An Overview Of Accessorial Liability In Nigerian Criminal Jurisprudence

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ABSTRACT

Accessorial Liability is a crime in all known legal systems. In Nigeria, an accomplice is regarded as an accessory to whatever type of crime, be it a felony, a misdemeanour or a simple offence, committed by the principal. There is also the principal offender who does the act or makes the omission, which constitutes the actual offence. Sometimes, the principal offender commits the offence, but following from his cowardly disposition, he runs away as a fugitive to avoid arrest and punishment and another person receives and hides him. That person who provides an escape route for the principal offender is known as an accessory after the fact. It is generally this set of accessories, which provide the watershed for this paper.

Keywords: Accessory, Liability, Principal, Fact.

1 INTRODUCTION

Accessorial Liability is an integral part of the general criminal responsibility and criminal responsibility means, liability to punishment as for an offence.[1] When someone is said to be criminally responsible, it means that such a person is liable to punishment as for an offence.[2] Liability also means the quality or state of being legally obligated or accountable, legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.[3] Similarly, to say that someone is legally responsible for something often means only that under legal rules, he is liable to be made either to suffer or to pay compensation in certain eventualities.[4]

Salmond is of the view that liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. This *vinculum juris* [5]is not one of mere duty or obligation, it pertains not to the sphere of *ought* but that of *must*.[6]

[1] Criminal Code Act, Cap C. 33, *Laws of the Federation of Nigeria* (LFN) 2004, s. 1. See also Criminal Code Law, Cap 38, *Laws of Akwa Ibom State* 2000, s. I . See further the Penal Code Law 1960, s. 3 (1).
[2] *Ibid* .
[3] B.A. Garner, *Blacks' Law Dictionary*, 8th ed. (USA: Thomsom West 1999), p. 932.
[4] *Ibid* at p. 1338 .
[5] This is a Latin expression which means'a bond of the law'. In Roman Law, it means ' the tie that legally binds one person to another; legal bond; obligation'. B. A. Garner, *op cit* at p. 1705.
[6] John Salmond, *Jurisprudence*, (Glanville Williams ed.; 10th ed. 1947) , in *Blacks Law Dictionary* as contained in note 3 above at p. 932.

All legal systems have to some extent, degree or other incorporated the simple moral idea that no one should be convicted of a crime unless some measure of fault can be attributed to him.[7] It is this measure of fault, which underscores criminal liability or responsibility. Criminal liability generally rests upon proof of two things, that is to say, *actus reus* and *mens rea*. *Actus Reus* literally means 'guilty act' but it is probably more sensible to think of *actus reus* as a term which refers to the external elements of an offence. These are the elements of the offence that have to be established by the prosecution, other than those that relate to the defendant's state of mind.[8] *Mens rea*, otherwise known as fault element, refers to the defendant's state of mind as exemplified by intention, knowledge, recklessness, negligence, etc. This is relevant in some cases where the prosecution must establish that a particular state of mind existed at the time of commission of the crime. The proof of the *actus reus* and the *mens rea* of an offence is epitomized or embodied in the Latin maxim *actus non facit reum, nisi mens sit re*, meaning that "an act does not make a person legally guilty unless the mind is legally blameworthy."[9]

The imposition of criminal liability is based on the assumption that a defendant's acts or omissions at the time of the alleged offence were voluntary, in the sense that, he was able to exercise some control over his actions or failure to act.[10] Thus, not only does the terms *actus reus* and *mens rea* serve the important purpose of stressing the two basic requirements of criminal liability, but they also suggest a useful framework for the analysis of the definition of specific offences.[11] The *actus reus* and *mens rea* are derived from the way and manner such an offence is couched.

The Nigerian Criminal Code[12] deals comprehensively with the question of criminal responsibility. For example, the Criminal Code provides that "subject to the express provisions of the 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"[13]. This section deals with the problem associated with vicarious responsibility, and provides a general presumption against it, because the act of someone else is usually, independent of the exercise of one's own will. It is important to note that section 24 of the Criminal Code does not apply to negligent acts and omissions. It does not also apply in cases of insanity, immaturity and intoxication.

