

**KENNY'S  
CRIMINAL  
LAW**

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Class-room live lectures edited, enlarged  
and updated**

# KENNY'S CRIMINAL LAW

. KENNY'S CRIMINAL LAW (CHAPTERS 1 TO 5)

[Refers to English criminal Law]

## CHAPTER-1 CRIME AND

### CRIMINAL LAW

#### 1. The nature of a crime:

Difficulty of definition. Tort and crime. Crime in the primitive state. Early Rome. Crimes as the creation of government policy.

2. The place of criminal law in criminal Science, Criminology, Criminal policy, Criminal law.

## CHAPTER-2

### PRINCIPLES OF CRIMINAL LIABILITY

#### 1. At common law :

A. **Historical** ; not embodied in a code. The period of strict liability. Expiation of guilt by money payment. The most serious offences recognized first. The need for a new test of criminal liability. The recognition of a mental element in criminal liability.

B. actus reus (a) Deed of commission, a result of active conduct (b) Result of omission.

Causation : (i) Where there is no physical participation (ii) Where the participation is indirect (iii) Where any other person has intervened (iv) Where the victim's own conduct has affected the result (v) contributory negligence of the victim (vi) Where the participation is superfluous.

C. Mens rea (a) The objective standard of morality (b) The emergence of a subjective standard **Mala in se and Mala prohibita**.

Voluntary conduct. Foresight of the consequences. Intention, recklessness and negligence.

Where the consequences are different from those foreseen, Mens rea alone not enough.

Vicarious liability at common law.

General principles of liability at common law, conclusions.

#### 2. In Statutory Offences:

A. Actus reus in statutory offences:

B. Mens rea in statutory offences. Foresight of consequences in statutory offences. Negligence in statutory offences. Vicarious liability in statutory offences.



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## Questions Bank

### KENNY'S CRIMINAL LAW

1. Explain with what restraints Kenny attempt at defining "Crime"
2. Discuss the role of 'mens rea' in common law and in statutory offences. Refer to leading cases. What is the position under I.P.C.?
3. Discuss how far
  - i) Mistake
  - ii) Intoxication and
  - iii) Insanity could be considered as defences
4. Explain how Kenny deals with "Attempt" in crimes. Refer to Indian law.
5. Explain Kenny's concept of
  - 1) Principals in the I & II degree
  - 2) Accessories before the fact and accessories after the fact.

# KENNY'S CRIMINAL LAW

## CHAPTER 1

### DEFINITION OF CRIMES

The definition of crime has always been regarded as a matter of great difficulty. No satisfactory definition has been achieved as yet in English law.

Tort and crime are a viscous inter-mixture. There is not much difference between them. A crime is against the society and a tort is against an individual. But, the society is composed of individuals. The difference is one of degree.

'Felony' indicated something cruel, fierce or wicked. The word "Crime" was used in the 14th century. *Any* conduct which was destructive according to a powerful section of any community was a crime. The sovereign power of the state would command to punish such crimes. The procedures taken by the courts, was the "criminal proceeding".

In Rome, the sovereign power was with the senate. In the first stage, there was no police organisation. It was left to the individuals to punish: for example a traitor could be killed by any person and there was no punishment to him.

**Emperor Cladius**, changed the marriage law as so to enable him to marry his brother's daughter Agrippina. This is an extreme case, but, a 'dictator could alter the law according to his whimsies and fancies.

In later years, the law making, came under the influence of **public opinion**.

*Crime*, is the creation of Govt. policy, according to Kenny.

Crimes, originate in the Govt. policy of the moment. The governing power in society, forbids a man from doing certain acts, called crimes. Of course, subsequent governments may change them. As long as this changing pattern continues, the nature of crime, eludes a true definition. However, according to Kenny, there are three characteristics in a crime.

- i) It is a harm caused by human conduct, which the sovereign desires to prevent.
- ii) The preventive measure is threat of punishment.
- iii) Legal procedures are employed to prove the guilt according to law.

## CHAPTER -2

### PRINCIPLES OF CRIMINAL LIABILITY

Much of English criminal law is not contained in any code (in India there is the I.P.C.) hut it is a conglomerate mass of rules based on common law, and in addition there are a few enactments made by Parliament from time to time.

It was Chief Justice Coke who stated the rule "**Actus non facit reum nisi mens sit rea**" (the act and the intent must both concur to constitute crime). This famous maxim refers to man's deed (actus) and his mental processes (mens) at the time of the commission of the offense. This means the conduct of the person must have been inspired and actuated by his mens rea.

In *Meli and others V.R.* the facts were, that M and others took D to a hut at night, gave him beer, and, beat him on his head with intent to kill him. Thinking him to be dead, they carried the body out and rolled it down a hill. Medical evidence showed, that death was due to exposure to the cold as he was lying unconscious, and not due to the beating.

