IOSR Journal of Humanities And Social Science (IOSR-JHSS)
Volume 26, Issue 9, Series 1 (September. 2021) 01-10
e-ISSN: 2279-0837, p-ISSN: 2279-0845.
www.iosrjournals.org

The Principle of Parties to an Offence: A Legal Windbreak against the Exculpatory Defence of Alibi.

Adetifa, E. K. Ph.D[1]

Abstract
In administration of criminal justice system, penal sanctions are reserved or meant for the offenders who have committed an infraction of the criminal law in whatever respect. Culpability may arise from playing a role in the commissioning of the crime which participation may stem from active physical involvement in the crime or behind the scene indulgence where the defendant does not physically get involved in the crime but nevertheless has a hand or play an identifiable role in facilitating the occurrence of the crime. Generally, a person who is not personally present at the scene of crime may be availed of culpability by the defence of alibi. However, this defence has a brickwall in the principle of parties to an offence which renders a defendant culpable irrespective of his physical absence at the scene of the crime as long as a nexus exists between him and the crime committed either before, during or after the offence has actually been committed. Thus, where a defendant has counselled, procured, aided or conspired with another person to commit a crime or where he acted as accessory after the fact to such an offence, he will be treated as a party to the offence. The intriguing features of the defence of alibi and parties to an offence form the focus of the work.

Keywords: Exculpatory defence, accessory, alibi, parties, physical presence

---

Date of Submission: 20-08-2021 Date of Acceptance: 05-09-2021

I. INTRODUCTION

Criminal responsibility deals with ascertainment of blame for offences for which an accused has been brought to court for trial. Criminal responsibility applies not only to those who perform criminal acts but also to those who aid and abet a perpetrator by encouraging or in any way knowingly helping in the commission of such an act.[2] One of the most-important general principles of criminal law is that an individual normally cannot be convicted of a crime without having intended to commit the act in question. With few exceptions, the individual does not need to know that the act itself is a crime, as ignorance of the law is no excuse for criminal infraction. Thus, if a person believes that an act is perfectly legal and intentionally performs that act, the legal requirement of criminal intention is met.[3] The principle of criminal intention is however subject to many other exceptions and qualifications. For a very few offences, known as offences of strict liability, criminal intention is abandoned completely or is allowed only a limited scope.[4]

Indeed, no man can be liable for an offence involving mens rea which is committed by another person.[5] It is therefore of utmost importance that a court should always bear in mind that, unless statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence save and except where he has a guilty mind.[6]

---

[1]Senior Lecturer, Faculty of Law, Ekiti State University, Ado Ekiti, Ekiti State, Nigeria. Email:emmanuel.adetifa@eksu.edu.ng
[2]Oshisanya, O., An Almanac of Contemporary Judicial Restatements with Commentaries; Ibadan, Spectrum Books Limited, (2011).
[3]State v. Ajie (2000) 3 NSCQR
[4]Ojo v. The State (1972) 12 SC
[5]Abacha & ORS. v. The State (2002) FWLR (Pt. 118) 1224 at 1317 S.C
[6]This is commonly expressed by legal maxim actus non facit reum, nisi mens sit rea which means that act does not make the doer of it guilty unless the mind be guilty; that is, unless the intent be criminal. The intent and the act must both concour in unison to constitute the crime but in all cases where *mens rea* is an essential ingredient of an offence either expressly or by implication, then the existence of mental element may be negated by the defence of mistake, accident, compulsion, *bona fide* claim of right or, in respect of some cases not aggravated in form, by consent.

The act of a servant in those things in which he is usually employed is considered the act of his master who is thereby in law vicariously liable for the servant's deed. In Ashibiogwu v. A.G., Bendel State[7] Kayode Eso, J.S.C. as he then was, held thus:

A principal, whether disclosed or otherwise, is in a position to plead all defences available to him, but in the case of fraud, where the agent acted within the scope of the authority, actual or apparent, the act of fraud on the part of the agent binds the principal. .. The problem is one to be sorted out between the principal and the agent and not the third party.

Generally, the rationale behind the principle of alibi is to forestall a situation where a person who is not personally present at the scene of crime will be unjustifiably exposed to criminal liability. However, there are some situations when the defence of alibi will not avail the defendant. Indeed, the principle of parties to offences remains a formidable roadblock to the applicability of the defence of alibi. It is intended here to examine this principle with a view to espousing its restrictive potential on the defence of alibi.

