

A STUDY OF DEFENCES USED BY LAWYERS AGAINST CRIMINAL LIABILITY IN NEPAL

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ABSTRACT

“INNOCENT until proven guilty” is one of the major principles of criminal justice² which establishes the burden of proof upon the prosecution to prove the claim beyond reasonable doubt. In all sort of legal proceedings, the defendant has a constitutional right³ to raise a legally acceptable defense and to present evidence in support of that defense. Criminal defense is a strategic argument that attempts to challenge the validity and sufficiency of the prosecution’s evidence. The philosophy of criminal defence is a really indistinct and debatable factor in criminal law. In case of defence used by lawyers, there is a very weak jurisprudential analysis and legal principles along with that we can observe reluctance of the court, legislature to establish principles, laws, rules or guidelines.

KEY WORDS: *Criminal, Defence, Liability*

Introduction

When a person goes to a trial for allegedly committing a crime, the burden of proof lies upon the prosecutor to prove that he/she has committed that specified act beyond reasonable doubt. At the same time, the defendant is entitled with a right to defend them by presenting defence on their favour. The defendant may attempt to poke holes in the prosecutor’s case, argue that another individual committed the crime, or argue that he or she did commit the crime but had a legal and reasonable defense for doing so. Criminal defences can reduce the severity of criminal liability that has been charged but it is upon the parties to prove the element of defence. Different defences has different sorts of burden of proof. In some situation, the defendant themselves have the burden of proof but in some scenarios the prosecutor has the burden of proof to disprove the defence in preponderance of evidences. Basically, legal defenses fall into classification: justifications and

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² Article 66, The Rome Statute, 1998.

³ Article 20, Constitution of Nepal 2074.

excuses. Both classification of defenses admits that the crime has been committed. Justification defenses investigate upon the time the act was committed whereas, excuse defenses examines at the defendant's state of mind at the time of commission of that act. There are numerous criminal defenses available that may allow a defendant to avoid punishment for their actions.

TYPES OF DEFENCES

Some of the defences that are commonly observed during the course of a trial are illustrated below:

1) Duress Defence

Duress/ Coercion defense are adopted by the lawyers if there has been any immediate bodily threat or harm which has forced someone for commission or omission of a certain act. In the case of *A-G VS Whealm*,⁴ the Court has defined duress as a defence because there was a threat of immediate harm or serious personal violence sufficient enough to overbear the ordinary powers of human resistance and shall be accepted as a justification for the act. In the same way, The court in the case of *Hurley Vs Murray*⁵, stated that the threat to kill someone's beloved person fulfills the condition to use duress as a defence.

Duress defence can be adopted by the defendant after fulfilling the below mentioned elements

- 1) There was immediate threat of death or to bodily injury.⁶
- 2) The threat may relate to the defendant or a member of his immediate family or alternatively to a person for whose safety the defendant would reasonably regard himself as responsible⁷
- 3) Presence of threats was forcibly laid upon the defendant and the defendant's belief in the threat must be objectively reasonable as well as subjectively genuine⁸

After satisfying aforementioned elements, the defendant can use duress as a defence in any criminal proceedings.

In the case of Nepal, **Section 22** of the National Criminal Code 2017, has laid out the provisions for duress defence, where any act which is performed under coercion shall not be reacted as a crime. We can also observe some of the cases in which the defendant has plead duress as a defence. In the case of *HMG V Laxmi Mallaha*⁹, the defedant had claimed that the action was performed under the under coercion and wasn't a voluntary action. Since, the defendant was able to prove all the elements amounting to duress, the defence was accepted in the court of law consequently resulting in the reduction of their punishment.

⁴ A-G VS Whelam, IR 518, 1934.

⁵ Hurley vs Murray, VR526, 1967.

⁶ RR v Wright [2000] Crim. L.R. 510, CA..

⁷ *ibid*

⁸ *R v Hasan*, 2 AC, 467, 2005.

⁹ HMG V Laxmi Mallaha, NKP 2033, p.19.

