

'PRESUMPTION OF *MENS REA*' IN STRICT LIABILITY OFFENCE

Advocate Dr. Subash Acharya

Abstract

Generally strict liability offence is known as the offence which does not require *mens rea*. On this ground, courts in various jurisdiction convict the accused which sometimes result for no fault at all. In *Pharmaceutical Society of Great Britain v Storkwain (1986)* the pharmacist is made liable knowing the fact that he had no fault. This is a representative case of 'no fault liability', and the threat alarms upper in Nepal with the provision of Sec. 29, Muluki Criminal Code. Such menace of miscarriage of justice incites to find out whether strict liability offence does not require *mens rea* or at least it presumes some degree of mental element into the commission of act, because it is never the principle of criminal liability to penalize the person for no guilty. The search of 'presumption of *mens rea*' in strict liability gets its validity from the point that differentiates it from absolute liability, from the point that such liability are not statutorily defined, and from the point that court cannot penalize by interpretation. This paper draws a demarcation line among relative liability, strict liability and absolute liability, analyses cases, and accomplishes that strict liability is not the absolute liability; and, therefore, it requires a 'presumption of *mens rea*' into such offence as 'constituent element' in order to convict the accused.

Key Words: *Mens Rea, Strict Liability, 'Presumption of Mens Rea', Actus Reus, 'No Fault Liability', Absolute Liability, Relative Liability, 'Constitutional Principle', Criminal Capacity, Criminalize, 'Presumption Of Innocence', Stare Decisis, Onus of Proof, 'Constituent Element'.*

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."¹ 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

It is the basic principle of penal liability that a person is not criminally liable for his conduct unless the prescribed state of mind coincides with the prohibited *actus reus*. This is what we name as relative liability. This principle is indicted with sufficient accuracy in the legal

¹ Smith and Hogan. *Criminal Law*, 12th ed., Oxford: Oxford University Press, 2008, p. 150.

maxim, *actus non facit reum nisi mens sit rea* – the act alone does not amount to guilt, it must be accompanied by a guilty mind.²

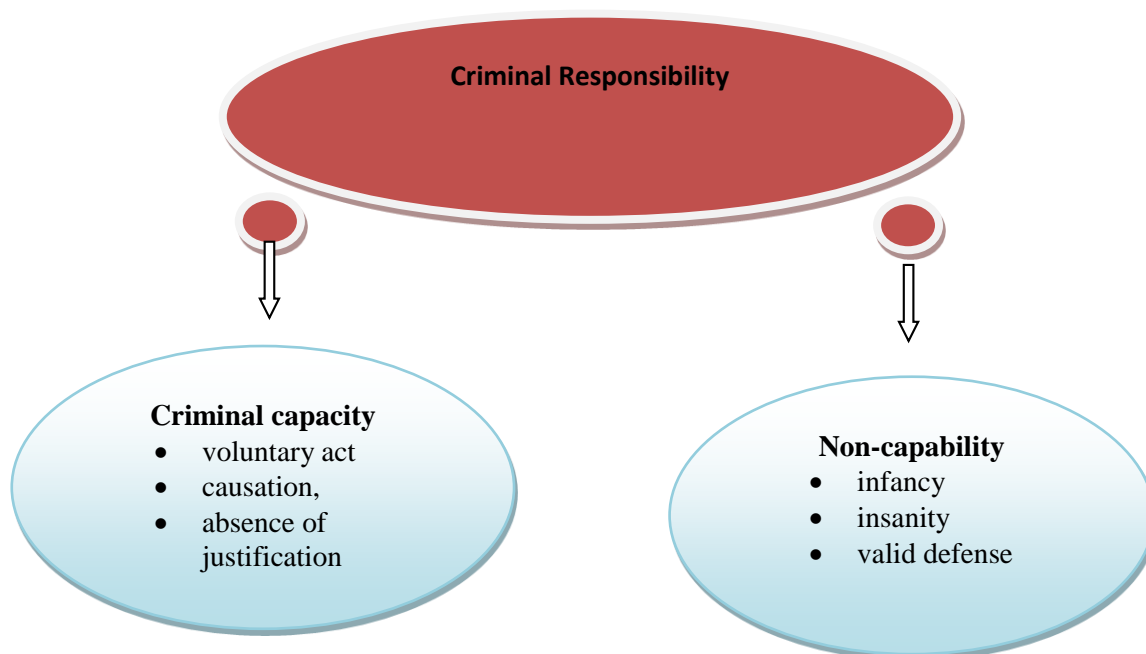
The chief concern of the criminal law is to prohibit behaviour that represents a serious wrong against an individual or against some fundamental social value or institutions. This suggests that there are some wrongs that are not appropriate for legal liability, such as breaking a promise to a friend without good reason, and there are some wrongs that are serious enough for civil liability such as breach of contract, but not for criminal liability.