Parties to an Offence

The principle of parties to an offence essentially underscores the two basic elements that attend the commission of crime; that is, the mens rea and actus reus.[8] The term mens rea has its own meaning which can be ascertained only by reference to its statutory definition or the case law. In crimes requiring mens rea as distinct from negligence, the accused should be liable only for that which he had chosen to bring about or to take the risk of bringing about. Njoku v. State[9] In criminal trial, before an accused person is asked to undergo any sort of sentence, there must be a finding by the trial court on the concurrence of the two main elements of any crime, that is the actus reus and the mens rea. Actus reus refers to the observable wrongful act of the offender or the physical components of a crime and which is generally accompanied with mens rea.[10] Mens rea is the criminal intent or guilty mind of the accused. For the prosecution to establish a criminal act against an accused person, it must go beyond establishing the commission of the unlawful criminal act by the accused but must establish that the accused has the correct legal mind of committing the act.

It should be noted that if there is no mens rea, there cannot be actus reus, However, there can be actus reus without mens rea.[11] For instance, where an adult commits a crime, such as stealing, through the instrumentality of an infant, or an imbecile or any other person who is innocent or has no capacity in law to commit the crime, in that circumstance, the law will not attach culpability to the innocent person but rather to the adult in whom resides the requisite mens rea.[12] The foregoing position is commonly expressed by the maxim *qut facit per alium facit per se* which means that he who acts through another is deemed to act in person.

However, the principle of acting through an innocent agent or other person will not avail where parties had the requisite mens rea while committing the offence regardless of the existence of principal and agent or master and servant relationship between them as criminal liability is personal. On the impropriety of agent denying criminal liability on the basis of his status as an agent when his principal is charged for criminal offences, Peter-Odill JSC in Romrig Nig. Ltd. v. F.R.N.[13] held thus:

On the other leg of the defence to which the appellant is seeking refuge which is that since the principal, Lucky Igbinedon had taken a plea bargain, the appellant as agent of the said known principal cannot have a charge against him in related offences. This stand is strange to our jurisprudence and cannot be sustained, as criminal liability is personal and an accused cannot be heard to say, when charged for a criminal offence that he was acting as an agent of a principal.

Aside from the foregoing general consideration, the principle of parties to offences is more decidedly highlighted by the segmentation of offenders into either principal or secondary offenders. For the purpose of this work, this classification of offenders will be examined within the context of sections 7, 8, 9 and 10 of the Criminal Code[14]. The general import of the sections is to the effect that notwithstanding the varied role played by two or more defendants in the process of carrying out a criminal act, they are jointly and severally culpable in

---

[7](1988) 1 N.W.L.R. (Pt. 69) 139-154

[8] Njoku v. State (2013) All FWLR (Pt. 689) pg. 1072 at 1087 paras A-C

[9](2013) ALL FWLR (Pt. 689) 1072 at 1087 paras A – C or 1076 R. 4

[10] Okoro v. State (2013) All FWLR (Pt. 678) pg. 979 at 997 paras C-E

[11]Harb v. F.R.N (2008) All FWLR (Pt. 430) pg. 705 at 726 paras. A-B

[12]In such a case, the principal is deemed to have acted in person on the basis that the person he procured to commit the offence (the agent) is innocent. It is to be observed, too, that this maxim may apply to cases of "agent provocateur", for as Lord Goddard, C.J. of England, declared in Brannan… Peek (1948), 1 K. B. 68: It is wholly wrong for… any person to be sent to commit an offence in order that an offence by another person may be detected.

[13](2018) All FWLR (Pt. 935) pg. 1330 at 1381 paras A-B

[14] Cap 38 Laws of Federation of Nigeria, 2004

the eyes of the law. This is commonly exemplified by the legal maxim *particeps criminis* otherwise expressed as partners in crime.

Section 7 of the Criminal Code provides that whenever an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may indeed be charged with actually committing such an offence:

(a) Every person who actually does the act or makes the omission which constitutes the offence.

(b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence.

(c) Every person who aids another person in committing the offence.

(d) Any person who counsels or procures any other person to commit the offence.

The above provision of Section 7 of the Criminal Code was given judicial pronouncement in Alao v. State[15] when the court held thus:

By the provisions of Section 7, Criminal Code, where common intention among several participants in a crime is established against those who are jointly charged of committing such crime, it is enough to prove that they all participated in the crime. What each of the participants did in furtherance of the commission is immaterial. The mere fact of the existence of the common intention manifesting in the execution of the common object is enough to render each of the members of the groups of the accused person guilty of the offence. Every person who aids another in the commission of an offence is deemed to have taken part in committing the offence and could be charged with the actual offence.

