



## Analysis of the no liability without fault in criminal responsibility relative to the problem of concurrence of the physical and mental elements under section 24 & 25 of the Nigerian criminal code

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### Abstract

This paper dealt with the discussions of criminal responsibility with regards to no liability without fault. It is always critically important that there should be concurrence of the mental and physical elements of a crime. This is of the utmost importance for the protection of the liberty of the subject, that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out men's rea as a constituent party of a crime, the court shall not find a man guilty of an offence against the criminal law unless he has a guilty mind. In analyzing the above postulation, this paper further dealt with the idea of whether to ground the crime charged, the presence of both the physical and mental elements have to be simultaneous i.e. to concur at the same time of committing the offence. With further interrogation on this issue, the author takes the position based on many legal authorities and precedents that even though there is the need for concurrence of the mental and physical elements however, these elements do not have to be simultaneous.

**Keywords:** concurrence, simultaneous, actus reus, mens rea, proportional, transactional execution

### Introduction

Since it has been determined through many precedent cases that the presence of the dual elements of an offence are necessary for not only making definition and punishment of crimes logical and sensible but also for better understanding of the law of crimes, the next stage is to determine how to treat the presence of the dual elements to ground the crime charged.

In *Fowler v. Padget* <sup>[1]</sup>, Lord Kenyon lent weight to the basis of criminal responsibility when he stated that "The intent and the act must both concur to constitute a crime". Rarely did English courts impose liability for a crime without first considering the presence of the dual elements of a physical act and state of mind, except in one case described as isolated in academic cycles in *R. v. Larsonneur* <sup>[2]</sup>.

Two theoretical problems emerge here. The first is whether to ground the crime charged, the presence of both the physical and mental elements have to be simultaneous i.e. to concur at the same time of committing the offence. Okonkwo/Naish seemed to be of the above view, as well as Smith & Hogan, by saying that "for there to be criminal liability, the actus reus and mens rea must coincide at one time <sup>[3]</sup>."

But it is submitted that the above theory may lead to injustice and absurd results. The possibility of an absurd result arose in the case of *Thabo Meli v. R* <sup>[4]</sup>, a celebrated Basuto Land case that went to the Privy Council. In the case, the appellants struck a man with the intent to kill him. Believing him dead, though, in fact, he was only unconscious; they rolled him over a cliff in order to make his death appear accidental. He died from the subsequent exposure. The defence argued that the intent to kill did not concur with the act of causing death and that the subsequent act which caused death was not accompanied by an intent to kill and that therefore in respect of the latter act, the accused should be guilty, not of murder but of the lesser offence of

culpable homicide. The Privy Council, however, rejected the argument by saying that the transaction could not be divided up in this way.

For *R. v. Chiswibo* <sup>[5]</sup>, in seeking to apply the locus classicus of the *Thabo Meli*'s case, the court opined that "so long as the transaction is continuing and the execution of the plan is not yet complete any intention necessary to constitute any crime committed as part of the whole plan may be deemed to be a continuing intention." The court however, held in the above case that the burying of the body was not part of the same preconceived transaction.

In *R. v. Church* <sup>[6]</sup>, the defendant was charged with the murder of his wife whose badly injured body was found in a river. Actually, the cause of death was drowning. He said that he took her to his van for sexual purposes, was mocked by her for failing to satisfy her, whereby a fight ensued. He knocked her semi-unconscious. He tried to arouse her for about half an hour but in vain, and thinking she was dead, was seized by panic and threw her into the nearby river.

After reviewing the circumstances of the case, the defendant was acquitted of murder and convicted of manslaughter. In this case, it was clear that no mens rea actuated or fuelled the actus reus of murder and thus the defendant was rightly convicted of manslaughter instead of murder. Consider what would have been the verdict had the court on the earlier case discussed the theory of concurrence of the dual elements. It is submitted that the Nigerian courts should adopt the latter theory of concurrence in dealing with the presence of the physical act and the state of mind, provided for under section 24 of the Nigerian Criminal Code.

### Analysis of section 24 of the Nigerian criminal code

The purpose here is to see if by any stretch of interpretation, the elements of an offence namely a physical act and a state of mind known as actus reus and mens rea in English law are truly covered by section 24 of the Nigerian Criminal

Code. First, of all, it is pertinent to analyze fully the extent of actus reus and mens rea in English law. The basis of criminal responsibility later came to find expression in the Latin maxim *Actus non facit reum nisi mens sit rea*.

