

STRICT LIABILITY AND THE NIGERIAN CRIMINAL CODES: A REVIEW

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Introduction

The concept of strict responsibility in Nigerian criminal law seems to have veered off the axis charted at common law as the justification for its application. In England, lip service is still paid to the view variously expressed in the past thus:

It is in my opinion 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 part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.¹

The reality however, is that the courts in England have moved the construction of the exception in this rule to cover a very wide range of offences that will today be difficult to reconcile with the general principle of presumption of mens rea in crimes qua crimes.²

Glanville Williams expresses the view that "In general, the authorities on strict liability are so conflicting that it is impossible to abstract any coherent principle on when this form of liability arises and when it does not"³

The law of crimes in Nigeria would seem not to have the common law presumption of mens rea in offences generally, as applicable.⁴ Nigeria, having a codified criminal law generally has provisions in the Criminal Code as well as Penal Code⁵ which serve as reference points for the question whether or not strict liability exists in this country under our criminal law⁶. It is another matter whether the courts have paid sufficient attention to these provisions or have rather chosen to import the English doctrine of mens rea wholesale or in some material particular.

Again the Nigerian legislature, it seems, has equally been quite vague as to whether or not offences outside the Codes require any mental element. Several offences exist in Nigeria today both within and outside the codes which by common law standards should have a guilty mind, but are treated purely as strict responsibility offences not by any known and discernible pattern or principle but rather by an ad hoc abstraction from case to case. This work will attempt to look at the application of the concept of strict responsibility to crimes in Nigeria

¹ *Brend v. Wood* (1946) 62 TLR.462, per Lord Goddard, CJ

² Several Offences from felonies to regulatory or mere public welfare offences have at various times been construed as strict responsibility offences without reference to the conceptual origin and application of the principle

³ Glanville Williams, *Textbook on Criminal Law*, 910.

⁴ *Clegg v. C.O.P.*, (1949) 12 W.A.C.A. 379. The Federal Supreme Court nevertheless held the presumption of mens rea applicable to felonies in Nigeria.

⁵ Section 24 of Criminal Code (Southern States) and 48 of the Penal Code (Northern Nigeria).

⁶ S. 2 (4) Criminal Code Act actually makes Chapters, II, IV and V of the Code dealing with criminal responsibility, punishment and parties to a crime applicable to all offences in or outside the Code. It is however not certain that a similar provision is in the Penal Code Law.

and also to discern some pattern in its application in relation to development in some other jurisdictions.

General Principles Of Criminal Responsibility

Upon a strict legal construction of the codes in force in Nigeria i.e. the Criminal Code and the Penal Code, criminal law in Nigeria has no business with the English doctrine of mens rea as developed at common law considering that the Codes have extensive provisions dealing with the mental element of a crime⁷. This view has been expressed with some force as follows:

First and most important, ... there is really no need to import mens rea into Nigeria Criminal law at all in view of the provisions in the criminal code itself.⁸

A Brief History And Origin Of The Rule

The general principle of criminal responsibility in Nigerian is akin to the common law doctrine of *actus non facit reum nisi mensit rea*. By the time of Sir Edward Coke in the 17th century, this concept of subjective blame-worthiness of no liability without fault' had become firmly rooted.⁹ In England this doctrine used to be absolute. It was expressed thus:

There can be no crime large or small without an evil mind... It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent without which it cannot exist.¹⁰ Every crime by this doctrine has a physical side which is volitional deliberate or willed in nature and not accidental and without the knowledge of the actor express or implied, while there is a mental element which connotes blame worthiness in the sense of the harm intended to be caused or actually caused, where the actor is reckless as to whether or not the harm occurs, or indeed negligent as to the outcome¹¹

The only known exceptions to the common law doctrine of *actus non facit reum nisi mensit rea* were in the areas of public nuisance,¹² criminal libel,¹³ and contempt of court.¹⁴ In these exceptions the position at common law is that a conviction would be sustained without proof of mens rea. Smith and Hogan even adds a fourth exception of blasphemy:

⁷ Chapter V of the criminal Code; and chapter II of the Penal Code both providing exclusively for criminal responsibility and the concept of blameworthiness crimes.

⁸ Okonkwo & Naish, *Criminal Law in Nigeria* (2nd ed., Ibadan, Spectrum, 1980) at p 67.