Section 8 of the Criminal Code on the other hand provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such unlawful purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence.[16]

Section 9 of the Criminal Code equally posits that if 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, they shall both be held liable for the result of such action. It is immaterial whether the offence actually committed is the same as that counseled or a different one provided the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

Equally, Section 10 of the Criminal Code states that a person who receives or assists another who is to his knowledge is guilty of an offence in order to enable him to escape punishment is said to become an accessory after the fact to the offence[17]. The usage of the word **guilty** in couching the provision of section 10 is somewhat misleading and legally inappropriate. By the provisions of sections 135, 138 of the Evidence Act 2011 and section 36 (5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), every person charged with a criminal offence shall be presumed innocent until proved guilty. The standard of proof in any criminal proceeding is proof beyond reasonable doubt. The burden of proving the guilt of the accused person rests squarely on the prosecution and does not shift. However, where the prosecution is able to prove the criminal allegation against an accused person beyond reasonable doubt; the burden of proving reasonable doubt shifts to the accused person. In order to establish the guilt of an accused person beyond reasonable doubt, the prosecution may rely on either eye witness evidence, circumstantial evidence that leads to the irresistible conclusion that the accused person committed the offence or the confessional statement of the accused.[18]

No one can legally be convicted of a crime or pronounced guilty except he stands trial according to law for the particular offence. There must therefore be a distinctly stated charge in that regard and an opportunity given the accused to offer his defence before the court gives its decision as to the guilt or innocence of the defendant.[19]

[15](2005) All FWLR (Pt. 795) Pg. 342 at 361 paras B-D
[16]Section 8 of the Criminal Code
[17]Section 10 of the Criminal Code
[18]Ogu v. C.O.P. (2018) All FWLR (Pt. 928) Pg.31 at 59 paras F-H; Pg. 60 paras C-E; TAIYE v. STATE (2018) All FWLR (Pt. 969) pg. 737 at 757 paras C –D
[19]Divine Ideas Ltd. v. Umoru (2007) All FWLR (Pt. 380) Pg. 1468 at 1504 paras. D-F.

It is evident from the foregoing consideration that it is only the court that can determine whether a defendant is guilty or not and not for the person who receives or assists the offender one way or the other. Therefore, the expression who is to his knowledge has committed an offence would be more appropriate as against the expression who is to his knowledge is guilty of an offence used in section 10 of the criminal code.

Principal Offender

This refers to the person in a group of offenders who carries out the actus reus of the crime. A principal offender is the person whose act is the immediate factor that produces the occurrence of the criminal act. In Bashaya v. State[20] the deceased who was on a journey was attacked by a gangster with various weapons and sticks which culminated in his death. The court in holding all of them culpable for the offence of murder opined that the different roles played by the assailants that resulted to the death of the deceased were immaterial as they were all joint principals. If there is more than one principal offender, they are called joint principals.

It is trite law that once an abettor is found to be present at the scene of the offence he abetted, he automatically becomes a principal offender and it is mandatory for the trial court to convict him of the main offence and not its abetment. It is the law that where two or more accused persons embarked on a joint enterprise each is criminally liable for the act done in pursuance of the joint enterprise and even including the unusual consequence arising from the execution of the joint enterprise.[21] The foregoing decision of the court clearly encapsulates the provision of section 7 (a) and (b) of the Criminal Code as all the offenders were not only physically present but partook in the attack that led to the death of the deceased.

The presence of a person at the scene of crime has thrown up some legal controversy as to his culpability. In some circumstances, the mere presence of an innocent person at the scene of crime without more does not translate to any criminal liability. In some other cases however the presence of a person at the scene of crime may constitute encouragement or subtle moral support for the offender or demonstrate a willingness to assist the offender if the need arises in the course of committing the crime.

Since not even the devil knows the innermost intent of a man, therefore in rendering a person culpable for his presence at the scene of crime, he must have assisted, encouraged or directed the principal offender in some way. A person who is simply present at the scene of crime will usually not have offered such assistance or encouragement.[22] For the accused's presence to constitute assistance or encouragement, he or she must have done something more than simply be at the scene of the crime. The accused must, at some point, have said or done something which showed that he or she was linked in purpose with the principal offender and thus contributed to the crime. [23] The accused must have done something of a kind that can reasonably be seen as intentionally adopting and contributing to what was taking place in his or her presence.[24] To be so liable for the crime, his act or omission must be of actual assistance one way or the other to the consummation of the alleged crime. In R v. Jackson[25] the court held that the presence of the defendant at a meeting where the plot to kill another person had been hatched coupled with a solemn oath taking to do the killing was not enough to bring the defendant within the purview of accessory to the actual offence.

It can be deduced from the foregoing consideration that to render a person criminally liable for his presence at the scene of crime, he must possess and demonstrably evince the relevant mens rea in relation to the crime under reference one way of the other; without which his real intent for being present at the scene of crime cannot be unveiled. This ostensibly constitutes a marked distinction between such a person and another who is innocently present at the scene of the crime without any criminal intent.

