



**BNS – BASIC**

1. *ELEMENTS OF CRIME*
2. *ELEMENTS OF MENS REA*
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4. *STAGES OF CRIME*
5. *EXTRA TERRITORIAL OFFENCE (S-1(4) & 1(5))*
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**CARDINAL PRINCIPLES OF CRIMES**

‘Nullam Crimen Sine Lege Nulla Poena Sine Lege’, **No crime without law, no punishment without law.** The law which makes a prohibited action, an offence, should be there in the statute before the action was done by the offender. This also means, as long as an action is not prohibited expressly by any statute, it is not an offence. This means, the legislature cannot make a law saying that something someone did in the past is illegal after it has happened. **So, no law can be post facto.**

- ❖ No crime without law, no punishment without law.
- ❖ A man is presumed to be innocent until proven guilty.
- ❖ Ignorance of fact is an excuse, But, Ignorance of law is no excuse.

- ❖ An act must be accompanied by a criminal intent to constitute an offence.

### **ELEMENTS OF CRIME ( TO ESTABLISH CRIMINAL LIABILITY)**

The element of Mens rea implies a state of mind which is described by the presence of **knowledge, intention, motive, negligence** etc depending on the definitional requirements of the crime in question.

**1. Accused person, 2. Mens rea, 3. Actus reus, 4. Injury.**



#### **1. Accused person ( Human Being )**

A crime can be committed only by a human being. The victims of a crime may be other human being or even animals but the perpetrator who is held liable for having committed a crime cannot be anybody other than a human being. It

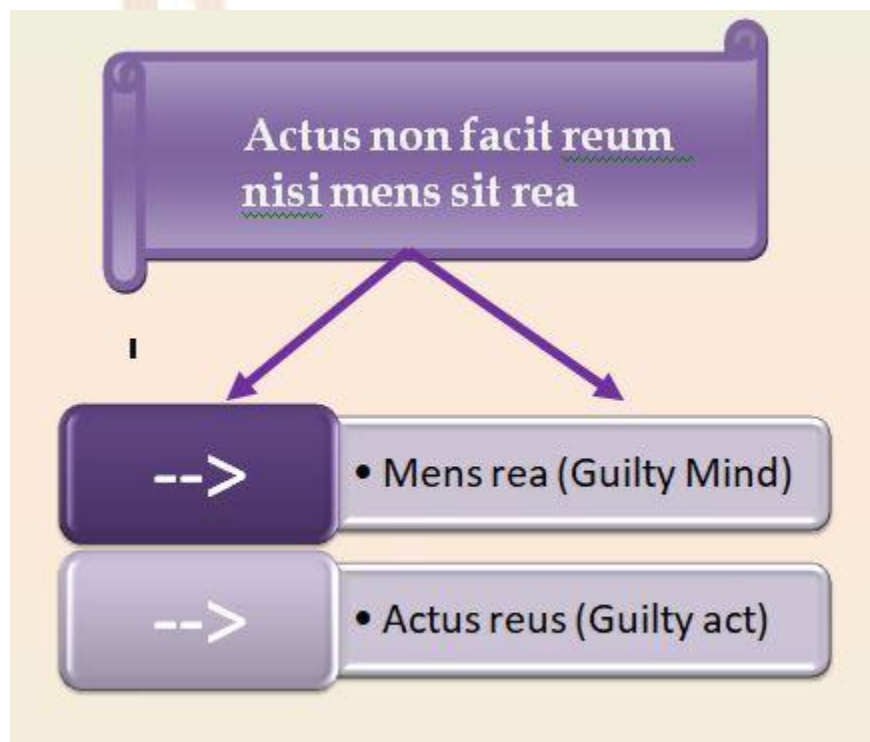
may be noted that in ancient times, even animals were held liable for having committed a crime.

## 2. Mens rea

The elements of 'Mens rea' and 'Actus Reus' have been derived from the Latin maxim of "**Actus non facit reum nisi mens sit rea which means**"; '*An act does not make a man guilty of a crime, unless his mind be also guilty.*'

This maxim has formed the foundation of criminal liability in common law jurisdictions and essence of this maxim mandates that **in order to hold person liable for any crime**, two elements must be present;

1. The person must have committed an **guilty act** (Actus Reus)
2. The person must have committed the act with a **guilty mind** (Mens Rea)



- ❖ The concept of a guilty mind is not that of a malicious mind. It is the presence of such a state of mind in a person wherein he can be legitimately be held responsible for the acts committed by him under the provision of law. The element of mens rea implies a state of mind which is characterized by the presence of knowledge, intention, motive, negligence etc depending on the definitional requirements of the crime in question.
- ❖ **It may be noted that the term mens rea has not been explicitly mentioned in any of the provisions of the BNS.** However, the concept pervades all the crimes enumerated therein by implication through use of words such as 'voluntarily', 'fraudulently', 'wilfully' 'intentionally', 'wrongfully', 'dishonestly', 'negligently' etc. Thus, the requisite mens rea in a given situation depends on the definition of the offence.
- ❖ **For example,** When X intentionally throws a rock at Y, he is aware about the physical consequences of the rock hitting Y. He would be liable for causing hurt to Y even though he was not meaning to hurt Y was only joking around. In this case, the **awareness in X about the physical consequences of his act is sufficient** mens rea to attract criminal liability.
- ❖ When an act is an offence when committed with a dishonest intent, mens rea is present if the person had the dishonest intent. The person would not be liable simply because he did the act intentionally as long as he was not acting dishonestly.
- ❖ **For example,** section 303 of the **BNS** defines theft as X taking dishonestly the movable property of Y without the consent of Y. In this case, it is not sufficient that X was aware about the physical consequences of taking a movable property of Y (for example a book) to his own house. It is also necessary that he must have done the act with a dishonest motive. Thus, when X has taken the book of Y innocently to read it and then return it, he is not guilty of theft as the mens rea as required under section 303 is absent. On the other hand, if X has taken

the book with a view to gift it away to one of his cousins, he is guilty of theft as the requisite dishonest motive is present.