Defense was as follows : The first part was the beating with intent to kill M ; but, this beating did not cause the death, hence, there was no *actus reus* of murder. Once, they believed that he was dead, their intention to kill had ceased ; but, they desired to evade detection (malice afore thought) and hence, put him down the hill. Here, death was due to freezing, but, the Privy Council rejected this and held that it was one transaction and therefore, it was murder.

**Actus reus :**

This is the deed or the commission. It is the material result of the conduct of the accused, which the law wants to prevent. In case of murder, it is the victim's -death by any means that is the actus reus, but mens rea is the intention of the accused.

The actus reus must have been prohibited to create criminal liability e.g.. harm to the person, destruction of property etc. It is therefore, clear that if killing is authorised e.g. death sentence, there is no murder.

**Causation** : A man is said to have caused, the actus reus of killing a person, if death would not have occurred *without the participation of the accused*.

(i) This participation may be direct i.e., when the accused A kills B

(ii) It is indirect when he instigates another to kill. A secretly puts poison into a drink which A knows that B will offer to C.

(iii) A crime may be committed without physical participation e.g. conspiracy, abetement etc.

(iv) Mens rea in one and actus reus in another is possible. A keeps a goldsmith G, at the point of gun, takes him to a house where G is forced to open the lock which he does. A thereupon takes away the goods, here, G is kept in such a threat to his life that there is no 'mens rea' and hence not guilty.

v) By intervention of a third person, a crime may be committed. In **R.C. Higgins**, the warden of a jail was held not guilty for the death of the prisoner. The prisoner had been confined for 44 days in a dangerous room. The warden neither intended nor did he know about the confinement. But, such cases are to be decided with caution, according to Kenny.

E, an engineer, had left his place, by leaving an ignorant boy in charge of an 'engine. The boy failed to stop the engine properly, and, as a result of that, 'A' a worker died, held, **E was liable**, the engineer-should have contemplated such a possibility.

vi) There are also cases where the victim's own conduct or contributory negligence would result in a crime. These are to be decided with sound reasons. This establishes the rule that both mens rea and actus reus must concur to constitute a crime.

### **Objective and subjective standards :**

Mens rea as one of the elements to constitute crime, was recognised by the English courts by a slow process. In the beginning the courts applied as objective standard. The courts applied its own standard of what was right or wrong and tested whether the prisoner had acted obedient to it or not. The view of the prisoner was of no consequence.

This theory was replaced by subjective standard doctrine. The court took into consideration the personality-mental and physical- of the prisoner. This led to the examination of his actual intention. This is the subjective test. For example, in cases of self-defence or misadventure, where the prisoner kills 'A' according to the objective standard the court would award him conviction, but would then be pardoned by the Crown. However with the subjective standard of looking to the 'mental element" the courts **may acquit** the prisoner on grounds of private defence etc.

**Conclusions :** For application of the concept of actus non tacit

reum, nisi mens sit rea, at common law in England the conditions are summarised, by Kenny, as follows :

1. The person (prisoner) must be of full age, of male sex, of sound mind and living within the jurisdiction of the English courts.

2. he must have committed the offence within the courts jurisdiction. Further, there must be "actus reus", that his conduct must be voluntary and that he foresaw some consequences, the nature of these is fixed by law.

### **Ch. .2. Mens Rea in statutory offences :**

The old view was that the legislature should not override common law. This has long been abandoned. In modern law the statute made by the Parliament is paramount. Hence, in interpreting the statute there is a presumption that mens rea is part of the offence. This is a weak presumption and may be rebutted by the statute itself.

After the 19th century, there was a marked move by the Parliament in regulating social life by creating offenses with light punishment. The courts became inclined to solely interpret the words of the statute, than imposing 'mens rea.

The leading case is **R.V. Prince** : P had taken a girl, out of the possession and against the will of the parents. The girl was in fact below 16, but P contended that she looked to be above 16 and hence, there was no offence. The courts held him guilty. No reference was made to mens rea.

Though this was the trend set by the courts, still there are instances where courts have in suitable cases insisted on proving mens rea, on the basis of true protection of the liberty of the individual. In recent years, in respect of many of the offences created by legislation, the courts have considered them as exceptions to the rule of mens rea. In some, mens rea is held as

part of the offence.

In *Kat V Diment*, the prisoner was convicted for having used false trade description, of 'non-brewed vinegar'. It was held that when a statute forbids the doing of an act, doing of it, itself supplies mens rea.

