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Fundamentals OF CRIMINAL LAW

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1. INTRODUCTION

Criminal law can be defined as an institution designed to protect society from certain substantive harm / crimes e.g. prostitution by imposing sanctions upon selected individuals. It is clear from the above that criminal law is backed by sanctions i.e. it states that 'do it this way or else you suffer for it.'

The criminal law is the foundation of the criminal justice system

Sanctions of criminal law are usually punishments hence if a person breaks any rule of criminal law, he /she is arrested, tried and punished if found guilty.

Substantive Criminal Law: According to B.J. Odoki C.J in his book, A Guide to Criminal Procedure in Uganda, Third Edition at Pg.1 states tht substantive law defines the rights, duties and liabilities of persons, e.g. Criminal Procedure, Law of Civil Procedure. Therefore substantive Criminal Law is an analysis of the definition of specific crimes and of the general principles that apply to all crimes.

Criminal Procedure: A study of the legal standards governing the detection and investigation and prosecution of crime. C

1.1 REASONS FOR DEVELOPMENT OF CRIMINAL LAW IN SOCIETY

a. It developed as an instrument of social control in a society. Naturally human beings are weak. Therefore, they have the urge to do wrong hence criminal law developed to control that urge.
b. Criminal law developed because of conflict among members of society. Every member of society would like to have something which another person does not have or to hurt another hence criminal law developed to resolve conflicts.
c. It developed to preserve society against anti-social behaviour / tendencies. It was important to set down the 'Dos' and 'Don'ts' in society.

1.2 PURPOSES OF CRIMINAL LAW

a. To forbid and prevent conduct that unjustifiably threatens or causes substantial harm to an individual or public interest. It calls for respect of life and property.
b. To subject to public control, persons whose conduct indicates that they are inclined to commit crime. eg imprisonment for 4 years is meant to restrict one from committing more crimes i.e. he acts as an example to other criminals.
c. Give fair assessment of the nature of conduct declared to be an offence ie it would be unfair to punish one for conduct he does not know. Hence it defines what is criminal or not.
d. To both warn people of conduct that is subject to criminal punishment and of the severity of that punishment
e. To impose punishments that satisfies the demands for revenge, rehabilitation and deterrence of future crimes.
f. To insure that the victim, the victim's family and the community interests are represented at trial and in imposing punishments.

1.3 GENERALLY CRIMINAL LAW HAS THE FOLLOWING FUNCTIONS:

a. To preserve public order and decency.
b. To protect citizens from what is offensive and injurious.
c. To provide sufficient safeguard against exploitation and corruption of the more vulnerable members of society e.g. the young and weak in mind or body.

1.4 METHODS OF CRIMINAL LAW / HOW DOES CRIMINAL LAW OPERATE?

A person who commits an offence is arrested, tried and punished if found guilty. Courts can impose the following punishments;

a. A judge / magistrate can caution the accused. He does this when he wants the accused to improve his conduct. If he commits the offence again, he will be punished.

b. Fine an accused person e.g. pay some money because of the offence he has committed.
c. Punishment of imprisonment: An accused person can be confined in a certain place so as to exclude her / him from normal life.
d. Corporal punishment: (Since abolished)
e. The law in Uganda states that for capital offences e.g. murder and armed robbery, the punishment is death. Refer to the Kigula Ruling.
f. Remanding; For a young person between 7 – 13, if he commits an offence, he is sent to a remand home where he is looked after and trained to be a good citizen. Between 14 – 18, the offender is sent to approved school where he is taught a skill
g. Reconciliation: It is not a punishment as such. Under section 160 of the MCA (Magistrate's Court's Act) the court may order reconciliation between two parties. It is done where the offence is minor.

1.5 WHY CRIMINAL LAW APPLIES THE CONCEPT OF PUNISHMENT

There are 5 reasons / theories that explain the rational punishment theory:

a. Deterrent theory: The main aim of this theory is to make the offender an example and warn all potential criminals so that when he is punished, others fear doing what he has done.
b. Preventive theory: Punishment seeks to prevent or disable him from doing it again.
c. Reformative / Rehabilitation theory: It is when a criminal is sometimes punished so that he can be reformed. Reformation can be done in two ways:

    - Imprisonment: Here, criminals are taught skills so as to earn a living rather than stealing.
    - Probation: The criminal is monitored to see whether he can reform.

d. Retributive theory: According to this theory a punishment serves to satisfy the emotions of the victim and the public at large.
e. Educative theory: The purpose of punishment may be to educate people out of a certain behaviour which is prevalent.

1.6 RELEVANCE OF CUSTOMARY LAW IN CRIMINAL LAW

Customary Law is an important source of criminal law as can be inferred from S.14 of the Judicature Act provided it is not repugnant to natural justice, morality and good conscience, or incompatible with any statute or subsidiary legislation. A custom cannot apply in this country where it is inconsistent with any of the provisions of the constitution; Article 4 and Article 37 of the Constitution of Uganda, 1995 as amended.

Customary law is also relevant in the following four circumstances;

(i) Assessing local circumstances. (that is why there are assessors)
(ii) In determining who is a reasonable person. (According to circumstances)
(iii) In determining a blame - worthy state of mind
(iv) It is also relevant in influencing judges or magistrates in sentencing. People are always given an opportunity to plead matters in mitigation. It does not exonerate one from the charge because it is not a defence but the courts may take it in account if reasonable.

There has been a debate as to whether customary law is capable of creating criminal offences or affording a defence to a criminal charge. According to article 28(12) of the Constitution, no person shall be tried and convicted of a criminal offence unless that offence is defined and the penalty prescribed by written law.

