
NAVIGATING INTENT: ADVOCATING FOR MENS REA IN THE BIGAMY LEGAL FRAMEWORK

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ABSTRACT

While common law traditions universally require mens rea, certain statutory offenses operate under strict liability, leading to inconsistent interpretations. Bigamy is one such offence where statutes, from across several jurisdictions, have not given a clear clue as to whether mens rea is relevant in such cases and courts have had to decide whether bigamy is indeed a strict liability offence. This legal analysis examines the question of mens rea in bigamy cases under Section 494 of the Indian Penal Code (IPC). The paper argues that Macaulay's intent and the structure of Sections 494 and 495 imply a mens rea requirement in bigamy cases. The study critiques the application of the Tolson defence, a principle established in the UK case *Regina v Tolson*, which introduced an 'honest and reasonable bona fide mistake of fact' defence in bigamy cases. The author argues against the 'reasonability standard' in *Tolson*, advocating for a revision that emphasizes an 'honest mistake of fact made in good faith' to align with the subjective mens rea approach. The paper scrutinizes its applicability to the Indian scenario, asserting compatibility with Section 494 of the IPC. The analysis extends to a critique of Indian case law, highlighting inconsistencies in applying the Tolson principle and emphasizing the importance of distinguishing between mistakes of fact and law. The proposed revision of the Tolson defence seeks to establish a more principled and uniform application of the law in cases of bigamy, promoting consistency and fairness in judicial outcomes.

Introduction

In criminal law, mens rea (Latin for “guilty mind”)¹ is the mental state of a defendant who is accused of committing a crime and it encompasses two kinds of intent – specific and general. General intent, inherent in all crimes, pertains to the intention to commit the act, while specific intent involves an intent to violate the law in a particular manner, articulated by terms like 'knowingly', 'intentionally' etc. It is the universal rule in common law that a crime requires two elements: actus reus and mens rea.²

However, there are certain statutory offences, known as strict liability offences,³ where the legislature may dispense with mens rea, and where a statute does so in clear terms, the court has no choice but to obey. Bigamy is one offence where statutes, from across several jurisdictions, have not given a clear clue as to whether mens rea is relevant in such cases. Courts have then had to answer the question on its own, having regard to matters such as the nature of the offence, the historical background of the statute and the language of the statute. The leading case on this issue is the UK case - *Regina v Tolson*⁴, which laid down the ‘honest and reasonable mistake in good faith’ defence (the “Tolson defence”) in cases of mistakes of fact in bigamy offences, essentially recognising mens rea to be a relevant fact in the statutory offence of bigamy.

Grounded in the common law tradition, the Indian Penal Code (“IPC”) outlines the essential components of actus reus and mens rea for each offence in a clear and distinct manner. At the same time, the IPC also contains offences in which the mens rea element is not mentioned explicitly or altogether missing. One such provision is Section 494⁵ which criminalises the offence of bigamy i.e. the act of marrying a person other than one’s spouse during the subsistence of the present marriage. Indian Courts, however, have read an element of mens rea into the provision on many occasions.⁶ However, the Court’s interpretation in all these judgments do not follow a model of consistency. Without a consistent framework, courts often apply the Tolson principle mechanically without a comprehensive analysis of the historical

¹ Black’s Law Dictionary (11th edition, 2019) 1137

² Justin Miller, Handbook of Criminal Law (1934) 52

³ See Indian Penal Code 1860, s 120A & Narcotic Drugs and Psychotropic Substances Act 1985

⁴ *Regina v Tolson* [1889] 23 QBD 168

⁵ Indian Penal Code 1860, s 494

⁶ See *Sukumaran v Saraswathy* [1983] SCC OnLine Ker 230 and *Janaki Amma v Padmanabhan Nair* [1954] KLT 977

context and legal principles surrounding mens rea, fault, and mistake surrounding the offence of bigamy. This has given rise to a notably inconsistent body of precedents, where Courts have employed different reasonings to arrive at varying results.

I argue that mens rea is a requisite element under Section 494 IPC by indicating that Macaulay, in his Notes on the IPC (1837), intended a mens rea element in the bigamy provision at the time of the IPC's conception. Secondly, I shall scrutinize the Tolson defence by arguing that the 'reasonability standard' is not sound in law and must be scrapped. I shall also assert that an honest and good faith defence be applicable in cases of mistakes of fact in bigamy cases. The applicability of this revised Tolson principle to the Indian scenario is also shown to be compatible. Thirdly, the paper shall analyse case law from India to argue how the lack of theoretical depth surrounding mens rea and mistake in bigamy cases has led to inconsistent rulings.