- ❖ **Thus, in terms of intention, mens rea does not mean the intention to commit a crime but the intention to commit an act being aware about the physical consequences of the act.**
- ❖ The illustration to section 2(33) provides a scenario where for the **purpose of facilitating a robbery**, X sets fire to a residential house at night in an inhabited town. Due to the fire, a person (Y) who was sleeping in the house died. Here, the main purpose of X was to facilitate a robbery and he might not have intended to commit the offence of murder by causing the death Y but he will still be liable for the same as he knew such a consequence to be likely when setting fire to a residential house at night.

### **Mens rea absent:**

- The element of mens rea can be also understood by exploring the situations where it is absent. Thus, when a person does something **not voluntarily but under some coercion, mens rea is absent** in such a situation. This is underscored by the maxim of **actus me invito factus non est mens actus** (an act done by me against my will is not my act) which is considered an accompanying principle to the fundamental principle of *Actus non facit reum nisi mens sit rea*.
- This principle is also recognised in the BNS under Section 32 (Act is compelled by threat) wherein a person is excused from criminal liability when he commits the crime (other than murder or an offence against the state punishable with death) under threat to his life.
- **Also, mens rea is said to be absent** when the act is committed under **the influence of insanity or involuntary** intoxication of a nature which deprives the person of the capacity to know the nature of his act.
- Similarly, an infant is excused from criminal liability due to the lack of maturity in understanding the nature of the acts committed by him. A

person is also excused from criminal liability when the act committed is by mistake or due to an accident.

**Note :** Offences under the Sanhita are generally qualified by terms such as 'intention', 'knowledge', 'voluntarily', 'fraudulently', 'dishonestly', 'wrongful loss', 'wrongful gain' etc. all these words indicate the mental condition required at the time of commission of offence. **Therefore, mens rea means different things to particular offences.** The guilty mind may be dishonest mind, fraudulent mind, negligent mind etc.

### **STRICT LIABILITY (Exception to the Requirement of Mens rea)**

- It is important to remember that though the element of mens rea is traditionally an inherent part of most definitions of crime, there are certain exceptions to the rule.
- There are certain situations where a person will be held guilty of a crime even though it may not be possible to hold him responsible for the alleged act. These are known as rules of strict liability when the **commission of the act is itself a conclusive proof of the fault of the accused and the state of his mind plays no part in the determination of his guilt.**
- There are situations when a person may be liable for some harm even though he is not negligent in causing the same, or there is no intention to cause the harm. The Strict Liability principle is also called as '**No Fault Liability**'.
- Strict liability offences are those offences in which mens rea is not required to be proved. In such kind of offences, the accused may be held guilty **on proof of actus reus** even without guilty mind.

The following are the exceptional case in which **mens rea is required** in criminal law.

- 1 Mens rea is not essential in respect of offences including **waging war, kidnapping, contempt of court, public nuisance, criminal libel, bigamy**, etc.
- 2 Several modern Statutes passed in the **interest of public safety and social welfare** imposes such a strict liability. In matters concerning public health, food, drugs, environment, taxation, bribing, smuggling, forest violations, sale of adulterated articles etc., such strict liability is imposed.

In state of **Maharashtra Vs M.H.George**, AIR 1965 SC 722, the Supreme Court held that offences which adversely affected the economic conditions of the country will be strict liability offences.

- 3 **When it is difficult to prove mens rea**, where the penalties are petty fines, and where a statute has done away with the necessity of mens rea on the basis of expediency, strict liability in criminal law may be imposed **E.X.** traffic offences, S – 68 Sexual intercourse by a person in authority.
- 4 In case where a person violates a law without the knowledge of the law, it cannot be said that he has intentionally violated the law. As **ignorance of the law is no excuse**, the fact that he was not aware of the law and that he did not intend to violate it, is no defence. He would be liable as if he was aware of the law.

### **Exceptions of strict liability**

The **defendant will not be held accountable** if the harmful thing was done for the mutual advantage of the defendant and plaintiff.

**1. Consent of the Plaintiff:** When the plaintiff has either expressly or impliedly **consented to the presence of a source of danger** and also there has been no negligence on the defendant's part, the defendant will not be held liable. It is basically the defence of 'Volenti non fit injuria' taken by the defendant in the court.



**2. Plaintiff's Own Default:** When damage is caused to the plaintiff solely **due to his own fault**, he shall receive no remedy in such cases.

**3. Act of Stranger:** When **damage is caused due to wrongful act committed** by a third party or any stranger over whom the defendant had no control, the defendant will not be held liable under such circumstances.

**4. Act of God or Vis Major:** For acts which are **beyond human control** and contemplation, caused due to superior natural forces, the principle of strict liability does not apply.

**5. Common Benefit of Plaintiff and the Defendant:** Where the act or escape of the dangerous thing was for the **common benefit of the defendant and plaintiff**, the defendant will not be held liable.

**6. Statutory Authority:** If any act done under the authorization of the law/statute like the government of a country or a **state government causes any damage** to a person, it acts as a defence to an action for tort.

#### **Absolute liability:**

The rule of absolute liability, in simple words, can be defined as the **rule of strict liability minus exceptions**.