2) Insanity:

Defence of insanity can be claimed by the defendant, if the defendant claims that he/she lacks mental capacity to differentiate between right and wrong. In order to prove certain act as a crime except for the crimes associated with strict liability, there must be actus reus and mensrea, where actus reus is the commission or omission of a conduct or an act and mensrea is a mental element which proves that the purported has an intent to commit the act and had knowledge about it. In *Durham v. The United States*,¹⁰ S.C. gave the verdict that if any action was the result or product of a mental disease or defect then we can use insanity as a defence. Therefore, with the help of the defence of insanity, the defendant can eliminate the mens rea element and hence, avoid the liability incurred upon them.

Article 31 of Rome Statute, has accepted insanity as a defence because it assumes that such person doesn't have capacity to control their actions or conduct. Defence of insanity can be adopted in two different circumstances i.e. if the accused lacks the mental capacity to differentiate between right and wrong while committing the crime and secondly, when the purported isn't in good mental state while being tried out. If a defendant intends to use insanity as a defence then they must be able to prove that he/she lacks of understanding of the wrongfulness of the conduct. If one succeeds in being declared "not guilty by reason of insanity," then the result frequently is treatment in a mental hospital, although some jurisdictions provide the sentencing authority with flexibility.

In Nepal, **Section 14** of criminal code has explicitly granted a provisions about insanity where, it states that, if a person commits any crime while they are not in good state of mind then it isn't regarded as a crime. Similarly, in the case of *HMG V Dev Giri*¹¹, the defendant pleaded insanity as a defence and was able to prove all the elements, consequently, it reduced his criminal liability.

3)Automatism:

Automatism, is a state where the muscles act without any control by the mind, or with a lack of consciousness. In *Bratty v Attorney General for Northern Ireland*¹², Court of Appeal defined automatism as 'the state of a person who, though capable of action, is not conscious of what he is doing. It is used as a defence because the person has no knowledge about the conduct or act the committed, which negates the mensrea elements.

¹⁰ Durham vs UN, 1945.

¹¹ HMG V Dev Giri, NKP 2042, p.110.

¹² Bratty v Attorney General for Northern Ireland, AC 386, 1963.

In order to use this as a criminal defence, one must be able to prove that they have automatism and because of that they had performed that specified act. **Article 31** of the Rome Statute, establishes automatism as a defence, as it is a defect that destroys person's ability to appreciate the unlawfulness or nature of its conduct.

In Case of Nepal, there is no specific provisions that accepts automatism as a defence. Nevertheless, in **Section 14** of Criminal code of Nepal, has enumerated that if a person commits any crime when he is not in good state of mind then it isn't regarded as a crime. Thereby, this provision somehow governs the automatism defence.

4) Intoxication:

Intoxication is a state where you have your physical and mental capacity diminished by excessive use of drugs, alcohol or any intoxicating substances. There are usually two types of intoxication, i.e. voluntary and involuntary. In voluntary intoxication, the person has been intoxicated by their will but in involuntary intoxication the person has been intoxicated against their will. It is an established principle that a person has no control over his/her actions when he/she is intoxicated.

Furthermore, Article 31(2) of Rome Statute has accepted intoxication as a defence as their state destroys their ability to appreciate the unlawfulness of their act or conduct. In order to use it as a defence, the defendant must be able to prove that the action or conduct was the sole result of his/her intoxicated state.

In Nepal, there is no any explicit provisions that had incorporated intoxication as a defence in criminal jurisprudence. However, there are few instances where the defendant had pleaded intoxication as a defence. In the case of *Man Bdr v HMG*¹³, the intoxication defence was accepted in the court of law and hence, the amount of punishment was reduced.

5) Mistake of Fact

Mistake of Fact occurs when there has been genuine misunderstanding about certain circumstances, it can only be used as a defence mechanism if mistake of fact negates mens rea element required by the crime as contained in the **Article 33** of Rome Statute.

¹³ Man Bdr v HMG, NKP 2045,p.162.

The landmark decision in *DPP VS Morgan*¹⁴, The House of Lords gave the decision that, to use Mistake of Fact as a defence, one must be able to prove that there has been a reasonable and genuine misunderstanding and that led to commission of certain act.

In the context of Nepal, there is neither any any legal provisions nor any legal precedents governing the mistake of face as a criminal defence in the court of law .