Criminal liability arises when one violates criminal law voluntarily and without justification. Criminal liability is, therefore, the formal condemnation that the judicial or quasi-judicial body inflicts for violating the law. Raising criminal liability for violating criminal law, the act requires the fulfilment of following three elements:

- a. Voluntary act,
- b. Causation, and
- c. Absence of justification.

These are the preconditions that amount criminal capacity to be held responsible for criminal liability. Non-capable of committing a crime is not criminally liable for the act, and this leads to an examination of-

- a. Infancy,
- b. Insanity, and
- c. Valid defense.



² Fitzgerald, P J. *Salmond on Jurisprudence*. 12th ed., Indian Economy Reprint, Delhi: Universal Law Publishing Co Pvt. Ltd., 2009, p. 351.

Having established that the defendant meets the preconditions for criminal responsibility, we then move to the fault requirements (*mens rea*). The paradigm of fault requirement is basically intention. However, there is a hierarchy of fault requirement: intention is the paradigm and most demanding, followed by recklessness and then by negligence.

However, the presence of fault requirement does not mean that D is necessarily culpable. If D's conduct is justified as in the case of killing for the 'protection of chastity', D is not liable. On the other hand, there are offences which neither requires intention, nor recklessness, nor negligence as in the case of strict liability. At the same time there are offences which attribute liability for the act of others as well.

Here comes the question that what are demarking lines for a person to be liable and not to be liable for the act? What are the criteria to shape boundaries of criminal liability? There cannot be a single formulaic answer to these questions, nor can any person might answer with universally acceptable answer. Generally, a person who commits a criminal offence is criminally responsible if;

- a. He/she commits an act with *mens rea*, as defined crime under existing law;
- b. If no lawful justification exists for the commission of that criminal offence;
- c. If there is no grounds of defense from the criminal responsibility for the act committed; and
- d. If there aren't any statutory exclusion from responsibility for the act committed.

These parameters for criminal responsibility might vary a good deal from one jurisdiction to another, and from one offence to another. However, the structural aspects of criminal liability are the same all over the world. The overall outline of criminal liability can be drawn under the following three headings:³

- a. The range of offences,
- b. The scope of criminal liability, and
- c. The conditions of criminal liability.

The **range** of criminal offences is enormous. First, there are offences harming to the persons, including offences of causing death and wounding, sexual offences, certain public order offences, offences relating to safety standards at work and in sports stadiums, offences relating to firearms and other weapons, and serious road traffic offences. Second, there are offences harming general public interests, including offences against state security, offences against public decency, offences against the administration of justice, and various offences related with public obligations such as the payment of taxes. Third, there are offences harming the environment and the proper conditions of life, including the various pollution offences, offences related with health and purity standards, and minor offences of public order and public nuisance. Forth, there are offences harming property interests, including crimes of damage and offences of theft and fraud, offences of harassment of tenants, crimes of entering residential premises and offences of plagiarism and intellectual property. Fifth, there are offences harming dignity and wellbeing such as offences of defamation and cybercrime.

The **scope** of criminal liability has three dimensions: (a) criminal liability for commission of act by oneself, (b) inchoate liability and (c) criminal complicity. Criminal liability for commission of act arises to the person who does any harm prohibited and punished by laws.

³ Ashworth, Andrew. *Principles of Criminal Law*. 6th ed., Oxford: Oxford University Press, 2009, p. 5.

Whereas, the circumstance in which a person does not actually cause prohibited harms, but nevertheless, be held criminally liable- has two extents: inchoate liability and criminal complicity. A crime is described as inchoate when the prohibited harm has not yet occurred. It is 'doing an act with intent to commit crime'. Therefore, it does not matter whether the prohibited harm actually occurred, as in the case of attempted murder. Regarding criminal complicity, this doctrine is designed to ensure the conviction of a person who, without actually committing the full offence himself, plays a significant part in an offence committed by another.⁴ Thus a person may be convicted for aiding, abetting, counselling or procuring another to commit a crime, or for participating in a joint criminal venture during which another participant commits a more serious offence than planned.