⁹ Francis Bowes Sayre; "Mens Rea" 45 Harv. L.R. 974-1026

¹⁰ Bishop, *Criminal Law* (9th ed.,) p.287

¹¹ Some authors have resisted the temptation that negligent acts connotes some element of fault or state of mind. See Colin Howard, "Strict Responsibility in the High Court of Australia," 76 L.Q.R. 547.

¹² These had the character of civil liability: *R v Stephens* (1866) LR 1QB 70 quarry owner of 80 years was convicted when his employees obstructed neighbouring river without proof of mens rea.

¹³ The Libel Act, 1843, modified the common law and Defendant can now plead lack of authority, knowledge, consent and adequate care and caution.

¹⁴ *Evening Standard Co. Ltd.* (1954) 1 QB 578 where publishing facts of a case likely to influence jurors secured a conviction without proof of mens rea. Contempt of Court Act 1981 confirms this.

A writing is blasphemous when it has a tendency to shock and outrage Christians. *Lemon and Gay News Ltd.*¹⁵ decides that it is unnecessary to prove that D. was aware of this tendency.¹⁶

From these few exceptions, a vast proportion of what is now known in England as police cases or regulatory offences that are regarded as having no element of moral blameworthiness, but are necessary for the protection of the public welfare, have developed from the later 19th century through most of the 20th century.¹⁷ It is true that an act or omission or status to qualify as a crime in England as well as in Nigerian and other common law countries such as Canada, the United State of America, India, and Australia among others, the general rule of presumption of some mental element is still the law.¹⁸ The character and nature of this mental element has varied from time according to the criminal policy of the era.¹⁹ This mental element has been regarded as “evil mind or will”, “malice afore-thought or evil motive”, “intention, recklessness or advertent negligence” and in some cases even mere “inadvertent negligence”²⁰ There is one view that mere inadvertent negligence or negligence simpliciter does not qualify as a state of mind or mens rea, so long as it does not give rise to some subjective fault and the test for determining the care and caution required is that of a reasonable man.²¹ The House of Lords decision in the *Caldwell*^{21a} case it seems, changed the above position for a while. While construing the English Criminal Damage Act, 1971 on the legal meaning of “recklessness” in the criminal law, the House of Lords after reviewing a plethora of cases on the applicable tests, whether subjective or objective, introduced the concept of the ordinary reasonable man in determining whether or not a person is reckless. Lord Diplock²² expressed the view thus:

Nevertheless, to decide whether someone has been reckless, whether harmful consequences of a particular kind will result from his act, as distinguished from his actually, intending such harmful consequences to follow, does call for some consideration of how the mind of the ordinary prudent individual would have reacted to a similar situation. If there were nothing in the circumstances that ought to have drawn the attention of an ordinary prudent individual to the possibility of that kind of harmful consequence, the accused will not be described as reckless....

¹⁵ [1979] AC 617

¹⁶ Smith and Hogan, *Criminal Law* 7th ed., (London, Butterworths & Co. 1992) p.100. See also R. v. Chief Metropolitan Stipendiary Magistrate. Ex. P. Choudhury (1990) 3WLR 986, also ex. p Siadatan at P. 1006 where the court defined blasphemy under English law as inapplicable to Islam.

¹⁷ Elliot and Woods, *Casebook on Criminal Law*, (4th ed., London Sweet & Maxwell 1982) p. 128: of the 7,200 offences listed in Stone's Justice' Manual for 1975, over half did not need proof of mens rea.

¹⁸ Okonkwo & Naish, *Nigerian Criminal Law*, supra, 67.

¹⁹ The area between specific intent and mere inadvertent negligence lies a shade of gray which has from time to time characterised the mental element of crimes.

²⁰ Okonkwo & Naish, supra

²¹ *Caldwell* [1981] 1 All ER 961 H.L.

^{21a} *Caldwell*, supra

²² *Caldwell*, per Lord Diplock

The earlier case of *Briggs*,²³ and *Parker (Daryl)*²⁴ which restricted criminal negligence to advertent negligence or subjective recklessness were described by Lord Diplock as off the cuff' decisions,²⁵ and accordingly not to be relied upon. The case of *R v Lawrence*^{25a} was used by Lord Diplock to put paid then, to the abridgement of both civil and criminal law concepts on the question of criminal negligence or recklessness. The position in Nigeria depends largely on the construction of the statute creating the offence. Some opinion is that:

It is to be hoped that the *Caldwell* test will be ignored by our courts in favour of the body of authority once recognised in England and the view still existing in many other common law countries that recklessness involves conscious foresight of probable consequences combined with an objective judgement of the reasonableness of the risk taken²⁶