The sublime view is that the *mens rea* doctrine, with a common law origin, has made an inroad into Nigerian criminal law but section 24 of the Criminal Code takes care of the principle of criminal responsibility. Added to this is the fact that, section 24 of the Criminal Code is wider in scope and applicability than the *mens rea* doctrine. The scope of this paper is to examine critically the law on accessorial liability as presently obtains and the offer useful suggestions for improving on its profile and vitality on the criminal justice administration in Nigeria.

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[7] C. O. Okonkwo, *Criminal Law in Nigeria*, (Ibadan: Spectrum Law Publishing, 1990), p. 68

[8] Michael Molan, *Sourcebook on Criminal Law,* (London: Cavendish Publishing Ltal, 2001), p. 39.

[9] *Younghusband v. Luftig* (1949) 2 KB 354 at 370 .

[10] See note 4 above.

[11] R. Card, *Criminal Law,* (London: Butterworths, 1995), p. 51.

[12] See Chapter V of the Criminal Code Act.

[13] *Ibid*, s. 24. Please note that the principle of criminal responsibility is also known as the principle of 'no liability without fault'.

Apart from the general criminal responsibility, which has been examined above, there are also specific liabilities such as strict liability, vicarious liability and accessorial liability.

2. STRICT LIABILITY

In strict liability, the accused can be held liable notwithstanding the fact that he did not have the required or necessary *mens rea.* In this kind of liability, the law dispenses with the proof of *mens rea*. Offences, which create this kind of liability, are known as offences of strict liability. To say that these offences do not require proof of any *mens rea,* it is argued, may however be too sweeping, for, there are offences where no fault element at all arises and it is perhaps better to classify these as offences of absolute liability.[14] Strict liability was amply demonstrated in the Privy Council case of *Lim Chin Aik v. R* [15] where the Council relied extensively and accepted as correct the *dictum* in *Sherra v. de Rutzen* to the effect that: There is a presumption that *mens rea,* or evil intention or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it creates, and both must be considered.

It thus means that if the words of the statute or its object dispenses with proof of *mens rea,* liability is considered strict or absolute. But when dealing with a statutory offence that is silent as to *mens rea* , the task before the court lies in determining whether or not the enacting authority actually intended the offence to operate without proof of fault. The exercise is, largely, one of statutory interpretation.[16] Strict liability crimes are also known as crime of liability without fault.

2.1 VICARIOUS LIABILITY

The next discussion centres on vicarious liability. Vicarious liability is liability for the acts of another.[17] In this law, a person can be guilty of complicity for the offence under which he has authorised or, if he has a right of control over the perpetrator, which he has deliberately, failed to prevent.[18] However, it is a general rule of the criminal law that one person is not responsible for the acts of another, which he has not authorised and of which he was ignorant, even if that other person is his employee acting in the course of his employment so that civil vicarious liability might arise.[19]

Vicarious liability can arise only if the employee or delegate, etc, was acting within the scope of his employment or authority. Doing an authorized activity in an unauthorised way falls within such a scope, but a wholly unauthorised activity does

[14] M. Molan, *op cit,* at p. 177; See also the case of *R v. Efana* (1927) 8 NLR 81, and the case of *Police v. Adamu Yahaya* (1942) 16 NLR 98, where strict liability was applied to forfeiture Under the Custom Act .
[15] (1963) AC 160.
[16] See note 8.
[17] Williams , *Mens Rea and Vicarious Responsibility* (1956) 9 CLP 57 ; see also Smith & Hogan, *Criminal Law,* 10th ed. (London: Butterworths , 2002), p. 192.
[18] *R. v Stephens* (1866) LR 1 QB 702 at 710.
[19] See R. Card, note 10 *at* p. 570, see also the case of *Huggins* (1730) 1 Barn KB 358 at 396.

not. In *Copper v. Moore* No 2[20] , an employer was held vicariously liable for a sale effected by a sales assistant in an unauthorised manner, but in *Adams v. Camfoni*[21] , the accused licensee was acquitted of supplying intoxicants outside permitted hours because the supply had been effected by a messenger boy who had no authority to sell anything at all.[22]

Vicarious liability may of course be imposed by statute. A statute may clearly create vicarious liability by excluding the operation of section 24. Under the Code, a man will be liable for the unlawful acts of another, which he has willed,[23] and even for some which he has not willed.[24] In the Penal Code Law, [25] provision is made for acts done by several persons in furtherance of common intention. It says that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if he did it alone.[26]

The exception is that a person cannot be vicariously liable for aiding or abetting[27] or for attempting to commit [28] an offence. However, it is suitable to opine that criminal liability is a venerated concept in Anglo – Nigerian criminal jurisprudence.