The absolute liability principle laid down in **MC Mehta Vs Union of India**. The Court pointed out that that this rule is 'absolute and non-delegable' and the enterprise cannot escape liability by showing that it has taken reasonable care and there was no negligence on its part. The Supreme Court also explained the basis of this rule as follows:

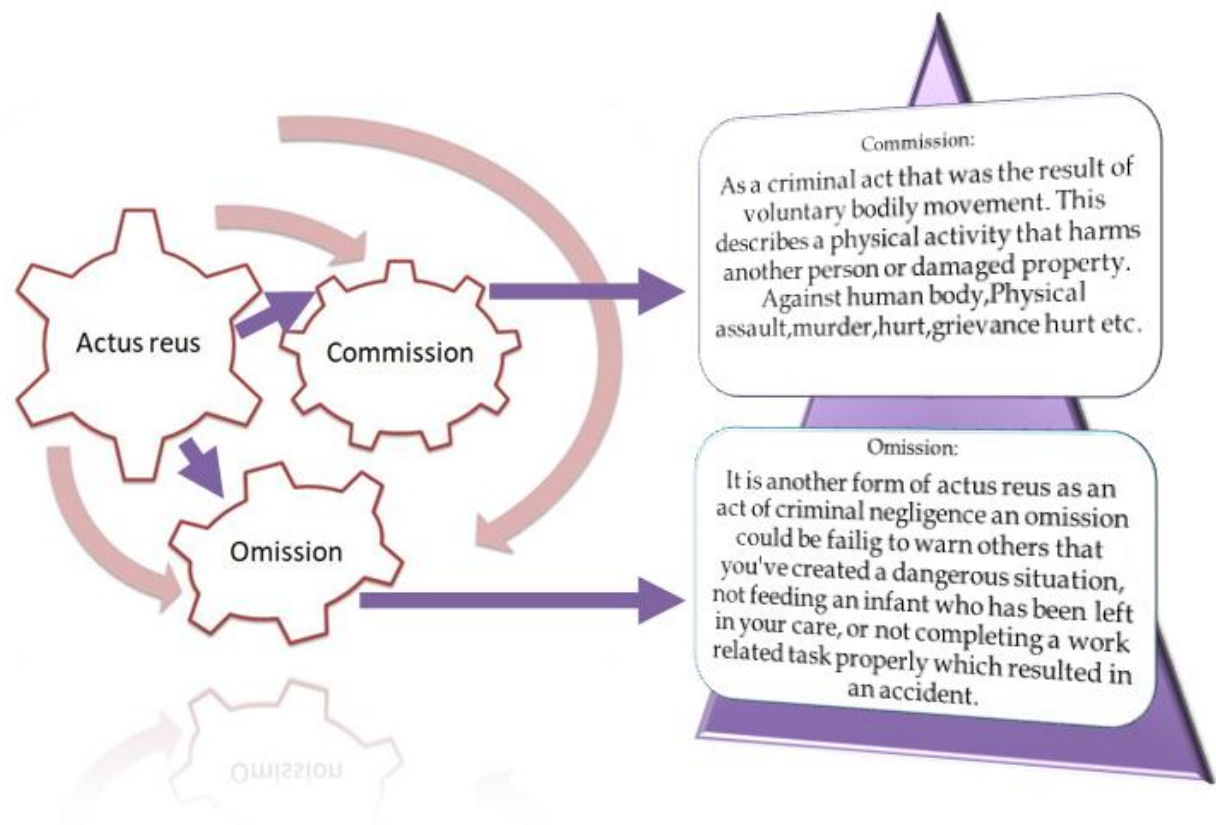
If an enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the **law must presume that such permission is conditional on the enterprise**. If any accident arises on account of such hazardous or inherently dangerous activity, the enterprise alone has the



resource to discover and guard against hazards or dangers and to provide a warning against potential hazards.

### 3. Actus Reus

- Actus reus refers to the act forbidden by the law for the commission of which a person is held to be criminal liable. It is the other important element which is derived from the maxim of **Actus non facit reum nisi mens sit rea**.
- While the element of **mens rea refers to the state of the mind** of the accused while committing a physical act, the element of **actus reus focuses on the very physical act** which forms the subject matter of the crime.

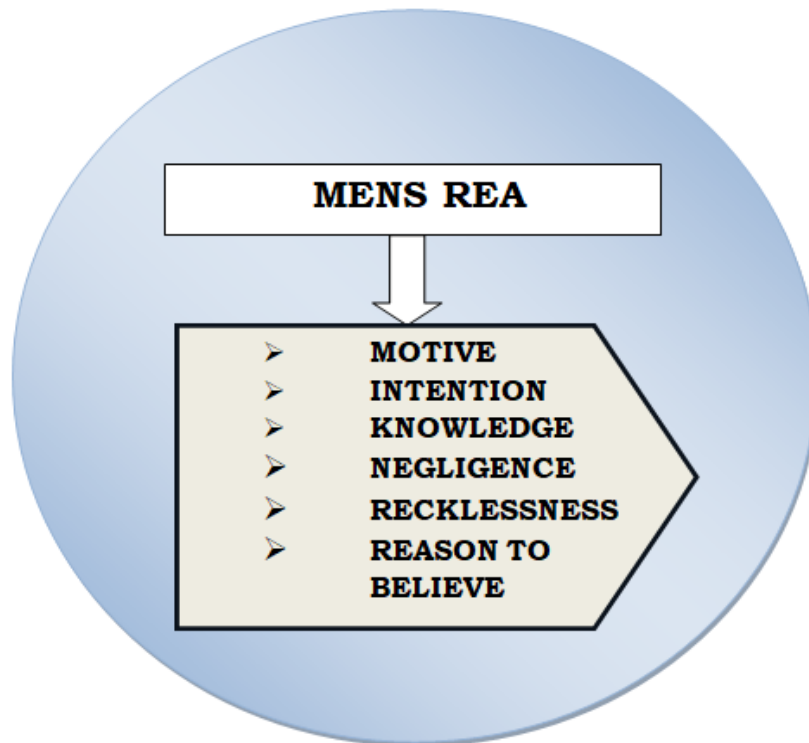


**For example,** when X takes a movable property from the possession of Y without the consent of Y with a dishonest motive, he is said to commit theft. Here the requisite mens rea consists of the dishonest motive on the part of X. The actus reus consists of the taking away of a movable property from the possession of Y. In simple terms, actus reus refers to the conduct (act or omission) which is forbidden by the law wherein the person engaging in the forbidden conduct is punishable by a sanction.

#### **4.Injury**

The nature of the injury may vary depending on the nature of the conduct which is criminalised. Thus, the injury may be in the form of injury to the body, mind reputation or property of another human being. Crimes such as causing of hurt, commission of rape are injurious to the body of another person.