To the general presumption of mens rea has developed the concept of strict criminal responsibility by way of exception to the general rule.²⁷ This is often so in England, mainly where statute has reduced the common law into writing²⁸ and the question turns on the construction of the statutory provision.²⁹

In Nigeria as well as in other code countries, the above scenario presents itself modified a pattern.³⁰ Not only is the body of the criminal law here statutory,³¹ the presumption of mental element as a general rule, as well as the construction of provisions creating offences as to determine whether or not strict responsibility exists, are all products of statute.³² This, it seems, is the line between the ease with which the English courts have compartmentalised the concept of strict responsibility and the difficulty with which it has been approached in Nigeria.³³

Strict Responsibility as an Exception to the Doctrine Of Mens Rea

One view is that before the middle ages and the advent of classic Roman and Cannon law effects on the common law in England, offences were generally of strict liability.³⁴ The then maxim of ancient law was *qui inscianter peccat scienter emendat* (he who commits evil unknowingly must pay knowingly); and *volens aut volens* (intending to or not intending to), the offender must be handed over to the next of kin of the deceased for vengeance.³⁵ The concept of the deodand in old English law by which a criminal instrument was capable of punishment is some proof of the concept of strict liability in early English criminal law. The concept of strict liability evolved from being the rule in English criminal law to becoming an exception to the doctrine of mens rea or of no liability without fault due to the

²³ [1977] 1 WLR 600

²⁴ D.W. Elliot & C. Wells, *Casebook on Criminal Law* 4th ed, London, Sweet & Maxwell, p. 25

^{25a} [1933] AC 699 (P.C)

²⁶ Aguda, T A and Okagbue I, *Criminal Responsibility in Nigeria* (2nd ed.) p.66

²⁷ *R v Prince* (1875) 13 Cox CC 138; *Cundy v. Lecocq* (1884) 13 QBD 207

²⁸ *Reynolds v G.H. Austin* [1951] 2 KB 135 per Lord Devlin.

²⁹ *Sherras v. De Rutzen* (1995) 1 QB 918 per Wright J.

³⁰ The Common Law of Crime is excluded.

³¹ See Criminal Code Law and the Penal Code Law

³² Section 24 Criminal Code (supra)

³³ *Clegg v COP* supra

³⁴ F.B. Sayre supra

³⁵ Leges of Henry I. Quoted by Sayre above

combined influence of the Roman and cannon law principles on English legal scholars in the Middle Ages³⁶. From the time of Bracton³⁷ through Sir Edward Coke, the principle of subjective blameworthiness had permeated the English criminal law to the extent that it completely eliminated the concept of strict liability.³⁸ This was the dawn of the maxim “actus non fact reum nisi mensit rea.”³⁹ The same view has been expressed thus: “The idea that mens rea is in some sense a basic or indispensable ingredient of common law until statutes began to introduce exceptions to the doctrine of “no liability without fault.”⁴⁰ The common law exceptions of strict liability offences were originally restricted to public nuisance, criminal libel, and contempt of court⁴¹ These exceptions have now been extended to include a vast body of crimes that have made it impossible to ascertain any pattern or discern any consistent principle in its applications.

Strict responsibility in England Australia, and Canada has largely been restricted to mainly statutory offences that are in the nature of creating some form of public welfare protection for society’s safety. The cases on strict responsibility in Australia have largely been justified on the ground of lack of care and caution which amounts to negligence simpliciter. In the view of Colin Howard, an Australian scholar

... assuming that the offence falls into a class not requiring mens rea, and the question is asked what is the effect of excluding mens rea, the difference between English and Australian law appears. In England the answer so far has been strict responsibility; in the High Court the usual answer is, in effect, responsibility for negligence.⁴²

In Nigeria, the determination of what constitutes strict liability offences will largely be inferred from the words of the statute. The use of such words and epithets as intentionally, knowingly, wilfully, endeavour and the like have excluded the doctrine of mens rea.⁴³ It is doubtful however, whether the absence of such words ipso facto means strict responsibility.⁴⁴ The cases have not shown any consistency in this area. In the case of *Efana & Anor.*⁴⁵ in a trial under the Customs Ordinance in Calabar, the Divisional Court under a case stated held that the accused persons ought to have been convicted without the need to prove a guilty mind by the prosecution. In this case the court found on the facts that the Defendants acted innocently without any intention to defraud, as the original mistake was that of the bank which delivered all the documents to the 2nd accused person. Webber J. cited with approval the decisions of the English Courts in *Cundy v Lecocq*, *R. v Prince*,⁴⁶ and *R v Wheat & Stocks*.^{47a} The Learned Judge approached this issue of statutory construction thus:

³⁶ See Sayre, supra

³⁷ His writing, *De Legibus*, cited by Sayre....

