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Critical Study of the General Exception of Mistake of Fact under the Indian Penal Code- With Special Reference to State of Orissa v. Ram Bahadur Thapa[1]

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ABSTRACT

The concept of mistake of fact under law is internationally accepted and is allowed as a defence to those who act on a mistaken belief in committing an offence. Through the years, there have been jurists and legal luminaries who have attempted to objectively define its standards of application, however there has been no consensus on the matter which caused the application to be varied and has increased the burden on courts to arrive at a justified interpretation. The opinions of various jurists and the ratios of landmark common law and civil law cases have been referred to in order to highlight the differences in interpretation and application of the exception. Emphasis has been laid on application in Indian Courts and the interpretation of the law concerning the defence of mistake of fact. This paper aims to identify the problems in not having certain universal standards of application with a special reference to the case in point which highlights the problems and fallacies in the Indian laws. The moot issues in relation to the application of the exception are the concepts of 'good faith' of the accused and the theory of justification which have been elaborated upon hereunder. In order to ensure that proper justice is served, there ought to be certain principles which have to be universally applied to every case where the defence is pleaded thus ensuring no miscarriage of justice. The paper would not deal with or question the validity of the exception in terms of fact or law but only with the standards of its application which shall also be strictly limited to mistake of fact. This paper is ultimately aimed at substantiating certain standards that can be applied universally and thus ensuring that in interpreting the defence, courts and judges alike do not allow their subjective cognition to seep into what essentially ought to be an objective standard.

Keywords: *Offence, Defence, Exception, Mistake, Fact.*

I. INTRODUCTION

The concept of Mistake of fact has been understood to be a general defence against crimes

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under common law for a long period of time. In the case of *R v. Tolson*[3], mistake was accepted as a defence for a wife who had mistakenly believed her husband to be dead. In the case of *Horton v. Gwynne*[4] the fact that a mistake would negate *mens rea* and hence would constitute no offence was highlighted, it can be noted that *'actus non facitreum nisi mens sit rea'* was upheld. In the aforementioned case, the defendant was accused of violating the English Larceny Act of 1861 for killing a house dove but was excused on the grounds of mistake thinking it was a wild pigeon. The general rule to prosecute for a crime, is that evil intent is required to constitute it, and the same is seen as absent where the accused acts on a mistaken belief.

Internationally, the concept is highlighted in Article 32(1) of the ICC Statute and is similar to the common law principle that a mistake is applicable only in cases where *mens rea* or intention is negated. However, Article 32(1) is unequivocal and it does not contain any express requirement that the mistake ought to be a reasonable one. The article also does not take into consideration the mental capacity of an individual committing the act or his/her ability to comprehend the consequences of a particular action arising out of a mistake**.** AlbinEseropined that Article 32(1) ought to apply by analogy to mistakes relating to justifications as opposed to excuses[5] but the terms of the said Article, however, specify no such requirement. There do exist cases where the law has recognized mistakes even in cases where it relates to an excuse.[6]

II. INTERPRETATION OF THE EXCEPTION IN DIFFERENT JURISDICTIONS

It ought to be understood at this juncture that even though Common Law and Civil Law systems view the defence of mistake of fact in somewhat different senses, the crux of the exception remains the same, it is the applicability that varies. This applicability has no strict standards which creates a burden on the courts aswell as the parties pleading the defence, as this subjectivity may create a prejudice for either an accused who is denied it or an aggrieved person whose offender is not brought to justice. Therefore, there ought to be universality in the standards of application of the defence of mistake of fact especially in India as the case in point would suggest, which is discussed subsequently. There does exist a commonality that mistake is only applicable as a defence when it prevents the accused from possessing the necessary *mens rea* as stated earlier. This remains true after the landmark cases of *DPP v.*

[3](1889) 23 Q.B.D. 168.
[4](1921) 2 K.B. 661.
[5]AlbinEser, 'Mental Elements—Mistake of Fact and Mistake of Law', Vol. 1, The Rome Statute of the International Criminal Court: A Commentary (2002) , 889, 907.
[6]U.S. v. List VIII LRTWC 1,69.

