Guilty Mind in Sexual Crimes

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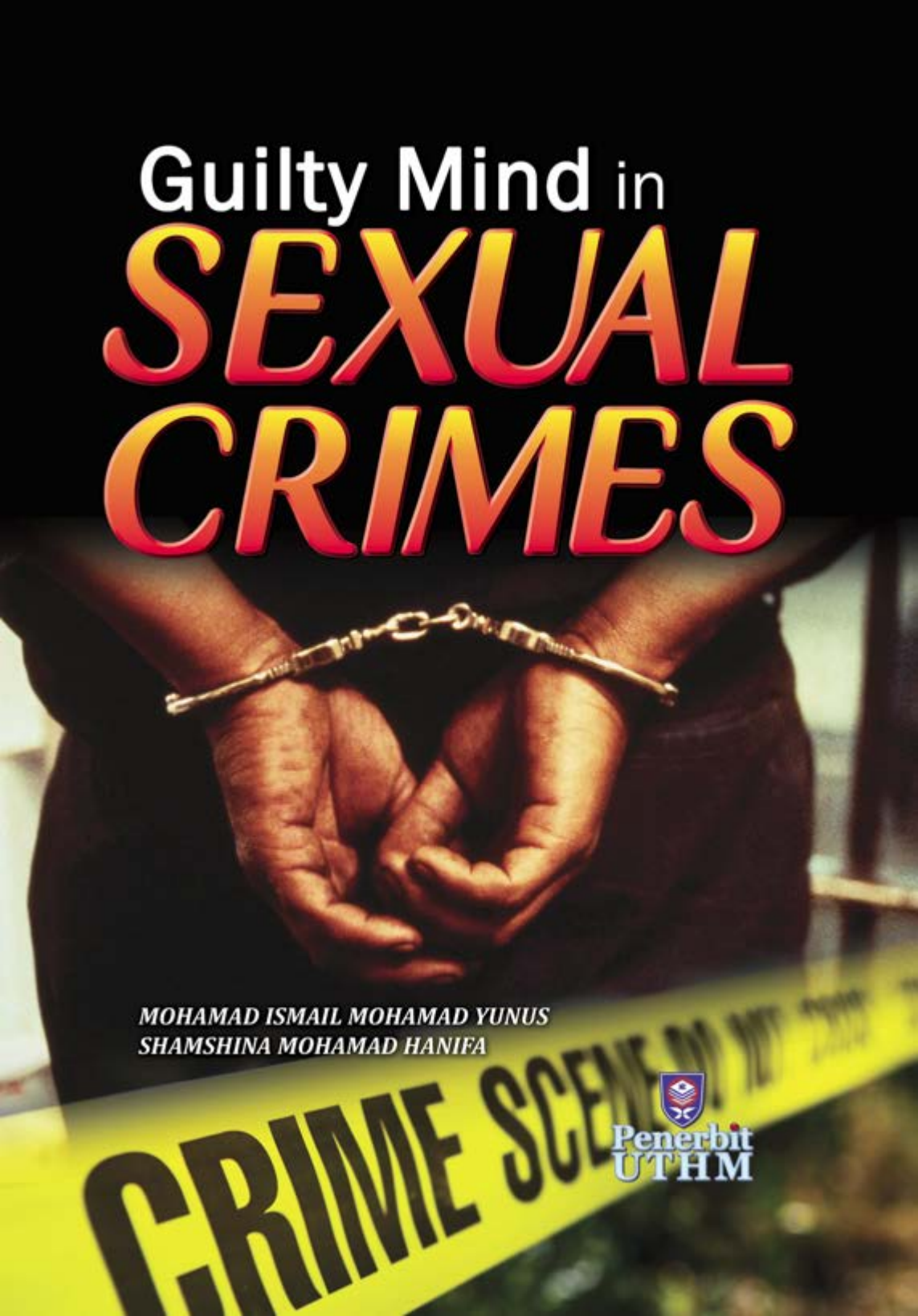
Abstract: "Actus non facit reum nisi mens sit rea" which means an act does not constitute crime unless done with a guilty mind. A reasonable man is viewed as a moral agent and not simply as an instrument of causing harm. He is regarded as responsible for his actions. Being a responsible agent means that man is capable of reason (right-thinking person); he is capable of understanding the social and legal norms to which he is subjected; he possesses free will. He can thus control his actions and can choose whether to comply with the law or not.