Generally, there are two basic types of principal offenders. A principal offender can either be in the first degree or a principal in second degree. A principal in the first degree is the person who actually commits the crime himself or causes an innocent person to commit the crime for him. A principal in the second degree is someone who either encourages the commission, or assists in the commission, of a crime and who is actually at the scene of the crime when the crime is being committed.[26] A principal in second degree may be physically present at the scene of the crime and actually assisted in the commission of the crime or he may be constructively present. However, whether or not a person is physically present at the scene of the crime when the crime is being committed, he will nevertheless be considered a principal in the second degree if he is constructively present at the time the crime is being committed. A person is constructively present if he assists

[20](1998) 5 NWLR (Pt. 550)
[21]Akinlolu v. State (2018) All FWLR (Pt. 927) pg. 1 at 54 paras A-D.
[22]R v. Makin (2004) 8 VR 262
[23]R v. Nguyen (2010) VSCA 23.
[24]Al-Assadi v. R (2011) VSCA 111.
[25](2007) SCC 52
[26]Commonwealth v. Lowrey, 32 N.E. 940 (Mass. 1893)

the principal in the first degree at the time the crime is being committed, but he does so from a distance, even though he is not actually physically present at the scene of the crime.[27]

Secondary Offender

This category of offenders are those who in one way or the other lend a helping hand to the commission of an offence by either aiding, counseling or procuring another person to commit an offence. The physical presence of secondary offender is not a condition *sine qua non* before attracting culpability. The essential ingredient for proof of being a party to a crime is the common intention to facilitate the acuts reus of the crime. Where the law stipulates aid or abet a crime, this connotes assist or facilitate in bringing about the offence[28] The act abetted must be committed in consequence of abetment. An accused person could be convicted of the offence of abetment on proof by prosecution of such ingredients as encouragement, incitement, setting on, instigation, promotion or procurement of offence. These ingredients are alternative and not cumulative such as proof of any of them must be positive, unequivocal and specially addressed to the commission of offence.

An encouragement here means an act of making someone to feel brave or confident enough to do something by giving active approval in support of the crime. Incitement also has the element of encouragement. By incitement, the person is provoked by a strong passion or feeling to commit an offence. The two words "set on" connote the semblance of causing to attack or close like one may say the fisherman prepared the bait to set on the fish.[29]

On the other hand, if a person is said to have counseled another to commit an offence this translates to advising in the commission of a crime.[30] However, where a person procures another to commit an offence, it means to invite or persuade another individual to carry out an act of criminality.[31] In all these instances, the person who has aided, abetted, counseled or procured another individual to commit an offence need not be present at the scene of the crime at the material time. A secondary offender may be an accessory before the fact or an accessory after the fact or both depending on the surrounding circumstances and the role played by such secondary offender in the course of committing the crime.

An accessory before the fact is a person who encourages or aids in the commission of a felony but is not actually or constructively present at the scene of the crime. In other words, an accessory before the fact provides pre-crime assistance to the criminal. An accessory after the fact is someone who gives post-crime assistance to the criminal. An accessory before the fact like an accomplice may be held criminally liable to the same extent as the principal. In some jurisdictions, an accessory before the fact is treated as an accomplice. An accomplice is a person that participates in a crime for which the accused is being tried. Where therefore an accomplice is being tried with the accused person on the same strength of evidence, he would be regarded and treated as a co- accused.

In law, an accomplice is a competent witness against an accused person and a conviction based on the evidence of such accomplice is not illegal, even where such evidence is uncorroborated.[32] The criminal act or actus reus element required for crime accomplice to draw criminal liability is doing any act to aid, abet, assist, or procure another person to commit an offence. In some jurisdictions, words are sufficed to constitute the criminal act element. On the other hand, the criminal intent element or mens rea for accomplice liability arises from either specific intent or purposely or general intent or knowingly.[33]

---

[27]State v. Hamilton, 13 Nev. 386 (1878).

[28] Ubahar v. State (2003) 6 NWLR (Pt. 1000)

[29]Oguno v. State (2015) All FWLR (Pt. 690) pg. 1291 at 1310 paras B-H.

[30]Amoo v. The State (1954) 4 SC.

[31]Idika v. State (1975) QB

[32]Zakari v. Nigerian Army (2013) All FWLR (Pt. 658) pg. 999 at 1021 paras. B-G.