However, as to whether it is capable of affording a defence to an offence under a penal code, has been subject of extensive adjudication of judicial consideration. In the case of ***Patric Akol v. Uganda***[1], the accused was charged and convicted of defilement and in his defence pleaded that under their custom that a girl of about 13years would be of marriageable age and that since they were married under that custom, there is no way he could have committed the offence of defilement. The court held that the offence of defilement is a creature of statute and it was very clear on the ingredients of that offence.

[1] S.C.Cr. A No.123 of 1992

The court concluded that the alleged custom couldn't constitute a defence to a defilement charge.

Customary Law has been applied in deciding whether a wife or a spouse is a compellable witness against the other in criminal offences. In ***Allai v. Uganda***[2] the accused was charged with adultery and his defence was that he wasn't guilty because the woman he was alleged to have had an affair with was not his wife as defined by English law as she was a party to a polygamous marriage which wasn't a recognised marriage. The court held that a married woman includes a woman who is married according to customs or customary law of Uganda regardless of whether it is a polygamous or Islamic marriage.

1.7 THE PRINCIPLES OF CRIMINAL LAW

a) Criminal Act: A crime involves an act or failure to act
b) Criminal Intent: A crime requires a criminal intent
c) Concurrence: The criminal act and criminal intent must coexist or accompany one another.
d) Causation: The defendant's act must cause the harm required for criminal guilt.
e) Responsibility: Individuals must receive reasonable notice of the acts that are criminal so as to make a decision to obey or to violate the law.
f) Defences: Criminal guilt is not imposed on an individual who is able to demonstrate that his or her criminal act is justified (benefits society) or excused (the individual suffered from a disability that prevented him or her from forming a criminal intent)

[2] [1967] E.A 596

1.8 DEFINITION OF A CRIME

Different people have attempted to define the term crime:

- Smith and Hogan in their book 'Criminal law' define crime as a public wrong thus every member of the public is supposed to bring a criminal for prosecution whether or not he has suffered any special harm over and above other members of the public. They argue that other members of society have an interest.

One common element in these definitions is that all criminal proceedings are instituted and conducted on behalf of the state. This is because:

1. Many wrongs are so serious to the extent that they do not only affect the person injured, but the public as a whole hence compensation is not enough. Therefore, it is in the interest of the public at large e.g. murder.
2. Some offences may have to expose private persons to considerable trouble and expense e.g. terrorism and murder.

1.9 CHARACTERISTICS OF A CRIME

a. It must be an act / omission against a community.
b. The act must be forbidden.

A distinction can be drawn between wicked types of conducts e.g. murder which can be referred to as *Mala inse* or technical conduct such as wrongful parking which can be expressed as *mala prohibitam*.(Needs no ill motive)

2. CATEGORIES OF CRIME

a. Felony: A crime punishable by death or by imprisonment for more than one year
b. Misdemeanor: Crimes punishable by less than a year in prison
c. Capital Felonies: Crimes subject to the death penalty or life in prison
d. Gross Misdemeanor: Refers to crimes subject to between six and twelve months in prison; Petty Misdemeanors: Are all other misdemeanors

e. Violations or Infractions: Acts that cause only modest social harms and carry fines

2.1 KINDS OF ACTS THAT CONSTITUTE A CRIME:

a. Spoken / written words: Speaking or writing is an act which is capable of constituting an offence. (Publishing nude pictures in Newspaper, signs, laughing in court.)

b. Omission: Failure to do something you are required to do e.g. Misprison of Treason,Evasion of tax and Failure to provide necessities.

c. Legal provisions which prohibit possession of certain items e.g. gun possession without licence and drug possession.

d. State of affairs: This is in a continuous series of behaviour e.g. prostitution.

e. A mere occurrence under certain conditions: This occurs without doing anything generally wrong e.g. sitting at State house with no invitation.

f. Positive acts: These are things generally forbidden by law e.g. murder.

2.2 DIFFERENCES BETWEEN CIVIL LAW AND CRIMINAL LAW

a. As mentioned before, crimes are wrongs which are judged to be injurious to the public and warrant applications of criminal procedure. In contrast with civil wrong such as tort and breach of contract, it is only the person who is injured that may sue. In civil cases, one is free to discontinue the proceedings anytime and if he succeeds, an award of damages may be made in his favour and he may at his discretion forgive the defendant or terminate his liability.

b. All criminal proceedings are in theory instituted by the state whereas civil proceedings are instituted by an individual in his own name and for his own redress.

c. In criminal proceedings, some offences can only be instituted by the consent of DPP e.g. Corruption and Abuse of office. In civil proceedings, an injured party can institute a case without consulting anybody.

d. Criminal proceedings cannot be time barred. If you commit an offence and you hide yourself, criminal proceedings can be instituted against you when you are caught. In civil proceedings, the suit must be instituted within 6 months etc (See the Limitation Act) otherwise it will be barred by the law of Limitation. In criminal cases there is no limitation except treason which must be instituted within 5 years.

e. When criminal proceedings have been commenced, they cannot be discontinued without the consent of the DPP. (Director of Public Prosecution i.e. Article 120 (d) of the Constitution of Uganda). No individual can stop criminal proceedings except the DPP. He does that by filing a request called *Nolle Prosequi* (no prosecution).

f. In civil proceedings, the plaintiff can withdraw the case anytime before judgment is delivered. The parties can decide to resolve the matters outside court as long as the judgment has not been passed.

g. In criminal proceedings, rules of evidence are applied in total. They cannot be waived, they can only be waived if the prosecution and the defence have agreed on technical evidence e.g. evidence of a doctor. It is only the technical evidence that the prosecution and defence can agree on. In civil proceedings, rules of evidence can be waived.

h. Under the laws of Uganda, no person can be tried for a criminal offence in absence. Every person charged with an offence must appear in person. See MCA for provisions on dispensing with attendance of accused person. In civil proceedings if a defendant does not enter appearance, the court can proceed to hear the evidence of the plaintiff and pass an *ex-parte* judgment.

i. In criminal proceedings, the guilt of the accused must be proved beyond reasonable doubt. But in civil proceedings, the plaintiff is required to prove his case on the balance of probabilities.

j. In criminal proceedings the main aim is always to punish the offender whereas in civil proceedings, the aim is to compensate the injured party.

k. If a person has been convicted of a crime, his victim cannot forgive him e.g. if your brother kills your father and he is sentenced to death, you cannot later

say that he must be forgiven. It is only the President who can exercise his prerogative of mercy. (Article 121(4) Uganda Constitution). In civil proceedings, the injured party can forgive the other party so long as they agree and come to a compromise.