3. ACCESSORIES

Criminal liability arises either as a principal or an accessory. A principal is that party or person who actually does the act or makes the omission. On the other hand, an accessory literally means ' a person or thing that aids subordinately, an adjunct, appurtenance, accompaniment'[29]. When this literal meaning is titivated against the commission of an offence, it means that an accessory is that person or adjunct who aids the commission of an offence and therefore an integral part of that offence. An accessory is a person who, even if not prevent, is considered, either before or after, in the perpetration of a felony. An accessory aid the principal's design, or assists subordinately the chief agent, as in the commission of a crime.

An accessory must knowingly promote or contribute to the crime. In other words, she or he must aid or encourage the offence deliberately, not accidentally. The accessory may withdraw from the crime by denouncing the plans, refusing to assist with the crime, contacting the police, or trying to stop the crime from occurring. In law, there are two types of accessories, that is to say, accessory before the fact and accessory after the fact. This paper shall discuss them *seriatim.*

[20] (1898) 2 QB 306*; Allen v Whitehead* (1930) 1 KB 211.
[21] (1929) 1 KB 95, also *Barner v. Levinson* (1951) 1 KB 342.
[22] See R. Card, note 19 at p. 573.
[23] Criminal Code Act , s. 7 .
[24] *Ibid,* ss.8 & 9.
[25] Which came into effect on 30th September 1960.
[26] Penal Code Law, s. 79.
[27] *Ferguson v. Weaving* (1951) 1 KB 814.
[28] *Gardner v. Akeroyd* (1952) 2 QB 743.
[29] A. W. Read *The New International Webster's Comprehensive Dictionary of the English Language,* Encyclopedic ed. (Florida: Trident Press International Corp, 2004), p. 19.

3.1 ACCESSORY BEFORE THE FACT

This is the one who instigates, aids, or encourages another to commit an offence or felony, but is not present at its perpetration. According to a juristic view, an accessory is one who assists or encourages another to commit a crime but who is not present when the offence is actually committed. Most jurisdictions (including Nigeria) have abolished this category of accessory and instead treat such an offender as an accomplice. Sometimes, accessory before the fact is shortened as accessory before.[30]

For Ceil Turner, an accessory before the fact is a person who procures or advises one or more of the principals to commit the felony. This definition requires from him instigation so active that a person who is merely shown to have acted as the stakeholder for a prize- fight, which ended fatally, would not be punishable as an accessory. The fact that a crime has been committed in a manner different from the mode, which the accessory had advised, will not excuse him from liability for it. Accordingly, if A hires B to poison C, but B instead kills C by shooting him, A is none the less liable as accessory before the fact to C's murder. But a man who has counseled a crime does not become liable as accessory, if instead for any form of crime suggested; an entirely different offence is committed.[31]

An accessory before the fact is someone behind the scenes who orders a crime or helps another person to commit. Many jurisdictions now refer to accessories before the fact as parties to the crime or even accomplices. This substitution of terms can be confusing because accessories are fundamentally different from accomplices strictly speaking, whereas an accomplice may be person at the *locus criminis*, an accessory may not. Also, an accomplice generally is considered guilty of the crime as the perpetrator, whereas an accessory has traditionally received a lighter punishment.

The conception of accessories before the fact is one of great antiquity and it cannot be properly understood without consideration of its history. In his sublime view, Mathew Hale said that an accessory before is he, that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. Therefore, in deciding whether or not an offence has been committed, it is preferable to consider the phrase 'aids, abets, counsels or procures' as a whole. The minimum requirement, which is necessary to constitute a person an accessory before the fact, is the conduct of an alleged accessory should indicate (a) that he knew the particular deed was contemplated and (b) that he approved of or assented to it, and (C) that his attitude in respect of it in fact encouraged the principal offender to perform.[32]

Similarly, in *R. v. Bainbridge*, [33] it was made clear that if the principal does not totally and substantially vary the advice or the help and does not willfully and knowingly commit a different form of felony altogether, the man who has advised, aided or abetted, will be guilty as an accessory before the fact.