³⁸ Kenny, *Outlines of Criminal Law* (2nd) p 39

³⁹ AT.H. Smith, *Reshaping the Criminal Law* (quoted by Elliot & Woods cited supra, p.44

⁴⁰ Lord Goddard’s dictum in *Brend v. Wood* (1946) cited in note 1 supra

⁴¹ Smith & Hogan cited in note, 16

⁴² C. Howard, “Strict Responsibility in the High Court of Australia”, 76 LQR 547 at 550.

⁴³ Okonkwo & Naish, cited in n 8 supra, p. 75

⁴⁴ See *Cundy v Lecocq* (1884) 13 QBD 207; cf *Sherras v De Rutzen* (1895) 1 Q.B. 918 per Day J

⁴⁵ (1927) 8 NLR 81

⁴⁶ Cited supra

^{47a} [1921] 2 KB 119

There are sections of the Ordinance in which the prohibited acts are excused if an absence of mens rea is proved..... But there are in section 224 (Customs Ordinance) certain prohibited acts without any qualifying terms. They seem to me to be absolute prohibitions, and no proof of the absence of mens rea, or even positive good faith, can in my opinion avail.⁴⁷

In contrast is the decision in *Arabs Transport Ltd v Police*⁴⁸ where the appellant company charged under Regulation 24(1)(g)(iv) of the Road Traffic Regulations, 1948 with causing or permitting its lorries to carry passengers without hackney permits, was discharged on the ground that mens rea was required and it was not proved. Though on the facts, the charges were laid under the wrong provisions, Hubbard J. was of the firm view that the verbs “permitting” or “causing” were by themselves sufficient to imply mens rea which being unproved in this case rendered the appellants not liable.

In the Australian case of *Proudman v Dayman*,⁴⁹ the High Court held that the word “permit” whether or not it implies some form of mens rea depended on the Defendant proving lack of such mens rea. This means that mens rea is not ipso dixit implied by the use of such verbs in the statute. The Australian approach though safe and probably has some similarity with the views of Day. J. in *Sherras v De Rutzen*⁵⁰ that the presence or absence of such words only shift the burden of proof, one of the learned Judges actually held in this case that the offence was one of strict liability, The disadvantages of the Australian approach will be considered in the course of this work.

The Common Law Position

Outside of the exceptions known to common law in which the presumption of mens rea will not be applicable, the general rule is that, strict responsibility offences are purely creations of statute.⁵¹ The re-emergence of strict responsibility offences or what has now become known as public welfare offences in England probably became obvious from the decisions in *R v Woodrow*,⁵² and *R v Stephens*.⁵³ In the former case Parke B. held the Defendant liable for possession of adulterated tobacco where the word “knowingly” or similar words are absent from the statute. The main ground however, was that the crime was created for the protection of the public welfare. The Court was of the view that the Defendant would still be liable even where he was not shown to be negligent, that is, where he exercised all reasonable care and caution.⁵⁴

The courts in England have continued in its efforts to find a juridical basis for the evolution of strict responsibility offences under statute law as well as the principles determining whether or not an offence requires mens rea. Historically

⁴⁷ Cited in n. 45 supra

⁴⁸ Per Webber J. at p. 86 (1952) 20 NLR 55

⁴⁹ (1941) 67 CLR 536

⁵⁰ (1895) 1 Q.B. 918

⁵¹ Smith and Hogan, supra.

⁵² (1846) 15 M.& W. 404.

⁵³ (1866) L.R.Q.B. 702.

⁵⁴ Contrast with Australian position on negligence simpliciter.

there was no definite standard or pattern to be discerned from the cases. In *R v Hibbert*,⁵⁵ the Defendant who was indicted for taking an under-aged girl out of the possession of her father against his will, even though he had reason to know her actual age, was acquitted on the ground that the state of mind of the defendant which is that “actual knowledge, or reasonable grounds to believe that she was in possession of her father,” must be proved to secure a conviction. This decision meant that mens rea needed to be proved in sexual offences under the Offences Against the Person Act of 1861.