2.3 CLASSIFICATION OF OFFENCES

Offences can be classified in a number of ways; some classifications may be merely for the sake of convenience and may have no legal significance. (eg. the divisions in the Penal Code Act.)

In English law there is classification into common law and statutory law. In Uganda, all crimes are statutory. Classification of offences is significant in that different legal consequences can attend different types of offences. Therefore the procedure of trial can differ. For example different offences would be tried in different courts as different courts have different jurisdictions as far as offences are concerned.

Under the Penal Code Act, offences are divided into three classes;

(i) Felony
(ii) Misdemeanour
(iii) Simple offences

The terms 'felony' and 'misdemeanour' derive from the English law. However, the distinction between them was abolished in England by the Criminal Act of 1967 under Section I. The classification of offences depends on the gravity of the offence. Section 2(e) of the Penal Code Act defines felonies as those offences which are punishable with 3 years imprisonment or more.

Misdemeanours are those offences with 6 months imprisonment up to three years. Those that are not felonies.

A simple offence is one punishable with any period not more than 6 months.

The consequences of classifying are both procedural and substantial.

- Procedurally, the power of a private person to arrest a person on a suspected misdemeanour is more limited than his power to arrest on a suspected Felon.
- The granting of a bail is more restricted when the offence is a felony.
- Where a complainant has filed a civil suit and has not taken reasonable steps to have the felony prosecuted, the court will suspend / stay the civil proceedings until the felony has been prosecuted.

NB This rule applies only to a felony. The basis of this rule is that where an offence is serious, an offender should first be brought to justice by the criminal branch of law before an individual can proceed with a civil claim.

2.4 CLASSIFICATION OF CRIMES

Crimes are classified as follows:

i. Crimes against the state
ii. Crimes against persons, homicide
iii. Crimes against persons, sexual offenses and other crimes
iv. Crimes against property
vi. Crimes against the public order
vii. Crimes against the administration of justice
viii Crimes against public morals
xi Crimes against the administration of lawful authority

The substantive consequences of the classification are;

a. Punishment for attempt or conspiracies to commit offences or for being an ‘accessory after the fact’ will vary according to whether the substantive offence committed was a felony, misdemeanour or a simple offence.

b. There are a number of defences available to charges of assault or more serious types of harm whether the assault was committed by public officers or private citizens in preventing the escape of felons. Felons can be arrested without a warrant.

2.5 NATURE AND SOURCES OF CRIMINAL LAW OF UGANDA

'Nature of law' means what the criminal law of Uganda consists and 'sources' means where the criminal law of Uganda derives from and where we can find it. The laws of Uganda consist of the Constitution, written laws, principles of common law, customary law, doctrines of equity, statutes of general application and religious laws.

I. The Constitution of Uganda

It provides protection of fundamental human rights in criminal proceedings. These are in articles 20 – 28

II. The Penal Code Act

This is the main source of Criminal Law in Uganda. Up to 1930, Uganda used the Indian Penal Code. The Uganda Penal Code was first enacted in 1930 by the Legislative Council. The Penal Code of Uganda modified English principles of Criminal Law under Section 3. The Penal Code is to be interpreted in accordance with the legal principles of interpretation obtaining in England and expressions used are to be presumed so far as are consistent within context and except as may be otherwise expressly provided with the meaning attached under the English Criminal Law, and shall be construed in accordance there with. In practice, this means that Ugandan Judges can refer to English cases freely in interpreting the Penal Code unless the contrary is shown. However, the identity of the Ugandan Penal Code with the English one is not applicable where the Penal Code is clear and unambiguous.

2.6 MAIN PRINCIPLES OF CRIMINAL LAW

Criminal Law is based on 3 basic principles;

a. Principle of legality

b. Burden of proof

c. Criminal responsibility or liability

2.7 THE PRINCIPLE OF LEGALITY

The principle is to the effect that there can be no crime without a rule of law. That means that immoral or unsocial conduct not forbidden and punished by law is not criminal. This is expressed in Latin word called ***nulla poena sine leges*** i.e. no one should be made to suffer for what is not forbidden by law. This is the foundation of Article 28(12) of the 1995 Constitution.

Further, society has to be governed in accordance with specific principles to avoid anarchy. Therefore, it is important that no person is to be punished unless he has breached a specific provision of criminal law. The above Maxim expresses the idea that a person should not suffer except for a distinctive breach of Criminal Law that is laid before him in precise and definite terms. This principle has several elements;

a. It outlaws retrospective application of laws. This means if an act is done before the law was made, the person cannot be convicted on the basis of that act. (Article 28(7) of the Constitution)
b. Every law that aggravates a crime is not allowed. (Article 28 (8) of the Constitution)
c. Every law that alters legal rules of evidence in order to convict the offender is not allowed. E.g. Military arrests or to be tried by an institution which is not empowered.
d. It also requires that a crime must be written so that each person understands it i.e. The law must be accessible to every citizen. (Art 28 (12)
e. The Criminal law of the land must be strictly construed so that in case of doubt as to the meaning of words or phrases, the accused will have benefit of doubt.
f. No one should create an offence. It is only the Parliament that should make law. (Art. 28 clauses 7, 8 &12).