[33]Aside from the legal classification of parties to an offence on the basis of principal and accessory, there is a distinction at common law as to when each of the categorizations will attract penal sanction and the extent of such sanctions. For instance, an accessory could not be convicted unless the principal himself was convicted of the crime. Also, an accessory could not be con;victed of a higher offence than the principal was convicted of. However, these rules would not apply to the principals of the crime. A principal in the second degree could be convicted even if the principal in the first degree was acquitted. Additionally, the principal in the second degree could be convicted of a higher offence than the principal in the first degree was convicted of. It should be noted that at common law, classification of offenders into principal and accessory was only applicable to felony. There was no such thing as criminal liability for being an accessory after the fact in a situation where only a misdemeanour was committed. Equally, where the offences were misdemeanours, there was no distinction between degrees of principals Modern statutes treat the classifications of principal and accessory differently. The rule that parties to crimes under the common law can be convicted of the crime itself has, for the most part,

An accessory after the fact is the person who knowing that a felony has committed a crime and still nevertheless aids the felon. In order to be convicted as accessory after the fact as envisaged under section 10 of the Criminal Code, it is imperative to establish that the import of assistance being offered to the offender must be for the purpose of shielding him from apprehension, trial and deserved punishment.[34] Thus, the two essential elements of crime, that is mens rea and actus reus must be present to render a person accessory after the fact. An accessory after the fact may be held liable for among other things, obstruction of justice.[35] However, where the prosecution cannot cogently establish or prove that a person has knowledge that another person whom he assisted has committed any crime, such an individual cannot be treated as accessory after the fact

Conspiracy and Parties to Offences

The term conspiracy generally implies wrongdoing or illegality on the part of the conspirators as people would not need to conspire to engage in activities that were lawful and ethical or to do which no one would object.[36] The offence of conspiracy refers to the agreement of two or more person to do an unlawful act or to do a lawful act by unlawful means.[37] The overt act or omission which evidences conspiracy is the actus reus and the actus of each conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is therefore not necessary to prove that the conspirators like those who murdered Julius Ceaser were seen together coming out of the same place at the same time and indeed conspirators need not know each other.[38]

People involved in an act of conspiracy need not to have started together at the same time. This is because a conspiracy started by some person may be joined at a later stage or later stages by others.[39] The prominent gist of the offence of conspiracy is the meeting of the minds of the conspirators to do an unlawful act which is contrary to or forbidden by law and it does not matter whether or not the accused person had knowledge of its unlawfulness as ignorance of the law does not constitute an excuse.[40]

Generally, the crime of conspiracy is usually hatched with utmost secrecy and the law recognizes the fact that in such a situation, it might not always be easy to lead direct and distinct evidence to prove it. Resultantly therefore, the court almost always resort to inferring conspiracy from the facts of the case.[41] Since the gist of the offence of conspiracy is embedded in the agreement or plot between the parties, it is rarely capable of direct proof. It is invariably an offence that is inferentially deduced from the acts of the parties thereto which are focused towards the realization of their common or mutual criminal purpose.[42]

It is a known principle of law that conspiracy to commit an offence is itself an offence and distinct from the actual commission of the offence to which the conspiracy is related.[43] To secure a conviction for criminal conspiracy, the prosecution must prove the following:[44]

(a) an agreement between two or more persons to do or cause to be done some illegal act or some act which is not illegal by illegal means;
(b) where the agreement is other than an agreement to commit an offence, that some act besides the agreement was done by one or more of the parties in furtherance of the agreement: and

---

remained the same. However, the technical distinctions between principals and accessories have basically been eliminated. For example, people who qualify under the common law as either principals or accessories before the fact are all considered principals under modern statutes and can be convicted of the actual crime itself. However, a common law accessory after the fact cannot be convicted of the crime itself under modern statutes. Rather, he can be convicted of a separate offence of being an accessory after the fact that carries a lower penalty than the actual crime. The procedural difference that resulted from the changes made by the modern statutes is seen most clearly in the fact that an accessory can now be convicted even if the principal is acquitted. In other words, it is no longer necessary for the principal in the first degree to be convicted of a crime in order for principals in the second degree and/or accessories to be convicted. According to modern ;statutes, anyone can be convicted, regardless of what happens to the principal in the first degree.

[34]Whorley v. State, 45 Fla. 123 (1903).
[35]Famuyiwa v. State (2018) All FWLR (Pt. 919) 1 SC
[36]EgunjobI v. F.R.N (2013) All FWLR (Pt. 670) 1195 SC
[37]Olayiwola v. State All FWLR (Pt. 918) 1; AKOGUN v. STATE (2018) All FWLR (Pt. 966) 314
[38]Haruna v. State (2018) All FWLR (Pt. 969) 689 SC
[39]Njovens v. The State (1973) 5 SC 12
[40]Clark v. The State (1986) 4 NWLR (Pt. 35) 381
[41]Ndozie v. State (2016) All FWLR (Pt. 824) 117 SC
[42]Dr. Segun Ogunye v. The State (2001) 2 NWLR (Pt. 677) 311.
[43]Balogun v. AG, Ogun State (2002) 2 SCNJ 196 at 209
[44]Ogu v. C.O.P. (2018) All FWLR (Pt. 928) Pg.31 at 72 paras E-G

(c) that each of the accused persons individually participated in the conspiracy.