Several statutory provisions do not expressly contain any specific provision for mental element (mens rea) in proving crimes committed. Nowhere in the Penal Code or elsewhere is there any general provision endorsing the doctrine of mens rea. Does this mean that liability in all such cases must be considered "strict" in the sense that no mental element or other criterion of blameworthiness need be established? For example, the offence of rape carrying a maximum to twenty years imprisonment under section 376 (1) makes no reference to any mental element. What is position of an accused who honestly believes that the woman is consenting to sexual intercourse when in fact she is not? And what of the accused who honestly thinks the girl is over 16 years of age when in fact she is not? Must such an accused person be convicted on the basis that the doctrine of mens rea is inapplicable under the Penal Code?

This book discusses the issue and other related matters on mens rea comparatively and it is necessary reference for the various parties involved in the administration of criminal justice including students studying the subject of criminal law and evidence.

Keywords: Guilty mind, Morgan's Approach, Penal Code

Guilty Mind in SEXUAL CRIMES



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AUTHOR'S PREFACE

In The Name Of Allah The Most Gracious Most Merciful

Sexual crime is not a crime against the person of a woman; it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society, which, on coming to know of the crime, looks down upon her in derision and contempt. Sexual crime is, therefore, the most hated crime. It is a crime against the basic human rights and is also violate of the victim's most cherished of the Fundamental Rights, namely, the Right to Personal Liberty enshrined in Article 5(1) of the Federal Constitution of Malaysia; "No person shall be denied his personal liberty".

This book explores the mental element (*mens rea*) in sexual crimes. It examines the position at the common law jurisdictions, which require *mens rea,* and some jurisdictions, which do not. This book analyses the issue of belief in consent, as an aspect of the mental element in sexual crime as decided by the House of Lords in *Morgan v. DPP* [1976] AC 182, where it was generally accepted that for a mistake of fact to provide a defense in criminal law, it had to be based on objectively reasonable grounds. Thus this principle might affect the law in other state jurisdictions and whether there should be any changes in the criminal code approach to the sexual offences.

This book is unique in that its methodology, approach and style of presentation in which the relevant materials have been analyzed, organized and presented making it a convenient, clear, compact, concise and comprehensive source of reference.

We wish to express our wholehearted gratitude to the Inspector General of Police, Tan Sri Dato' Sri Khalid Bin Abu Bakar for endorsing and gracing this book with his foreword. We also would like to extend our special thanks and appreciation to the Dean of Ahmad Ibrahim Kulliyyah of Laws (AIKOL), International Islamic University Malaysia, Professor Dr. Ashgar Ali Ali Mohamed, the Head of Legal Practice Department, Mr. Mohamad Darbi Hashim, the Head of Civil Law Department, Associate Professor Dr Farid Suffian Shuib, the Publisher & Editorial team members of University Tun Hussein Onn (UTHM) for their commitment and professionalism that they have shown leading to the publication of this book possible.

Thank you

DR. HJ. MOHAMAD ISMAIL MOHAMAD YUNUS
SHAMSHINA MOHAMAD HANIFA
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FOREWORD BY THE HONORABLE INSPECTOR GENERAL OF POLICE - IGP

Element of "Guilty Mind" in criminal law, is viewed as one of the necessary elements for most of the crimes. The standard common law test of criminal liability is expressed in the Latin phrase; *actus non facit reum nisi mens sit rea*, which means "the act is not culpable unless the mind is guilty". Thus, in our jurisdictions with due process, there must be an *actus reus,* or "guilty act", accompanied by some level of *mens rea,* or guilty mind to constitute the crime with which the accused is being charged.

Under the traditional common law, the guilt or innocence of an accused person relied upon whether he had committed the crime and whether he intended to commit the crime. However, many modern Penal Codes have created levels of *mens rea* called modes of culpability, which depend on the surrounding elements of the crime: the conduct, the circumstances, and the result, or what the Model Penal Code calls CAR (conduct, attendant circumstances, result). The definition of a crime is thus constructed using only these elements rather than the colorful language of *mens rea*.

Therefore, I would like to take this opportunity to congratulate Dr. Mohamad Ismail bin Mohamad Yunus and Madam Shamshina binti Mohamad Hanifa, from Ahmad Ibrahim Kulliyyah of Laws (AIKOL), International Islamic University Malaysia for publishing a reference book on "Guilty Mind in Sexual Crimes" which I believe will provide a great assistance and legal solutions to the law students, legal practitioners, enforcement officers, researchers and judges with an updated and authoritative reference points on the specific principle of substantive criminal law that will help in developing the criminal justice system in Malaysia.

