

# The Discretionary Power of the Criminal Judge when Determining the mens rea: A Case Study

Ashraf Shoukri - Senior Counsel - Litigation  
- Abu Dhabi

Shaden El Shibiny  
s.elshibiny@tamimi.com - DIFC

## Introduction

Mens rea and actus reus come from the Latin phrase “actus reus non facit reum nisi mens sit rea”, which means that no act is punishable unless the mind is guilty. Mens rea is the guilty mind or a culprit with an intention (i.e. the moral element) whereas actus reus is the action or conduct which constitute a crime (i.e. the material element). In criminal law, the offender is culpable if both the intention and act are present in the alleged crime.

Criminal judge or judges, depending on the courts, have wide discretionary powers when determining the cases they hear. In essence, they form their own beliefs when assessing whether the elements of the crime exist and evaluate the oral or written evidence based on the pleadings of the parties before the court. The judge’s aim is to reach a logical conclusion that the evidence presented to the court is satisfactory to either convict the accused regarding the crime in question, or acquit them if the evidence presented is weak.

In this article, we will demonstrate how the courts in the UAE at the different levels have approached and analysed subjectively the moral element of a crime. In addition, we discuss how an opinion of one judge may differ from another despite being presented with the same facts and associated circumstances. This difference in formulating legal opinion/belief, strengthens the application of the judicial review principle that is considered as one of the main factors of achieving the accused right to a fair trial.

## The Law

Article 38 from the United Arab Emirates Penal Code Federal Law No. 3 of 1987 as amended provides for the basic elements of Mens rea, it stipulates that “the moral element of a crime consists of the intent or error. The intent arises when the culprits’ will moves towards the commission or omission of an act, where such commission or omission is legally defined as a crime, for the purpose of producing a direct effect or any other criminal result which the offender expected. An error arises if the criminal result occurs by reason of the offender’s error whether such an error is negligence, inadvertence, carelessness, recklessness, imprudence or non-compliance with laws, regulations, rules or orders.”

In addition to the discretionary powers of the criminal judges, prosecutors enjoy similar powers. Their role involves conducting comprehensive and focused interrogations from which they reach a conclusion whether the accused committed the alleged crime with a criminal intent to achieve the resulted breach of the law.

The judge, however, is not obliged to follow the prosecutors’ opinion. The judge’s personal conviction informs his judicial opinion. Hence, he may take a different view on the evidence presented by the prosecutor and dismiss the case.

The following case study, which involves a case that was recently heard in the Abu Dhabi courts demonstrates clearly how the opinion differs from one judge to another when deciding in the same facts.

## Facts

The prosecutor accused a senior public official and a number of accomplices, natural persons and companies, of embezzling the State's funds upon receiving a complaint from the State Audit. The prosecutor referred the case to the federal courts after completing the investigations and interviewing witnesses as well as experts, given the financial nature of the crime. The prosecutor presented the evidence to the court, which supported the conclusion that a crime was committed by the accused. The defendants pleaded not guilty at all stages of the trial. They argued, inter alia, the lack of the moral element of the crimes attributed to them and that they did not benefit or have interests as a result of the acts (alleging that a government ministry received all the funds which were alleged to have been embezzled). Therefore, in their defence, they pleaded that no public funds suffered any damage or loss and accordingly the moral element was not satisfied in relation to the alleged crime. Interestingly, the trial lasted nearly six years and was heard before all the trial levels, and involved a series of conflicting opinions of the accused's culpability.

Courts of First Instance and Appeal 1:

Verdict - Guilty

The First Instance Courts analysed the evidence presented by the prosecution and concluded that the first two defendants "public officials" were aware and agreed together to commit the actus reus and concluded contracts between them to help embezzle public funds. The Courts found that the public officials' intention was to embezzle or facilitate the embezzlement of public funds for the rest of the defendants.

The Court concluded that there was a collective mens rea (moral unity) between all the defendants, and they were guilty by the mere fact that the public official had the intention to commit the actus reus of the crime. The Court stated "according to the facts of the case, the acts of the Accused show that they have a moral unity - that is, a mental or moral relation that brought them together with the First and Second Accused in embezzling the public funds, the subject matter of the case. In addition, they were aware that the act that they are carrying out represents an intention to agree on and assist in committing the crime when they made contracts with the Second Accused who executed those contracts with them. With their act, their intention and will was directed altogether to commit the crime as their intention intersected with the intention of the First Accused" (the authors' translation).

The Court's statements indicated that the criminal intent was present on the part of all of the accused (they "acted as one unit"). Moreover, the moral unity of all the Accused was based on the fact that the criminal intent was proven and it had materialized for the one of the accused by committing the material element of the crime.

Studying the criminal intent of the accused, the Court of Appeal relied on the conclusion reached in the judgment of the Court of First Instance and confirmed that the criminal intent was present for the first accused. It confirmed that the first accused had the criminal intention and prior criminal determination between him and the other accused. The Court adopted the reasoning stipulated in the Court of First Instance judgment stating "and the court supports the reasons contained in the same".

Court of Cassation-First Objection:

Verdict - Re-trial

The Court of Cassation dismissed the appeal and the First Instance Court decision, accepted the accused's petition, and remitted the case for a re-trial by the Appeal Court - before a different circuit - stating that the "judgments of the courts of merits did not clearly prove affirmatively the criminal intent. The court ruled that the court of merits did not show clearly and conclusively that the criminal intent is achieved in relation to the Accused in embezzling the State's funds and the reasoning of the court is just mere statements about acts without being connected to criminal intent" (the author's translation).

Accordingly, the Court did not prove that the alleged acts constituted embezzlement of the State's funds. The accused had argued the same but the Court did not verify that defense and decided to annul the judgment and remit the case for re-trial.

Appeal Second Hearing

In the re-trial, the Court ruled that it had been proved beyond reasonable doubt that the accused committed the actus reus; however, the essence of these acts did not prove that they were determined to embezzle the State's funds or collect undue fees. Therefore, the criminal intent, as such, was not achieved and accordingly it ruled that all the defendants were innocent from all the allegations made against them. The prosecutor objected to this judgement before the Court of Cassation for the second time, on the basis that the element of criminal intent was clear in the actions committed by the accused and that the appeal court did not specify its basis for denying any criminal intent in the accused acts. The prosecutor requested the annulment of the appeal judgment and the re-trial of the accused.

#### Court of Cassation (Second objection): Final verdict

The Court of Cassation confirmed that there was a criminal intent. Its assessment was based on the analysis of the criminal act and the material element committed by the public official. In addition, the Court concluded that the execution of the subsequent contracts with the other defendants had a fraudulent intent and were intended to avoid the lawful application of the applicable financial rules and regulations applicable in the State. The reason being that the money was diverted to a charity that did not have a beneficiary to receive the donations and the contracts had not included any bank guarantees or clear procedures to ensure that the contracted parties performed their obligations set in their contracts. The Court concluded that the defendants were guilty since they possessed the requisite criminal intention and actus reus, which resulted in the misappropriation of public funds. Accordingly, the Court of Cassation was convinced beyond reasonable doubt that the accused were guilty of the alleged offences and sentenced them with the appropriate penalty for all charges and suspended execution of the penalty.

#### Conclusion

This case is significant as it clearly outlines that the judgement of whether a criminal intention is present in a criminal case is very subjective. Judges apply their own opinions, to formulate their judgement in criminal cases. They need to be persuaded that the criminal charges could be proved beyond reasonable doubt and that the accused committed the acts with a criminal intention, which resulted in a crime penalized by the law of the State. As may be seen, this evaluation may vary from court to court given the subjective nature of the exercise.