The **conditions** to be fulfilled before an individual is convicted for an offence vary from one crime to another. They are many crimes which require very minimal fault or no personal fault at all. They are usually termed as offences of 'strict liability'. Whereas there are many other offences which require *mens rea*, the requirement of the proof that the defendant intended to cause the harm. On the other-hand, a person may be blameworthy for the acts of another as in the cases of vicarious liability. Besides, a person who knowingly inflicts harms may be acquitted if he acted in self-defense, whilst insane, whilst under duress, and so on.

Thus, the criminal liability is determined by the interplay of the *range* of offences, the *scope* of liability, and the *conditions* of liability.

However, strict liability and absolute liability are exceptions to relative liability, and they are also not the same.⁵ Distinguishing strict liability from absolute one, Prof Ashworth says, "Strict liability should not be imposed where there is nothing more a defendant could reasonably be expected to do in order to avoid the harm."⁶ It raises a question: is it justified 'imposing criminal liability without due diligence defense available?' If so, what about the term 'absolute liability?' In fact, strict liability is lesser to absolute liability as the first allows the defendant to avoid liability on the proof of 'due diligence'. This separates strict liability from absolute liability.⁷

- In strict liability, a defendant can avoid liability by establishing that there was no laxity at all;
- In absolute liability, the only defense available relates to fundamental elements of capacity, infancy and insanity.

3. DEVELOPMENT OF STRICT LIABILITY AND 'PRESUMPTION OF MENS REA' INTO IT

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 said⁸ to be that of *Woodrow*.⁹ In this British case, D was found guilty of having in his possession adulterated

⁴ Ibid.

⁵ Supreme Court of Nepal has also defined 'strict liability as an exception of criminal liability' in *GoN v Devendra Pudasaini* (NKP 2074, Vol. 7, DN 9844).

⁶ Ashworth, *Supra* note 3. at 168.

⁷ *Id.* at 160.

⁸ B. Sayre (1933) 33 Col LR 55; cited from Smith and Hogan, *Criminal Law*, 12th edition (Oxford: Oxford University Press 2008), p. 151.

⁹ *Reg.v. Woodrow* (1846) 15 M. & W. 404.

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.

However, the principle of strict liability has its origin in the case of *Rylands v Fletcher* (1868)¹⁰, Blackburn J. observed that "the rule of law is that the person who, for his own purpose, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape."¹¹ In this case, the defendants employed independent contractors to construct a reservoir on their land. The contractors found disused mines when digging but failed to seal them properly. They filled the reservoir with water. As a result, water flooded through the mineshafts into the plaintiff's mines on the adjoining property. The Court held the defendant liable and the House of Lords affirmed decision.

Another (mis)leading case imposing strict liability was *Pharmaceutical Society of Great Britain v Storkwain* (1986)¹². 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, *GoN v Kanhaiya Ray Kurmi et al.*¹³, *GoN v Tara Raj Bhandari (Karki)*¹⁴, *GoN v Sher Bdr. Thapa et al.*¹⁵, *Uddhav Prasad Acharya v GoN*¹⁶, *GoN v Lok Bdr. Karki et al.*¹⁷, *GoN v Devendra Pudasaini*¹⁸ are some Supreme Court cases relating strict liability offences. Among them, *Kanhaiya Ray Kurmi* and *Tara Raj Bhandari* cases try to define strict liability, and other cases are relating to burden of proof resting on the accused. In *Kanhaiya Ray Kurmi* Supreme Court has decided that in strict liability offences the perpetrator is made liable in terms of its harmful result of the act, not by his motive. (This case defines strict liability as a result crime; whereas, strict liability is a conduct crime). In *Tara Raj Bhandari* case Justice Min Bdr. Rayemajhi and Justice Tahir Ali Ansari assimilates 'presumption of *mens rea*' in strict liability offence whereas the dissenting opinion of Justice Bal Ram KC tries to avoid the same.