In *Young Husband v. Luftig* <sup>[7]</sup>, the aforementioned maxim was expressed to mean that “an act does not make a man legally guilty unless the mind is legally blameworthy.” Thus in English law, an act or omission (of an accused) and the state of mind must be proved to establish the crime charged. Professor Glanville Williams <sup>[8]</sup> highlighted the limited use of imposing this restriction on the criminal law of referring to offences of strict and vicarious liability. As basis of criminal responsibility in England, the maxim under discussion has suffered various criticisms. In *R. v. Tolson* <sup>[9]</sup>, Cave, J said “The maxim appears uncouth.” Stephen, J delivered a more pungent criticism of the maxim thus: “Though this phrase is in common use, I think it is most unfortunate and not only likely to mislead, but actually misleading on the following grounds: It naturally suggests that apart from all particular definitions of crimes, such a thing exists as a mens rea or guilty mind and which expressly or by implication involved in every definition. This is absolutely not the case for the mental elements of different crimes differ widely <sup>[10]</sup>.”

However, despite the strictures, e.g. as envisaged above by critics, the merits and/or importance of the juxtaposition of actus reus and mens rea as represented by the maxim under discussion have been continuously recognized in modern judgments, Lord Goddard, C. J. in *Brend v. Wood* <sup>[11]</sup>. “It is of the utmost importance for the protection of the liberty of the subject, that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent party of a crime, the court shall not find a man guilty of an offence against the criminal law unless he has a guilty mind.”

It is the view of this author that the basis of criminal responsibility evinced by the maxim is justifiable and commendable as at least it creates a standard test for evaluating criminal conducts and the attempt by the Nigerian Criminal Code under section 24 to enact a principle covering the maxim is also commendable. Professor Stephen in justifying the maxim submitted (aptly in this author’s view) that: “the reasons for imposing this great restriction upon the law are obvious. If it were not so restricted, it would be utterly intolerable: all mankind would be criminals and most of their lives would be passed in trying and punishing each other for offences which could never be proved <sup>[12]</sup>.”

However, Card, Cross and Jones <sup>[13]</sup>, have observed that it is important that the maxim (*actus non facit reum nisi mens sit rea*) should not be allowed to become the master rather than the tool of a criminal lawyer. It therefore means that lawyers should not adopt a mechanistic or mechanical approach in using the maxim to evaluate criminal acts.

It is the view of this author therefore, that in dealing with the physical act and mental state provided for under section 24, lawyers should not allow the ends of justice to be sacrificed on the altar of technicalities involved in the application of the dual elements.

For instance, it would be absurd if excusable automatism (e.g. epilepsy, yawning, etc.) are not allowed as a defence if the act produced criminal results. In such cases there would be no point grappling with the proof of actus reus and mens rea or “act” and “intention” under section 24 of the Nigerian Criminal Code.

### Scope of section 24 of the Nigerian criminal code

Section 24 of the Nigerian Criminal Code which is *ipsisssima-verba* with 93 Section 23 of the Criminal Code of the State of Queensland which provided as follows in its three limbs: “Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will or for an event which occurs by accident <sup>[14]</sup>.”

Referring to the first limb of the section, Okonkwo and Naish argued that “It is clear that it is stating very fundamental and wide principles, though the exact extent of these is uncertain <sup>[15]</sup>.” There seems to be judicial controversy as to whether the first limb of section 24 covers the common law doctrines of actus reus and mens rea (i.e. *actus non facit reum nisi mens sit rea*) or whether it has enacted a different rule of criminal responsibility.

With this in mind, this author makes these instructive arguments thus; if it is to be assumed without controversies that under the first limb of section 24 of the Nigerian Criminal Code that acts or omissions would cover actus reus, and “independently of the exercise of the accused person’s will” would cover mens rea, it then means that the basis of the criminal responsibility as well as the no liability without fault problem, subject to the problems of concurrence earlier discussed seems to be clearer. If that is the case, then there ought to be an evaluation, more elaborately, of what ought to be the scope of the physical element envisaged by section 24 of the Nigerian Criminal Code.

