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necessary for crime (*mens rea*). We turn now to a discussion of mistake of law and mistake of fact.

(b) *Mistake of fact and mistake of law*

(i) *Mistake of fact*

9. General propositions as to the availability of mistake as a defence to a criminal charge are difficult to express in categorical terms.[10] Indeed, it is doubtful if any propositions on the subject of mistake have a universal application. So much depends on the definition of particular offences and whether proof of *mens rea*, a guilty mind, is an essential element that must be established by the prosecution. To ignore the various qualifications that govern the availability, in criminal cases, of a plea of mistaken belief is to run the serious risk of misstating the law, or justifying questionable conduct by invoking legal principles that have a very limited application.

10. Several alternative circumstances need to be considered, the nature of which will dictate the scope of mistake as a legal defence. First, it is open to the legislative body, when it defines an offence, to state the criteria by which a mistaken belief must be judged. Where it does so, the mistake must be judged by an objective standard, in other words, according to whether a reasonable person would have been mistaken in the light of the prevailing circumstances. Anything less will not constitute a defence however genuinely mistaken the accused might have been. Examples of this category are to be found in the crime of extortion "without reasonable justification or excuse" (Criminal Code, section 305), or in pleading self defence which requires that the accused "believes, on reasonable and probable grounds that he cannot otherwise preserve himself from death or grievous bodily harm" (Criminal Code, section 34(2)). Other examples will be found in our recommendations with respect to the unauthorized disclosure of government information, in our First Report.[11]

11. The second situation relates to those offences which abound outside the Criminal Code, in federal and provincial statutes, and which are described as offences of strict or absolute liability. This means that there is no requirement of proving *mens rea*. Ordinarily, that would end the matter so far as invoking a defence of mistake is concerned. Recently, however, the Supreme Court of Canada in *R.* v. *Sault Ste. Marie*[12] has declared it to be the Canadian law that, unless Parliament or the legislature of a province has made its intention clear when defining the offence in question that liability is absolute, with no question of fault being involved, it is open to the accused to avoid liability by proving that he took all reasonable care in the circumstances. This defence, the Supreme Court has ruled, will be available "if the accused reasonably believed

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[10] For a more detailed discussion, see J.L.J. Edwards, *Mens Rea in Statutory Offences*, London, Macmillan, 1955, Chapter XI.

[11] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *First Report, Security and Information*, Ottawa, Department of Supply and Services, 1979, paras. 58 and 59.

[12] (1978) 40 C.C.C. (2d) 353.

in a mistaken set of facts which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event".

12. In thus recognizing a potentially wide field of application for the defence of mistake of fact, it needs to be emphasized that the defence, in the context referred to above, has nothing to do with proof or disproof of *mens rea*. The principle expressed in the *Sault Ste. Marie* case comes into play only where the particular offence is interpreted in a manner that excludes the requirement of proving a guilty mind. Normally, establishing the requisite *mens rea* in a criminal offence is part of the prosecution's burden of proof. In the special circumstances outlined by the Supreme Court of Canada in the *Sault Ste. Marie* decision, however, it is open to the accused to exempt himself from criminal liability by showing that he was mistaken as to fact and that the mistake was one that a reasonable man would have made in similar circumstances.

13. The third situation — the one which has generated the most controversy surrounding the proper test to be applied — concerns those crimes that specifically require proof of *mens rea*. Proving a guilty mind involves proving that the accused had knowledge of the various factual elements that constitute the offence in question. This may involve proof of intention or recklessness or knowledge to the requisite degree. If it can be shown that the accused was mistaken as to one or more of the essential elements, it follows that the prosecution has failed to establish that the accused had the necessary *mens rea* and, therefore, the accused cannot be held criminally responsible. This defence is open to an objective and a subjective interpretation. Those who favour the objective interpretation argue that, not only must the mistake occur and be shown to have genuinely occurred, but it must also be shown to have been a reasonable mistake. By thus setting the standard of exemption at the level of ordinary, reasonable people, the likelihood of fanciful defences of mistake being successfullly raised in a criminal case is severely reduced. Proof of the necessary *mens rea*, however, is concerned with the actual state of mind of the accused, not with the mental state of some hypothetical person. How can these two positions be reconciled?

14. The courts have recently accepted the subjective interpretation but it will be seen that they recognize that the reasonableness of belief may be relevant as to whether the accused believed in the existence of the fact in question. After two judgments[13] delivered recently, one in the Supreme Court of Canada and the other in the English House of Lords, it can now be stated that in cases involving a defence of mistaken belief the essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining such essential question. This principle does not state that an accused person is entitled to be acquitted however ridiculous his story might be. Neither does it imply that the reason-

[13] *Pappajohn* v. *R.* (1980) 14 C.R. (3d) 243 (Sup. Ct. Can.); *D.P.P.* v. *Morgan* [1976] A.C. 182 (House of Lords).

ableness or unreasonableness of his mistaken belief is irrelevant. The present law was expressed by Mr. Justice Dickson when he stated:

> . . . the accused's statement that he was mistaken is not likely to be believed unless the mistake is, to the jury, reasonable. The jury will be concerned to consider the reasonableness of any grounds found, or asserted to be available, to support the defence of mistake. Although 'reasonable grounds' is not a precondition to the availability of a plea of honest belief. . . those grounds determine the weight to be given the evidence. The reasonableness or otherwise of the accused's belief is only evidence for or against the view that the belief was actually held and the intent was therefore lacking.[14]

Put more shortly, the reasonableness or unreasonableness of the mistake is a question that goes to the credibility of the defence put forward by the accused. That is a matter of evidence in each individual case. It is no longer the governing criterion in cases of mistake, except in the two situations previously described in this chapter.

(ii) *Mistake of law*

15. So far we have been considering the nature and scope of a defence based on a mistake of fact. Many of the situations that we have examined involving the activities of the R.C.M.P., suggest, however, that the officers acted in the belief that they were lawfully entitled to act as they did. What is their position under the criminal law if the mistake in question is not as to the facts but as to the law? If the mistake is concerned with the existence of a legal prohibition that forbids the doing of the act in question, in other words if it is a mistake as to whether the particular conduct that is complained about is or is not a crime, the answer generally is that such a plea is no defence to a criminal charge. For reasons of public policy, ignorance of the law is not an excuse for committing an offence. Derived from English common law, this principle is enshrined in section 19 of the Criminal Code.

16. Greater difficulty is encountered where the mistake relates to the interpretation of a particular law, statutory or otherwise, or as to the existence of a right under the civil laws, for example, rights of property. This also qualifies as a mistake of law, but is it caught within the broad exclusionary principle contained in section 19 of the Code? It is in this area of what is loosely but compendiously referred to as "mistake of law" that confusion usually arises. We shall examine a series of situations in order to understand the true ambit of the "mistake of law" umbrella, which in one form or another has been relied upon by the R.C.M.P. in the belief that it excused or justified various activities that were subsequently called into question.

17. First, there are certain offences which by their very definition, including a requirement of *mens rea*, have traditionally been interpreted in such a way as to recognize a defence that is based on a mistake of law. Thus the offence of theft as defined in the Criminal Code (section 283) requires a fraudulent taking of the property of another without a colour of right. A long line of authorities has recognized that if an accused has a bona fide belief that he was

[14] *Pappajohn* v. *R.* (1980) 14 C.R. (3d) 243 at 267.