CHAPTER – 6

GENERAL DEFENCES IN THE ABSENCE OF
MENS REA UNDER INDIAN PENAL CODE

INTRODUCTION

As a general rule of law, a man is presumed to know the nature and consequences of his act and is held liable for his act. But there are some exceptions to this rule, wherein a person may be excused for a crime. In some cases, a person may be entirely excused from the criminal responsibility by reason of being the head of a sovereign state, or being representative of it or of the United Nation Organisation and so on. Besides it, Article 361 of Constitution of India grants immunity to the President of India and Governors of the States from the criminal prosecution, but this protection is limited till the term of their office. This protection has been given to them by virtue of having high status, position, prestige and the respect of their posts.

Others may be excused from the criminal responsibility by reason of the absence of requisite mens rea which is necessary for the commission of particular offence. This is based on the well known maxim “actus non facit reus nisi mens sit rea” which means “the act itself doesn’t make a person guilty unless his intention are so”.

The Absence of Mens rea means “an act which is done with due care and caution and without dishonest intention”. If the person committed an act which is prohibited and punished by law, shall be liable to be punished but there are some circumstances where such person is excused from criminal liability. It means such person shall not be liable for the punishment for his acts in some circumstances. Such circumstances have been given under Chapter IV of the Indian Penal Code, under the head of General Exception.
It deals with various exceptions which the person accused of any offence under Indian Penal Code or any special or local laws can plead.

As per **Section 6 of Indian Penal Code**, “Every Definition of an offence, every penal provision under Indian Penal Code and their illustrations shall be deemed to be subject to the General Defences contained in Chapter IV and there is no need to repeat them again and again”.

The scope of General Exception provided in this Chapter is very wide. It is not only limited to the offences under the Penal Code, but it extends to the offences under the Special or local laws as well as specified Under **Section 40 of the code**.

### LORD MACAULAY’S REPORT ON GENERAL EXCEPTIONS

The Lord Macaulay who is known as the father of the Indian Penal Code has mentioned in his report about General Exception that the authors of this code have observed that “This chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations.

Some limitations relate only to a single provision, or to very small class of provisions. Thus the exception in favour of true imputations on character (Cl. 470) is an exception to the law of defamation and doesn’t effect any other part of the Code. Similarly, the exception in favour of the conjugal rights of the husband (Cl.359) is an exception to the law of rape and doesn’t affect any other part of the code. Every such exception evidently ought to be appended to the rule which it is intended to modify.

But there are other exceptions which are common to all the penal clauses of the code or to a great variety of clauses dispersed over many chapters. Such are the exceptions in favour of infants, lunatics, idiots, persons under the influence of delirium, the exceptions in favour of acts done by the
direction of the law, of acts done in the exercise of the right of self-defence, of acts done by the consent of the party harmed by them. It would obviously be inconvenient to repeat these exceptions several times in every page. Therefore, we have placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision and every illustration of a definition or penal provision shall be construed subject to the provisions contained in that chapter”.

By the perusal of the above report of lord Macaulay, I came to the conclusion that the General Exceptions have been incorporated under Chapter IV of Indian Penal Code with the two broad objectives, these are:-

- To identify the exceptional circumstances by which a person can be escaped from Criminal Liability.
- To prevent the repetition of these General exceptions for every definition of an offence, every penal provisions and their illustrations by placing them in one chapter i.e. Chapter IV of Indian Penal Code.

**EFFECTS OF GENERAL DEFENCES IN THE ABSENCE OF MENS REA IN CHANGING SOCIAL CONDITION**

As all we know that the law changes with the change of the society and the bare needs of the society. The change is the nature of the society because as the time goes on, the thinking or mentality and circumstances of a person have also changed, that’s why it is necessary to change the law and the procedure of their application, like wise the effects of mens rea have also been changed as per the prevailing social condition, which we have already traced through the study of origin and development of the doctrine mens rea

48 Note B, P-15
which has been discussed earlier in details in the Chapter IV under the head of Mens rea, its Origin and Development. But in this the topic we have discussed the effects of mens rea in changing social condition.

In Past, the court didn’t considered the circumstances under which the offence was committed and whether there had any evil intent of the accused or not at the time of commission of an offence. The accused was absolutely liable for that offence no matter whatever the circumstances were prevailed at the time of commission of an offence and whether he had any evil intent or not.

But as the time goes on, with the change of civilization the effect of mens rea in the commission of crime has taken its place and the court started to consider the doctrine of mens rea in the commission of crime. It means the person is liable for the offence only if he does that act with evil intent the effects of doctrine of mens rea in the modern society have been discussed in details by the Hon’ble Courts in the two English leading cases viz R. V/S Prince and R. V/s Tolson. By the perusal of these cases the effects or importance of mens rea in the commission of crime and for the determination of criminal liability of a person have been found.