#### **ELEMENTS OF MENS REA**



1. MOTIVE, 2. INTENTION, 3. KNOWLEDGE, 4. NEGLIGENCE,
5. RECKLESSNESS , 6. REASON TO BELIEVE

### **MOTIVE & INTENTION**

- The primary difference between intention and motive is that intention specifically indicates the mental state of the accused, i.e. what is going on in his mind at the time of the commission of a crime. In contrast, motive implies motivation, i.e. what drives a person to do or refrain from doing something.
- If a person kills her mother to receive an inheritance, the inheritance is motive. This does not establish state of mind to commit murder. Prosecution must prove intent by showing killing was planned and deliberate.
- Motive is something which prompts a man **to form an intention** (i.e. Motive serves as the driving force behind forming an intention). It is an emotion which impels a man to do a particular act. The motive of an act

MOTIVE	INTENTION
Motive is the ulterior (hidden) intention.	Intention is immediate mental condition.
Motive is the ulterior (implied) purpose of the act.	Intention refers only to the immediate purpose with which an act is done.
Motive is not the primary element for affixing culpability, so it need not be proven.	On the contrary, when the intention of a person , is the element of affixing criminal liability, it must be proven beyond reasonable doubt.

is not a sufficient test to determine its criminal character. The general rule is that motive is irrelevant in determining criminal liability. However,

it is relevant on the question of intention. Even if the motive is pure, the act done under it may be criminal.

- Where there is clear proof of motive for the crime, this lends additional support to the court's finding that the accused was guilty but the absence of clear proof of motive does not necessarily lead to the contrary conclusion.
- Motive for an act cannot become a litmus test (final result) to determine the criminal characteristics. Where there is direct evidence against the accused, the motive becomes immaterial. But where there is circumstantial evidence, absence of motive is favourable to the accused.
- Motive is a personal notion, which is to be found through indirect evidence in a case.
- In order to establish the guilt of the accused, law takes notice of intention and knowledge but not motive. Although motive is not a sine qua non proving the guilt, it is relevant on the question of intention.
- **Intention** : The intention is the supposed action or purpose of the crime. It is the result of the motive and has a higher level of culpability since a harmful action was committed.
- The intent is characterized as a deliberate action and conscious effort to break the law and commit the offence. No matter whether the act is committed with good intent or bad, if a person does something purposefully and consciously which is prohibited by the law, it will amount to criminal liability.

## **KNOWLEDGE**

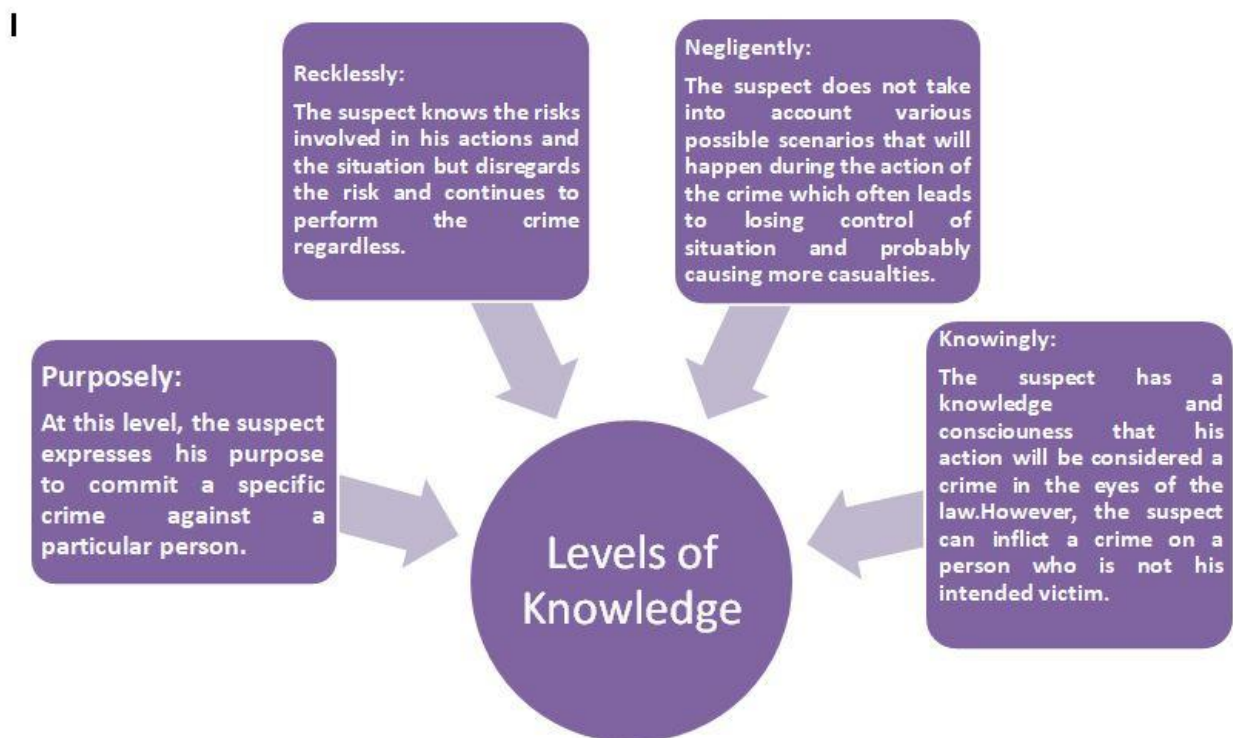
- In criminal law, knowledge is one of the degrees of mens rea that constitute part of a crime.
- Under the principle of ignorantia juris non excusat, ignorance of or mistake about the law is no defence. The mens rea of knowledge refers to knowledge about certain facts. This term applies if a person is aware that his or her actions will have certain results but does not seem to care.

- If a person violently lashes out (hit) at someone, inflicting harm may not be her primary goal. However, if she was aware that harm would be a predictable result of her actions, then she is guilty of having criminal knowledge.