TAN SRI DATO' SRI KHALID BIN ABU BAKAR
INSPECTOR GENERAL OF POLICE
ROYAL MALAYSIA POLICE
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2017

TABLE OF CASES :

ABBREVIATIONS OF JOURNALS/ARTICLES AND PERIODICAL

A.C.....Appeal Case
A.Crim.R.....Australian Criminal Reports
AIR Ajmer.....All India Reporter, Ajmer Series
AIR Mad.....All India Reporter, Madras Series
AIR SC.....All India Reporter, Supreme Court
All E.R.....All England Report
ALR.....Adelaide Law Review
B.C.A.C.....British Columbia Appeal
B.C.L.R.....British Columbia Law Reports
C.L.J.....Calcutta Law Journal (India)
CLJ.....Current Law Journal
C.L.R.....Calcutta Law Reports (India)
Cal.....All India Reports, Calcutta Series
Can.B.Rev.....Canadian Bar Review
Can.C.C.....Canada Criminal Cases
Car. and K.....Carnington & Kirwan's Nisi Prius
Car & P.....Carnington & Payne's Nisi Prius
CLQ.....Center's Criminal Law Queensland
Cox.....Cox's Chancery Reports
Cox C.C.....Cox's Country Court Cases
Cr.App.R.....Criminal Appeal Reports
Cr.L.J.....Criminal Law Journal (India)
CR.LR.....Criminal Law Reporter (India)
Crim.L.J.....Criminal Law Journal (Aus.)
Crim.L.R.....Criminal Law Review
Crim.L.Rev.....Criminal Law Review
Crim.R.....Criminal Reports
Crimes Act (NZ).....Crimes Act (New Zealand)
CRNS.....Code Reports, New Series
CRNZ.....Criminal Reports of New Zealand
CRR.....Canadian Rights Reporter
D.L.R.....Dacca Law Reports
DCR.....Discretionary Conditional Release
E.R.....East's Term Reports
F. and F.....Foster & Finlason's Nisi Prius Reports
KB.....King's Bench

INTRODUCTION

Guilty mind or *mens rea* is an essential mental element required by the definition of a particular crime.[1]

In *R. v. Tolson*[2], Stephen J. said:

"The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined has not been committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition".

The mental element of different crimes differs widely. Mental element means in the case of rape, an intention to have forcible connection with a woman without her consent".[3]According to Duffy J. the rule that a mistake of fact may make what would otherwise be a guilty act innocent has been sometimes subsumed under the maxim *actus non facit reum nisi mens sit rea*, and the principle said to be that a guilty mind is a necessary constituent of a crime and there is no crime without mental element is sometimes spoken of as being based on a general rule that a mistake of fact is a good defense in law. Sometimes the suggestion is that it is enough if there be an honest belief, sometimes that it must be reasonable also, sometimes that a guilty mind is an integral part of the crime that must be proved by the Crown, sometimes that mistake is a defense that must be proved by the accused. These distinctions, of course, may be important when considering under what circumstances a jury ought to be directed to take such a mistake into its consideration and what form such a direction should take.[4]

1. Mohamad Yunus, Mohamad Ismail. 2015. *The Central Issue in the Rape Trial*. Kuala Lumpur. IIUM Press. 6. *See also*, KL Koh, Clarkson & Morgan. 1989. *Understanding Criminal Law*. Kuala Lumpur. MLJ. 56.
2. (1889) 23 QBD 168, the facts of the case were that Mrs.Tolson, believing herself a widow after her brother-in-law and others had told her that her husband had been lost at sea, remarried. When the original husband reappeared she was charged with bigamy, but her conviction was quashed because of her mistaken belief on reasonable grounds that her husband was dead. Cf. *Wilson v. Inyang* [1951] 2 All ER 237, the court acknowledge that the presence or absence of reasonable grounds was a factor in determining whether the defendant had acted honestly.
3. Ibid. 185-187. This was followed in *R. v. Hornbuckle* [1945] VLR 281.
4. *R. v. Burles* [1947] VLR 392, 398.