Analysing Macaulay's Notes: Understanding the Historical Background of Section 494

Macaulay's IPC of 1860 stands as the first attempt to establish a modern legal system in India by consolidating common law principles borrowed from the United Kingdom, while also incorporating adjustments to align with the specific needs of the Indian context. Its enactment also reflected significant developments in England that led to an overhaul of England's criminal justice system.⁷ Therefore, it is crucial to examine Macaulay's Notes on the Indian Penal Code of 1837 to comprehend the present state of the IPC and the legislative purpose guiding its provisions.

Macaulay notes that the offence of bigamy is to be attended with circumstances which may excuse the commission of the offence but not justify it.⁸ In doing so, Macaulay is, in fact, recognising that offenders may escape liability by seeking recourse to the exculpatory defences in criminal law. Exculpatory defences are built upon the rationale that they negate the mens rea of the defendant despite the presence of the definitional elements of an offence.⁹ Since it is the 'guilty intent' that warrants punishment, the defendant must also escape culpability in case such a defence is proved. Hence, by making exculpatory defences applicable to the offence of

⁷ David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' [1998] MAS 513, 514

⁸ *ibid*

⁹ Eric Colvin, 'Exculpatory Defences in Criminal Law' [1990] OJLS 381

bigamy, Macaulay seems to be acting on the presumption that mens rea is already a necessary constituent element of bigamy.

Further, Macaulay explicitly suggests the punishment of individuals engaging in bigamous marriages with a 'fraudulent intention,' while he opposes penalizing those who commit the offense of bigamy without any fraudulent intent.¹⁰ This ascribing of punishment based on the presence or absence of a specific mental state (a 'fraudulent intent') lends further support to the existence of a mens rea element in the offence of bigamy.

Corresponding Macaulay's Intentions with the Present Statute

In the light of these observations, one needs to look at the relevant provision in the IPC as it stands today to ascertain the true intent requirement under Section 494 of the IPC.

Section 494 IPC: "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."¹¹

This language is noteworthy because the words 'knowingly' and 'intentionally' do not appear in the provision, which are typically employed to indicate that an intent to violate the law is an essential element of the offence. However, it would be incorrect to presume that Section 494's silence on the mens rea amounts to a non-requirement of the element itself.

The following Section 495 mentions an aggravated form of bigamy provided in Section 494 IPC meant to apply to those offenders who commit the offence "having concealed the existence of the former marriage".¹² While Section 494 ascribes a maximum sentence of seven years, Section 495 places the maximum limit at ten years. This gradation of punishment seems to be attributable to the existence of an additional morally culpable act in Section 495 - that of 'concealment'.

It must be noted however, that Section 495 makes no mention of the nature of intent that accompanies such concealment. I argue that, despite this fact, the act of concealment, in this

¹⁰ Ibid 172

¹¹ Indian Penal Code 1860, s 494

¹² ibid s 495

context, is itself indicative of a mental state of, not only the wrongfulness of the act, but also of the inherent fraudulent nature of the act. In *A. Subash Babu v State of A.P. & Ors.*, a case dealing with Section 495, the Court noted that the concealment of the former marriage by a married man and subsequent inducement of an innocent woman into marriage is “one of the grossest forms of fraud known to law”.¹³ A reading of this provision along with Macaulay’s Notes indicates that the legislative intent behind Section 495 was to ascribe a higher penalty for those who commit the offence of bigamy with a ‘fraudulent intention’¹⁴. In other words, a married man who by passing himself of as unmarried, induces an innocent woman to become, as she thinks his spouse, but in reality, his mistress, does so with a specific intent to deceive her into marriage. Hence, it is contended that the very idea of concealment connotes a specific intent of the offender to defraud the second spouse into marrying him/her.

This specific intent is lacking in Section 494 and therefore, it accounts for a lower punishment than Section 495. It is also thus, submitted that the distinction between Sections 494 and 495 being based upon the presence of an additional specific intent to defraud allows us to read mens rea into the words of these provisions. Hence, whilst Section 494 requires just a specific intent to violate the law, Section 495 additionally requires another specific intent to defraud the second spouse.

As established in the earlier section, Macaulay did intend to incorporate mens rea as a crucial component of the bigamy provision in the IPC. It is submitted that this intention aligns with the language and structure of Sections 494 and 495 of the IPC and thus, mens rea does find its place within those provisions. Looking beyond the linguistic construction of mens rea in Section 494 IPC, I shall now move on to scrutinising the Tolson defence on the absence of mens rea and suggesting a suitable revision of the defence.