From the above consideration, the synergy between conspiracy and parties to offences is clearly pronounced in Section 8 of the Criminal Code which relates to joint commission of a crime. It is enough to prove that all the parties participated in the crime. What each did in furtherance of the commission of the crime is immaterial. The mere fact of the common intention manifesting in the execution of the common object is enough to render each of the accused person in the group guilty of the offence. Where common intention is established, a fatal blow or gun- shot, though given by one of the parties, is deemed in the eyes of the law to have been given, by all those present and participating.[45]

The principle of common intention will equally apply where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any of them, in carrying out the common purpose commits an offence each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to the offence. The underlying import of Section 8 of the Criminal Code and which substantially encapsulates the offence of conspiracy is that a member of a group committing a criminal act can be liable for any incidental offences committed by its others members so long as the incidental offence was a probable consequence of carrying out the initial offence

It is evident from the foregoing general consideration that an offender needs not be physically present at the scene of the crime to be culpable. Indeed, liability for criminal offences is not restricted to the person who conceives the mens rea and executes the actus reus of the crime but inclusive of anyone who has given encouragement or assisted in the execution of the crime. It also includes anyone who has interfered with the apprehension of the criminal after the crime has been committed.[46]

Examination of Alibi as a Defence in Criminal Trial

The defence of alibi connotes that the defendant was not the person or one of the persons who committed the alleged offence as he was physically elsewhere when the offence was committed. In adumbrating on the meaning and import of the defence of alibi, the Supreme Court of Nigeria in Yalia v. State[47] held thus:

Alibi means elsewhere it is a defence based on the physical impossibility of a defendant's presence at the scene of a crime. In other words, alibi means when a person charged with an offence says he was not at the scene at the time of the alleged offence was committed, as such, he could not have committed the offence.

The defence of alibi falls into the genre of defences known as exculpatory defences. Others includes: self defence[48] and accident[49]. They are exculpatory defences because when they are established in a criminal

[45]Akinlolu v. State (2018) All FWLR (Pt. 927) pg. 1 at 54 paras A-D.

[46]At common law the different parties to a crime were carefully classified. The classifications were broken down into two ways. Firstly, according to the severity of the crime, so that there were differences between parties to a felony and parties to a misdemeanor. Secondly, according to what stage in the commission of the crime that the party helped the criminal. Thus, there were differences between people who encouraged the commission of the crime, people who actually assisted with the commission of the crime, and people who assisted the criminal after he had completed the crime.

[47](2009) All FWLR (Pt. 1012) Pg 653 at 664 paras C-D Dawai v. State (2018) All FWLR (Pt. 970) 923

[48]For the defence of self defence under Section 286 of the Criminal Code to avail an accused person, the nature of the assault on him must be such as to cause reasonable apprehension of death or grievous harm that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm. The extent of force which is acceptable as a defence must be from the belief on reasonable grounds that death or grievous harm was the only resort that must be used as a defence. The guiding principles of self defence are necessity and proportion and if the accused can show necessity for his conduct on the facts as he reasonably believed them to be a valid defence sufficient, his acquittal can be made. If however the threat offered is disproportionate with the force used in repelling it, then the defence cannot avail the accused. Omoregie v. The State (2008) 12 SCM (PT. 2) 599 AT 622. Iheanyighichi Apugo v The State(2006) 16 NWLR (Pt. 1002) 227 at 232; Samson Nkemji Uwaekweghinya v The State(2005) 9 NWLR (Pt. 930) 227 at 235.

[49]An event is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence, as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstance it is done, to take reasonable precaution against it. The defence of accident in criminal law has the following attributes: (a) An accident is the result of an unwilled act, and as such, an event without the fault of the person alleged to have caused it. (b) For an event to qualify as an accident under section 24 of the Criminal Code, it must be a surprise to the ordinary man of prudence, and that is, a surprise to all sober and reasonable people. (c) That test is always objective, and like all other defences, it presupposes that the

trial, they exonerate the accused person.[50] An accused person who set up a defence of alibi must do so at the earliest opportunity during the investigation of the case and not during the hearing of evidence so as to avail the prosecution of the opportunity to investigate same for the purpose of debunking or affirming such defence.[51] Thus, a defence of alibi raised for the first time from the witness box is belated and cannot be considered as a serious defence but merely as an afterthought.[52] Indeed, it is incumbent on the defendant who relies on the defence of alibi to give some facts and circumstances of his whereabouts at the earliest opportunity and the persons with whom he was at the material time[53].

Where the defendant has raised the defence of alibi promptly and equally supplied cogent particular details of the alibi raised, it becomes mandatory for the police to investigate such alibi.[54] Fail;ure to investigate the defence of alibi is fatal to the prosecution's case.[55] The fatality will arise as a result of inchoate investigation. In other words, where allegation of crime against an accused person has not been exhaustively investigated but omitted a fundamental aspect as to the presence or absence of the accused person at the scene of the alleged crime, such failure will certainly lead to two prosecutorial consequences or eventualities. The first one is that the prosecution will not be able to prove the quilt of the accused person beyond reasonable doubt as required by the law.