6) Necessity or threat of harm:

In certain circumstance, a person need to initiate certain action or conduct to avoid a foreseeable or a greater harm. In such situations, those actions doesn't attracts any type of criminal liability, presumably it was necessary to perform that specific action, it is known and necessity defence. In order to invoke necessity defence one must be able to prove that there is an imminent and actual threat that requires immediate actions to avoid greater harm or sufferings¹⁵. Along with that defendant needs to prove that they had no other realistic and viable options available to them at that period of time.¹⁶

In case of Nepal, we can observe few legal provisions and precedents that had adopted necessity as a defence. **Section 23** of Criminal code of Nepal enumerates that , any act which is committed to avoid huge damage shall not be regarded as a crime. Similarly, in the case of *Marda Bdr Rai et al v HMG*¹⁷, the court gave the verdict that if any person commits any offence because it was necessary to avoid greater harm then it shall not be considered as an offence.

7) Infancy

Doli incapax is a Latin term meaning “incapable of doing harm”, which has been used to presume the innocence of a child under criminal law. Hence, infants are exempted from the criminally liability even if they suffice both actus reus and mensrea. Section 16 of Children and Young Persons Act 1963 enumerates that Children below the age of 10 conclusively presumed to be incapable of guilty. Likewise, Section 34 of Crime and Disorder Act 1998, states that Children over ten are capable of being guilty of an offence.

In the context of Nepal, any act of a child below 10 years aren't considered as a crime as per **Section 13** of Criminal Code of Nepal.

8) Lawful capacity of Defense

¹⁴ DPP VS Morgan AC 18,1976.

¹⁵ R v Morgentaler v The Queen, 1975 CanLII 8 (SCC), 1976.

¹⁶ R v Latimer, 2001 SCC 1 (CanLII), at paras 32 to 3.

¹⁷ Marda Bdr Rai et al v HMG, NKP 2043,p.651.

This defense is generally available to public servants and first responders, such as police officers, firefighters etc. It usually protects the first responder from responsibility for otherwise criminal actions that the first responder must perform as an appointed agent of the jurisdiction in the course and scope of their duties.

In case of Nepal **Section 25** of Criminal code of Nepal enumerates about legal defence, which is generally available to public servants and first responders, such as police officers, firefighters, EMTs.

9) Self-defense

Self-defence is one of the most adopted defence in our criminal system. Sometimes, a person needs to initiate reasonable action to protect themselves from any kind of threat or harm and at such circumstances immediate actions adopted by the person wouldn't levy any sort of criminal liability upon them. In *Palmer v R*¹⁸, S.C gave the verdict that a man who is attacked may defend himself. "

In order to adopt this defence, the defendant must be able to prove that

- 1) There was imminent threat to his/her life.¹⁹
- 2) There was reasonable fear²⁰
- 3) There was use of proportional force²¹

There is no any sort of legal requirement that a person retreat far away from attacker before defending themselves. However, their ability to flee and whether they took the vary option before attacking will be assessed in the court of law. Nevertheless, if any action puts a person in dire peril then immediate defensive action can be admissible even if they have opportunity to flee.

Similarly, in case of Nepal **Section 24** of Criminal code of Nepal has legalized self defence in our criminal legal system. In the case of *Kousila Pun Magar V HMG*²², The S.C, gave the verdict that if any person commits any crime in order to defend him/herself then that cat can't be considered as an offence. We can observe number of self defences cased in the context of Nepal.

¹⁸ *Palmer v R*, AC 81,1971.

¹⁹ *Bullard v. State*, 195 N.E.2d 856, 857 . 1964.

²⁰ *State v. Browning*, 221 S.E.2d 375, 377 ,N.C. Ct. App. 1976.

²¹ *State v. Coles*, 91 So. 2d 200, 202-03 Fla. 1956.

²² *Kousila Pun Magar V HMG*, NKP, 2042,p.13.

Hence, above mentioned are some of the defences used in criminal defence system.