#### 1. An Act under Section 24

Smith & Hogan, Glanville Williams, Okonkwo & Naish all agreed with the view that “actus reus (an act) is the totality of all the elements in the definition of an offence except the accused’s mental state <sup>[16]</sup>.” For Kenny, actus reus or an act means “such results of human conduct that the law seeks to prevent <sup>[17]</sup>.” Gordon G. H., another writer on criminal guilt while picking holes in Kenny’s approach, sought to define crimes in terms of conduct crimes and result crimes arguing that Kenny’s definition sought to center on result crimes.

On the preponderance of authorities on the various propositions of an act (Russel, Glanville Williams, Okonkwo, Smith and Hogan, Kenny, Gordon G. H. etc.), it is this author’s understanding that “An “act” means all the material elements, in definition of an offence except the accused’s mental state <sup>[18]</sup>.”

It is therefore submitted that the material elements ought to be: act or omission, circumstances, events and consequences. This author therefore recommends that the proper approach will be to broaden the physical element provided for under the first limb of section 24 of the Nigerian Criminal Code to such a horizon as herein envisaged.

Note that an act may be voluntary or involuntary. Involuntary acts include something done in an automatic state or accidental results of willed and unwilled acts.

#### 2. An Omission under Section 24. Criminal Code

According to Okonkwo and Naish, in the absence of a legal duty to act, omission is scarcely criminal except in some notable instances, e.g. murder and manslaughter, misprision of treason, etc., where omissions becomes the act of the crime. If X stands callously by while Y’s one-year-old baby

drowns in a pool of water four feet deep, there seems to be no offence. In this regard, the approach of the Belgian Penal Code, amended in 1961, seems better—duties are imposed on people present to save those exposed to serious danger: Omissions causing harm to property are not criminal, e.g. If Kalu stands idly while the end of a cigarette sets fire to Opara's house, there is no offence in law even though he could have easily stamped his foot on the cigarette to save the property.

Okonkwo and Naish have argued in this light that: “human nature, being what it is, it would be harsh if men were to be pushed too far by the criminal law into doing their neighborly duty... Specific duties can be added if there is an unwarranted gap in the criminal law. liability for omissions in civil law is much wider<sup>[19]</sup>”

In the same vein, Lord Macaulay in his Notes on the Indian Penal Code submitted that: “It is evident that to attempt to punish men by law for not rendering to others all the services which are not their duty to render... would be preposterous. We must grant immunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible and must content ourselves with punishing such omissions only when they are distinguished from the rest by some

Circumstance which marks them out as peculiarly fit for penal<sup>[20]</sup>.”

### 3. Circumstances, Events and Consequences as part of an Act

It has been argued, that there ought to be no criminal liability unless the whole actus reus (i.e. either act or omission as conduct, events, circumstances and consequences) are fully present and proved.

In *White v. R.*,<sup>[21]</sup> the accused put potassium cyanide (KCN) in his mother's drink-intending to murder her. Later, the mother was found dead with the glass partly filled up beside her. Medical evidence revealed that she died of heart attack and not poisoning and that the quantity of KCN administered was insufficient to cause death. The accused was acquitted of murder and convicted of attempted murder because (it was contended) although the intended consequence (death) had occurred it has not been caused by the accused's conduct and thus an element of the actus reus of murder (accused's conduct) was missing and even though the circumstances and even the mens rea were present.

The question that will arise from our own (the Nigerian) perspective is whether the physical element under section 24 of the Nigerian Criminal Code is supposed to be interpreted as to include act or omission, events, circumstances and consequences.

Both section 13 of the Tasmanian Penal Code and section 23 of the Queensland Criminal Code are ipsissima-verba with our (Nigerian) section 24 of the Criminal Code. In *Vallance v. The Queen* (1961)<sup>[22]</sup> section 13 of the Tasmanian Penal Code failed to be applied. Two kids were banging on some galvanized iron tanks abandoned in a scrap yard and were ordered to go away by the appellant who was living in a nearby house. The children refused and kept hauling stones at the appellant. Feeling irritated, the appellant took an air gun and shot over the fence into the scrap yard. A pellet hit one of the kids and caused her a very minor injury. On a charge of unlawful wounding, the appellant's defence was that he aimed at the ground in the direction of the girl. In convicting him, the court held that

his intention in shooting transcended his positive desire, the result and foreseeable circumstances. Section B of the Tasmanian Penal Code which is in pari-materia with the Nigerian Criminal Code section 24 on being applied, though the learned justices of appeal differed in opinion on certain grounds, they nevertheless held that the “act” in question in the aforesaid section covers events and possible results of the accused's conduct.