With reference to deciding ratio in the case of *Tara* we can say that Supreme Court of Nepal has somehow accepted 'presumption of *mens rea*' in strict liability offence. There are cases¹⁹ including the case of *Sherras*²⁰ which is usually cited for its reference to the presumption *mens rea* as an essential ingredient in every offence, including strict liability. If it is absolute liability offence, there is no question of *mens rea*. But, strict liability is lower in criminal calendar to absolute one. Strict liability is used to denote "crimes in which one element or more (but not

¹⁰ UKHL 1, (1868) LR 3 HL 330.

¹¹ P. Ramanatha Aiyar. *Advanced Law Lexicon. The Encyclopedic Law Dictionary with Words & Phrases, Legal Maxims and Latin Terms.* 6th ed., Vol. 4 Q-Z, Haryana, India: LexisNexis, 2019, pp. 5372-73.

¹² 2 ALL ER 635.

¹³ NKP 2064, Vol. 5, DN 7844.

¹⁴ NKP 2065, Vol. 6, DN 7974.

¹⁵ NKP 2068, Vol. 12, DN 8728.

¹⁶ NKP 2071, Vol. 12, DN 9308.

¹⁷ NKP 2072, Vol. 2, DN 9346.

¹⁸ NKP 2074, Vol. 7, DN 9844.

¹⁹ *Sweet v Parsley* (1970) HL.

²⁰ *Sherras v. De Rutzen* (1895) 1 QB 918.

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*."²¹

4. JUSTIFICATIONS OF STRICT LIABILITY OFFENCES

Jonathan Herring writes: "At first sight it seems unjust that people can be convicted of a criminal offence, even though they had no knowledge of the circumstances rendering their conduct unlawful. Indeed in some strict liability offences a person could be guilty even though he had behaved entirely reasonably."²² However, the liability is imposed on the ground that they protect the general public from dangers and harms. The rationale of strict liability is, therefore, based on the form of protectionism or social defense. It maintains that one of the primary aims of the criminal law is the protection of fundamental social interests and welfare.

In *Salabiaku v France* (1998) 13 EHRR 379, the applicant was convicted of illegally importing drugs. Under French law once the accused was shown to have been in possession of an article it was presumed that he or she was aware of the contents. This provision was held not to violate Article 6. It was held by the European Court of Human Rights that: 'Contracting states may, under certain conditions, penalize a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence'. This suggests that strict liability offences does not infringe Article 6.

A big question in strict liability offences, therefore, is whether there is no *mens rea* requirement clause in statute or judges understand the fact that parliament did not intend *mens rea* in particular offence? If parliament did not intend *mens rea* in particular offence, is it so found written in express words in statute and judges understand, or judges 'just understand' so? The earlier decisions in cases such as *Rylands v Fletcher* (1868)²³, *Parker v Alder* (1899)²⁴ meet social grounds? Can the purpose of the legislation be to defeat the social grounds and impose 'no fault liability'?

The theory of strict liability as 'mechanical' liability has resulted much from judges' decisions rather than from the express words of the statute. There are two types of thoughts found in judges mind; one type of judges interpret it as absolute liability with no consideration of anything here and there, the other type judges somehow presume *mens rea* in the *actus reus*. These two conflicting mindset of judges is illustrated in the single case of *Tara Raj Bhandari*.²⁵

Fact of the case: Tara Raj Bhandari (Karki) was a third grade typist at Nepal Electricity Authority. He had passed the test exam (pre exam prior to SLC) from Nepal Youth High School in 2037 B.S. For the sake of promotion, he produced the document of graduating SLC in 1987 from Bihar School Examination Committee Gandhi High School.

Statutory provision: Prevention of Corruption Act, 2049, Section 12: Whoever, 'with the intention of' securing a position of a public servant, or of being continue in such a position, gives false description regarding his educational qualifications, name, names of the father and grandfather, age, caste, surname, address, nationality or inability, shall be liable to a punishment

²¹ Smith and Hogan, *Supra* note 1. at 152.

²² Herring, Jonathan. *Criminal Law*. 4th ed., Great Britain: Palgrave Macmillan, 2005, p. 112.

²³ UKHL 1, (1868) LR 3 HL 330.

²⁴ (1899) 1 Q. B. 20.

²⁵ *Tara Raj Bhandari v GoN* (NKP 2065, DN 7974, P.687).

of imprisonment for a term from two years to six years or a fine or both, depending on the degree of the offense committed.