Morgan[7]aswell as *Caldwell*[8] in which case the defendant was acquitted of rape as he was seen to have formed the mistaken belief that he was engaging in consensual sex. It is very difficult to ascertain the reasonableness of such mistakes which prima facie look to be unreasonable. One of the first instances where the courts looked into the degree of offence to understand the applicability of a mistake was in the case of *Westminster City Council v. Croyalgrange Ltd &Anr*.[9]where the concept of 'knowledge' was also highlighted as essential to consider the defence of mistake.

At this juncture it is essential to point out where the main fallacy in terms of the application of the exceptionlies. This understanding is imperative as it points out the varied standards of application and the problems that might arise by adopting a particular approach as was highlighted by George P. Fletcher in his book, Rethinking Criminal Law.[10]In the case of *People v. Weiss*[11] the Defendant was charged with kidnapping a suspect in the famous Lindbergh kidnapping case. The argument was that he believed, in good faith, that he had the legal authority to restrain the victim. The Trial Court in hearing the case, refused to admit into evidence any testimony showing the defendants good faith mistake and convicted him. However, when the case went to the New York Court of Appeals, the court resorted to a strict reading of the statutory law to acquit the accused of any punishment. The statute read as follows; "Wilfully seizing … another, with intent to cause him, without authority of law, to be … confined or imprisoned within this state" and the reasoning given by the court was that since "with intent" preceded "without authority of law", the intention of the accused must be under circumstances where he believed himself to not have authority of law. In the aforementioned case, the Defendant in good faith believed himself to have authority of law which was said to be the paramount consideration to constitute an offence under the statute. However, an inference that the legislature crafted the statute to produce an acquittal in cases of unreasonable aswell as reasonable mistakes is unwarranted on the basis of the reasoning of the court in the case.

Another unique observation with regards to the application of the defence was made in the case of *Morissette v, United States*[12]where the Defendant was initially convicted of a federal theft statute.[13] The facts of the case were that Morissette was accused of stealing bomb

[7](1975) 2 All E.R. 347.
[8](1981) 1 All E.R. 961.
[9](1986) 2 All E.R. 353.
[10]GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW,p.683 (2000).
[11]276 N.Y. 384 (1938).
[12]324 U.S. 246 (1952).
[13]18 U.S.C. §641.

castings from governmental lands. His defence was that he was under a genuine belief that the bomb castings were abandoned. This defence was not accepted in the Trial Court and he was convicted on the grounds that the statute merely required an intent. It was founded by the Trial Court that the mistake committed did not negate the *mens rea* required to commit the offence which was merely the intent to take the bomb castings from the government land. However, this decision was unanimously reversed by the Supreme Court on the reasoning that a 'criminal intent' was what was required and the reasonable belief of Morissette that the castings were abandoned negated this intent. Therefore, to ensure a conviction in this case, Morissette would have had to have had an intention to commit theft or deprive the owner of his property. Since, in this case, the Appellant was unware that a right of ownership existed for the said property, this intention is negated. However, under this assumption that the Court read into the statute to incorporate the common law crime, then any mistake made in good faith, even unreasonable ones would be allowed the defence. This is what creates a problem for the courts in determining which standard of application should be followed.

III. MISTAKE UNDER INDIAN CRIMINAL LAW

In India, 'mistake of fact' is provided as a general exception under Ss. 76 & 79 of the Indian Penal Code. Section 76 allows for the defence in case where a person believed himself to be bound by law to perform the act in question as a result of a mistake of fact in good faith while Section 79 provides for the same in case where a person believes himself to be justified by law. Even though the sections seem to be unambiguous, a study of the cases show that the standards of application of the defence remains unclear. In the case of *State of Orissa v. Ram BahadurThapa*[14]the accused was acquitted of murder and causing grievous hurt as it was held that he acted on a mistake of fact and in good faith believed the things he was attacking to be ghosts. However, on examination of the facts of the case, we can see that the accused ran around 500 meters towards what he believed to be ghosts and didn't stop attacking even after hearing screams of the victims until a person walking with him screamed aswell. Therefore, question arises as to whether the defence can be allowed even in cases where there exists proof to suggest a pre-emption of attack and gross negligence by the accused. It was held in the case of *Emperor v. Tustipada Mandal*[15]that to constitute a mistake of fact, the accused must be completely unaware of the real circumstances in which he/she was acting. Furthermore, *In Re Ganapathia Pillai &Anr.*[16]it was held that an honest blunderer can never