A classical example of an accessory before the fact is an accomplice. Liability, which arises against an accomplice, is known as accomplice liability. This is criminal responsibility of one who acts with another before, during or in some

[30] See note 3 above at p.9.
[31] J. W. C. Turner, *Kenny's Outlines of Criminal Law*, 16th ed. (London: Sweet & Maxwell 1952), p. 88.
[32] J. W. C. *Russell on Crime*, 2nd ed. (London: Sweet & Maxwell, 1986), p. 151.
[33] (1960) 1. QB 129 at 134.

jurisdictions, after the crime. In all jurisdictions including Nigeria, an accomplice is a person who aids, abets, counsels or procures the commission of an offence. He is liable to be tried and punished for that offence as a principal.[34] In *Johnson v. Youden & Ors*[35], the court held that an accomplice couldn't be convicted without some evidence that he knew of the facts that constituted the offence. The difficulty, however, has been in determining just how precise the accomplice's *mes rea* must be. Where there is evidence that he was certain as to what the principal offender intended to do, liability is easy to establish. The court has developed a slightly different approach to *mens rea* where the liability of accomplices is concerned. Thus, instead of a concept such as foresight, the court prefers expression such as 'contemplation'.

Where an accused is alleged to have been an accomplice to the principal offence, the charge may allege that he aided, abetted, counseled or procured it, and he will be convicted if he is proved to have participated in one or more of these four ways.[36] Smith and Hogan are of the lofty view that, while counselling implies consensus, procuring and aiding do not[37]. The leaned authors went further to opine that the law probably is that (1) 'procuring' implies causation but not consensus; (2) 'abetting' and 'counselling' imply consensus; but not causation; and (3) 'aiding' requires actual assistance but neither consensus nor causation[38].

Contributing further, Richard Card states that although 'aiding' and 'abetting' have sometimes been regarded as synonymous,[39] there is a difference between them. The learned author says that while 'aid' is used to describe the activity of a person who helps, supports or assists the perpetrator to commit the principal offence, 'abet' is used to describe the activity of a person who incites, instigates or encourages the perpetrator to commit it, whether or not he is present at the time of commission.[40]

In *AG's Ref (*No. 1 of 1975),[41] the court held that 'to procure means to produce an endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening . . . You cannot produce an offence unless there is a causal link between what you do and the commission of the offence'.[42]

A person procures the commission of an offence if he causes it to be committed or brings its commission about.[43] More fully, a person procures the commission of an offence where he sets out to see that it is committed and takes appropriate steps to produce its commission. The law is that whenever aiding, abetting and counselling almost inevitably involve a shared intention between the accomplice and the perpetrator that the principal offence should be committed, this is less likely to be so in the case of procuring.[44] It can be seen that there are three ways of becoming an accomplice, by assisting in the commission of the principal offence, by encouraging its commission or by procuring its commission.[45]

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[34] Richard Card, *Criminal Law* , 13th ed. (London: Butterworths, 1995), p. 551.
[35] (1950) 1 KB 544.
[36] *Ferguson v. Akeroyd* (*supra*).
[37] Smith & Hogan, *Criminal Law*, 4th ed. (Britain: Butterworths, 1978) p. 116.
[38] *Ibid.*
[39] *DPP for Northern Ireland v. Lynch* (1975) AC 653.
[40] *Bentley v. Mullen* (1986)RTR 7at 10 per May L.J.
[41] (1975) QB 773 at 779 –80.
[42] *Ibid*,
[43] *R. v. Beck* (1985) QB 808.
[44] See note 40 above.
[45] Richard Card, *op.cit*. p. 553.

To ' counsel' means to incite, solicit, instruct or authorise. It could also mean to advice, encourage or the like, does not add anything strictly but is used to describe encouragement before the commission of the principal offence. This foregoing piece beautifully encapsulates accessorial liability arising before the fact.

