**Title of Assignment**

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# Introduction

This assignment discusses the elements of mens rea and unlawfulness with regard to the case of Emmanuel Sibusiso, who accidently shot and killed his 11-years old son under the mistake of an attacker. For the purpose of simplicity, the assignment has been divided into four sections. The first section discusses the element of mens rea whereas the second section discusses the element of unlawfulness. The third section relates these two elements to the case of Emmanuel Sibusiso, and the last section concludes the discussion.

# The Element of Mens Rea

Rethinking criminal intent is of considerable importance in a case of murder. Thereby, as Bishop puts it, any person who has committed a crime whether large or small is not thought to have committed it if there is no evil mind (Criminal Law, 1930). For this reason, it is a legal principle of the criminal justice system that the wrongful intent is the essence of an offense, and without which it cannot exist (Criminal Law, 1930). Such examination of mens rea remains a requisite for any crime signifies that the mental element is necessary for conviction of a crime (Mens Rea 1). However, the only exception in this regard consists of the crimes being committed based upon negligence (Mens Rea 1).

In the early law, the clearest examples of criminal liability being imposed on people without having the criminal intent are found in the cases of killings in self-defense and through misadventure (Mens Rea 2). Sayre writes that except for the killings carried out under the orders of the king, in the early law, the killers were held liable for all killings whether intentional or accidental (Mens Rea 2). However, during the canon laws, the current conception of mens rea was existent to some extent (Pollock & Maitland, 1968). The mental intent was considered the eligible criterion of the guilt, and thus, the killing in self-defense or an unwitting killing could be pardoned by the sovereign (Pollock & Maitland, 1968).

Today, the law states that for the purpose of legally prosecuting a person for any criminal activity, the presence of a criminal intent is a must. A number of terms such as willful action, conscious will, an evil mind, a guilty mind, and moral blameworthiness among others are being interchangeably used for describing the conceptions of mens rea (Kelly, 2016). Overall, for a government to prosecute, convict and punish a person, it must be proved that a person has physically committed a crime, i.e., actus reus, and that act has been done with the criminal intent, i.e., mens rea (Kelly, 2016). Thereby, the American jurisprudence holds mens rea as a fundamental element.

In the recent case of 2015 titled *Elonis vs. United States,* the Supreme Court of the country made it clear that the criminal intention is what differentiates a wrongful act from an otherwise innocent act. It is the prerequisite to determine the person that must be held responsible for a wrongdoing (Elonis vs. United States). A similar decision has also been given in the other cases as well. For instance, in *Morissette vs. United States,* the Supreme Court provided a rule of construction. It reflects the basic principle that any wrongdoing of a person must be criminal by intent. It also posits that the defendant must have a blameworthy in mind for him to be found guilty of a crime.

The general rule of prosecuting a person for a wrongdoing is that a guilty mind is a prerequisite in indictment of any crime and its proof. The same has been applied in the 1922 case of *United States vs. Balint.* For this reason, the criminal statutes are inclusive of broadly applicable scienter requirements. In the case of *Staples vs. United States,* it has been put forward that mens rea does not mean that the defendant must know that the act he has done or being doing is of criminal nature but also have the knowledge of the facts that fit his actions in to the definition of the offense. Moreover, in some of the cases, the general requirement of actus reus is enough but when it remains insufficient to save an innocent person from a criminal liability, the statute would require the specific intent (*Carter vs. United States*).

# The Element of Unlawfulness

The element of unlawfulness is a prerequisite for both statutory and common law offences (Snyman, 2008). Under it, the question that if an act of omission is unlawful is discussed. As was provided in the decision of *Minister van Polisie v Ewels,* unlawfulness explains that the act remains unlawful because one did not act as was required in a legal duty. Moreover, the element of unlawfulness is excluded when the action of a person is justified for one reason or another, i.e., what he or she has done was the right thing to do (Fletcher, 2000). It must be decided considering all the relevant points (*S vs. Trainor*).

Possibly the most appropriate and well-known justification in this regard is self-defense. According to the law, the conduct of a person is justified, and thus lawful, in self-defense when it has been acted out in an unlawful commenced attack on an interest that is legally protected. Under such circumstances, the victim is allowed to use reasonable and necessary force against the attacker (*R vs. Zikalala*).