In Emine & Others v. The State[56] the apex court held as follows:

The law required that the guilt of an accused must be proved beyond reasonable doubt and where there is any doubt, the accused must be given the benefit of that doubt. The onus of proof remains always on the prosecution except in a few limited circumstances such as insanity where the law presumes an accused sane and casts the burden of establishing the contrary on him. See also the case of Onafowokan v. The State (1987) 3 NWLR (Pt. 61) pg. 538 at pg. 541.

Secondly, it will also cast doubt on the case of the prosecution and where such doubt exists in the mind of a court it presupposes that the case against the accused person has not been proved beyond reasonable doubt.[57] It is trite law that where doubt exists in criminal trial, such doubt enures to the benefit of an accused person. The Supreme Court in Almu v. State[58] where it is stated thus:

These facts should have been of paramount importance to weigh heavily on the minds of the learned justices of the Court of Appeal to exercise their lawful right of giving the appellant the benefit of the doubt. Where it is incumbent on the Prosecution to prove its case beyond reasonable doubt, all surrounding circumstances and the credible and unchallenged evidence before the court must be perused carefully by the Court to determine whether in fact the accused did commit the crime. The law is settled that in a situation where the Court entertains even the slightest of doubt, that should be resolved in favour of the accused person per Muktar JSC.

It should be noted however that it is not in all cases where alibi is not investigated that same will be fatal. For instance, when an accused person raises two alibis which are irreconcilably in conflict, then, there is no duty on the Police to investigate the alibi which must be deemed not established.[59] Equally, the defence of alibi would crumble where the defendant is unequivocally pinned to the locus in quo of the crime by the victim or other eye witness.[60] In such circumstances, the investigation of a claim of alibi would serve no useful

---

accused physically committed the offence, but should be acquitted because it was inadvertent. At common law, there must be absence of mens rea for the defence of accident to avail an accused. Thus, under the Criminal Code, the defence of accident can avail an accused if it can be proved that the event occurred independently of the exercise of the will of the accused person. Okoro v. State (2013) All FWLR (Pt. 678) pg. 979 at 997 paras E-H.

[50]Iliyasu v. State (2015) All FWLR (Pt. 793) pg. 1961 at 1986 paras C-D.

[51]Aremu & Or. v. The State (1991) 7 NWLR (Pt. 201) page 1

[52]Ehimiyein v. State (2017) All FWLR (Pt. 868) pg. 728 at 748 paras D-F

[53]Adeyemi v. State (2018) All FWLR (Pt. 929) 282

[54]Aliyu v. State (2007) All FWLR (Pt. 388) 1123

[55]Ndukwe v. The State (2009) 2 SCM 147. Once an alibi is raised, the onus is on the prosecution to investigate and rebut such evidence in order to prove its case beyond reasonable doubt as failure to disprove the alibi is an admission of same. Alamu v. The State (2009) 4 SCM 40

[56](1992) 7 NWLR (pt. 256) pg. 650 at pg. 660

[57]Udosen v. State (2007) All FWLR (Pt. 356) Pg. 669 paras. A-B.

[58](2009) 10 NWLR (Pt 1148) 31 at 50 paras D-E and 53 H; UGBOJI v. STATE (2018) All FWLR (Pt. 926) Pg. 68 at 117 paras. F-G; Babarinde v. State (2013) All FWLR (Pt. 662) pg. 1731 at 1763 para D.

[59]Omotola v. State (2009) All FWLR (Pt. 464) pg. 1490 at 1584 paras. D-E.

[60]Otunba Oluwemimo & Ors v. The State (2004) 4 SCM 199.

purpose.[61] Where the defence of alibi succeeds, there is no need for the court to consider other elements in the offence charged; as the accused must be discharged and acquitted because he was not at the scene of the crime. [62]

The Legal Connect and Disconnect between Parties to Offences and Defence of Alibi

From the analysis of the principle of parties to offences already highlighted in this work, it remains to assert that there is an area of convergence and divergence between the principle of parties to offences and defence of alibi. The area of legal convergence can be seen from the provision of Section 7 of the Criminal Code which deals with a person who personally or physically actualizes the actus reus of the offence committed. This section would seem to be concerned with principal in first degree as its frontier cannot be extended to cover principal in second degree who is deemed in law to be constructively present at the scene of the crime. In consequence therefore, it is only a principal in first degree who may validly invoke the defence of alibi where the circumstances permit such a defence.