**For example,** 'A' sets fire by night to an inhabited house in a large town for the purpose of facilitating robbery and thus causes the death of a person. Here, 'A' may not have intended to cause death, but he knew that death was a probable consequence.

### Levels of Knowledge

There are 4 levels of knowledge under criminal law which are necessary to understand clearly and separately to establish criminal liability.



- **Negligence** is a breach of duty imposed by law. Negligence may be civil or criminal depending upon the nature and gravity of the negligence.

- Criminal negligence is gross and culpable neglect or failure to exercise reasonable and proper precaution to guard against any injury.
- Negligence is an omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do.
- The defendant fails to meet the standard of care that a reasonable person would exercise, resulting in harm.

**For Example:** A doctor fails to diagnose a patient correctly due to carelessness, leading to harm.

**Recklessness:** The defendant is aware of a substantial risk that their actions could cause harm but chooses to proceed anyway.

**For Example:** A person drives at high speed in a crowded area, risking an accident.

**Culpability:** A mental state that includes purposely, knowingly, recklessly, and negligently.

### **STAGES /STEPS OF CRIME**

Every crime begins with the intent i.e., Mens Rea to commit it, followed by the preparation to commit it, the attempt to commit it, and finally the completion or accomplishment. The stages can be described as follows: –

#### **1. Mens rea (Intention), 2.Preparation, 3.Attempt, 4.Commission of an Act**

##### **1. Intention to commit**

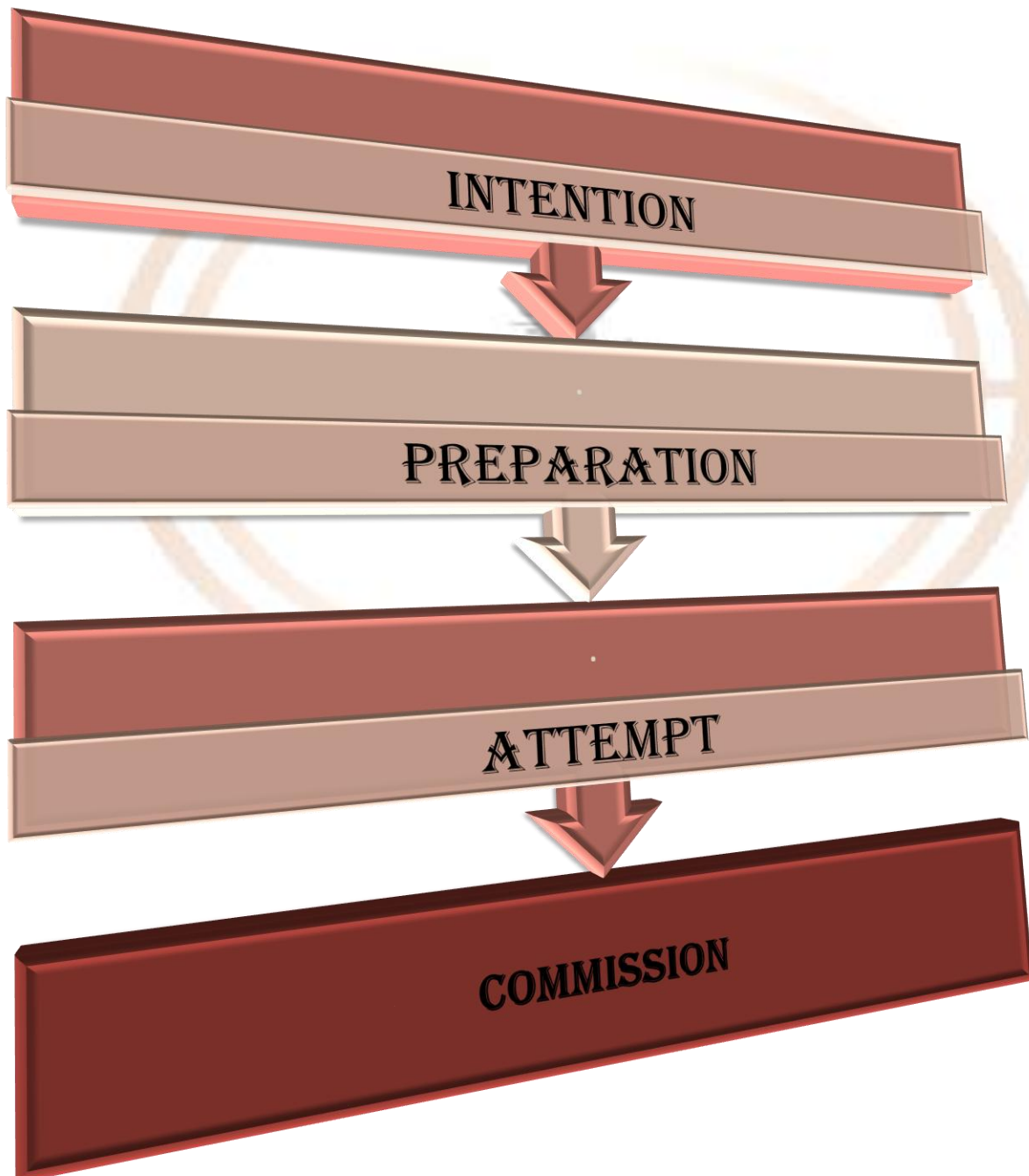
In this stage, the offender determines his motive and his course of action in relation to the offence. Mens rea, the first stage, is the mental element of an offence is **never punishable**.

##### **2. Preparation to commit**



It refers to putting in place the essential measures to carry out the desired criminal act. Preparation includes arranging means and measures to execute the intention and is **generally not punishable** except in cases of offences against State such as waging war against the state, possession crimes such as relating to counterfeit currency and dacoity.

### **STAGES /STEPS OF CRIME**





### **3. Attempt to commit**

The direct movement towards the commission after the preparation is made. **Attempt is failed commission** while commission is a successful attempt. All commission is attempt but not vice versa. Attempt is always punishable because the guilt of the offender remains same as in commission.