Issue: The legal construction ‘with the intention of’ presupposes *mens rea* within the *actus reus* or not? The answer will vary based on mindset

Verdict by Justice Min Bdr. Rayemajhi and Justice Tahir Ali Ansari. Submitting a fake certificate includes in itself a mal-intention to get possible benefit of position in the service. So, the *Actus Reus* of submitting fake certificate is comprised of *Mens Rea* into it. **-Mindset 1**

Varying opinion by Justice Balaram K.C.: The element of *mens rea* is not required for the offence under Section 12. Submitting fake document is enough to make person criminally liable. *Mens rea* is not required in the offences of strict liability or absolute prohibition. **-Mindset 2**

When we critically examine the legal construction of Sec. 12 of Prevention of Corruption Act, we find at underlying level a safeguard from ‘no fault liability’. Legislature is careful that mere act of ‘submission of fake document’ might harm innocent in the case for example if it has been made and submitted by others in the name of defendant! But, the purpose of the language of legislation is defeated when judges turn it into absolute, mechanical, technical ‘no fault liability’. The theory of strict liability should result from the will of the legislature, not from the predilection of the judges.

As discussed above, there are two thoughts that exist in the practice of strict liability cases. One is liability on the face of it- ‘no fault liability’, and other is ‘presumption of *mens rea*’ as constitutional element into the *actus reus*- ‘constitutional principle’.

(a) ‘No fault liability’. Glanville Williams writes, “The judges frequently claim that the absence of the word ‘knowingly’ in a statute is evidence that Parliament meant the offence to carry strict liability, but this is obviously a *non sequitur*. Parliament may have left out ‘knowingly’ because it was not bothering itself about the fault element, or Parliament may have left meant that the offence can be committed knowingly or recklessly, or it may have meant that the offence can be committed negligently. To say: ‘This offence does not require knowledge, therefore it is of absolute liability, therefore it does not require negligence’ exhibits the fallacy of ambiguous middle.”²⁶ However, liability on the face of it though may result in ‘no fault liability’ is one form of strict liability. Such strict imposition of liability is more a result of judicial pronouncement rather than a legislative announcement.

*Howells (1977) QB 614*²⁷

D was charged with possessing a firearm without a certificate, an offence contrary to Section 1 of the Firearms Act 1968, with a maximum penalty of three years' imprisonment. D sought to rely on Section 58 of the Act, which exempted 'an antique firearm which is...possessed as a curiosity or ornament'. When evidence was given that the gun was not an antique but a reproduction, D then put the point that he believed it to be an antique, since it had been sold to him as such. The Court of Appeal ruled this out and upheld strict liability:

'First, the wording would, on the face of it, so indicate. Secondly, the danger to the community resulting from the possession of lethal firearms is so obviously great that an absolute prohibition against their possession without proper authority must have been the intention of

²⁶ Glanville Williams. *Text Book of Criminal Law*, 2nd ed., Fourth Indian Reprint 2012, New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2012, p. 935

²⁷ Cited from Ashworth, *Supra* note 3. at 165.

Parliament when considered in conjunction with the words of the section. Thirdly, to allow a defense of honest and reasonable belief that the firearm was an antique and therefore excluded would be likely to defeat the clear intentions of the Act.'

Prof Ashworth writes, "This is poor reasoning...rendering a person liable to imprisonment without proof of fault."²⁸ He raises the issue of debate that whether the Court should deal differently with (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.

(b) 'Constitutional principle'. The risk of 'no fault liability' kills 'presumption of innocence' and harms fair trial principle. Unless it is expressed in clear-cut words, every individual has right not to be criminalized. It demands 'presumption of *mens rea*' even in cases of strict liability. The concept of 'presumption of *mens rea*' in strict liability was ascended either by the words of the statute creating the offence or by the subject matter with which it deals, and it was argued that both must be considered.²⁹ The new millennium 2000 brought an apparent change of direction.