The decision in *Prince*⁵⁶ contrasts sharply with that in *Hibbert*. Prince was charged with the same offence as Hibbert but the court after paying lip service to the doctrine of mens rea, convicted Prince notwithstanding that the girl in this case told him that she was above 18 years and notwithstanding his actual state of mind. These decisions initially showed the inconsistencies in the common law approach to the problem posed by strict responsibility offences.

The above cases were later to be followed by others which at a glance appeared to compound the problems and invariably reduced it to a question of chance’ whether or not an offence is one of strict responsibility. Glanville Williams gave expression to this difficulty thus:

....it is often an accident of draftsmanship whether a statute enacts a prohibition and provides an excuse or whether it incorporates the excuse as a negative condition of the prohibition.⁵⁷

The decisions in *Cundy v Lecocq*⁵⁸ and *Sherras v De Rutzen*⁵⁹ are equally quite difficult to reconcile in principle. In the former case, the Queens Bench Divisional while construing section 13 of the Liquor Licensing Act 1872, affirmed the conviction of a licensed victualler who sold alcohol to a drunken man without knowing that he was drunk. The latter case however, while construing the same Act under section 16 held that a man who sold liquor to a Policeman on duty when he did not know he was on duty was excused. This brought in the presumption of mens rea. A review of other English decisions in this century together with the works of some of their legal scholars, tend to advance some justification for strict responsibility offences. One view is that offences of strict liability are pertinent to protect the public welfare. This means that there exists a tendency for public welfare offences to punish without the need for mens rea or any mental element to be established. In *Bishop*,⁶⁰ defendant’s conviction was affirmed for receiving two lunatics into an unlicensed house though on the facts it was evident that he honestly and reasonably believed they were not lunatics.

According to Sayre, public welfare offences which are punishable without proof of mens rea are usually upon mere forbidden conduct irrespective of intent. In his view this is possible where the statute is of purely regulatory nature, and if the injury is of widespread and public character especially where guilty

⁵⁵ (1869) L.R.ICCR 184.

⁵⁶ Cited above in n. 27 above

⁵⁷ Glanville Williams, *Criminal Law General Part*, (2nd ed, London Stevens, 1961) p. 236.

⁵⁸ Cited supra n. 44

⁵⁹ Cited supra n. 44

⁶⁰ (1880) 5 Q.B.D. 259

knowledge will be so difficult to prove that convictions would be impossible to secure.⁶¹

In the case of *Reynolds v G H Austin & Sons Ltd*⁶² Devlin J. as he then was, gave judicial approval to the views of Dean Roscoe Pound in his book⁶³ thus:

Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals.⁶⁴

The learned Judge was ready to accept strict responsibility offences, only where the statute provides expressly for it. He expresses the view negatively that:

where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he might reasonably be expected to influence, then in the absence of clear and express words, such punishment is not intended.⁶⁵

The intensity of the above view becomes strengthened in the light of such decisions as *R v Bishop*, *Cundy v Lecocq*, *R v Prince* and other similar cases. In these cases, the facts available to the defendants could not have deterred them or subsequent offenders. The point at issue is whether the offence is in fact committed even where defendant had a means of avoiding it.

On the contrary however, *Woodrow*⁶⁶ was convicted for possession of adulterated tobacco though he had no knowledge or means of knowing that it was in point of fact adulterated. Equally, *Stephens*⁶⁷ the 80 years quarry owner was convicted when his workers without this knowledge obstructed a nearby river. In the same way in *Hobbs v Winchester Corporation*,⁶⁸ the English Court of Appeal held a butcher properly convicted under the Public Health Act 1875 for selling unwholesome meat though he could not have discovered it by exercising all reasonable care and caution expected of him.

It is in fact, clear that the strict responsibility cases mentioned above were punished not only where no form of mental element exists, but also irrespective of whether or not the defendant was negligent.