[14]*Supra* Note 1.
[15]A.I.R. 1951 Ori 284.
[16]A.I.R. 1953 Mad 936.

be acting within the meaning of 'good faith' for acting negligently.

In order to ascertain the essence of the concept of good faith, one has to look into the Indian Penal Code where it is defined as follows; Nothing is said to be done or believed in "Good faith" which is done or believed without due care and attention under Section 52. The cardinal feature of the aforementioned provision are the words 'due care and attention', the importance of which was highlighted even in the relatively old case of *Emperor v. AbdoolWadood Ahmed*[17]where it was held that any act done with an 'injurious intention' would constitute acting without due care and attention as mentioned in the code. The concept of 'due care' is also defined in Black's Law Dictionary as; Just, proper, and sufficient care so far as the circumstances demand it; the absence of negligence. That care which an ordinarily prudent person would have exercised under the circumstances.[18] Even though it is a settled principle that in the determination of good faith, a reference to the capacity, intelligence and the position of the accused as well as the circumstances under which he acts, therefore, becomes a relevant consideration[19] it has to be noted that the concept of 'due care' cannot be subjective as evident from the definitions stated above. Furthermore, honesty of intention which is essential to constitute good faith is vitiated when there does exist an intention to injure or 'injurious intention'.[20] It also has to be understood that good faith is not merely no bad intention, but also such care and skill as the duty reasonably demands for its due discharge. Where peril is greatest the greatest caution is necessary.[21] From the facts of the *Ram BahadurThapa*[22] case it is clear that the blows with the 'Khukri' were undertaken with an intention to injure and it can be affirmed that no 'due care and attention' which is essential to constitute good faith was undertaken.

It ought to be highlighted that Section 79 only allows for acts which may be 'justified' by law as a result of mistake of fact, an act is justified by law if it is warranted, validated and made blameless by law.[23]There exist two approaches to the question of whether an act is justified or not. The common law approach views the justifications through the subjective perceptions of the accused or in other words, whether the accused believes himself to be justified in performing the act in question, this is also called the subjective theory of

[17](1907) 9 Bom.L.R. 230.
[18]BLACK'S LAW DICTIONARY, 4TH EDN. P.589
[19] A.I.R. 1926 Lah 554.
[20]*Supra* Note 15.
[21]SewakramSobhani v Karanjiya RK A.I.R. 1981 S.C. 1514.
[22]*Supra* Note 1
[23]Raj Kapoor v Laxman A.I.R. 1980 S.C. 605.

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justification.[24] The alternative viewpoint is that of the objective theory which views justification as eligible if the said force is actually necessary.[25] The objective theory of justification is followed throughout continental Western Europe, Latin America and Japan.[26] In the objective theory, as Professor Paul Robinson opines, perception and mental state are irrelevant to the application of the defence.[27] Even though Indian Courts have relied of subjective interpretation of good faith in previous cases[28], as seen earlier, an act would be justified if it was warranted and made blameless by law which prima facie points towards an objective theoretical application. Furthermore, an act to be justified must be supported by sufficient reasons and by credible evidence to show such reason when weighed by an unprejudiced mind and guided by common sense and correct rules of law.[29] It would be appalling to suggest that Ram BahadurThapa acted in a justified manner when he continuous struck blows even on hearing the cries of the aggrieved and the law definitely does not warrant running 500mts even if it may have been an act of supposed self defence under mistaken beliefs.