Note that as for the mental element provision under the section 24 of the Nigerian Criminal Code there ought to be a consideration of the dual connotation of mens rea under the English law.

1. Specific mens rea- i.e. the state of mind of an accused person required to be proved before the court with respect to the particular crime charged to establish the guilt of the accused.
2. General mens rea which is taken to mean a general principle of statutory interpretation and criminal responsibility pervading the entirety of the English Criminal Law system, that whenever a court is considering the definition of an offence, it must presume until the contrary is proved, that the definition requires proof of a guilty mind against the accused.

However many legal scholars have argued that specific mens rea is the application of the principle in general mens rea. It should also be noted that the basic mental concepts already discussed are Intention, Recklessness, Negligence, Knowledge and perhaps automatism are relevant in understanding the mental states provided for under the various sections of the code. It should be noted specially that section 24 of the Nigerian Criminal Code provides that the provisions of sections 24 and 25 shall apply in relation to any offence against any legislative enactment and to all persons charged with any such offences. Thus, the provisions of section 24 no doubt extends to all legislative enactments or statutes of federal and state legislature in both civil and military regimes including decrees and edicts.

In analyzing the liability without fault in criminal responsibility, it is important to realize that the connotation of paragraph two of section 24 to the extent that unless the intention to cause a particular result is expressly declared to be an element of the offence constituted in whole or in part, by the act or omission (actus-reus) the result intended is irrelevant. Brett & McLean were of the view that the effect of this second limb of section 24 appears to be that “there is no presumption that mens rea is required unless the statute creating the offence expressly says so<sup>[23]</sup>.”

But this conclusion is manifestly absurd and is the opposite of the application of mens rea in English Law.

Okonkwo & Naish<sup>[24]</sup>, while disagreeing with Brett's conclusion above submitted that the second paragraph merely enacts that where an intended consequence is not mentioned as part of the definition of the offence, then it is not to be taken into account. It is also our humble opinion that the above provision can have the effect of section 8 Criminal Justice Act 1967 England abolishing the presumption, that once an act is committed a man is deemed to intend its natural and probable consequences. This connotation seems to be more logical and accords with common sense and the intent of a good criminal justice system. But the Nigerian courts now have the duty to interpret the phrase.

Note that the third paragraph of section 24 stressed that motive is irrelevant as regards criminal liability. This had earlier been explored.

#### 4. Section 25 (What Is Its Effect On Actus Reus and Mens Rea?)

Section 25 provides that “people who does or omit to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule maybe excluded by the express or implied provisions of the law relating to the subject.

By simple analogy, section 25 exculpates anyone who may have committed an offence under an Honest, and Reasonable mistake of fact. Whether a mistake is honest or reasonable is subject to judicial determination and the court must take all the circumstances of a particular case into consideration. For a mistake of law, full liability attaches and section 25 might not come in aid of anyone who commits an offence, under a mistake that the act is contrary to a particular criminal statute. The maxim, which is now age-long, is *ignorantia legis neminem excusat* (ignorance of the law is no excuse). It is, however, submitted that it is not wrong to argue that considering high illiteracy level in Nigeria, coupled with the fact that Nigeria operates a largely transplanted legal set up, together with the fact that she have series of undemocratic governments i.e. dictatorships, whereby the country’s laws were not debated by legislatures (i.e. representatives) of the people, but decrees are churned out frequently sometimes retroactively, the argument that ignorance of the law is no excuse need to be reviewed in the Nigerian circumstances.

For present purposes, it is submitted that the effect of a mistake of fact under section 25 is that it makes proof of actus reus and mens rea unnecessary including determining the question of concurrence.

#### 5. Inconsistencies in the Doctrine of Mens Rea in English Law

Another reason for discouraging the continuous use by the Nigerian courts of the doctrines of actus reus and mens rea as basis of criminal liability is that as a doctrine, mens rea has been variously interpreted and understood to the extent that it can lead to absurd results and judicial manipulations even in cases with prima facia facts.

