Asif Tufal

MISTAKE

MISTAKE OF LAW

There is a general rule that ignorance of the criminal law is no defence, even if the ignorance is reasonable in the circumstances. For example, see:

> *R v Reid (Philip)* [1973] 3 All ER 1020. A constable saw the defendant driving a car without a tax disc displayed on the windscreen. He stopped the defendant and questioned him about it. The constable noticed that the defendant's breath smelt of drink. The constable asked the defendant to provide a specimen of breath. The defendant refused to provide a specimen stating that the constable had no power to administer a breath test except after an accident, where there had been a moving traffic offence or where the constable had reasonable cause to believe from the manner of his driving that the driver had been drinking. The defendant was arrested and charged with and convicted of failing, without reasonable excuse, to provide a specimen for a laboratory test, contrary to s3(3) of the Road Safety Act 1967. He appealed contending, inter alia, that he had a reasonable excuse for failing to provide the specimen. The Court of Appeal held that the fact that the defendant mistakenly believed that he was not legally obliged to provide a specimen did not constitute a 'reasonable excuse' for refusing to do so.

By way of contrast to mistake of criminal law, mistake of civil law can quite easily provide a defence to a criminal charge, provided the *actus reus* of the offence involves proof of a legal concept. See:

> *R v Smith* [1974] QB 354. The defendant was the tenant of a flat. With the landlord's consent he installed some hi-fi equipment and soundproofing. When given notice to quit the flat, the defendant tore down the soundproofing to remove some wires that lay behind. Unknown to the defendant the soundproofing had, as a matter of civil law, become a fixture of the property and therefore property belonging to the landlord. The defendant's conviction for criminal damage was quashed by the Court of Appeal. It was held that no offence is committed if a person destroys or damages property belonging to another if he does so in the honest though mistaken belief that the property is his own.

MISTAKE OF FACT

A) MENS REA OFFENCES

It is clear from the decision in *DPP v Morgan* [1975] 2 All ER 347, that a mistake of fact, rather than law, is a defence where it prevents the defendant from forming the *mens rea* which the law requires for the crime with which he is charged.

> *DPP v Morgan* [1975] 2 All ER 347. The defendants were members of the RAF. Morgan invited the three other defendants to his house and suggested to them that they should all have intercourse with his wife. He told them to expect some show of resistance on his wife's part but that it was mere pretence whereby she stimulated her own sexual excitement. The three younger men were convicted of rape and aiding and abetting rape despite their contentions that they had believed the victim to have been consenting to sexual intercourse and Morgan was convicted of aiding and abetting rape. They appealed against the trial judge's direction that a belief that Mrs Morgan consented must have been honestly and reasonably held.
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> The House of Lords, by a majority of three to two, held that a defendant was to be judged on the facts as he honestly believed them to be, and thus a mistake of fact would afford a defence no matter how unreasonable it might be provided that it was honestly made. However, the House of Lords applied the proviso to s2(1) of the Criminal Appeals Act 1968 and dismissed the appeals as the jury obviously considered that the defendants' evidence as to the part played by Mrs Morgan was a pack of lies (per Lord Cross).

There is a limiting factor to this defence. Lord Hailsham stated: "Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held…"

B) NEGLIGENCE

Where the law requires only negligence, then only a reasonable mistake will lead to a defence: an unreasonable mistake is one which a reasonable man would not make and is, therefore, negligent. See:

> *R v Tolson* [1886-90] All ER 26. The defendant's husband deserted her in 1881. She learned from his elder brother and from general report that he had been lost on a vessel bound for America, which went down with all hands. In 1887 the defendant, supposing herself to be a widow, remarried. Tolson returned from America and the defendant was charged with bigamy. In quashing the conviction, Stephen J stated: "It appears to me that every argument which showed, in the opinion of the judges in *Prince*, that the legislature meant seducers and abductors to act at their peril, shows that the legislature did not mean to hamper what is not only intended, but naturally and reasonably supposed by the parties, to be a valid and honourable marriage, with a liability to seven years' penal servitude."

C) STRICT LIABILITY OFFENCES

If no *mens rea* is required with regard to one element of the *actus reus* then even an honest and reasonable mistake with regard to that element will not negative liability. For example, see:

> *R v Prince* (1875). The defendant took a girl under 16, believing on reasonable grounds that she was 18, out of the possession of her parents. The defendant was convicted and the conviction affirmed. (See Handout on Strict Liability.)

D) DRUNKEN MISTAKE

Where a defendant's mistake of fact arises from self-induced intoxication, it will only provide a defence to crimes of specific intent. In general, where a defendant is charged with a basic intent crime, the jury will be directed that evidence of self-induced intoxication is irrelevant to the question of what the defendant believed to be happening. See for example:

> *R v Woods* (1981) 74 Cr App R 312. The defendant was convicted of a collective rape of one girl. He made admissions of his part in it to the police but at his trial he went back on those admissions and said in effect that he had so much to drink that he was not sure what had happened. He did not know whether he had raped her or not and did not realise that she was not consenting to anything that went on. Griffiths LJ stated: "The law, as a matter of social policy, has declared that self-induced intoxication is not a legally relevant matter to be taken into account in deciding as to whether or not a woman consents to intercourse."
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> *R v Fotheringham* [1988] Crim LR 846. The defendant got into his own bed after coming home from a party and forced the baby-sitter (who was already in the bed) to have sexual intercourse. He claimed that he was so drunk that he thought the girl was his wife. The Court of Appeal upheld his conviction. It was held that (1) self-induced intoxication cannot be used as a defence to a crime of basic intent and stated that (2) neither could the defence of mistake be raised, if this mistake were caused by self-induced intoxication: *R v O'Grady* [1987] 3 WLR 321.

E) BURDEN OF PROOF

Whilst there is always an evidential burden on the defendant to put evidence before the jury that he did actually make the mistake upon which he relies, the legal burden always rests with the prosecution to establish beyond reasonable doubt that the defendant was not mistaken and therefore did have the requisite *mens rea* for the offence with which he is charged.

F) EFFECT

As is the case in any trial where the prosecution fails to establish *mens rea*, if the defendant succeeds with his defence of mistake he must be acquitted.

See also: handouts on Intoxication and Self-defence.