2.8 BURDEN OF PROOF

According to article 28 (3) (a) of the Constitution, any person charged with a criminal offence is presumed innocent until proved guilty or until he pleads guilty. This means that an accused person is innocent until the court proves otherwise.

In practice, this means several things;

a) That it is the duty of a party to persuade court by the end of the case that the propositions or allegations made are true. The propositions that need proof and the nature of proof is dependent on the substantive rules of law and the charge itself. The foregoing is referred to as the legal burden of proof/ultimate burden of proof and this does not shift to the accused person.
b) It may mean a party's duty to produce sufficient evidence for court to call upon the other party to answer the charge. The evidential burden of proof resting upon the prosecution may be justified in some cases. The evidential burden of proof may shift to the accused person requiring him or her to say something in defence. It is important to note that where the evidential burden shifts to the accused, he or she is required to prove any relevant fact not beyond reasonable doubt but on the balance of probabilities. See ***Shieldtake v. D.P.P Attorney General's Reference No.4 of 2002-2005 Vol.1 A.C Pg.264.***

The Evidence Act of Uganda provides the principle of burden of proof. For criminal offences, section 105(1) provides that;

> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from or qualification to the operation of the law creating offence within which it is charged and the burden of proving any act especially within the knowledge of such a person is upon him.

Therefore, the accused is not required to prove his innocence beyond reasonable doubt. He has only to prove his innocence on the balance of probability. It is the duty of the prosecution to prove every issue beyond reasonable doubt. After the prosecution has presented their evidence, the accused must be acquitted unless the judge / magistrate is satisfied that the accused is guilty. It is the principle of Criminal Law that innocence must be presumed. The leading authority on the principle of burden of proof and standard of proof is ***Woolmington V DPP***[3] where Lord Viscount stated:

> "Throughout the web of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

2.9 STATUTORY EXCEPTIONS.

Statutory exceptions may be expressed or inferred by necessary implications and such enactments specifically declare onus of proving a particular defence to be on the accused e.g. the defence of insanity and diminished responsibility; S.10 of the Penal Code Act.

However, where the burden is cast on the accused to prove any relevant fact, the standard of proof is not beyond reasonable doubt but on the preponderance of evidence as balance of probabilities. In the case of ***Sebakige John V. Uganda***[4], the Supreme Court observed that diminished responsibility is a breach of statute which statute expressly places the burden of proving it on the defence.

[3] (1935) AC 44
[4] S.C.Cr.A No.6/2000

3. IMPLIED STATUTORY EXCEPTION

Where an accused person relies for his or her defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or a matter of complaint in the enactment creating the offence, the burden of proving the exception, exemption, proviso, excuse or qualification lies on him or her.

In the case of ***R. V. Edwards***[5]**,** the defendant was convicted of selling intoxicating liquor without the justice's licence. He appealed on ground that since the prosecution had access to a register of licences in force, it should have presented evidence to show that no licence was in force. It was held that the legal burden of proving that the accused was o holder of a justice's licence rested on the defence and not on the prosecution.

3.1 STANDARD OF PROOF

A standard of proof required for the prosecution is proof beyond reasonable doubt but this does not necessarily mean proof beyond a shadow of doubt. The prosecution must always prove the accused's guilt beyond reasonable doubt. This implies that where the judge is in doubt as to the accused's guilt that is decided in favour of the accused person. ***Orete v. Uganda [1966] E.A 430.***

The standard of proof required for the defence in exceptional cases where the legal burden lies on the accused is on the balance of probabilities and not beyond reasonable doubt. If the trial court is of the opinion that the facts and evidence as adduced by the accused raises a probability or a likelihood of the defence pleaded, the court would be satisfied.

3.2 CRIMINAL LIABILITY PRINCIPLE

Being responsible in general terms refers to one who is answerable as a primary cause, or agent of an offence (the blame-worth or criminal liability). One of the elements of determining Criminal Liability is proving '*Actus Reus*'. This involves conduct of the accused person, its results and those relevant surrounding circumstances and consequences or state of affairs. *Actus Reus* refers to physical elements of an offence

[5] (1975) 1 W.L.R 70

which can be expressed in full as *Actus non facit Renon*. This maxim means that a person cannot be found guilty of an offence unless he has done the act which is forbidden by the law. The Marxism further means that no person can be punished for mere wishes. No person can be punished for jealous or hatred, lust, contempt unless he / she has taken positive steps to do the forbidden act and that act is the *Actus Reus* of that offence. *Actus Reus* is made of conduct, sometimes consequences and state of affairs. It may also consist of failure to take action where action is required by law. eg. Concealment of treason (s. 25 PC), negligence and failure to provide the necessaries

CASES:

1. *Buwanika v R* (1957) EA 279
2. *Hawkins V R* (1959) EA 47

Actus Reus may also be created by a statute. For every statute that creates a duty on a particular person, the provision of such statutes must be clearly defined. If an accused person fails to comply, then he will have committed an offence. There are instances where a result of conduct is not what a person intended to do. The issue here is whether that person is liable eg. If the intended aim is harmless, but turns out to be harmful, the result which is harmful does not make that person liable eg if somebody gives another a glass of poison mistaking it to be a glass of water. The second situation is where the intended aim is harmful but not unlawful. Eg Arresting someone.

3.3 THE NATURE OF AN ACTUS REUS

An actus reus can consist of more than just an act, it comprises all the elements of the offence other than the state of mind of the accused, Depending on the offence, this may include the circumstances in which it was committed, and/or the consequences of what was done. For example, the crime of rape requires unlawful sexual intercourse by a man with a person without their consent. The lack of consent is a surrounding circumstance which exists independently of the accused's act.