Our law makes were also concerned with that circumstances in which the person committed an act without an evil intent, although such act would amounts to an offence but such person would be excused from criminal liability by reason of the absence of mens rea. These type of provisions have been incorporated in the Indian penal code under Chapter IV i.e. Section 76 to 106 of the Code. The incorporation of this chapter under Indian Penal Code shows the extent or effects of mens rea in the commission of crime. It means no person shall be liable for an act unless and until he has done that act with evil intent. The absence of mens rea in the commission of an act would not amount to an offence. The Chapter IV of the code which we known as the chapter of general exceptions or defences explains the circumstances in
which a person is excused from the criminal liability. The provisions related to it have been discussed in detail in the Chapter – 7, 8 and 9 of this thesis.

After the incorporation of this chapter in the code, a question arises whether this benefit has been available in the cases of strict liability. To answer this question, the law makers itself have made several provision in the code and other laws, where the benefits of these general defences are not available to the culprit that’s we known as the offences of strict liability. In it, the person is liable for the offence whether he acted with evil intent or innocently. As the time goes on, the law makers and Indian judiciary have broaden the scope of Mens rea in the commission of crime, there are so many circumstances where the benefit of the general defences is not available to the accused. It means in some circumstances he can’t take a plea of absence of mens rea in the commission of crime to get rid of his criminal liability. That’s these circumstances have been discussed in details under Chapter IV of this thesis under the head of Mens rea, its Origin and Development.

By the perusal of the above content of this topic, it has been found that the defences in the absence of mens rea changes with the changing social condition. These changes have been made by reason of change of the social condition from time to time, which have broaden the scope of mens rea and general defences. This credit goes to our Indian Judiciary who has given their opinion on it from their various case.

**BURDEN OF PROVING THAT CASE OF ACCUSED COMES WITH IN THE GENERAL EXCEPTIONS**

Generally, the burden of proving the charge framed against the accused, lies on the prosecution who substantially asserts the affirmative and not upon the person who denies it except in offences relating to the dowry death, rape, abatement to suicide of married women etc.
The rule has its origin in the Roman law maxim “ei qui affirmat non ei qui negat incumbit probatio” which means “he who seeks the aid of a court should be the first to prove that he has a case and that in the nature of things it is more difficult to prove a negative than an affirmative”\(^49\).

**Section 105 of the Indian evidence Act, 1872** puts on the accused the burden of proving the existence of circumstance which bringing him within the scope of any of these General Exception mentioned above.

**Section 105 of Indian Evidence Act provides that** –

“when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code or with in any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.”

It means if a person wants to take a benefit of any of the General Exception mentioned in Indian Penal Code, he must prove the existence of such circumstances and in such cases the court shall presume the absence of such circumstances.

**For Example :-**

(a) ‘A’, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on ‘A’.

(b) ‘A’, accused of murder, alleges that by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on ‘A’.

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\(^{49}\) Cross, Rupert, Evidence, 3rd Edn. (1967) P -87
The burden of the accused to prove the circumstances which entitle him to the General Exception to Criminal Liability, is subject to the following three propositions:

- No evidence appearing in the case to support the plea of exception pleaded by the accused can be excluded altogether from consideration on the ground that the accused hasn’t proved his plea fully.
- Such obligatory presumption is necessarily lifted only when there is enough evidence on record to justify giving the benefit of doubt to the accused on the question whether he is guilty of the offence with which he is charged.
- If the doubt though raised due to evidence in support of the exception pleaded, is reasonable and affects an ingredient of offence with which the accused is charged, he would be entitled to the acquittal.\(^50\)

Thus, the law lays down that the onus of proving circumstances which gives the benefit of a General Exception to the accused lies on him and in the absence of evidence the presumption is against the accused, this doesn’t mean that the accused must lead evidence. If it is apparent from the evidence on the record that a General Exception would apply, then the presumption is removed and it is open to the court to consider whether the evidence proves to its satisfaction that the accused comes within the Exception\(^51\).

It means the General Burden of Proving the guilt of the accused is always on the prosecution and it never shifts and the Special Burden of Proving the circumstances under **Section 105 of Evidence Act** is on the accused. Such Special Burden of Proving doesn’t affect the liability of the

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50 Rishikesh v/S State, AIR 1970 All 51; 1970 CrLJ 132; 1969 All LJ 657

51 Musammat Anandi, (1923) 45 All 329, Babulal, 1960 CrLJ 437 (All.)
prosecution to discharge his General Burden of Proving the guilt of the accused beyond the reasonable doubt.\textsuperscript{52}

**CHART RELATING TO GENERAL EXCEPTIONS**

By the analysis of the Sections combined in *Chapter IV of the Indian Penal Code*, it reveals that they deal with the two broad classes of Exceptions or Defences, namely -

1). **Excusable defences.**
2). **Justifiable defences.**

Thus, *John Gardner* puts it as, for committing a wrong, a person must be responsible for doing a Wrongful act without having justification or excuse for it.\textsuperscript{53}

A Justified act is a one which otherwise, under normal conditions, would have been wrongful but the circumstances under which the act was committed make it tolerable and acceptable. The person fulfills all the ingredients of the offence but his conduct is held to be right under the circumstances.