- In *B v DPP (2000) 2 AC 428*³⁰, the House of Lords had to decide whether, in the offence of indecency with a child under 14 contrary to the Indecency with Children Act 1960, there was strict liability as to the age of the child or the prosecution had to establish knowledge of the child's age. The House unanimously held that 'the common law presumes that, unless Parliament has indicated otherwise, the appropriate mental element is an unexpressed ingredient of every offence'. It is known as 'constitutional principle'.
- In *K (2002) 1 AC 462*³¹ the same approach was taken by the House of Lords, where the charge was indecent assault on a girl under 16. The defense was that the girl had told D that she was 16. The question was whether this would lead imposing strict liability as to age or whether the 'presumption of *mens rea*' required! House of Lords find unanimously in favour of the 'presumption of *mens rea*', and described the presumption as a 'constitutional principle'.

5. THE PRINCIPLE OF 'PRESUMPTION OF INNOCENCE' AND 'STRICT LIABILITY'

'Presumption of innocence' simply has two sides of the same coin: 'either presume innocence or prove guilty'. That is, without proving guilty, you cannot convict, rather you have to presume innocent. And, the element 'prove guilty' means to State to prove that D committed prohibited act, and D committed it with guilty mind.

The principle of 'presumption of innocence' is constitutionally as well as legally guaranteed right. Art. 20(5) of Constitution of Nepal, and Sec. 12 of Muluki Criminal Code, 2074 enshrine the right to be presumed innocent unless proven guilty.³² Can this right be waved or

²⁸ Ibid.

²⁹ *Sherras v de Rutzen (1895) 1 QB 918*.

³⁰ Ashworth, *Supra* note 3. at 167.

³¹ Ibid.

³² It has also been guaranteed by Art. 11(1) of UDHR, Art. 14(2) of ICCPR, and Art 6(2) of the European Convention.

suspended? If not so, the question does arise whether strict liability offence can infringe the 'presumption of innocence' guaranteed by Constitution? When the strict liability offences are not listed by the statute, how can it curtail the right guaranteed by law and which is rooted in fundamental right? The 'presumption of innocence' simply alarms the standard of criminal liability that state has onus of proof, and by this burden it demands the state to prove the guilt of D in order to make him criminally liable.

The 'presumption of innocence' simply demands burden of proving the guilty mind, otherwise presume innocence. On the other hand, it is commonly accepted principle under court of law that court cannot criminalize. Courts have no power to create new offences and they have no power to abolish offences. 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.³³ Therefore, no argument can open the door to the prosecutor to release from proving *mens rea* in the particular *actus reus*.

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."³⁴

Defining the right of 'presumption of innocence', Lord Bingham wrote in a land mark decision of *Sheldrake*³⁵:

"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 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."³⁶

6. THE 'PRESUMPTION OF *MENS REA*' AND 'STRICT LIABILITY'

Strict liability offences need to be invariably construed 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

³³ In *Ratna Bahadur Baagchand et al. v Office of Prime Minister and Council of Ministers* (NKP 2062, DN. 7491) the Special Bench of Supreme Court has exclusively interpreted this limitation of court in criminal cases.

³⁴ 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), p. 155.

³⁵ *Sheldrake v Director of Public Prosecutions* (2005) 1 AC 264, p. 21.

³⁶ *Ibid*, 22.

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."³⁷

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 or *mens rea*, commonly reciting the well-known statement by Wright J in *Sherras v De Rutzen*:³⁸

"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*³⁹ 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".⁴⁰

With the decisions of the House of Lords in *B (A Minor) v DPP*⁴¹ and *K*,⁴² 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*⁴³ 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."⁴⁴

7. 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:⁴⁵

³⁷ Devlin J., *Samples of Lawmaking*, 1st ed., (Birmingham: Birmingham University Press 2003), p. 71.

³⁸ *Sherras* (n 8) at 921.

³⁹ *Sweet v Parsley* (1970) AC 132.

⁴⁰ *Ibid.*

⁴¹ *B (A Minor) v DPP* (2000), 2 AC 428.

⁴² *R v K* (2002) 1 AC 462.

⁴³ *R v G and Another* (2003) UKHL 50, (2004) AC 1034.