The second justification for strict responsibility offences is probably that it covers offences that are merely regulatory. Such offences known as police cases in England are usually light of punishment. The Privy Council on the contrary, in *Gammon (Hong Kong) Ltd v AG of Hong Kong*⁶⁹ said that the heavy fine did not affect strict responsibility offences: Finally, there exists in England a class of offences that are civil in character but sanctioned by statute. Such offences may be committed without the need to prove guilty mind. The position or trend in

⁶¹ Sayre, "Public Welfare Offences" (1933) 332 Colum L.R.55

⁶² (1951)2 K.B. 135

⁶³ See Elliot & Wood *Casebook on Criminal Law* (4th ed Sweet & Maxwell London) P. 133

⁶⁴ Per Devlin J. *Reynolds v G H Austin* (supra)

⁶⁵ *Ibid*

⁶⁶ (1846) 15 M& W 404

⁶⁷ (1866) LR 1QB 702

⁶⁸

⁶⁹ (1985) A.C.1

England now it seems has gone back to such attitudes found on *Sweet v Parsley*⁷⁰ and *R v Sheppard*⁷¹ where mens rea is almost always implied in an offence where the statute is silent. The offences in this category are also called quasi crimes. The case of *R v Stephen*⁷² is a good example. These offences do not carry the usual stigma of moral opprobrium.

The Nigerian Position

Strict responsibility offences without doubt exists in Nigeria. The only difficulty is that the principles governing it are not on all fours with the ones in England. In the first place, common law offences do not apply in Nigeria. Section 36(12) of the constitution of the Federal Republic of Nigeria 1999 provides inter alia:

Subject as otherwise provided by this Constitution a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; a written law refers to an Act of the National Assembly or law of a state, any subsidiary legislation or instrument under the provision of a law.

The Criminal Code Act⁷³ which is in force in the Southern States of Nigeria, has a complementary provision which states emphatically in section 4:

No person shall be liable to be tried or punished in any court in Nigeria for an offence except under the express provision of the Code or some other. Ordinance, or some law, or of some order in Council **or under the express provision of some statute....which is in force or forms part of the law of Nigeria....**

The combined effect of these provisions, it seems, is to eliminate the common law of crimes in Nigeria as well as every other form of customary criminal law.⁷⁴ The celebrated case on this issue is the case of *Aoko v Fagbemi*⁷⁵ where a conviction for adultery which was not an offence under the Criminal Code was quashed. In similar vein and to the same effect are the provisions of sections 2 and 3 of the Penal Code Law⁷⁶ in force in Northern Nigeria. It means therefore that criminal law in Nigeria is not only statutory but codified, albeit in principle.

The question which must be resolved in this regard concerning the doctrine of mens rea and the question of strict responsibility offences, is whether or not, in the light of the purely statutory nature of our laws, the English law concepts are applicable in Nigeria. One is able to state in principle that the common law presumption of mens rea and its exception are not applicable to Nigeria Criminal law.^{80a} The principles governing the physical and mental element of any crime in Nigeria are strictly statute based, and may be extracted upon a true construction of the words of the law creating the offence.

⁷⁰ [1970] AC 132

⁷¹ [1981] AC 394

⁷² Cited supra n.71

⁷³ Cap. 77 Laws of the Federation of Nigeria, 1990.

⁷⁴ A G Karibi-Whyte, *Criminal Policy: Traditional & Modern Trends*, (Lagos, 1988) pp. 25-68.

⁷⁵ [1961] ALL NLR 400

⁷⁶ Cap 89 Laws of Northern Nigerian, 1963

^{80a} Okonkwo & Naish, cited supra.

A clear picture of the position of strict liability offences in Nigeria would only appear after a proper consideration of the extent and scope of the provision of section 24 of the Criminal Code⁷⁷ and section 48 the Penal Code.⁷⁸ Section 24 Criminal Code provides:

Subject to the express provision 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.....

This section in fact goes on to declare as immaterial the intention to cause a particular result as well as the motive which induced the offender to commit an offence. Section 48 of the Penal Code states:

Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution.

The interpretation and construction of the principle of criminal responsibility in Nigeria today are essentially to be gleaned from the clear provision of the Codes or the statute creating the offence. Professor Gledhill once wrote: "The Indian, Sudan and Northern Nigerian Codes are not intended to be amending Acts, assuming a pre-existing body of laws. They are complete codes in relation to the matters they dealt with."⁷⁹

While Professor Okonkwo expresses the view that the provisions of the codes in Nigeria relating to the elements of a crime should be construed in isolation of English Law concepts and doctrines with the latter acting only as guide,⁸⁰ the Hon. A. G. Karibi-Whyte seems to suggest that the above views would only be acceptable where the Code provisions are clear and unambiguous.⁸¹ The Privy Council decision in the Ghanaian Case of *Wallace Johnson v The King*⁸² would seem to have laid to rest some of this uncertainty. While interpreting the Ghana Criminal Code, the Council held that though similarity existed between English cases and the principles enumerated in the code for the offence of sedition, the code and not the English and Scottish cases would remain the reference point. Bairamian J. in *Ogbuagu v Police*⁸³ made a similar pronouncement on the Criminal Code in Nigeria.