Similarly, the same act may be part of the actus reus of different crimes, depending on its consequences. Stabbing someone, for example, may form the actus reus of murder if the victim dies, or of causing grievous bodily harm (CBS) if the victim survives; the accused's behaviour is the same in both cases, but the consequences of it dictate whether the actus reus of murder or GBH has been committed.

The definition of burglary, for example under section 295(2) of the Penal Code Act (PCA) requires that the accused should have broken and entered a "dwelling house" "in the night". Night according to section 2 (q) of the PCA means the interval between half past six o'clock in the evening and half past six o'clock in the morning. If D breaks and enters a dwelling house at 5pm, his conduct doesn't, in these circumstances, amount to the actus reus of burglary but maybe housebreaking. In this case, apart altogether from D 's state of mind, and conduct, one of the essential constituents of the crime is missing. In the great majority of crimes, of course the time of commission is irrelevant. i.e murder, rape, housebreaking, can be committed at any time of the day or night.

Sometimes a particular state of mind on the part of the victim is required by the definition of the crime and where this is the case, that state of mind is part of the actus reus and the prosecution will be required to prove its existence without fail. i.e if D is prosecuted for rape under s.123, it must be shown that p did not consent to the act of intercourse. The absence of consent by p is an essential constituent of the actus reus. So although it is a state of mind of the victim it forms part of the actus reus of rape and failure to prove absence of consent would mean that one of the essential constituents of the crime is missing. It must be emphasised that in many crimes, the consent of the victim is entirely irrelevant. i.e if D is charged with the murder of P, it is no defence for him to show that P asked to be Killed. In the case of defilement it is no defence to show that J consented to having sexual intercourse.

It is apparent from these examples that it is only by looking at the definition of the particular crime that we can see what circumstances are material to the actus reus. Many factors may be relevant; for example in bigamy, the fact that D is validly married; in

receiving stolen goods, that the goods have, in fact, been stolen; and so on. In general, it may be said that, if the absence of any fact (other than the accused 's state of mind) will negative the commission of the crime, that fact is part of the actus reus.

It is therefore right to say that an actus reus is an act or deed, that is prohibited by the law or such result of human conduct as the law seeks to prevent.

Let us look at more examples after the definition of actus reus above. The actus reus of murder may be described as the killing of another human being by an unlawful act or omission. It therefore follows that no crime is committed when a duly appointed public executioner puts to death a condemned criminal for although he does so with full intent to kill, this deed being justified by the law, is therefore not an actus reus on the executioner's part.

3.4 TYPES OF ACTUS REUS

Crimes can be divided into three types, depending on the nature of their actus reus,

I. Action Crimes

The actus reus here is simply an act, the consequences of that act being immaterial. For example, perjury is committed whenever someone makes a statement which they do not believe to be true while on oath. Whether or not that statement makes a difference to the trial is not important to whether the offence of perjury has been committed.

II. State of affairs crimes

Here the actus reus consists of circumstances, and sometimes consequences, but no acts-they are being' rather than 'doing' offences. The offence committed in R v Larsonneur is an example of this where the actus reus consisted of being a foreigner who had not been given permission to come to Britain and was found in the country.

III. Result crimes

The actus reus of these is distinguished by the fact that the accused's behaviour must produce a particular result — the most obvious being murder, where the accused's act must cause the death of a human being.

3.5 CAUSATION

Result crimes raise the issue of causation: the result must be proved to have been caused by the accused's act. If the result is caused by an intervening act or event, which was completely unconnected with the accused's act and which could not have been foreseen, the accused will not be liable. Where the result is caused by a continuation of the accused's act and the intervening act, and the accused's act remains a substantial cause, and then he or she will still be liable. Much of the case law on the issue of causation has arisen in the context of murder, and therefore this issue will be discussed in detail later. It should be remembered that the issue of causation is relevant to all result crimes.

IV. An Actus Reus must be proved

If there is no actus reus there can be no crime. Although D believes it is 7.30 pm when he breaks and enters a dwelling house, he cannot in any circumstances be guilty of burglary if the time, in fact is only 6.00 pm. D has the mens rea but the actus reus, the other fundamental element of the crime, is lacking. D may assault P with intent to ravish her against her will but, if she in fact consents, his act cannot amount to rape. If D makes a statement, which he believes to be false, for the purpose of obtaining money, he cannot be convicted of obtaining by false pretences if the statement is, in fact, true.

V. Analysis of an Actus Reus

S. 126(b) of the Penal Code Act, provides:

> "It is an offence for a person acting without lawful authority or excuse to take another person under the age of eighteen years out of the custody of any of the parents or any other person having lawful care or charge over that person"

Here the conduct which is the central feature of the crime is the physical act of taking away the person. The material circumstances are:

(a) the absence of lawful authority or excuse;
(b) that the person is under eighteen;
(c) that the person was in the custody of the parents or lawful guardian

If any of these circumstances is not present the crime is not committed. Thus if D was acting under the order of a competent court; or if the person was nineteen; or if he/she was not in the custody of the parent or lawful guardian, in none of these cases would there be an actus reus.

So when a hangman executes a condemned prisoner, or a soldier in battle shoots an enemy, the killing is not the actus reus of any crime for there is a lawful excuse for it.

VI. The conduct must be willed

If the actus reus includes an act, that act must be willed by the accused. if a man is unable to control the movement of his limbs it seems obvious that he should not be held criminally liable for that movement or any of its consequences. It is a common law defence of automatism for one to show that his act was involuntary.

In Charlson[6], D a devoted and indulgent father made a sudden and savage attack on his son striking him on the head with a mallet and throwing him from a window. He was charged with various offences against the person and at his trial evidence was adduced to the effect that there was a possibility that he was suffering from cerebral tumour. A person who was so affected according to the medical evidence would be liable to an outburst of impulsive violence over which he would have no control at all. It was held that he was an automaton without any real knowledge of what he was doing. His actions were purely automatic and his mind had no control over the movement of his limbs.