In Nigeria, the Criminal Code creates liability for principal offender such as every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.[46] Here, the act of assistance is done before the act of committing the crime. This, therefore, roughly corresponds with the English law of accessory before the fact. A common type of assistance in the area of the law will be the loan of an instrument, for example, a rope, a machete, a car, to an intending criminal for the commission of an offence.[47]

Similarly, the Code creates another set of accessory before the fact when it states thus: 'Any person who counsels or procures any other person to commit the offence'.[48] This appears to be similar to section 7 (b) of the Criminal Code but the chasm between them is that under section 7 (d), words alone suffice for liability, which is not the case with s. 7 (b). The words of counselling must involve some positive act of encouragement to those who commit the offence, thus, tacit acquiescence or words amounting to a bare permission are not enough.[49]

Clearly, under section 7 (d) of the Criminal Code, a person may be charged either with himself committing the offence or counselling or procuring its commission. A conviction for counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction for committing the offence. The third limb or prong of section 7 provides thus: Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.[50]

Still under the provision of the Code, the law is that when a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counseled or a different one, or whether the offence is committed in the way counseled or in a different way, provided in either case, that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.[51] In this situation, the person who counseled is clearly an accomplice and fits completely and totally into the shoes of an accessory before the fact.

The law punishes an accessory before the fact because ordinarily, he is an integral part of the crime. The law cannot punish his partner – in crime and allows him to escape liability. This would be unjust. It would be selective and it cannot auger well for any society founded on the rule of law.

[46] Criminal Code Act, s. 7 (b).
[47] C. O. Okonkwo, *op.cit*, p. 159.
[48] Criminal Code Act s.7 (d) .
[49] *Idika v. R* (1959) 4 FSC. 106.
[50] See generally Criminal Code, s.7.
[51] *Ibid*, s.9.

3.2 ACCESSORY BEFORE THE FACT

At common law, an accessory after the fact is one who, knowing that another has committed a felony, receives, relieves, comforts or assists the felon, or in any manner aids him to escape arrest or punishment. To be guilty as an accessory after the fact, one must have known that a completed felony was committed, and that the person aided was a party. The mere presence of the accused at the scene of the crime will not preclude a conviction as an accessory after the fact, where the evidence shows that the accused became involved in the crime after its commission[52]

Better explained, an accessory after the fact is someone who knows that a crime has occurred but nonetheless helps to conceal it. This accessory probably may not have been at the scene of the crime, but knows that a crime has been committed and helps the offender to try to escape arrest or punishment. In some jurisdictions, this action is often termed obstructing justice or harbouring a fugitive.[53]

Most penal statutes establish the following four requirements to wit: (1) someone must have committed a felony, and it must have been completed before the accessory's act; (2) the accessory must not be guilty as a principal; (3) the accessory must personally help the principal tries to avoid the consequences of the felony; and (4) the accessory's assistance must be rendered with guilty knowledge.[54]

In Nigeria, accessories after the fact are provided for in the Code. It provides that a person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.[55] The Criminal Code constitutes punishment for accessories after the fact to felonies to the effect that any person who becomes an accessory after the fact to the felony is guilty of a felony, and is liable, if no other punishment is provided, to imprisonment for two years. [56] It also provides that any person who becomes an accessory after the fact to a misdemeanour is guilty of a misdemeanour; and is liable to a punishment equal to one-half of the greatest punishment to which the principal offender is liable on conviction.[57] The Code provides further that any person who becomes an accessory after the fact to a simple offence is guilty of a simple offence, and is liable to a punishment equal to one –half of the greatest punishment to which the principal offender is liable on conviction.[58]

From the above, one salient issue becomes apparent and that is, accessories after the fact to any offence, whether a felony, a misdemeanour or a simple offence, is punishable in Nigeria. But the worry of this present writer is why punishments for accessories after the fact are provided for, in the last three sections of the Code. The question is why did the draftsman not provide for punishments for accessories after the fact next following section 10 of the Criminal Code which provides for the actual or main offences in order to provide for enduring sequence and logicality?. A further question is, is the punishment provisions in the last three sections of the Code an after thought?; or does it signify the importance or the seriousness of the offence of

[52] Am Jur, *Criminal Law*, 2nd ed. (1998) pp. 275 –276.
[53] B. A. Garner, *op.cit* at p. 15.
[54] *Ibid.*
[55] Criminal Code, s. 10.
[56] *Ibid* , s. 519.
[57] *Ibid* , s. 520.
[58] *Ibid* , s. 521.

accessories after the fact?. These are pertinent questions, which this paper would have wished the draftsman or the enacting authority to answer. Again, these are questions, which should concern and perturb all stakeholders in the criminal justice administration in any conceivable future amendment of the Criminal Code. But one thing is clear and that is, there is the offence of accessories after the fact in the Code and punishments are therein prescribed.