Criminal Code and Penal Code Offences

In respect of offences charged under the Criminal Code, it is submitted most humbly that section 2(4) of the Criminal Code Law⁸⁴ expressly provides that chapter 5 of the Criminal Code is applicable to all offences in southern Nigeria. It states inter alia:

The provision of Chapter II, IV and V of the Criminal Code shall apply in relation to any offence against any Order in Council,

⁷⁷ Supra n. 80

⁷⁸ Penal Code Law (No. 59 of 1959)

⁷⁹ Gledhill, *The Penal Codes of Northern Nigeria and the Sudan* (1963) p. 15.

⁸⁰ Okonkwo, cited earlier

⁸¹ A.G. Karibi- Whyte, *History & Sources*, p. 245

⁸² (1940) A.C.231

⁸³ (1953) 20 NLR 139

⁸⁴ Supra n. 80

Ordinance Law or Statute and to all persons charged with any such offence.

The consequence is that since all offences in Southern Nigeria and presumed to be code offences under the principle of “exhaustiveness” under this provision, it may seem that there are no strict responsibility offences in the Southern States. This is buttressed by the fact that if section 24 of the Criminal Code applied to all offences, then some form of mental element needs be proved to secure a conviction for any offence governed by the Criminal Code.

This scenario it seems has not been given the needed recognition it deserves going by the cases available for review on this question. *Clegg v COP*⁸⁵ suggests without more that mens rea is required merely because the offence in question is a felony. Our view however, is that a different reason could have been advanced for so holding. That is, that the said offence is covered by chapter V of the Criminal Code which requires a mental element for every offence governed by the Criminal Code subject only to the exception therein contained. The cases of *Efana*⁸⁶ and *Arabs Transport Ltd. v Police*⁸⁷ equally seem to have followed this pattern of determination whether or not mens rea is required without reference to the strict provisions of section 24 of the Criminal Code. It seems that the application of section 24 of the Criminal Code is subject to only one exception. That is, “the express provision of the Code relating to negligent acts and omissions.” Some writers have used this exception as an excuse for the view that the express words of the statute could not in fact create strict responsibility offences in Nigeria.⁸⁸ The West African Court of Appeal stated it thus:

In order to determine whether mens rea, that is to say a guilty mind or intention is an essential element of the offence charged, it is necessary to look at the object and terms of the law that creates the offence.⁸⁹

This attitude it is submitted, cannot be extracted from the provisions of the Code. There is no basis for an automatic importation of the English law principles of strict responsibility coupled with its complex of juridical and analytical denominators into the Nigerian criminal law when in fact, the Code is very clear on what should be done and that is to apply the Code provisions by reference to its own definitions.

The position under the Queensland Code in which the Australian High Court has consistently refused to recognise strict responsibility offences is more suitable to Nigeria. In their cases, offences that would otherwise pass for “strict responsibility” offences are rather justified on the basis of negligence or absence of adequate care and caution.⁹⁰ A Nigeria scholar once expressed the current trend thus: “It follows therefore that a criminal status should never be interpreted

⁸⁵ Supra note

⁸⁶ (1972) 8 NLR 81

⁸⁷ Supra n.49

⁸⁸ Okonwo, Supra

⁸⁹ *Amofia v R* (1952) 14 W.ACA 238 per Foster Sutton P

⁹⁰ C. Howard Supra note....

as not requiring proof of some fault”⁹¹ Such public welfare offence of strict responsibility under our law, that is road traffic offences, food and drugs offences, public nuisance cases and contempt of court cases are justifiable on the basis of negligent acts or omission which are recognised as exceptions under section 24 of the Criminal Code, and to some extent by section 48 of the Penal Code.

In *Widgee Shire Co v Bonny*^{95a} Sir Samuel Griffith stated: “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.”

The word “will” is clearly indicative of some blameworthiness that may be subjective or objective.

It is however arguable that where the statute expressly creates offence of strict responsibility, the provision of section 24 is therefore by implication of the Interpretation Act, excluded. A subsequent Act of Parliament necessarily amends an older one where they deal on the same subject matter.^{95b}

The principles highlighted above are equally applicable to the Penal Code offences. However, it must be pointed out that strict responsibility offences in Nigeria are more in offences outside the two codes.