**Conclusions** : Kenny concludes that it was not possible to formulate any principle in statutory offences to say to what extent mens rea is a constituent. The statute itself is the guiding star. The ordinary rules of interpretation should be used. A statute may directly exclude mens rea. **R.V. Tolson** : W, married H, with the reasonable belief that her first husband was dead, as he was not heard of for 7 years. There was no reference to mens rea in the statute. Held, that mens rea is excluded in the statute. W was held not liable as she had a reasonable belief that her first husband was dead. The modern trend is to exclude mens rea from statutory offences.

### **Ch. .3 . Mala in se and Mala prohibita :**

The subjective standard doctrine of mens rea led to a fallacious classification of crimes in England. Some were serious and gave rise to deep moral reprobation. Such offences were mala in se (bad in themselves) e.g. Homicide, adultery, bigamy, slave trading, offences against God and nature etc. (Blackstone).

Other offences "mala prohibita" (prohibited acts) were breaches of laws which imposed duties without involving moral guilt. Eg. : Not performing work on public roads. This classification has no relevance today.

### **Mens rea and I. P. C.**

In India, the concept is not applicable. The difficulty felt in England, in interpreting mens rea, is obviated by the I.P.C. and by Indian statutes. This is done by defining exactly, the nature of the mental element of the accused.

The various offences in the I.P.C., require that the act (actus

reus) must have been done with the mental element: "dishonestly", "fraudulently", "knowingly", "intentionally", "with intent to" etc. With this description the concept of mens rea has been excluded from the definitions of offences. Hence, it has no relevance to Indian Criminal Law.

## CHAPTER 3

### VARIATIONS IN LIABILITY

#### Ch. 3.1. Mistake as a defence at common law :

Kenny puts three special circumstances in which the criminal guilt is lessened or entirely excluded. These are "mistake", "intoxication" and "compulsion".

If mistake is to be considered as a good defense, three conditions are to be fulfilled.

a) The mistake must be of such a nature that, if the supposed circumstances were real, there would not have been any criminal liability attached to the accused.

Mistake negatives mens rea and hence, the accused is not guilty. It does not negative actus reus.

Accordingly to Foster, in a case, 'A' before going to the church, fired off his gun and left it empty. In his absence, some person took the gun, went out for shooting and on returning left it loaded, later A returned, took up the gun and touched the trigger, which went off and killed his wife. A had reasonable grounds to believe that the gun was not loaded. Hence, he would not be guilty of murder.

b) The mistake must be reasonable. This is a matter of evidence. But, this is to be established to the satisfaction of the Court, A, in order to free his wife from a demon which had possessed her, held her over fire and with a red hot poker, which scared her. The wife *died in* consequence. A had reasonably believed that he would free her from the devil, with his actus reus. Held, A **was guilty of murder**.

c) Mistake however reasonable must relate to matters of fact. The rule is

*ignorantia facti excusat* : Ignorance of fact excuses

*ignorantia juris non excusat*. Ignorance of law is no excuse.

An Italian who kept a lottery house in England was held guilty. His plea that in Italy the act was legal and that he had mistaken notion of English law, was rejected by the court.

In India, Sns. 76 and 79 deal with mistake of fact and mistake of law (Refer Chapter 2,).

### **Ch. 3.2. Intoxication :**

The old law in England, dealt with intoxication as one which aggravated the crime and hence, punishable. But, in the present day, the effect of intoxication is considered as similar to illness produced by poison etc. Hence, actual insanity, produced by drinking as in "delirium tremens", is a defence. This should be established as a fact.

If the intoxication, is caused by a companion and not voluntarily by the accused himself, then the accused is exempted. However, it is to be established before the court that the accused was incapable of knowing the nature of his act.

**Relevance :** Drunkenness may be relevant : i) to establish a mistake ii) to show the absence of intention or specific intention

iii) to show this as part of an offence e.g. drunken person in charge of child of seven years, or drunken driver causing an accident etc.

iv) to show that it has happened in provocation.

A in a fit of passion, is provoked and kills B, who was responsible for the provocation. In some circumstances, this is culpable homicide and not murder.

The general rule is that intoxication is not a defence but may be relevant as stated above. The position in India is stated in Sn. 85. I.P.C. (See ch. 2.2.)

### Ch. 3.3. Insanity

Insanity of a particular and appropriate kind is regarded as a good defense in English law. Medical profession has classified these mental variations.

The leading case is **R.V. Mcnaghten**. One M had killed Mr. Drummond the private secretary of Sir Robert Peel. But, in reality by mistake, he had killed not the real Mr. Drummond. Insanity was the ground of defence. He was acquitted on this ground. This caused great resentment and the House of Lords stated certain principles as guidelines.

- i) Every person is sane, until proved otherwise.
- ii) At the time of committing the offence, the accused must be labouring from a disease of mind to lose his reason and to know whether what he was doing was wrong or not.

iii) If he was conscious that the act was one which he ought not to do, he is punishable.