Another worry created by section 10 of the Criminal Code is the dichotomy between a wife and husband of a Christian marriage and those of a customary marriage or marriage under native law and custom. The said section provides that "a wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; nor by receiving or assisting, in her husband's presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does the husband become accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment."[59]

The Criminal Code is product of reception or legal transplant having been introduced from the Diaspora to the Protectorate of Northern Nigeria by Lord Luggard in 1904. At the amalgamation of the Colony and Protectorate of Southern Nigeria with the Protectorate of Northern Nigeria in 1914, the said Code was made applicable generally in Nigeria. Being a product from the Diaspora, the Code has some provisions or contents which are contrary to our world view, and this seems to explain the reason why it has introduced dichotomy into non-liability of a husband or wife of a Christian marriage as an accessory after the fact, as against couples of marriage under native law and custom.

The question now is, what is wrong with marriage under native law and custom? Is it because under such a marriage, a husband is allowed to marry more than one wife? Can one really say and rightly too that there is any repugnance associated with customary law marriage? The summary of the answer to these questions is that, it appears that the draftsman purposely discriminated against customary law marriage in lifting criminal liability which should be apportioned against couples of Christian marriage as accessory after the fact. This paper hazards a guess that the said section 10, proviso 2, was intended by the draftsman (with his colonial mentality) to encourage the natives to embrace Christianity which was seen or regarded by them (natives) as the opium of the people[60] and a bourgeois anachronism to the exorcised. Karl Marx, for example, stated that religion is rooted in social oppression. He stated further that religious distress is at the same time the expression of real distress and the protest against real distress. Religion is the sigh of the oppressed creature, the heart of a heartless world, just as it is the spirit of an unspiritual situation. It is the opium of the people.[61]

It is pitiable that the many common law principles which originated from the customs and traditions of the English people during the Norman Conquest 1066, are still being regarded as representing the true position of the law whereas, the Code, in

[59] Criminal Code Act , s. 10, 2nd limb.
[60] Robert Nisbet, *The Social Philosophers*, Concise Edition (New York: Washington Square Press, 1983), p. 131.
[61] Karl Marx, *Toward the Critique of Hegel's Philosophy of Right*, p. 131.

the second limb of section 10, with its English origin, has rubbished the cultural norms and values of the Nigerian society.

The provision of bigamy[62] in the Code was designed to checkmate the incidence of customary law marriage and thus discourage or prevent the marriage of more than one wife by a man. But when one considers the fact that the provision is so innocuous and bland, as that offence is not frequently prosecuted in courts in Nigeria, one sees the futility of the effort by the draftsman to discriminate against customary marriage, which opens the corridor for a man to marry more than one wife.

The burden of proof is accessorial liability, like the general criminal liability, is for the prosecution to prove its case beyond reasonable doubt.[63] The law is that he who alleges must prove. The burden of proof is a party's duty to prove a disputed assertion or charge to the satisfaction of the court. Proof beyond a reasonable doubt means that every ingredient of an offence must be established to that standard of proof so as to have no reasonable doubt of the guilt of the accused.

In *Woolmington v. DPP*[64], Lord Sankey LC held that throughout the web of the English criminal law, one golden thread is always to be seen and that is, it is the duty of the prosecution to prove the prisoner's guilt. The view of this paper is that the principle, though of colonial antiquity, is still applicable in Nigeria to this day.

4. GUIDING PRINCIPLES IN ACCESSORIAL LIABILITY

The law is that if there is no *actus reus* on the part of the principal offender, the aider abettor, counselor or procurer cannot be convicted. In *Thornton v Mitchell*[65], the court held that in order to convict, it would be necessary to show that the respondent was aiding the principal, but a person cannot aid another in doing something which that other has not done[66]. Similarly, in *R v Loukes*[67], the English Court of Appeal also held that a man cannot be convicted of procuring an offence where the *actus reus* is not established. This means that the accused, for the purpose of accessorial liability, cannot procure an offence, the *actus reus* of which has not been committed.