In *R v. Hibbery* <sup>[25]</sup>, a man charged under section 55 of the offence against the person’s act, with taking an unmarried girl under the age of 16 out of the possession of her father. The accused in this case was aware of the girl’s under age but unaware that she had a father. His conviction was quashed on appeal for lack of mens rea. But in *R v. Prince* <sup>[26]</sup>, the accused was charged with an offence with similar facts under the same section. In his defence it was clear that he genuinely believed that the girl he took away was above 16 years. He was convicted on appeal. But he could well be said not to have mens rea by his genuine belief that the girl he took away was over 16 years of age.

In *Cundy v. Legocq* <sup>[27]</sup>, a publican was held guilty of selling liquor to a drunk person contrary to a provision of the Law. But he never knew that the person was already drunk. He could also have been said not to have mens rea. In *Shellas v. Derutzen* <sup>[28]</sup>, someone who sold liquor to a

police constable on duty and in plain clothes was held not guilty because he believed the policeman to be off duty. These inconsistent decisions on mens rea are no good pointer to the attitude the Nigerian courts should adopt in determining the mental element in an offence. By drawing analogy from the practice in Queensland, operating the same Code with Nigeria, it becomes more obvious that the Nigerian courts need not continue applying the doctrines of actus-reus and mens rea. Furthermore, in *Widgeshire Co. v. Bonney* <sup>[29]</sup>, Sir Samuel Griffith J who himself drafted the Queensland Criminal Code declared that: “Under the criminal law of Queensland, it is never necessary to have recourse to the old doctrine of mens rea, the exact meaning of which has been the subject of much discussion. The test now to be applied is whether the prohibited act was or was not done accidentally or independently of the exercise of the will of the accused person.”

Also in *Thomas v. Macheather* <sup>[30]</sup>, the above dictum was heavily relied on and the learned judges (Cooper CJ and Luckin J) went on to pungently refer to mens rea thus: “It seems to us that the legislature has by the express provisions of sections 23-25 (Nigeria’s 24-26) laid down in clear terms what the law in future should be and directed that the courts should in future be guided by reference to the tests prescribed by the language of those sections.” In other instances, e.g. *Anderson v. Nyston* <sup>[31]</sup>, the Queensland Courts had constantly bluntly jettisoned the doctrine of mens rea as no longer part of the Queensland Criminal Law. In the above case, Douglas and Philip and even dissenting Webb concurred in the fact that mens rea is no longer part of their law of criminal responsibility. In *AdamuAlli v. Okulaja* (unreported) it was pointed out that Nigerian courts are free to determine the application, extent, and or meaning of the common law doctrine within the Nigerian context. Collin Howard <sup>[32]</sup> in 1962 edition of *Modern Law Review* summarized the position of criminal responsibility in Queensland thus: “It can be said through the operation of section 23 and 24 (Nigeria’s 24 &25) of the criminal code, the principle that there should be no criminal liability without fault has been vigorously preserved in Queensland. It is submitted that this principle is worth preserving. The virtue of a well drafted Code in this respect is that it puts the intention of the legislature beyond doubts.”

#### Conclusion

From all indications, the Nigerian Supreme Court has fallen in line with the Queensland approach. In the case of *Ovienfus v. The State* <sup>[33]</sup>, the appellant undoubtedly killed the deceased thus it was easy for the prosecution to establish the actus-reus. Therefore, in the words of counsel to the appellant, “It is the mens rea ingredient that constitutes the subject of controversy.” The Supreme Court of Nigeria, per Karibi Whyte, JSC stated inter-alia on section 22 Western State Criminal Code (Similar to section 24 Criminal Code) that: “This is a clear misunderstanding of the jurisprudence of the criminal code. Although very familiar and often used with common law concepts, the expressions mens rea and actus-reus have ceased to be relevant in the interpretation of the criminal code, based in the Queensland Code of 1899 drafted by Sir Samuel Griffiths. This is because of their lack of precision. The provision of section 22 of the Criminal Code of Western Nigeria LWN 1959 (ipsissima-verba with section 24 Criminal Code Nigeria) which defines criminal responsibility as designedly refrained from the use of those

Latin expression. In that section, the expressions voluntary act and intention have replaced those concepts. Thus where a prohibited act results, there is responsibility for the commission of such a prohibited act as a situation. Both ingredients constituting the offence are complete.” It is therefore submitted by this author that this bold attempt by Nigeria’s highest court to illuminate what hitherto could be classified as one of the dark crevices of our criminal law is laudable.

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