[6] (1955) 1 ALL ER 859

If the accused is to be found guilty of a crime, his or her behaviour in committing the actus reus must have been voluntary. Behaviour will usually only be considered involuntary where the accused was not in control of his or her own body (when the defence of insanity or automatism may be available) or where there is extremely strong pressure from someone else! such as a threat that the accused will be killed if he or she does not commit a particular offence (when the defence of duress may be available).

In a much criticised decision of ***R v Larsonmen***[7], a Frenchwoman was arrested as an illegal immigrant by the authorities in Ireland and brought back to the UK in custody, where she was charged with being an alien illegally in the UK and convicted, This is not what most of us would describe as acting voluntarily, but it apparently fitted the courts' definition at the time. It is probably stricter than a decision would be today, but it is important to realise that the courts do define 'involuntary quite narrowly at times.

3.6 OMISSIONS

(i) How will actus reus be proved if all the person did was doing nothing?

Criminal liability may be imposed for true omissions at common law, though there are situations where a non-lawyer would consider that there has been an omission but in law it will be treated as an act and liability will be imposed.

There are also situations where the accused has a duty to act, and in these cases there may be liability for a true omission.

An actus reus may consist in a failure to take action where action is required by the criminal law. Criminal liability for omissions is exceptional at common law. The generally accepted definitions of most offences include a verb like kill, assault, damage

[7] (1933) 24 Cr App R 74

or take which at first sight at least requires an action of some kind. However many statutes make it an offence to omit to do something e.g. a company which fails to file its returns is guilty of an offence. Nevertheless liability for omissions (though exceptional) is not limited to crimes expressly defined by statute as omission offences. Murder and manslaughter both require that the accused should have 'killed' but both may be committed by omission.

There are three problems according to Smith and Hogan, 5th edn, chapter three at page 52:

(i) When the definition of the crime requires proof that D caused a certain result, can he be said to have caused that result by doing nothing?
(ii) If we can overcome that difficulty, the next question is whether the law recognises that the particular offence may be committed by omission.
(iii) If the offence is capable of being committed by omission, who was under duty to act? The result has occurred and no one prevented it from occurring. Is the law going to impose criminal liability on every person in the jurisdiction of the court, for failing to do so? What is the criteria for selecting the culprit?

(ii) Act or omission?

It must first be decided whether in law you are dealing with an act or an omission? There are three situations where this question arises: continuing acts, supervening faults and euthanasia.

(iii) Continuing acts

The concept of a continuing act was used in ***Fagan v Metropolitan Police Commissioner***[8] to allow what seemed to have been omission to be treated as an act. The accused was told by a police officer to park his car close to the kerb; he obeyed the order,

[8] [1969] Q.B 439

but in doing so he accidentally drove his car onto the constable's foot. The constable shouted, 'Get off, you are on my foot.' The accused replied, 'Fuck you, you can wait, and turned off the ignition. He was convicted of assaulting the constable in the execution of his duty. This offence requires an act; an omission is not sufficient. The accused appealed on the grounds that at the time he committed the act of driving onto the officer's foot, he lacked mens rea , and though he had mens rea when he refused to remove the car, this was an omission, and the actus reus required an act, The appeal was dismissed, on the basis that driving on to the officer's foot and staying there was one single continuous act, rather than an act followed by an omission. So long as the accused had the mens rea at some point during that continuing act, he was liable.

(iv) Supervening fault

A person who is aware that he or she has acted in a way that has endangered another's life or property and does nothing to prevent the relevant harm occurring, may be criminally liable, with the original act being treated as the actus reus of the crime. In practice this principle can impose liability on accused's who do not have mens rea when they commit the original act, but do have it at the point when they fail to act to prevent the harm they have caused.

This was the case in R v Miller (supra). The accused was squatting in a building. He lay on a mattress, lit a cigarette and fell asleep. Sometime later, he woke up to find the mattress on fire. Making no attempt to put the fire out, he simply moved into the next room and went back to sleep. The house suffered serious damage in the subsequent fire. Miller was convicted of arson. As the fire was his fault, the court was prepared to treat the actus reus of the offence as being his original act of dropping the cigarette.

A rare example of the principle in Miller being applied by the courts is the case of Director of Public Prosecutions v Sautra-Bermudez (2003). A police officer had decided to undertake a search of the accused, as she suspected that he was a ticket tout, Initially she had asked him to empty his pockets and in doing so he revealed that he was in

possession of some syringes without needles attached to them. The police officer asked the accused if he was in possession of any needles or sharp objects. He replied that he was not. The police officer proceeded to put her hand into the accused's pocket to continue the search when her finger was pricked by a hypodermic needle. When challenged that he had said he was not in possession of any other sharp items, the accused shrugged his shoulders and smirked at the police officer. The accused was subsequently found guilty of an assault occasioning actual bodily harm (discussed on p. 143). This offence is defined as requiring the commission of an act, as opposed to an omission, but the appeal court applied the principles laid down in Miller. By informing the police officer that he was not in possession of any sharp items or needles, the accused had created a dangerous situation, he was then under a duty to prevent the harm occurring. He had failed to carry out his duty by telling the police officer the truth.

3.7 CONCEPT OF TRANSFERRED MALICE

This happens where the *actus Reus* is intended to affect a certain person, but it is performed on another e.g. When a step mother poisons the stepchild's food and it is eaten by her own child and he dies or if one intends to shoot the president and he shoots the bodyguard. It can also be where the intended aim is an *Actus Reus* of an offence and *Actus Reus* of a different kind is committed eg. If one intended to murder a person and instead he shoots his cow.