⁴⁴ *Ibid.*

⁴⁵ The foreign cases illustrated here are available at

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

<i>Tara Raj Bhandari</i> ⁴⁶	The prevailing decision in <i>Tara Raj Bhandari</i> is that the act of submitting false certificate includes in itself the knowledge and proves the <i>mens rea</i> . Hence, it accepts ‘presumption of <i>mens rea</i> ’ in strict liability. ⁴⁷
<i>Sherras</i> ⁴⁸	The case of <i>Sherras</i> is usually cited for its reference to the presumption that <i>mens rea</i> is an essential ingredient in every other offence.
<i>Sweet</i> ⁴⁹	<i>Sweet v Parsley</i> is usually cited at the defining case on strict liability where the need for <i>mens rea</i> in most criminal cases was spelt out and where it was acceptable for the presumption for <i>mens rea</i> 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 <i>mens rea</i> there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require <i>mens rea</i> ... "
<i>Rimmington and Goldstein</i> ⁵⁰	In <i>Goldstein</i> 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 <i>mens rea</i> and was not guilty.
<i>Gammon (Hong Kong) LTD</i> ⁵¹	The case developed principle of five presumptions as below: <ul style="list-style-type: none"> a. There is a presumption of law that <i>mens rea</i> is required before a person can be held guilty of a criminal offence. b. The presumption in particularly strong where the offences 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 as issue. e. Even where a statute is concerned with such an issue, the ‘presumption of <i>mens rea</i>’ 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.
<i>B (a minor)</i> ⁵²	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.

⁴⁶ NKP 2065, DN 7974.

⁴⁷ However, Justice Bal Ram KC differs his opinion.

⁴⁸ *Sherras v De Rutzen (1895) Wright J.*

⁴⁹ *Sweet v Parsley (1970) HL.*

⁵⁰ *R v Rimmington and R v Goldstein (2005) HL.*

⁵¹ *Gammon (Hong Kong) LTD v A-G of Hong Kong (1985) PC.*

⁵² *B (a minor) v DPP (2000) HL.*

	In order to rebut the presumption that an offence required <i>mens rea</i> , "compellingly clear implication" that Parliament intended the offence to be one of strict liability is required. The <i>mens rea</i> 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. Verdict: Not Guilty.
--	--

8. CONCLUSION

The case *Kanhaiya Ray Kurmi* wrongfully defines strict liability as a result crime.⁵³ Other Supreme Court cases such as *Sher Bdr. Thapa*, *Uddhav Prasad Acharya*, *Lok Bdr. Karki* and *Devendra Pudasaini* simply rest burden of proof on the accused. The only case *Tara Raj Bhandari* tries to assimilate ‘presumption of *mens rea*’, but has a dissenting opinion of Justice Bal Ram KC challenging the same. The dissenting opinion of Justice Bal Ram KC has tried to define strict liability as a crime in which *mens rea* is not required. However, he further explains about two requirements for the fulfilment of strict liability offence: First, D committed the act wilfully; and Second, D committed that act knowingly it to be the crime. These requirements impliedly presupposes *mens rea*.

It shows that Nepalese Supreme Court has not developed standard *ratio decisis* in strict liability and has not adopted a clear and consistent approach. Therefore, while interpreting Sec. 29, court needs to distinguish elementarily relative liability, strict liability and absolute liability. For relative liability there is no dispute. But, the point of demarcation need to be drawn. The point of demarcation is ‘presumption of *mens rea*’, as illustrated below:

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

Absolute liability offences are expressly construed in statutes which gives no room for *mens rea*. But, strict liability offences are not named in statutes and they are interpreted and established. As liability cannot be imposed by interpretation, the elements of liability also cannot be erased by explanation. Therefore, the element is ‘either presume innocence or prove guilty’. Court cannot omit the requirement of ‘proving guilty’, i.e. guilty mind. ‘Presumption of innocence’ is the right and ‘presumption of *mens rea*’ is the necessity to make a person criminally responsible under strict liability offences.

Ignoring certain state of mind in deciding particular act as offence is ignoring the principle criminal liability; and is against Article 126 of the Constitution of Nepal. Avoiding ‘presumption of *mens rea*’ in strict liability challenges the threat of imposing no fault liability, and that also without express construction of legislature into the particular offence. Therefore, Supreme Court has to interpret to contextualize Sec. 29 with the necessity of ‘presumption of *mens rea*’ in strict liability offences as ‘constituent element’.

This article was originally published in **Nepal L. Rev.**; cited as-

Subash Acharya, ‘*Presumption of Mens Rea*’ in *Strict Liability Offence*, 29 *Nepal L. Rev.* 368 (2020) (Nepal Law Campus, Faculty of Law, Tribhuvan Univ.).

⁵³ Strict liability offences are a conduct crime.