CONCLUSION

We can't always presume that the alleged is guilty. Everyone person is entitled to a fair chance to prove their innocence. The principle of criminal defence grants an opportunity to the defendant to prove their innocence or explain the situation that led them to the commission of the act in the court of law. If a defendant adopts any sort of defence then they are obligated to prove all the elements required. In light of those elements or facts presented by the defendant if the principle of criminal defence is established then it would reduce the criminal liability incurred upon the defendant.

Practically speaking, these types of defence doesn't hold any prominent significance while deciding any case under criminal law. The crux of criminal law is guilty mind. The court has to examine the circumstances and facts of each case. In order to determine whether a particular defence is obtainable to the accused or not. Elements or mensrea determines whether there is a presence of guilty mind or not. . If the defendant is able to prove the absence of men rea then they can exempt from levied criminal liability. The main motive of using different types of criminal defence is to prove that they lack mensrea and thus, they don't have guilty mind. Criminal defences are important to guarantee that the accused only receives as much punishment as is deserved. Thus, even if a defendant is convicted of a crime that is really too serious, given the nature of his or her actions, the defendant may ultimately receive less punishment than one might expect. Indeed, judges holds accused criminally responsible for certain action and impose sentences. By doing so, they are maintain rule of law and upholding principle of criminal justice. As per the retributive principle, an offender shall only be liable to the punishment proportionate to the offence that they have committed.

There is one very important quote in criminal justice system that let 1000 criminal go but prevent 1 single innocent from being punish. That's why it is very prominent factor to evaluate all the necessary elements and factors by the court before pronouncing any judgment regarding criminal defences. Sometimes, in certain situations people can adopt any defences just to avoid the criminal liability, which would be unfair to the aggrieved party. Thereby, the court must be very rational, mindful and diligent whenever dealing with criminal defenses during the trial.

In the case of Nepal, different types of defences have been incorporated in laws of Nepal but there are several other aspects that our laws have failed to incorporate, for instance, the defence of intoxication has not been incorporated into the legal provisions of Nepal but we can observe them in the practice. We can observe very limited cases, where the defendant has to seek any sort of criminal defence during their trial. In the same way, we can even observe the cases where the defendant adopts criminal defence just to escape from the criminal liability. There are various precedences which the Supreme Court has made genuine decision. Like in the case of *DhanaBahadur Rai V HMG*²³, *HMG V Dhanamaya Chhetrini*²⁴, *HMG V JogendraBahadur Karki*²⁵, and others. But there are also the cases which the Supreme Court has failed to address the justice in the part of defense. For instances, the cases like, *Bal Manjari V HMG*²⁶, *Hanif Ansari V HMG*²⁷, *Shiva Mahato V HMG*²⁸ and others.

In the context of Nepal, we can observe minimum awareness among the people regarding the defences available to them. In very few cases, people have adopted criminal defences but were unable to satisfy all the elements required. Not only that, there were instances where the defendant has adopted criminal defence just to evade from the prescribed criminal liability. On top of that our legislative body court system has also failed to address the different criminal defences and its consequences, as a result it has made use of criminal defence less accessible to the people of Nepal. As a result, criminal jurisprudence of self-defence isn't very developed in Nepal. There is a need to create awareness among Nepalese population regarding the criminal defences available to them. Similarly, a provision for sanction needs to be established to punish the one who uses criminal defences just to evade the criminal liability or to decrease the criminal liability, even if they are the guilty. Strong investigation process standards needs to be established and regulated properly in Nepal, with the support of government and local bodies. Specific directives or procedure for judiciary body shall be created which would assess them while dealing with the related cases. All of these would ensure proper investigation, application of judicial mind and fair, equitable justice. Hence, We can conclude that the boundaries of criminal defence in Nepal aren't fixed, principles

²³ HMG V Dhanamaya Chhetrini NKP 2031, 123.

²⁴ *Ibid.*

²⁵ HMG V JogendraBahadur Karki NKP, 2033, 24.

²⁶ HMG V Bal Manjari and Others NKP, 2040, 297.

²⁷ HMG V Hanif Ansari NKP 2044, 3290.

²⁸ HMG V Shiva Mahato NKP 2046, 1039.

aren't well developed, there is a weak jurisprudential analysis and reluctance of the court and legislature to frame laws, rules, guidelines and interpretation.