Chapter 1

THE NATURE AND DEVELOPMENT OF MENTAL ELEMENT OF RAPE

1. 1 The Decision in *Morgan v. DPP* [1976] AC 182

The issue of belief in consent as an aspect of the mental element of rape was not the subject of an authoritative decision by the courts until 1975.[5] Before the decision of the House of Lords in *Morgan v. DPP*,[6] it was generally accepted[7] that for a mistake of fact to provide a defence in criminal law, it had to be based on objectively reasonable grounds.

The authorities of cases that support the reasonableness requirement, the best known are those arising from bigamy. While it is true that Martin B. in *R. v. Turner*,[8] directed the jury simply to consider whether the accused woman had an honest belief that her first husband was dead, Cleasby J. in *R. v. Horton*,[9] while purporting to follow the *Turner* case, made a vital addition by directing the jury:

"You must find the prisoner guilty, unless you think that he had fair and reasonable grounds for believing, and did honestly believe, that his first wife was dead."

5. Mohamad Yunus, Mohamad Ismail. 2014. *A Commentary on Criminal Law & Evidence*. Kuala Lumpur. Marsden Law Book. 53. One of the few earlier pronouncements of direct relevance was that of Lord Denman in *R. v. Flattery* (1877) 13 Cox C.C. 388, 392, "There is one case where a woman does not consent to the act of connection and yet the man may not be guilty of rape, that is where the resistance is so slight and her behavior such that the man may bona fide believe that she is consenting. In *R. v. Sperotto* (1970) 92 WN (NSW) 223, the Appellate Court of New South Wales held that in a rape trial the prosecution must prove beyond reasonable doubt that when the accused had intercourse with the complainant either (1) he was aware that she had not consented, or (ii) he realized that she might not be consenting and was determined to have intercourse with her whether she was consenting or not.
6. [1976] AC 182.
7. D. Cowley, "The Retreat from *Morgan*" [1982] Crim. L.R. 198; Smith and Hogan, *Criminal Law* (3rdedn 1973) 148-150; Cross and Jones, *Introduction to Criminal Law* (7thedn 1972) 63-65; Rook and Ward, *Sexual Offences* (2ndedn. 1997) 67.
8. (1862) 9 Cox CC 145.
9. (1871) 11 Cox CC 670.

Chapter 2

THE CRITICISMS OF *MORGAN'S* APPROACH

2.1 The Rapist Character

The decision of the House of Lords in *DPP v. Morgan* met with widespread public disapproval. It was heralded as a "Rapist's Character" by the popular press in England.[63] It is viewed by some academics as representing the high-water mark of subjectivism.[64]

In the House of Commons, Mr. Jack Ashley M.P. was given leave by an overwhelming majority of the House of Commons (228 votes to 17) to introduce a Bill, which would have imposed a requirement of reasonableness where a mistaken belief in consent was alleged.[65]

The Government's response was to set up a committee chaired by a judge, Mrs. Justice Heilbron, to look into the matter. The Heilbron Committee took the view that the majority decision of the House of Lord was correct in principle, that it would neither cloud the real issues in rape trials nor encourage juries to accept bogus defences.[66]

63. Some critics claimed that the practical effect of *Morgan* would be that, in order to be acquitted of rape, an accused need merely assert his mistaken belief as to consent- however ridiculous his story might be: see The Criminal Law Reform Committee (NZ*)* 1980*, Report on the Decision in DPP. v. Morgan* (1980) 1.
64. James Faulker, 'Mental element in Rape: Morgan and the Inadequacy of Subjectivism' (1991) 18 MULR 60. See also Wells, 'Swatting the Subjectivist Bug'[1982] Crim. L.R. 209.
65. H.C. Deb., Vol. 892, cols. 1412-1416 (21 May 1975).
66. Report of the Advisory Group on the Law of Rape, hereinafter cited as "Heilbron Report" (1975) Cmnd. 6352, paras. 81-84. The Group felt that legislation was required for two principal reasons. The first was to avoid possible doubts about the ruling on recklessness in *Morgan*. The second was to prevent the tendency arising to direct the jury that a belief, however unreasonable, that the woman consented, entitled the accused to an acquittal. The Group feared that such a direction might tend to give an undue or misleading emphasis to one aspect only and the law, therefore, should be statutorily re-stated in a fuller form to obviate the use of those words. For the criticism of the Heilbron Committee, see Stephen Shute, 'The Second Law Commission Consultation Paper on Consent (1) Something Old, Something New and Something Borrowed: Three Aspects of the Project.' [1996] Crim. L.R. 684.