Offences Outside The Codes

It must be observed that the provision of some specific penal statutes in Nigeria within the last two decades have tended to create offences of strict responsibility. Section 3(2) of the Counterfeit and Fake Drugs (Miscellaneous Provisions) Act⁹² and section 16(4) of the National Drug Law Enforcement Agency Act⁹³ contain offences, which appear to attach strict responsibility to company officers for corporate criminal acts. Similar provisions are also to be found in other statutes,⁹⁴ in which merely being a company director or officer attaches a crime committed by a company albeit vicariously to such an officer not only without any act or omission but equally without any form of mental element. These are some forms of strict responsibility offences in Nigeria. The view has been expressed that this format of offences is not supportable by legal theory⁹⁵ All it takes to commit the offences, is having the requisite status without more^{99a} Francis Bowes Sayre wrote thus concerning an American decision:

Illustration of this dangerous tendency are all too frequent. In *State v Lidbery*^{99b} a Washington Court convicted a bank director for the felony of borrowing \$13,000.00 from his own bank; ... the court on the authorities held that no guilty intent need be proved.

The Court actually rejected evidence of honest and reasonable belief that the money was from another bank”. A good illustration in Nigeria is the definition

⁹¹ A. Oyajobi, “New Dimensions to Criminal Responsibility in Nigeria,” (1991) 2 *Justice* 80 at p 82. See also Colin Howard “Protection of Principles under a Criminal Code” (1962) 25 *Modern Law Review* 190.

^{95a} (1907) C.L.R. 977

^{95b} Interpretation Act (No. 1 of 1964)

⁹² Cap. 73, Law of the Federation 1990

⁹³ Cap. 253 Law of the Federation 1990

⁹⁴ Federal Environmental Protection Agency Act, Cap 131, Law of the Federation, 1990, Section 20 (4)

⁹⁵ See note 95 supra. Sayre B. p. 80 calls this a danger.

^{99a} Sayre supra p.80

^{99b} 125 Wash 51

^{99c} S.29 of the Decree, of 1994

and liability of directors under the Failed Bank Decree^{96c} and the Banks and Other Financial Institutions Decree. The Tobacco Smoking (Control) Decree⁹⁶ contain some strict responsibility offences going by the definition of offences therein contained. However, this has not been subjected to judicial interpretation permitting a clear analysis of the elements involved.

Conclusion

The offences reviewed above, would, it seems fall into some of the common law categorisation of strict responsibility offences. The common law exceptions to the doctrine of mens rea aside, one would notice that most offences of strict responsibility in Nigeria are actually outside the Codes. In a similar vein will be found the fact that the provisions of the relevant statute as it were, will determine whether or not the offence is one of strict responsibility.

It is observed that while the Criminal Code Act in section 2(4) actually makes the provision of Chapter V (inclusive of section 24) applicable to every offence in Southern Nigeria, there is it seems, no equivalent provision in the penal Code Law. Consequently, while some form of subjective blameworthiness of mental element is a sine qua non in Criminal Code offences, the same cannot be said for Penal Code offences. This infers arguably, that Penal Code offences in Northern Nigeria do not carry the general presumption of any form of mental fault element. The wordings of each section would, it seems, determine the nature or the offence created.

We would tend to subscribe to the suggestion by Aguda and Okagbue⁹⁷ that in the future the Nigerian legislature should specify whether or not an offence is one of strict responsibility. Another observation is that the distinction between strict responsibility offences and mens rea offences suggested by several legal writers⁹⁸ easily breaks down upon a review of the Nigerian situation. One is unable to find any dichotomy based on morality (*mala prohibita and mala in se*), the gravity of the offence, and the quasi criminal nature as an indication of the type of criminal responsibility attaching to them.

Finally, the concept of strict responsibility has not been able to eliminate other common law and general statutory defences of infancy (*doli incapax*),⁹⁹ infirmity of mind and body (insanity), and mistake of fact. However, these defences must be proved strictly in order to avoid liability from strict responsibility offences. So long as Nigeria has recognised the principle of strict responsibility in offences, our legislature should make effort in applying some of the general principle available from other jurisdictions in minimising its harsh effects in Nigeria and thereby minimize its uncertainty.

⁹⁶ No. 20 of 1990

⁹⁷ Cited supra

⁹⁸ Sayre, "Public Welfare Offences," supra p.70

⁹⁹ State v. Yeargan 117 N.C. 706.