3.8 MENTAL ELEMENTS OF AN OFFENCE (MENS REA)

This term means that a person's wrongful act should be associated with blame-worthy attitude of mind. This is loosely translated as a guilty mind. There are several circumstances under which *mensrea* is concluded.

3.9 FORESIGHT OF CONSEQUENCES/RECKLESSNESS.

This means that a person is deemed to have acted with *mensrea* if he was aware that certain consequences would follow his act. He must have appreciated that his

conduct would produce negative / illegal products. Case ***DPP V Smith*** **(1961) AC 290 (1960)**

i. Voluntariness of conduct.

A person is said to have acted with *mesrea* if his act is voluntary. This is when a person applies his will to it. Therefore, the person is said to be acting without *mensrea* if he acted through automation (acting without will) Case: ***Bratty v Attorney General for Ireland (*****1963) AC 386** Case**:** ***Charlson*** **(1955) All ER 859**

ii. Intentions.

This is a wish to bring about a particular result. If this result is forbidden by the law then the offence is committed.

iii. Negligence.

This is where a person acts without realising that a particular result will follow from what he is doing, but a reasonable person ought to realise such a result. See Chapters 21 and 22 Penal Code.

iv. Coincidence of Actus Reus and mensrea

The *mens rea* must coincide in point of time with the act which causes the *Actus Reus.* Case: ***Thabo Meli V R*** **(1954) 1 All ER 57**

4.1 STRICT LIABILITY

The general rule of criminal law is that a man is not criminally responsible for an act or conduct unless it is proved that he did the act voluntarily and with a blameworthy state of mind. This principle is also frequently stated in the form of a Latin maxim: *actus non facit reum nisi mens sit rea.* The definition of a particular crime, either in statute or under common law, will contain the required *actus reus* and *mens rea* for the offence.

In criminal law, strict liability is liability for which *mens rea* does not have to be proven in relation to one or more elements comprising the actus reus. The liability is said to be strict because the accused will be convicted even though he was genuinely ignorant of one or more factors that made his acts or omissions criminal. The accused may therefore not be culpable in any real way, i.e. there is not even criminal negligence, the least blameworthy level of *mens rea.*

The principle of strict liability is an exception to the general rule of criminal law. The accused may be criminally liable although his conduct was not intentional, reckless or negligent. This is known as strict liability or liability without fault. Thus strict liability is simply criminal liability in the absence of intent, purpose, knowledge, belief, recklessness, negligence or some other prescribed mental element. Offences of strict liability are those crimes which do not require mens rea with regard to at least one or more elements of the actus reus. The defendant need not have intended or known about that circumstance or consequence. Liability is said to be strict with regard to that element. For a good example see:

R v Prince [1874-80] All ER Rep 881

R v Hibbert (1869) LR 1 CCR 184.

These laws are applied either in regulatory offences enforcing social behaviour where minimal stigma attaches to a person upon conviction, or where society is concerned with the prevention of harm, and wishes to maximise the deterrent value of the offence. Examples of strict liability include statutes that regulate sale of food, drinks and sellers of meat, offences under the Traffic Act, Public health and industrial regulations and environmental offences.

Se**e Cundy v Le Cocq**[9]**.** The appellant was convicted of unlawfully selling alcohol to an intoxicated person under s.13 Licensing Act 1872. The appellant appealed on the grounds that he unaware of the customer's drunkenness. The appeal was dismissed and conviction was upheld. Court held that S.13 was silent as to *mens rea*, whereas other offences under

[9] (1884) 13 QBD 207

the same Act expressly required proof of knowledge on the part of the defendant. It was therefore taken that the omission to refer to *mens rea* was deliberate and the offence was one of strict liability.

See also **Sherras v De Rutzen [1895] 1 QB 918**

a) What crimes are crimes of strict liability?

Unfortunately, statutes are not so always obliging as to state "this is a strict liability offence'. Occasionally the wording of an Act does make this clear, but otherwise the Courts are left to decide for themselves.

It is always a question of construction whether the offense requires a mental element and if so what that mental element is. Often the definition section of the offense uses a word or phrase knowingly, with intent to, recklessly, willfully, dishonestly and so on which gives guidance to the court.

However it should be noted that it doesn't follow that where no word or phrase importing a mental element is used, the court will find that mensrea is not required and therefore the offense being that of strict liability. On the contrary the courts have frequently asserted that there is a presumption in favour of mensrea which must be rebutted by the prosecution in each and every case.

According to Lord Edmund Davies in ***Whitehouse v Lemon***[10] at 920, an offense is regarded and properly regarded as one of strict liability if no mensrea need be proved as to a single element in the actus reus. For example, an offense of driving without a valid, driving license under S.35 of the traffic and Road safety Act.

Another example is that of defilement, where the accused will be convicted of defilement even though he reasonably but mistakenly believed that the victim was old enough to consent to intercourse

[10] [1979] 1 ALLER 898

No precise rules can be given as to when court will interpret a statutory offense as one of strict liability. The courts will consider the wording of the statute, the gravity of the offense and particularly the object and purpose of the legislation. It is believed that where the statute applies to an issue of social concern such as the sale of medicinal drugs without a prescription or public safety, then strict liability would be effective to promote its objects.

What factors are taken into account by the courts when assessing whether or not an offence falls into the category of strict liability offences?

In **Gammon (Hong Kong) Ltd v Attorney-General for Hong Kong**[11], the accused were involved in building works in Hong Kong. Part of a building they were constructing fell down, and it was found that the collapse had occurred because the builders had failed to follow the original plans exactly. The Hong Kong building regulations prohibited deviating in any substantial way from such plans, and the defendants were charged with breaching the regulations an offence punishable with a fine of up to US $ 250,000 or three years imprisonment. On appeal they argued that they were not liable because they did not know that the changes they made were substantial. However the Privy Council held that the relevant regulations created offenses of strict liability, and the convictions were upheld.