Tolson and the Defence of Mistake of Fact

It is a general rule in criminal law that an ignorance of fact would stand to excuse the commission of the crime whereas a mistake of law would be no defence to escape culpability.¹⁵ The defence of mistake of fact is used to demonstrate that the accused lacked the requisite mens

¹³ *A. Subash Babu vs. State of A.P. and Ors.* MANU/SC/0845/2011 [11]

¹⁴ T.B. Macaulay, *The Indian Penal Code as Originally Framed in 1837 with Notes* (first published 1888) 172

¹⁵ Black’s Law Dictionary (11th edition, 2019) 881

rea to commit the offence.

In the context of bigamy cases, cases of mistakes of fact could be as follows:

1. Where one spouse, in good faith, believes that the marriage has ended by the death of the other, remarries, whereas the other spouse is still living (like in *Regina v Tolson*);
2. Where one spouse, in good faith, believes that the marriage has been dissolved by legal proceedings, whereas no such dissolution has happened (like in *Sukumaran v Saraswathy*).¹⁶

A leading UK case on this issue is *Regina v Tolson* which is authority for laying down the ‘honest and reasonable bona fide mistake of fact’ defence in the context of the statutory offence of bigamy. It has also been regularly cited by Indian Courts in cases of bigamy and other offences.¹⁷ The brief facts of the case are as follows: Mrs. Tolson got married in 1880. In December 1881, her husband went missing. She came to know that he had been lost in a shipwreck of a vessel bound for America. Believing herself to be a widow, she married again in January, 1887. These circumstances were all known to the second husband. However, the first husband turned out to be alive and he returned home in December, 1887. Mrs. Tolson was then charged under Section 57 of the Offences Against Persons Act, 1861 for the offence of bigamy, whose terms are almost identical to Section 494 IPC¹⁸. The prosecution argued on the grounds that Mrs. Tolson had married for the second time in less than seven years and since there was no mens rea requirement under the statute, she should be held guilty. The Court instrumentally laid down that mens rea can be read into the statute. It also directed the jury that an honest and reasonable mistake made in good faith about the death of the first husband should be a valid defence to the accused. Mrs. Tolson was thereafter acquitted by the jury.¹⁹

Revisiting the ‘Reasonability Standard’ in Tolson

In *Regina v Tolson*, the moot issue was whether a mistake of fact could be a defence at all to charge of bigamy under relevant provision. The court decided that an honest and bona fide belief on reasonable grounds in the death of the first husband at the time of the second marriage

¹⁶ *Sukumaran v. Saraswathy* [1983] SCC OnLine Ker 230

¹⁷ See *Girja Nath v. State* [1953] SCC OnLine All 333

¹⁸ Indian Penal Code 1860, s 494

¹⁹ *Regina v Tolson* [1889] 23 QBD 169-202

afforded a good defence to the offender. This dictum of the Court, in effect, introduced an objective standard in judging the mental state of the accused – that of ‘reasonability’ of the mistake. I argue that this reasonability requirement is not only inconsistent with the ratio of the case itself but also unprincipled and hence, must be done away with.

The main decision of *Regina v Tolson* was that the statutory offence of bigamy required mens rea. Hence, if bigamy requires a mens rea element, then a genuine and honestly held belief in good faith would suffice to negative the mens rea and thus, absolve the offender of the crime. It should have been immaterial whether the mistake is reasonable or not. Even if the mistake had been an objectively unreasonable one, it would not affect the innocent state of mind of accused.

On the other hand, the subjective mens rea approach encompasses the belief principle, which holds that criminal liability should be based on what the accused believed he was doing, not on facts which were unknown to him at the time.²⁰ For example, according to the belief principle, if the accused is found to have contracted a second marriage during the subsistence of his previous marriage, but claims he had a bona fide belief that his former marriage has been ended by the death of his former spouse or by legal proceedings, if the prosecution cannot prove otherwise, he should be acquitted of committing the offence of bigamy. However, it is crucial that the mistake be one of fact and not one of law. The doctrine that a mistake of fact must be reasonable is based purely on an objective test and hence, also inconsistent with the belief principle that the mens rea required is a subjective element.

Further, using a reasonability standard in judging mistakes would mean that the offence of bigamy can also be committed negligently. Negligence, as a state of mind, entails that there has been an absence of thought about the circumstances or the consequences where such thought should have been given at the time, or that a belief is reached without proper regard for its basis.²¹ As I have shown earlier, this is not the mens rea standard that bigamy demands, for a specific intention to violate the law is what the standard requirement is.