Chapter 3

THE APPLICATION OF *MORGAN'S* APPROACH

3.1 The Concept of Reasonable Belief

The decision in *Morgan* has been influential in related areas of law and in some other jurisdictions. A number of law reform agencies and other advisory groups have also considered it, mainly with approval.[96]

In the English case of *R. v. Cogan and Leak,*[97] the accused L took the accused C back to his home and told his wife that C wanted to have sexual intercourse with her and that he was going to see that she did. L's wife was not willing to have intercourse with C but she was frightened of L who made her go to the bedroom where C had sexual intercourse with her. The wife was sobbing throughout the intercourse. She did not struggle with C but she did try to turn away from him. C was charged with rape.

At the trial, C's defence was that he believed that L's wife had consented to the intercourse. The jury found C guilty and returned a special verdict that C had believed the wife was consenting but that he had no reasonable grounds for such belief.

96. Heilbron Report (1975); Criminal Law and Penal Methods Reform Committee of South Australia (1976); Victorian Law Reform Commission (1976); Tasmanian Law Reform Commission (1976). In New Zealand, the case was referred to the Criminal Law Reform Committee (1980) for consideration. The report concluded that the mental element in rape is the same in New Zealand as in England. The report recommended, however, that for the sake of clarity the Morgan's formula should be expressly written into statute: see Warren Young, "Rape Study: A Discussion of Law and Practice" vol. 1 (1983) 96.

97. [1976] 1 Q.B. 217.

Chapter 4

THE MODERN APPLICATION OF MENTAL ELEMENT

4.1 The Concept of Recklessness

The other important aspect of *DPP v. Morgan* is that the decision laid down that the defendant would be reckless to the fact that the woman was not consenting only if he had thought about the possibility that she might not be so consenting and continued to have sexual intercourse in any case.[229]

The following are clear statements that their Lordships regarded recklessness as an alternative to intention:

Lord Cross said:

"Rape imports at least indifference as to the woman's consent."[230]

Lord Hailsham said:

"The mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly whether the victim consents of not."[231]

Lord Simon said:

"The mental element is knowledge that the woman is not consenting or recklessness as to whether she is consenting or not."[232]

229. D. Selfe and V. Burke, Perspectives on Sex, Crime and Society (1998) 74.
230. [1975] 2 All ER 347, 352.
231. Ibid. 362.
232. Ibid. 365.

Chapter 5

CONCLUSION AND RECOMMENDATIONS

The issue of mental element usually only reaches appellate courts when the defendant alleges that the trial judge misdirected the jury on the issue. On those occasions, courts have often held that, despite any misdirection, there was no miscarriage of justice, as the jury would have found against the accused on the issue anyway. Some judges have reasoned by examining the evidence and finding that the real issue at the trial was consent or non-consent and, accordingly, dismissing the appeal.

This was the case, for example, in the famous case of *DPP v. Morgan*.[449] A modern example is the Victorian case of *R. v. Ev Costa*,[450], where two judges approached the question of whether serious misdirection on mistake in consent affected the jury's verdict in a rape trial by examining the testimony of the parties.[451] The accused's testimony left no room for the issue of the accused's belief in consent, because his evidence either denied the acts altogether or claimed that the complainant demonstrated willing participation.[452] The complainant's testimony in relation to the first indecent assault charge, that the accused's assault had woken her from sleep, similarly left no room for the mistake issue.[453] However, the complainant's testimony in relation to the three rape counts, that she had said "you should not be doing that" and that she "froze" during the assault, combined with evidence of the possibility that the accused was drunk, meant that the jury's rejection of the accused's evidence would not necessarily preclude a reasonable doubt that the accused believed that she consented.[454]

449. [1976] AC 182, 204 per Lord Cross; at p. 207 per Lord Hailsham; at p. 235 per Lord Edmund-Davies; Cf. R. v Brown (1975) 10 SASR 139 at pp. 150-151 per Bary CJ; at p.152 per Wells J.; at pp. 157-158 per Sangster J.; R. v. Wozniak (1977) 16 SASR 67, 75-76.
450. Unreported, 2 April 1996, Vic. CA. No 177 of 1995.
451. Ibid. 25-26, 32-35 per Callaway JA and Southwell AJA.
452. Ibid. 25, 32.
453. Ibid. 25.
454. Ibid. 26, 32-33. Philips CJ reached the same conclusion as the majority by ruling that the prosecution had not established that a conviction on the rape counts would have occurred absent the misdirection.

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