- iv) the nature of the delusion decides the question. The actus reus must have been actuated by delusion directly.

The burden of proof is on the accused to prove his insanity

#### **India : Sn. 84,1.P.C. insanity as a defence.**

If the offence is done by a person, who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or knowing the nature of what he was doing was wrong or illegal, he is not guilty of the offence.

In **Sakaram Ramji's case**, the accused was a habitual ganja smoker. He quarreled with his wife and killed her and the children. The plea that he had a diseased state of mind due to Ganja, and that he was incapable of knowing what he was doing, was rejected by the court. Held **Guilty** of murder.

## CHAPTER -4

### **PRELIMINARY CRIMES Attempt :**

This is the most common of the preliminary crimes. It consists of the steps taken by the accused in furtherance of doing an offence, i.e.. The long chain of steps taken to reach a stage to constitute the crime of attempt. This chain is the "actus reus".

To constitute attempt, there must be mens rea and actus reus at common law, The actus reus consists of the deed done in actual furtherance of the crime intended. This must show that the accused was aiming at a crime. This means, he must have taken some steps to do the crime or to attain his ultimate objective.

The leading case is **R.V. Robinson**.

Robinson, a jeweler, had insured his stocks. One day he bound himself up with a cord and called out for help. The police came on the scene. R told the police, that a stranger had come and tied him up and emptied the jewels. The cash-box was open and empty. Later the police suspected the story, and made a search and found the jewels under a safe. He was charged for attempt to obtain money from the insurance company, by false pretenses.

Held, not guilty. Kenny makes a clear analysis of this case. R is not guilty because, the attempt had not yet reached that stage to charge him. The actus reus was not there. If he had made attempts to claim from insurance company, then of course there would have been an attempt. However, **in this case there was no attempt, and hence, not guilty.**

**Completed act:** When the attempt is completed it results in an offense and the attempt -disappears. The accused becomes

liable for the completed offence.

**India** : Sn. 511 of the I.P.C. deals with "attempt" as a stage in an offence.

## **CHAPTER - 5**

### **PARTIES TO A CRIME**

*Crimes, in England, are grouped into 3 classes.*

Treasons, felonies, and misdemeanor. The gravest is treason, and the least of this crime is misdemeanours. Any participation of the accused makes him guilty as a principal in both these offences.

But the rules of common law relating to felonies are complicated and the gradation of participation is to be decided to award punishment. For this purpose, Kenny has divided the parties into two groups : [principles of the I degree and of the II degree and Accessories before and Accessories after the fact.](#)

#### **i) Principals in the first degree :**

He is the actual offender and the man with the guilty mind. The actus reus is done by him generally. In some cases, the deed may be done through an innocent person. The man who instigates is the real offender. Thus, if a doctor tells the nurse to administer a dose of medicine made by him, and if the patient dies in consequence of the dose, the doctor is the principal of the first degree.

There may be two or more persons in the first degree. If a night watchman opens the main entrance of his masters house and allows the accused to enter and steal the goods thereof, both are principals of the first degree. Similarly, when A holds the tongue of C and B cuts it off resulting in the death of C, both A and B are principals in the first degree,

#### **ii) Principal in the second degree:**

These are the persons who aid and abet another in the commission of the crime. At common law, these were punishable equally with the principal in the first degree, but, this was later changed by the Accessories and Abettors Act 1861.

The second degree man, is one who aids and abets at the very time when the offence is committed, e.g. A person who, aids in possessing explosives, a receiver of stolen property from the thief; person keeping watch and ward when the crime is going on inside the house, etc. Mere presence, will not make a person, an abettor. **There must be evidence to show his participation.**

**iii) Accessories before the fact :**

An accessory is a person who is absent at the time of the commission of the felony, buy commends, procures, or abets a felony. R. V. Saunders : in this case, S desired to kill his wife so that he could marry M. He consulted Archer, who advised him to put poison to apple. S did so. the wife after eating a bit of the apple, gave to her female child which ate and died in consequence.

Held, Saundes was guilty of murder. The court held that Archer could not be held to be guilty as accessory to kill the child since his aid and advice was to kill the wife and not the child.

The principal, in criminal law is different from the principal in tort or contract A, lodge owner, directs M, a maid servant to steal jewels from the inmate of his lodge and M steals them, the maid is the principal and the owner is the accessory before the fact.

iv) Accessories after the fact:

An accessory in this case is a person who gives shelter or relief in such a fashion as to avoid justice. He may conceal a murderer in his house- mens rea is to assist him. Hence, a person who harbours an offender is an accessory after the fact. But, a wife is exempted and incurs no criminal liability for giving shelter to her felonious husband.

**THE END**

*But can we put an End to Crimes ?*