Therefore, I submit that the ‘reasonability standard’ in *Tolson* is unprincipled and must be construed as mere obiter dicta in the judgment. The actual defence that should be afforded to

²⁰ Jeremy Horder, *Ashworth’s Principles of Criminal Law* (9th edn, OUP 2019) 175

²¹ *Ibid* 176

those who commit the act of bigamy should be just an ‘honest mistake of fact made in good faith’.²²

Applicability to the Indian Scenario

The question that now arises is whether the revised Tolson Defence should be applicable to offenders under Section 494 of the IPC. J. Cave, in *Regina v Tolson*, posits that an honest mistake stands on the same footing as the defence of insanity or infancy in negating mens rea.²³ Furthermore, the defence of mistake of fact in good faith already exists under Section 79 IPC.²⁴ It has also been held that the question of good faith must be considered with respect to the subjective state of mind of the accused and not with a uniform objective test,²⁵ thus lending support to the revision of the Tolson defence done in the preceding section.

Therefore, it is implicit in the legislative intent that a bona fide mistake of fact would serve as a defence under Section 494. It appears improbable that the legislature would establish a defence where an actual belief in the death of the former spouse is not required, only to leave unprotected those individuals who genuinely believe in the death of their former spouse.

Hence, it is submitted that making the revised Tolson defence to offenders under Section 494 is compatible and does not, in any way, vitiate against the crime of bigamy. Although it restrains the State from punishing those who can demonstrate a reasonable and genuine belief in their freedom to remarry, it does not hinder the conviction of the conscious wrongdoer.

Finally, I turn to Indian cases to ascertain how this body of theoretical knowledge surrounding mens rea, fault and mistake has been construed by Indian courts and arguing how the revised Tolson principle would ensure consistency.

Critiquing the Application of Tolson Principle in Indian Cases

In *Sukumaran v Saraswathy*²⁶, a married woman, being under a bona fide and reasonable belief that her earlier marriage had been dissolved vide a divorce deed, whereas in reality, it had not,

²² Hereinafter referred to as the ‘revised Tolson Defence’

²³ *Regina v Tolson* [1889] 23 QBD 181

²⁴ Indian Penal Code 1860, s 79

²⁵ *State of Orissa v. Ram Bahadur Thapa* [1959] SCC OnLine Ori 22

²⁶ *Sukumaran v. Saraswathy* [1983] SCC OnLine Ker 230

married for the second time and was acquitted by court. In *Kunju Ismail v Kadeeja Umma*,²⁷ although the Court recognised that there was no mistake, it still proceeded to answer the question on mens rea under Section 494. In both cases, the Court reasoned along the lines of *Regina v Tolson* to support ‘the honest and reasonable bona fide mistake’ defence, which as I have shown, is unprincipled. I argue that the revised Tolson principle, which is sound in law, would be better suited to arrive at the proper result. It would involve – first, looking at whether the mistake is one of fact or law. In case the mistake is one of fact, one would then look at the honesty of the belief and whether it was held in good faith so as to negative the mens rea of the accused.

In *Ahmed Koya v Amina Beebi*,²⁸ a married woman entered into her second marriage in the bona fide belief that by embracing Abamadeeya faith, the complainant ceased to be a Sunni Muslim and that resulted in the dissolution of the first marriage. The Court noted that this was not the law. The accused’s plea was on the basis that her decision was on the advice of an authoritative religious godman and that she did not have the requisite mens rea to commit the offence under Section 494. The court applied the Tolson rule and acquitted her on the grounds that she had an honest and reasonable belief that she was allowed to remarry. This judgment is grossly erroneous because the Court completely failed to appreciate the difference between cases of mistakes of fact and mistakes of law. This was a case clearly falling under a mistake of law. However, the Court in its mechanical application of the Tolson principle completely misunderstood it and failed to recognise that this was a case of mistake of law not fact. Had the revised Tolson principle been applied, the woman would have rightly been convicted under Section 494.

Conclusion

In conclusion, this paper reveals that Macaulay's intent, coupled with the linguistic construction of Sections 494 and 495 of the IPC, supports the incorporation of mens rea into the offense of bigamy. Further, on a principled level, the ‘reasonability standard’ for judging a mistake in *Regina v Tolson* is redundant and must be done away with. The argued revision of the Tolson defence, emphasizing an honest mistake made in good faith is the correct position and it also aligns with legislative intent in Section 494 IPC. However, it is important to note that this

²⁷ *Kunju Ismail v. Kadeeja Umma* [1958] SCC OnLine Ker 151

²⁸ *Ahmed Koya v Amina Beebi & Others* [1971] SCC OnLine Ker 42

defence must only be applied in cases of mistake of fact and not of law. This approach would ensure a nuanced consideration of mens rea and avoids errors as in the case of *Ahmed Koya*.²⁹ The adherence to such a rule would promote a more principled and uniform application of the law in cases of bigamy.

²⁹ *ibid*