In addition to the justification of self-defense, other justifications include consent, necessity, and de minimis. Moreover, the list of such justifications remains open so that new justifications can be added with time (Snyman, 2008). The ultimate test of justifications of the element of unlawfulness is the community’s legal convictions (*S vs. Gaba*). The roots of which are provided in the Constitution (*Carmichele vs. Minister of Safety and Security*). However, it is a practice of balancing between values and interests (Burchell, 2006). Moreover, the forms of the defenses remain variable in the light of the community’s legal convictions (Burchell, 2006).

Moreover, the element of unlawfulness is ultimately determined through the yardsticks of reasonableness and the reasonable person (*Carmichele vs. Minister of Safety and Security*). In deciding the cases, the courts often ask that what a reasonable person would have done in such particular circumstances. Although such a practice is dangerous, it serves a factual and normative function (Van Der Walt & Midgley, 2005). In this regard, the court asks following questions: (i) what would have a reasonable person done? and (ii) if the accused did what a reasonable person would have done.

More importantly, such normative judgments remain open to re-evaluations. In the recent case of 2005 titled *S vs. Engelbrecht*, reveals a re-evaluation of the question. A close understanding of the judgment further reveals that Satchwell J. dramatically developed the law on recognizing the fact that one can respond against an inevitable attack rather than what the law has prescribed in previously that a person may only respond to a commenced or imminent attack (Grant, 2007). For this reason, the element of unlawfulness is open to development under the light of the community’s legal convictions, which requires a normative judgment made in a manner that suggests that if the person did what was right.

Additionally, it is also pertaining here that the element of unlawfulness remains an ever-present and pervasive requirement of all criminal liability. Thereby, it is required for all criminal acts, and when it is not expressed in clear words, it is considered to be the silent requirement and simply read-in (Snyman, 2002). The work done by the element of unlawful is impressive. Also, the work it does in combination with the elements of negligence or intention is amazing too. For this reason, the answer to the question that when an accused must be resorted to the defense lies in the mere facts of each case.

# The Case of Emmanuel Sibusiso

Firstly, in the case of Emmanuel, he shot on his son without knowing that it was him primarily because he was sleeping in the vehicle when the son knocked at the door. Emmanuel thought of him as an attacker and shot to save his vehicle from being stolen. He did not recognize his mistake until later when the son told him his identity. As per the facts of this particular case, it can be concluded that Emmanuel clearly lacked a criminal intention, i.e., mens rea, in his action despite having complete actus reus.

As discussed in the previous sections, any person who has committed a crime whether large or small is not thought to have committed it if there is no evil mind. It has also been pointed out in the earlier discussion that for a government to prosecute, convict and punish a person, it must be proved that the act has been done with the criminal intent. Such criminal intention is what differentiates a wrongful act from an otherwise innocent act. It is the prerequisite to determine the person that must be held responsible for a wrongdoing. Thereby, Emmanuel lacks criminal intent in killing his son, and thus, must not be prosecuted for the murder of his son.

Secondly, in Emmanuel’s case, he clearly lacks the element of unlawfulness. As per the facts of this particular case, the defendant killed his son without knowing that it was him. He shot on him because he thought that he has been attacked. It is clear from the case laws that a person can respond to an inevitable attack. This can be concluded on the grounds of the tests discussed in the discussions in the previous sections.

As pointed out in the previous discussion, unlawfulness explains that the act remains unlawful because one did not act as was required in a legal duty. The conduct of a person is justified, and thus lawful, when it has been acted out in an unlawful commenced attack on an interest that is legally protected. Moreover, the element of unlawfulness is ultimately determined through the yardsticks of reasonableness and the reasonable person. The court must ask that (i) what would have a reasonable person done? and (ii) if the accused did what a reasonable person would have done. Emmanuel did what a reasonable person would have done under such circumstances, i.e., he was allowed to use reasonable and necessary force against the attacker.

# Conclusion

Emmanuel was justified in his action of killing his son because firstly he lacks a criminal intention of doing so, and secondly, he passes the test of reasonableness pertaining to the element of unlawfulness. Thereby, in his defense, Emmanuel can argue that although he performed actus reus, he primarily lacked mens rea in this regard. Wrongful intent is the essence of an offense, and without which a crime cannot exist. He can further argue that one can respond against an inevitable attack rather than what the law has prescribed in previously that a person may only respond to a commenced or imminent attack.

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