### **4. Accomplishment**

The accomplishment or completion of an offence is the final stage in the stages of the crime.

#### **Types of liability**

1. Strict liability (Exceptions to Mens rea)
2. Absolute liability (strict liability minus exception)
3. Joint liability – S- 3(5) **or** vicarious liability
4. Constructive liability – S- 190 (Unlawful assembly)

**Note :** Constructive liability is the **advanced version of joint liability**. In constructive liability, the offence is committed by any one member of an unlawful assembly in the advancement of the common objective of that assembly.

#### **EXTRA TERRITORIAL OFFENCE: S- 1(5)**

The object of Section 1(5) of BNS is to make provisions of the BNS applicable to an Indian citizen who commits an offence outside India and also to any non-Indian who commits an offence on any ship or aircraft registered in India or for committing an offence targeting a computer resource located in India.

Following are the circumstances in which an offence committed **outside India may be tried as an offence committed in India:**

1. Section **1(4)** of BNS provides that an act constituting an offence in India shall also be an offence when committed outside India. It gives the jurisdiction to Indian courts to try **any person** for offences committed beyond India, as if it had been committed in India. **Following conditions are to be fulfilled:**

(a) Person should have committed an act outside India, which if committed in India would be punishable.

(b) Any person is liable under some Indian law to be tried in India for that offence.

2. When an offence is committed by a citizen of India in any place without and beyond India, provisions of BNS will apply by virtue of Section **1(5)**.

**For example**, 'A' who is a citizen of India, commits a murder in any place outside India. He can be tried and convicted of murder in any place in India in which he may be found.

3. When an offence is committed by a person on any **ship or aircraft** registered in India wherever it may be, then also the BNS will be applicable.

4. When an offence is committed by a person in any place without and beyond India committing offence **targeting a computer resource** located in India, it may be tried as an offence committed in India.

Section 1(5) of BNS is almost similar to Section 208 of the Bharatiya Nagarik Suraksha Sanhita, which lays down that no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government. Language of Section 1(5) of Bharatiya Nyaya Sanhita and Section 208 of Bharatiya Nagarik Suraksha Sanhita plainly means that if at the time of commission of an offence, the person committing it is a citizen of India, then

even if the offence is committed outside India, he is subject to the jurisdiction of the courts in India.

### **PUBLIC SERVANT S-2 (28)**

This section does not define a public servant. It only enumerates various functionaries as a public servant. All Government servants are not public servants as per section 2(28) of the Sanhita.

"public servant" means a person who fits any of the following descriptions:

- (a) every commissioned officer in the Army, Navy, or Air Force;
- (b) every Judge, including anyone authorized by law to perform judicial functions, either alone or as part of a group;
- (c) every officer of a Court, like a liquidator, receiver, or commissioner, whose job is to investigate, report, manage documents, handle property, execute judicial processes, administer oaths, interpret, or maintain order in the Court, and anyone specially authorized by a Court to do these tasks;
- (d) every assessor or member of a panchayat helping a Court or public servant;
- (e) every arbitrator or person to whom a case has been referred for decision or report by any Court or public authority;
- (f) every person who holds a position that allows them to confine someone;
- (g) every government officer whose job is to prevent crimes, report crimes, bring criminals to justice, or protect public health, safety, or convenience;
- (h) every government officer whose job is to manage government property, conduct surveys, make contracts, execute revenue processes, investigate or report on matters affecting government finances, or manage documents related to government finances;

(i) every officer whose job is to manage property, conduct surveys, levy taxes for public purposes, or manage documents for the rights of people in a village, town, or district;

(j) every person who holds a position that allows them to prepare, publish, maintain, or revise an electoral roll or conduct an election;

(k) every person:

(i) in the service or pay of the Government or paid by fees or commission for performing public duties for the Government;

(ii) in the service or pay of a local authority, a corporation established by law, or a government company.

### **MLA not a Public Servant - R.S. Nayak Vs. A.R. Antulay, AIR 1984 SC 684**

The Supreme Court held that Member of Legislative Assembly is not a public servant merely because he gets pay and allowances by way of honorarium. He does not get pay from the State Government because legislature of a state cannot be comprehended in the expression of State Government.

### **MP is a Public Servant**

In *Narasimha Rao vs State (CBI/SPE)* 1998, the Supreme Court of India had to determine whether Members of Parliament (MPs) are public servants under IPC Section 19. The question arose in the context of the Prevention of Corruption Act, which penalizes public servants for accepting bribes.

The court ruled that MPs are indeed public servants within the meaning of Section 19 of the IPC. It emphasized that they perform public duties and are remunerated from the public exchequer. Therefore, they are liable for acts of corruption committed while holding public office. This ruling expanded the scope of Section 19, bringing MPs within its ambit and reinforcing accountability at the highest levels of government.

## **Chief Minister is a Public Servant**

In *M. Karunanidhi Vs. Union of India*, AIR 1979 SC 898, the constituted bench of the Supreme Court held that the Chief Minister gets his salary for public work done or the public duty performed by him and the salary is paid to him from government funds. Thus, Chief Minister works under the pay of Government and is therefore a public servant under section 2(28), BNS.

- Lecturer of Government College not a Public Servant , Government Company not a Public Servant

## **JOINT LIABILITY**

COMMON INTENTION 3(5), SIMILAR INTENTION 3(6) & COMMON OBJECT (190) ( VICARIOUS LIABILITY/CONSTRUCTIVE LIABILITY)

<b>Sections</b>	<b>Joint liability on the basis of</b>
<b>3(5) to 3(9)</b>	Common Intention
<b>61(1) &amp; 61(2)</b>	Conspiracy
<b>190</b>	Common object (Unlawful assembly)
<b>Other joint liability sections</b>	
<b>193(1) to 193(3)</b>	Liability of owner on which unlawful assembly held
<b>310(3)</b>	Dacoity with murder
<b>331(8)</b>	All persons jointly concerned in lurking house - trespass

## **COMMON INTENTION 3(5):-**

- Common intention means **meeting of mind** of the persons accused of an offence (Meeting of mind : an agreement between the accused persons to do some act). It requires **prior concert**. (Pre- arranged plan)
- Although common intention means meeting of mind which requires prior concert, it can **also develop on the spot** after the offenders have gathered there.
- Once such agreement is formed between two or more persons, they become mutual agents of each other.
- To constitute common intention it is necessary that the intention of each person be known to all the others and be shared by them.
- It deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of all actions taken, as if he had done them himself.
- The rule of joint liability under section 3(5) only a rule of evidence does not create a specific offence.