Where the principal offender lacks *mens rea* or has less *mens rea* than the accomplice, the law is that the accomplice would be convicted. This was the position in the case of *R v. Cogan and Leak*[68], where the court quoting Chapman J in the earlier ease of *R. v Humphreys*,[69] held that it would be anomalous if a person who admitted to a substantial part in the perpetration of a misdemeanour as aider and abettor could not be convicted on his own admission merely because the person alleged to have been aided and abetted was not or could not be convicted. The court held further that in the

[62] Criminal Code Act, s. 370.
[63] Evidence Act, Cap, E14 *Laws of the Federation of Nigeria* (LFN) 2004, s. 138 (1). See also Constitution of the Federal Republic of Nigeria, Cap C. 23 LFN 2004, s. 36 (5); see further the cases of *Amala v. State* (2004)18 NSCQR 834 and *Aiguobarueghian v. State* (2004), 17 NSCQR 499.
[64] (1935) AC 462.
[65] (1940) 1 All ER 339.
[66] *Morris v. Tolman* (1923) 1 KB 166.
[67] (1996) 1 Cr App R 444.
[68] (1976) 1 QB 217.
[69] (1965) 3 All Er 689 at 692.

peculiar circumstances of the case, it would be even more than anomalous as well as an affront to justice and to the common sense of ordinary folk.

The principal offender may have a defence not available to the accomplice. In *R v. Bourne*[70], the court held that the appellant was properly indicted for being a principal in the second degree to the commission of the crime of buggery. The complainant being the appellant's wife raised the defence of duress against her husband and the court went further to hold that the appellant caused his wife to have sexual connection with a dog and so was guilty, whether he was regarded as an aider, abettor or an accessory, as a principal in the second degree. Also, in *R v. Howe & ors*[71], it was held that where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not result in a compulsory reduction for the other participant.

A party who has a change of mind and wishes to withdraw from a joint enterprise must communicate to the other parties his intention to withdraw from the enterprise and must do so in sufficient time before the commission of the offence. In *R v. Rook*[72], the court quoted with approval the dictum of Dunn LJ in *R v. Whitefield*[73] thus: "if a person has counseled another to commit a crime, he may escape liability by withdrawal before the crime was committed , but it is not sufficient that he should merely repent or change his mind. If his participation is confined to advice or encouragement, he must at least communicate his change of mind to the other, and the communication must be such that serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it, he does so without the aid and assistance of those who withdraw". [74] In *R v. Barker*[75], it was held that the words ' I' m not doing it' and the turning around and moving a few feet away, were far from unequivocal notice that the appellant was wholly disassociating himself from the entire enterprise. The words were not an unequivocal indication that he did not intend to take any further part in any further assault on the deceased.

The foregoing guiding principles are intended to streamline the law relating to accessorial liability and to avoid the much confusion, which would have arisen in the course of the prosecution and adjudication on the crime.

5. PRESCRIPTIONS

More effort should be made in order to strengthen the law on accessorial liability. As already canvassed, in the amendment of the Criminal Code, punishment provisions for various categories of accessory after fact currently contained in sections 519, 520 and 521 of the Criminal Code should be brought immediately after section 10 which creates the offence of accessories after the fact. The amendment should also be focused on removing the dichotomy contained in section 10, proviso 2 between Christian marriage and marriage based on customary law.

[70] (1939) 1 KB 687.
[71] (1987) 1 ac 417.
[72] (1993) 1 WLR 1005.
[73] (1983) 79 Cr. App R 36 at 39 – 40.
[74] *Ibid.*
[75] (1994) Crim. LR 444.

Furthermore, the amendment should define phrases such as 'aid', 'abet', 'counsel', 'assist' and "procure" in the interpretation section of the Code, as against the current situation in which recourse is usually hard to judicial authorities for their definitions. Also, the said amendment should affect section 7 of the Code. That is to say, there should be a new proviso in section 10 which shall contain provisions as to which of the sub-sections therein should be regarded as providing for accessory before the fact, the principal offender and accessory after the fact.

6. CONCLUSION

The law on accessorial liability, when properly applied, enables the courts to apportion appropriate punishments to different categories of offenders either as an accomplice, the principal parties or even the accessory after the fact. It also acts as a deterrent against the participation by third parties in wrongful conduct, thereby restricting the opportunity for criminal wrong doings. A proper interpretation of the law on it is the hallmark of this piece. Nigeria should, therefore, overhaul her criminal policy especially in the area of accessorial liability.