The operation or availing nature of the defence of alibi will not be available to a principal in second degree who is regarded as being constructively present at the scene of the crime at the time of committing the offence even though he may not be personally present Also the defence of alibi will cease to be of legal moment and will be dispensed with, where by the peculiarity of the facts and circumstances surrounding the alleged crime, physical presence is not a condition sine qua non to its commission such as offence of conspiracy. The technological advancement in the contemporary society has greatly played down the necessity of physical presence or participation before rendering a person criminally culpable.[63] Thus, a person could be hundreds of miles away and nevertheless still be involved in the act of criminality elsewhere either by way of aiding, abetting, counseling or procuring the actual or physical offender[64] either through handset, tweeter, email, WhatsApp or any other relevant technological devices suitable for the commission of the offence concerned.

Under the principle of parties to an offence, a secondary offender needs not be physically or personally participate in the offence at the scene or location of the crime before attracting criminal liability. Illustratively, a bank official who colluded with armed robbery gang by relaying sensitive information of cash movement from or to the bank for the purpose of aiding an attack on the bank, will not escape culpability simply because he was not personally or physically present or participated at the scene of the robbery incident.

Cross border crimes such as international terrorism, money laundering, human trafficking, drug trafficking, arms smuggling among other species of acts of criminality where the real culprits operate behind the scene using mercenaries or foot soldiers as the physical perpetrators equally constitute examples of crimes where physical presence of the offenders is not imperative to consummate their commission.

II. CONCLUSION

Notwithstanding the mirage of drawbacks that afflict the defence of alibi, there is no gaining saying the fact that it still retains some legal implication in that a person who was not personally present at the scene of the crime and who did not in any way have involvement in the alleged crime should not be exposed to criminal culpability. However, the non-physical presence or participation of a person in the commission of crime does not in all cases translate to non-involvement in the crime for which a verdict of not guilty will automatically be made by the court.

It is settled law that circumstances alter cases. Hence, each case must be determined in the light of its peculiar facts and circumstances[65]. In APC v. INEC[66] Supreme Court held thus:

Decisions of courts must therefore irredeemably relate to the facts which informed them. Justice suffers whenever decisions of courts proceed not on the basis of the facts which should otherwise inform those decisions.

---

[61]State v. Ekanem (2016) LPELR 41304 Victor v. State (2013) 12 NWLR (Pt. 1369) 465; Yunusa v. State (2018) All FWLR (Pt. 920) 115

[62]The State v. Fatai Azeez & Ors. (2008) 8 SCM 175.

[63]Supra note 2

[64]Ibid

[65]Bude v. State (2016) All FWLR (Pt. 839) 1126 at 1144 Para e. Brittania-U Nigeria Ltd v. Seplat Petroleum Development Company Ltd (2016) All FWLR Ppt. 826) 398 at 448 Para E.

[66](2O15) ALL FWLR (771) 1420 at 1464 to 1465 paras G– A; See: Bude v. State (2016) ALL FWLR (Pt. 839) 1126 at 1144 Para E. the Apex court held thus: "*Each case will be determined in light of its own peculiar facts.*" See also: Brittania-U Nigeria Ltd. v. Seplat Petroleum Development Company Ltd. (2016) ALL FWLR (Pt. 826) 398 at 448 Para E. where the Supreme Court held thus: *"A case is an authority for another case based on what it actually decided on the fact and circumstance in issue."*

The twofold aims of criminal justice are that the guilty shall not escape or the innocent suffer.[67] It therefore goes to show that once the facts and circumstances of a case reveal the involvement of a party in the commission of an offence, the fact that he was not personally present or took part in the actus reus at the scene of the crime will not avail.

In concluding this work, it is pertinent to stress that only a natural person can raise the defence of alibi and same would not be available to non-natural person even though an artificial person is a recognizable person in law[68]. This however does not imply that that an artificial person cannot commit crime as a corporate body is vicariously liable for the authorized acts done by its agents who are the alter ego of the company.[69] It should be stressed that the principle of vicarious liability is in contradistinction to the individualistic notion of the criminal law which attaches personal liability for criminal infraction.

In vicariously rendering a company liable for the acts of its agents, possession of *mens rea* for the particular offence or physical presence at the scene of the crime is dispensed with. It suffices in law under the principle of attribution to impute the acts, intent and the presence of the company's agents at the scene of the crime to the company.

[67]Zubairu v. State (2015) All FWLR (Pt. 794) Pg. 178 at 190 para C.

[68]Moses v. NBA (2019) ALL FWLR (Pt. 1022) pg 444 at 460 paras E-F; An artificial person is an entity, such as a corporation, created by law and given certain legal rights and duties of a human being, a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.

[69]Aureol Plastic Ltd & Anor (2002) All FWLR (Pt 129) 1471 at 1489; Union Bank Nigeria Ltd. (2004) All FWLR (Pt. 197) 981 at 1002 SC. See also Section 65 of the Companies and Allied Matters Act. Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefor to the same extent as if it were a natural person.