**Note :** In order to attract section 3(5) of the Sanhita, there must be pre-arranged plan and meeting of minds which may also develop on the spot as well but before the crime. There must be at least two persons to be charged under joint liability. Even if out of the two, one is absconding and it is found that both participated in the crime then Section 3(5) can be invoked even against one.

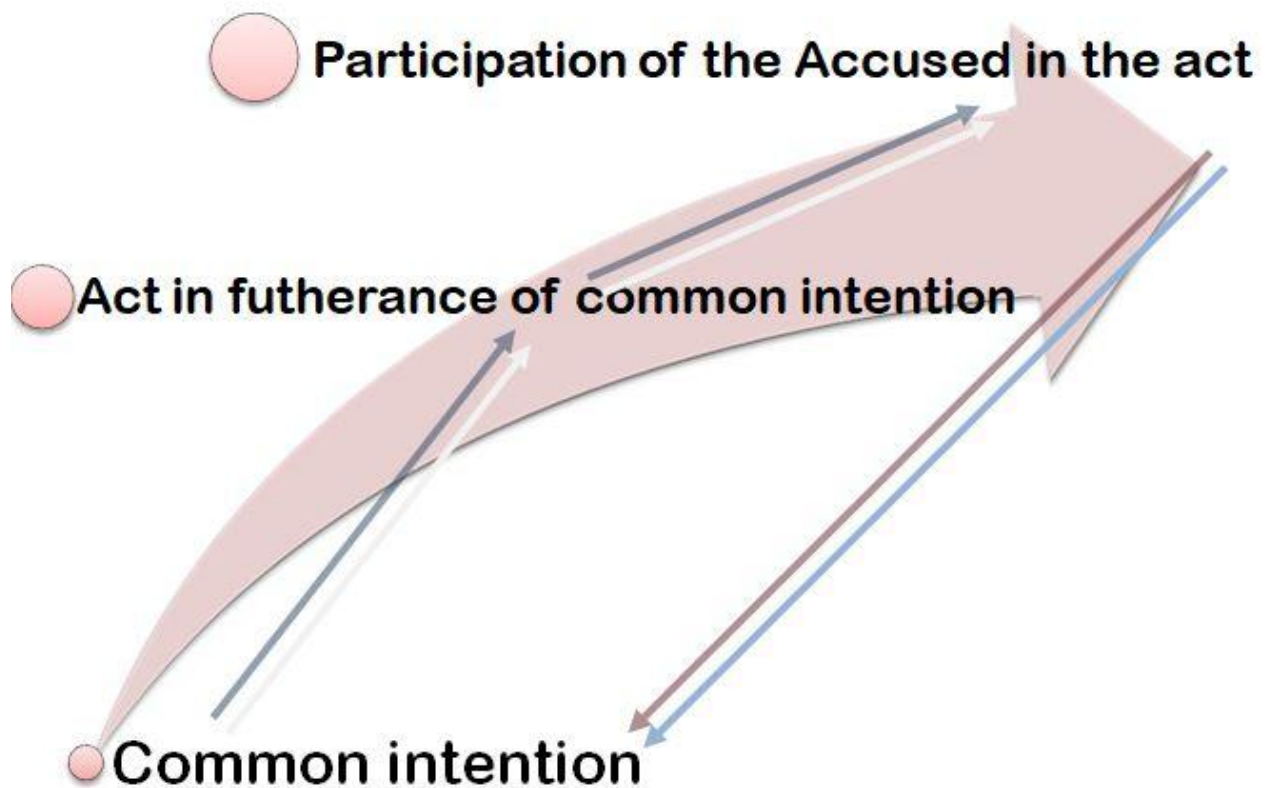
### **Essential ingredients**

- A criminal **act** must be done by **several persons**;
- Such act must be done in **furtherance of** common intention of all, and
- There must be **participation** of all persons in furtherance of the common intention.

### **Participation**



- ❖ Mere presence is not sufficient under this section rather participation is required. Participation may be by presence or absence. Mere presence at the crime scene as a spectator does not establish a common intention unless active participation in the crime is proven.
- ❖ It is not necessary that accused must be actively involved in physical activity of assault to convict him on the ground of common intention. If mental element is cogently (expressed clearly) established then it is sufficient to convict accused under section 3(5) of BNS. **Role may either be active or passive.**
- ❖ Where a crime **involves diverse** (different) **acts** to be done at different places and time then in that case it is not necessary that the participant must be present at the scene of crime.
- ❖ Where a crime **involves physical violence**, generally physical presence is necessary. However, participation may be direct or **indirect** or may be latent or patent.





## **Furtherance of Common Intention**

The phrase 'in furtherance of common intention' means **any offence which is committed in order to fulfill the objective** of their common intention. Therefore, if any other offence apart from the main offence which is agreed to be committed by formation of common intention is committed to support or facilitate the commission of the offence agreed upon, then all the other accused would be jointly and constructively liable for the commission of that offence.

**For example**, 'A', 'B' and agree to kill 'X'. After killing 'X' they were returning back and they were chased by 'Y'. 'B' kills 'Y' also. In this case all of them i.e. 'A', 'B' and 'C' will be liable for murder of 'Y' also.

## **Principle of Joint Liability**

- Section 3(5) of BNS recognizes the principle of vicarious liability in criminal jurisprudence. It would be attracted only if one or more than one persons act conjointly in commission of offence with other.
- It is only a rule of evidence and does not create any substantive offence. i.e. it is not an independent offence and for it there is no separate punishment. Mere fact that the co-accused was found in the company of the main accused at the time of occurrence is not sufficient to impute common intention on him.