The reader may make an argument that the mistake in this case still negated the *mens rea* of the accused and hence no intention can be proved which is an essential to constitute a crime as such even if the defence is not allowed. It has to be noted that in the case of *Dr.Meeru Bhatia Prasad vs State*[30]the apex court held that a person need not intend to cause a certain effect. If an act is a probable consequence of the means used by him, he is said to have caused it voluntarily whether he really means to cause it or not. The court laid down the principle that a man is presumed to intend the probable consequences of his actions. Further, if a particular effect could have been avoided by due exercise of reasonable care and caution, then the effect of such act is also said to have been caused voluntarily.[31]

These aforementioned principles point to the fallacy in the *Ram Bahadur Thapa* judgment.[32]However, the aforementioned case isn't the only one with similar facts where the defence has been afforded. In *BondaKui v. King Emperor*[33] the accused, described as a

[24] Russell L Christopher, "Mistake of fact in the objective theory of justification: Do two rights make two wrongs two rights?", The Journal of Criminal Law and Criminology (1973-), Vol. 85, No. 2 (Autumn, 1994), pp. 295-332.
[25] Fletcher, *Supra* Note 8 at 971-80.
[26]*Supra* Note 23.
[27]PAUL H. ROBINSON, CRIMINAL LAW DEFENCES. S122(f), p.27 (an objective theory of justification suggests that no subjective mental element plays a part in the formulation of justification).
[28]*Supra* Note 18
[29]BLACKS LAW DICTIONARY 4TH EDN., P.1004.
[30]2002 Cri.L.J. 1674.
[31]Barendra Kumar Ghosh v King Emperor A.I.R. 1925 P.C. 1.
[32]*Supra* Note 7.
[33]1942 Cri.L.J. 787.

'superstitious woman' aged 50, was in her house in north-east India, accompanied only by a niece, when in the middle of the night she saw 'a form, apparently a human form, dancing absolutely naked with a broomstick and a torn mat around the waist.' Taking this bizarre apparition to be 'an evil spirit or a thing which eats up human beings,' Bonda Kui threw off her own clothes and attacked the figure with an axe. Having succeeded in hacking it to death, she told her niece she had killed 'an evil spirit or witch,' but, on investigation, the figure turned out to be that of her sister-in- law. She was however acquitted allowing the defence under Section 79.

In *Waryam Singh v. King Emperor*[34] the defendant was aman living in what is now Pakistan whose three children had all died young. It was suggested to his wife that she could safeguard the lives of any future infants by bathing on the tomb of one of her dead children. Singh's wife took off her clothes and sat on the tomb while her husband poured water over her. As he did so, a figure appeared in the dark that the bereaved parents took to be a ghost. Singh beat the figure to death and was charged with murder, but acquitted on the grounds that if he believed in good faith at the time of the assault that the object of his assault was not a living human being buta ghost or some object other than a living human being, he is not guilty of murder.

IV. CONCLUSION

Even though it ought to be conceded that the application of the defence of mistake of fact may vary to a certain extent depending on the facts and circumstances of the case at hand, the law needs to ensure certain standards that apply universally to all cases to ensure that the defence is not misused or justice is not denied to the victims. As mentioned above, the court ought to observe and conclude as to whether the accused in question did infact act in good faith as defined in Section 52 of the Indian Penal Code by ascertaining whether there existed an intention to injure and whether the accused acted with due care and attention. The concept of good faith is key in determining not only the mental state of the accused but the reasonableness of the offence as well which has to be a relevant consideration in allowing the defence. Mistake of fact ought to be allowed only for reasonable mistakes as unreasonable ones borderline on negligence. Furthermore, an objective theory of justification ought to be applied by the courts to ascertain whether the act committed by the accused was actually justified under the law in force. The application of the two aforementioned principles would allow for the courts to distinguish between what was a genuine mistake under the law and

[34]*Supra* Note 17.

what was a fabrication or an attempt to misuse the defence. It would also ensure that justice is served to the aggrieved person by punishing those who did not act in good faith or were not justified under the law.

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