**For Example**: - A man while protecting his fields shot an arrow at a moving figure honestly believing it to be a bear but caused the death of a man who hiding in the bushes. He cannot be held liable since his conduct was justified under the circumstances.\textsuperscript{54}

In case of an Excuse, though the person has caused harm, it is held that the person should be excused because he cannot be blamed for the act. **For Example**, if a person of unsound mind commits a crime, he cannot be held responsible for being mentally sick. The two terms do not mean the same


\textsuperscript{54} State of Orissa V/S Khora Ghasi 1978 Cr.LJ 1305(Ori)
thing. As Joshua Dressler says in his article, ‘A justification does not excuse conduct; an excuse does not justify conduct.’

These defences or exceptions can be understood easily through the following Chart:-

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DIFFERENCE BETWEEN EXCUSABLE DEFENCES AND JUSTIFIABLE DEFENCES

According to Glanville Williams, the term 'Justification' was earlier used for cases where the object of the law was not frustrated. An Excuse was used where the court thought that it would not be correct to punish the actor.

It was important to distinguish between the two categories because Justification protected from the criminal charge but an Excuse was simply an ‘occasion for a royal pardon.’

As law evolved with the passage of time, the need to distinguish Justifiable and Excusable defences found its application into judicial decisions. The distinction also helped during law making since the success of a defence raised by the defendant was based on the manner in which the court characterized it. For Example, if the court was looking for a Justification for the conduct of the person and nothing less than that, the defence may have failed. However, if it was looking only for an Excuse, it may have succeeded.

A clear distinction between the two categories of defences can help in a better understanding of criminal law and bring in systematic reforms. It also plays a role in demarcating clearly the scope of defences. A defence that exonerates the conduct of a person must be either a Justification or an Excuse. Eminent scholar Paul H Robinson asserts that to understand the definition of triggering conditions that warrant the use of defensive force, the defences need to be distinguished from one another. He emphasizes on the practical advantages that the distinction creates. A lack of a clear demarcation between these categories leads to ambiguous acquittals where the court is

57 J.C. Smith, Justification and Excuse in the Criminal Law (Stevens and Sons 1989) 12.
unable to differentiate between the two. According to him, Justifications elucidate the rules of conduct while excuses address the principles of adjudication. An absence of differentiation results in an overlap of the two principles which in turn leads to ambiguity in understanding the concept.

While some scholars have preferred the classification of defences under Justifiable and Excusable, others have not favoured the approach. ‘Glanville Williams’ finds the distinction to be of little practical significance. Even though ‘Kent Greenawalt’ accepts the distinction when done by scholars for academic purposes, he does not support the law in making the same distinction. According to him, the two terms are conceptually vague and the moral standards differ in every society. Therefore, it will be futile to define which defence is an Excuse or a Justification. It is also argued that the distinction will not serve the purpose since many of the defenses are ‘complex amalgamations’ of Justifications and Excuses. Another argument against distinguishing Justifiable and Excusable defences is that there will always be a temptation to class every defence as either of the two.

A close perusal of above literature and the nature of these defences will reveal some clear distinctions between the two categories of defences:-

1. Justified acts do not necessarily lack intention. But the intention under the prevailing circumstances at the time of commission of the offence does not qualify as criminal intent. Excusable Defences apply only if the act is done without any intention.

2. Justifications focus on the wrongful nature of the act. On the other hand, Excuses look at the blameworthiness of the actor.

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60 Paul H Robinson, ‘Four Distinctions That Glanville Williams Did Not Make: The Practical Benefits of Examining the Inter relation among Criminal Law Doctrines in Dennis J. Baker and Jeremy Horder (eds) 61 Greenawalt (n.7)

3. An act is justified under the circumstances regardless of the fact whether the defendant is aware of them or not. However, circumstances that can excuse conduct will not excuse the person unless he is aware of them.\(^{63}\)

4. Justifications negate the social harm of the offence whereas Excuses exonerate the actor of moral blameworthiness for the offence.\(^{64}\)

5. Justifications also arise from balancing of harms. \textbf{For Example}, if a police officer uses force to search for evidence under a judicial search warrant, he will be justified even if his conduct amounts to an offence. Excuses, on the other hand, do not involve any such balancing of harms.\(^{65}\)

\(^{63}\) J.C. Smith (n.6)
\(^{64}\) Dressler (n. 3)
\(^{65}\) An Article by Rishima Rawat on Justifiable and Excusable Defences in IPC