**For example**, A and B goes to kill X. B stood on the door so that X does not escape. A killed X by stabbing him. In this case, both A and B will be liable for murder.

## **COMMON OBJECT**

**S- 190** Every member of unlawful assembly guilty of offence committed in prosecution of **common object**.

## **ESSENTIAL INGREDIENTS**

- a) There must be an **unlawful assembly**, as defined in section 189.
- b) Criminal act must be **done by any member** of such assembly.
- c) Such act must be done **for the prosecution of the common object** of the assembly **or** members of that assembly (group) knew that the act was likely to be committed.

**Note:** Here the word "common" must be distinguished from "**similar**"; it means "common to all and known to the rest of them and also shared by them" Members must have **known the common object** and shared by all and each one of the members of such unlawful assembly.

- Every person of the assembly will be liable for the commission of offence.

#### **When Membership Creates Vicarious Liability:**

Member of an unlawful assembly becomes liable **under S. 190** under 2 conditions:

- (a) It is an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly; **or**
- (b) It is an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object.

In the **first condition** an **action is committed** by an unlawful assembly in direct prosecution of the common object of the assembly. "The purpose for which the members of the assembly set out or desired to achieve is the object. In the **second condition** although the action was not the object of the unlawful assembly, **member of the unlawful assembly knew** it likely to be committed in prosecution of the object of the assembly.

'The word "knew" used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense "might have been known". Positive knowledge is necessary.'

### **Common intention 3(5) Vs Similar intention 3(6)**

- If a person does a criminal act with criminal intention or knowledge and another person joins him with same criminal knowledge or intention, then liability of the person joining will be **same as the liability** of person doing the criminal act.
- Common intention requires the proof of the fact that the accused had entered into an agreement with the main accused to commit the offence together. There has to be a clear evidence of said agreement.
- In case of similar intention each one will be held liable for their individual acts and not jointly for the acts of others. Also, the accused acts simultaneously but does not share the intention with others.

### **Difference of Common intention Vs Similar intention: Liability of each individual**

We can understand this through two **simple situations**:

A, B, & C togetherly plan to murder D.

A, B, & C, having no interactions among them, plan to murder D.

In 1st situation, A, B, and C has reached a consensus to murder D. Their intentions are known and shared with each other. So, it is an example of **Common Intention**.

In the 2nd situation, A, B, and C do not know each other at all and they have not ever had an interaction. Their intentions are not shared and known, though it is the same. So, it is an example of a **Similar Intention**.

## **PUNISHMENT : S-4**

Section 4 of BNS classifies the punishment in **6** categories. Following are the kinds of punishments to which offenders can be made liable for an offence under the BNS, 2023.

- a) Death
- b) Imprisonment for life. (This mean the reminder of that person's nature life)
- c) Imprisonment has descriptions

1. Rigorous 2. Simple

- d) Forfeiture of property
- e) Fine
- f) Community service

- **Death penalty** : it is the most extreme form of punishment and is provided under the section 65(2), 66, 70(2), 71, 103(1), 103(2), 104, 107, 109(2), 113(2), 140(2), 147, 160, 230(2), 232(2), and 310(3) of Bharatiya Nyaya Sanhita, 2023.
- When the court decides to give death penalty the section 393(3) of **BNSS**, 2023 provides that the court has to give the 'special reasons' in awarding the death penalty. Another procedural safeguard in this regard is section 407 of **BNSS**, 2023. It provides that once the Court of Session has awarded death sentence, it will not be executed unless it has been confirmed by the high court.

**Note** : According to **section 6 of BNS**, for calculating fraction like half or one-fourth etc., life imprisonment will be treated as twenty years and **not for other purpose**.

### **4(f) Community service**

Section 4 of the BNS act introduced the Community service (4(f)) as the sixth type of punishment. **Community Service**- punishment has been provided for **6 petty offences** mentioned below.

1. Involvement of public servants in illegal trade (**S – 202**)
2. Non-appearance in response to a proclamation (**S – 209**)
3. Attempt to commit suicide to influence legal authority (**S – 226**)
4. First conviction of petty theft involving property valued below Rs 5,000. (**S – 303(2)**)
5. Public misconduct by a drunken person (**S – 355**)
6. Defamation (**S – 356**)

Community service is not defined in section 2 of BNS act. But, it is defined in **BNSS**, section 23(3). “Community service” shall mean the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration.”

### **Death penalty award in rarest rare case – Points to remember**

- There is no statutory definition of rarest of rare.
- It depends upon facts and circumstances of a particular case, brutality of the crime, conduct of the offender, previous history of his/her involvement in crime.
- Aggravating factors includes the brutality of the crime, the impact on the victim and society, and the criminal’s prior record.
- Mitigating factors includes the accused age, mental health, and potential for rehabilitation.

The expression ‘rarest of rare cases’ was coined (constructed) by the Supreme Court in the case of **Bachan Singh Vs. State of Punjab**, (1980) and since then, life imprisonment is the rule and death penalty is the exception, as in India it is awarded only in the gravest of cases.

The principles laid down in Bachan Singh were summarized by a three Judge Bench of the Supreme Court later in the case of **Machhi Singh Vs. State of Punjab**, (1983). The following propositions emerge from Bachan Singh case:

- The **extreme penalty** of death need not be inflicted except in gravest cases of extreme culpability.
- Before opting for the death penalty, the **circumstances of the offender** also require to be taken into consideration along with the circumstances of the crime.
- Life imprisonment is the **rule and death sentence is an exception**. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
- A **balance sheet** of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

**Following factors may be taken into consideration** while deciding whether the case falls in rarest of the rare category or not:-

**Dimensions of rarest rare test:**

1. Manner of commission of crime
2. Motive for commission of crime
3. Anti-social or socially abhorrent (disgusting) nature of the crime
4. Magnitude of crime
5. Personality of victim of murder: