, Art 6(2) of the European Convention etc. Hence, courts cannot 'strike down' statutes, cannot interpret the law beyond legislative will, and cannot establish offences in the manner which are not statutorily supposed.

It must be legitimately and rationally answered keeping in cogito to the principles of criminal liability accepted across the globe whether strict liability offences infringe the presumption of innocence guaranteed under Art 24(5) of the Interim Constitution of Nepal, 2063 or not? Professor Ashworth has illustrated the objection to strict liability as:

"That it is wrong to convict people of serious offences without proof of culpability, and that is a separate argument from the presumption of innocence. It is not an argument about evidence and procedure at all but an argument about the proper preconditions of criminal liability."¹¹

Defining the right of presumption of innocence, Lord Bingham wrote in a land mark decision of *Sheldrake*¹²:

"The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence flexibility in application of the presumption, retention by the court of a power

⁷ Properly translated as "an act does not make a man guilty of a crime, unless his mind be also guilty".

⁸ *Sweet v Parsley* (1970) HL.

⁹ *Sherras v. De Rutzen* [1895] 1 QB 918.

¹⁰ Of United Kingdom

¹¹ Professor Ashworth, "Four Threats to the Presumption of Innocence" (2006) E & P 241, cited from Smith and Hogan, *Criminal Law*, 12th edition (Oxford: Oxford University Press 2008), 155.

¹² *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, p. 21.

to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption."¹³

4. 'The Presumption of Mens rea' and 'Strict Liability'

Strict liability offences are almost invariably found in statutes. So, the courts, in enforcing them, profess merely to be implementing the intention of legislature, express or implied, as they find it in the statute; not in their free will of interpretation. In 1958, Devlin J. wrote:

"The fact is that Parliament has no intention whatever of troubling itself about mens rea. If it had, the thing would have been settled long ago. All that Parliament would have to do would be to use express words that left no room for implication. One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to the judges and does not want to legislate about it."¹⁴

The courts then have a fairly free hand in this matter, subject to any existing precedent. It is only rarely that the statute ruled out *mens rea* expressly (which is an extreme rarity) or by necessary implication. When strict liability has been imposed, it has usually been because the judges considered it necessary or desirable in the public interest- effectively exercising a legislative function. In the past, judges were quick to state that there is a presumption in favour of mens rea, commonly reciting the well-known statement by Wright J in *Sherras v De Rutzen*:¹⁵

"There is a presumption that mens rea, or evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced wither by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

Lord Reid in that in *Sweet v Parsley*¹⁶ powerfully reaffirmed the presumption: "...whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea"; and "...it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted".¹⁷

With the decisions of the House of Lords in *B (A Minor) v DPP*¹⁸ and *K*,¹⁹ in United Kingdom it is now understood by practice that court cannot criminalize and must presuppose *mens rea* as one element in the crime beyond reasonable doubt. The strength of the presumption of *mens rea* and of a requirement of *mens rea* in the subjective sense was endorsed in the strongest terms in the case of *G*²⁰ on recklessness. Lord Bingham observed:

"It is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but familiar rule *actus non facit reus nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also."

¹³ Ibid, 22.

¹⁴ Devlin J., *Samples of Lawmaking*, 1st edition (Birmingham: Birmingham University Press 2003), 71.

¹⁵ *Sherras* (n 8) at 921.

¹⁶ *Sweet v Parsley* (1970) AC 132.

¹⁷ Ibid.

¹⁸ *B (A Minor) v DPP* (2000), 2 AC 428.

¹⁹ *R v K* [2002] 1 AC 462.

²⁰ *R v G and Another* [2003] UKHL 50, [2004] AC 1034.

5. Judicial Decisions Presuming Mens Rea in Strict Liability

The cases below illustrate the fact that presumption of *mens rea* is required even in strict liability offences.²¹

Sherras v De Rutzen (1895) Wright J

The case of *Sherras* is usually cited for its reference to the presumption that *mens rea* is an essential ingredient in every other offence.

Sweet v Parsley (1970) HL

Sweet v Parsley is usually cited as the defining case on strict liability where the need for *mens rea* in most criminal cases was spelt out and where it was acceptable for the presumption for *mens rea* to be dispensed with: "... there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea* ... "

R v Rimmington and R v Goldstein (2005) HL

In *Goldstein* the defendant put salt (as a joke to his friend) into an envelope, salt leaked and the sorting office was evacuated as it was feared it might be anthrax poison. Mr Goldstein did not foresee the leakage (nor desire it; there would have been no joke) and so had no *mens rea* and was not guilty.

Gammon(Hong Kong) LTD v A-G of Hong Kong (1985) PC

The case developed principle of five presumptions as below:

- a. There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence.
- b. The presumption is particularly strong where the offence is "truly criminal" in character.
- c. The presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute.
- d. The only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue.
- e. Even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

B (a minor) v DPP (2000) HL

Fact: D incited a child under 14 to commit an act of gross indecency.

Held: D entitled to be acquitted if he held an honest belief that the child in question was 14 or over, and the prosecution had the burden of proving the absence of honest belief on the defendant's part.

In order to rebut the presumption that an offence required *mens rea*, "compellingly clear implication" that Parliament intended the offence to be one of strict liability is required. The *mens rea* of the offence of gross indecency in section 1 of the Indecency with Children Act 1960 was found to be the absence of a genuine belief by the accused that the victim was fourteen years of age or above.

²¹ Available at http://sixthformlaw.info/01_modules/mod3a/3_10_principles/index.htm retrieved on 14.01.2014

Verdict: Not Guilty.

6. Conclusion

The case of *Tara* shows that in defining the will of legislature relating to the elements of mens rea, the courts have not adopted a clear and consistent approach. But, there is not a single case of bribery in Nepal where the Supreme Court has not looked at demand or *mala-fide* intention; which is undoubtedly an element of mens rea.

While interpreting Sec 29, court needs to distinguish strict liability from absolute liability. Strict liability is used to denote "crimes in which one element or more (but not all) of the *actus reus* requires proof of mens rea; absolute liability denotes those crimes in which there is no *mens rea* attaching to any element of the *actus reus*."²²

All too familiar litanies of vague overlapping criteria which from time out of mind have signally failed to compel from judges predictable consensus. The court must start from the presumption of *mens rea*, and by reference to a number of interpretative techniques, decide the case accordingly. Presumption of innocence is the right and presumption of *mens rea* is the necessity in establishing criminal liability even under strict liability offences.

Ignoring certain state of mind in deciding particular act as offence is ignoring the principle of crime and criminal liability; and is against Article 126 of the Constitution of Nepal. Court must be careful with the threat of imposing 'no fault liability'.²³ To avoid ambiguity and inconsistencies, Court interprets; but, Court does not interpret laws hard to the accused, rather interprets favourable to the accused.

Criminal law sharply differs from other law like tort. Criminal law first and foremost deals with regulating the public welfare and respecting the individual autonomy²⁴ at the same time. It is not the matter either 100 rupees or 50 rupees is compensated. But, in criminal law, once an offence is established he/she is criminally liable. And, no democratic country can imagine that an innocent can be detained in the name of detaining so many perpetrators:

"State power always calls for justification –justification by reference to democratic principles, and justification in terms of sufficient reasons for invoking coercive and censoring machinery against individual subjects."²⁵

Therefore, presumption of *mens rea* is required even in the case of strict liability. The Court must deal differently with the butcher, as argued by Prof. Ashworth, who sold meat in the following three manners: (i) the butcher who knew that the meat was tainted; (ii) the butcher who did not know, but ought to have known; and (iii) the butcher who did not know and had no means to finding out. Sentence cannot properly be imposed without deciding into which category the convicted person falls.

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²² Smith and Hogan (n 1) at 152.

²³ Subash Acharya, *Text Book on Criminal Law* (Kathmandu: Pairavi Prakashan 2017), 29.

²⁴ Andrew Ashworth, *Principles of Criminal Law*, 6th edition (Oxford, OX2 6DP: Oxford University Press 2009), 23. (H.L.A Hart has also strongly advocated, in his 6th lecture, the principle of autonomy in his *Punishment and Responsibility*, 2nd edition (2008): "An individual should not be held criminally liable unless he had the capacity and a fair opportunity to do otherwise, is grounded in the primary importance of individual autonomy").

²⁵ Ibid, 22.

Hart, H.L.A., "Chapter 6", *Punishment and Responsibility*, 2nd edition (2008).
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