Explaining the principles on which they had based the decision, Lord Scarman laid down the criteria upon which a court should decide whether or not it is appropriate to impose strict liability:
"In their Lordships' opinion, the law … may be stated in the following propositions;
(1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is

[11] [1985] 2 All ER 503

concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

These principles were recently applied by the Court of Appeal in:

R v Blake (1996) The Times, 14 August.

In this case, investigation officers heard an unlicensed radio station broadcast and traced it to a flat where the defendant was discovered alone standing in front of the record decks, still playing music and wearing a set of headphones. Though the defendant admitted that he knew he was using the equipment, he claimed that he believed he was making demonstration tapes and did not know he was transmitting. The defendant was convicted of using wireless telegraphy equipment without a licence, contrary to s1(1) Wireless Telegraphy Act 1949 and appealed on the basis that the offence required mens rea.

The Court of Appeal held that the offence was an absolute (actually a strict) liability offence. The Court applied Lord Scarman's principles in Gammon and found that, though the presumption in favour of mens rea was strong because the offence carried a sentence of imprisonment and was, therefore, "truly criminal", yet the offence dealt with issues of serious social concern in the interests of public safety (namely, frequent unlicensed broadcasts on frequencies used by emergency services) and the imposition of strict liability encouraged greater vigilance in setting up careful checks to avoid committing the offence.

NOTE: The court seems to have been inconsistent in its use of terminology in the present case. The offence is one of strict liability as the defendant had to be shown to have known that he was using the equipment.

4.2 PRESUMPTION OF MENS REA

Courts usually begin with the presumption in favour of mens rea, commonly the well-known statement by Wright J in **Sherras v De Rutzen**[12]**:**

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 deals, and both must be considered.

In **Sherras v De Rutzen**[13]**:** The defendant was convicted of selling alcohol to a police officer whilst on duty, contrary to s16(2) of the Licensing Act 1872. He had reasonably believed the constable to be off duty as he had removed his arm-band, which was the acknowledged method of signifying off duty. The Divisional Court held that the conviction should be quashed, despite the absence from s16(2) of any words requiring proof of mens rea as an element of the offence. Wright J expressed the view that the presumption in favour of mens rea would only be displaced by the wording of the statute itself, or its subject matter. In this case the latter factor was significant, in that no amount of reasonable care by the defendant would have prevented the offence from being committed. Wright J stated:

> "It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under section 16, subsection (2), since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public house. I am, therefore, of opinion that this conviction ought to be quashed."

4.3 GRAVITY OF PUNISHMENT

As a general rule, the more serious the criminal offence created by statute, the less likely the court is to view it as an offence of strict liability. See:

[12] [1895-9] All ER Rep 1167
[13] [1895-9] All ER Rep 1167

Sweet v Parsley[14]**:** The defendant was a landlady of a house let to tenants. She retained one room in the house for herself and visited occasionally to collect the rent and letters. While she was absent the police searched the house and found cannabis. The defendant was convicted under s5 of the Dangerous Drugs Act 1965 (now replaced), of "being concerned in the management of premises used for the smoking of cannabis". She appealed alleging that she had no knowledge of the circumstances and indeed could not expect reasonably to have had such knowledge.

The House of Lords, quashing her conviction, held that it had to be proved that the defendant had intended the house to be used for drug-taking, since the statute in question created a serious, or "truly criminal" offence, conviction for which would have grave consequences for the defendant. Lord Reid stated that "a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma". And equally important, "the press in this country are vigilant to expose injustice, and every manifestly unjust conviction made known to the public tends to injure the body politic [people of a nation] by undermining public confidence in the justice of the law and of its administration."
Lord Reid went on to point out that in any event it was impractical to impose absolute liability for an offence of this nature, as those who were responsible for letting properties could not possibly be expected to know everything that their tenants were doing.

4.4 WORDING OF THE STATUTE

In determining whether the presumption in favour of mens rea is to be displaced, the courts are required to have reference to the whole statute in which the offence appears. See: **Cundy v Le Cocq**[15].
The defendant was convicted of unlawfully selling alcohol to an intoxicated person, contrary to s13 of the Licensing Act 1872. On appeal, the defendant contended that he had been unaware of the customer's drunkenness and thus should be acquitted. The Divisional Court interpreted S.13 as creating an offence of strict liability since it was

[14] [1969] 1 All ER 347
[15] (1884) 13 QBD 207

itself silent as to mens rea, whereas other offences under the same Act expressly required proof of knowledge on the part of the defendant. It was held that it was not necessary to consider whether the defendant knew, or had means of knowing, or could with ordinary care have detected that the person served was drunk. If he served a drink to a person who was in fact drunk, he was guilty. Stephen J stated:

Here, as I have already pointed out, the object of this part of the Act is to prevent the sale of intoxicating liquor to drunken persons, and it is perfectly natural to carry that out by throwing on the publican the responsibility of determining whether the person supplied comes within that category.

4.5 ISSUES OF SOCIAL CONCERN

a. Is There Any Purpose In Imposing Strict Liability?

The courts will be reluctant to construe a statute as imposing strict liability upon a defendant, where there is evidence to suggest that despite his having taken all reasonable steps, he cannot avoid the commission of an offence. See:

Sherras v De Rutzen [1895-9] All ER Rep 1167

Lim Chin Aik v R[16] The defendant had been convicted of contravening an order prohibiting in absolute terms, his entry into Singapore, despite his ignorance of the order's existence. In allowing the defendant's appeal, Lord Evershed expressed the view that the imposition of strict liability could only really be justified where it would actually succeed in placing the onus to comply with the law on the defendant. If the defendant is unaware that he has been made the subject of an order prohibiting him from entering a country, the imposition of strict liability should he transgress the order would not in anyway promote its observance. Lord Evershed stated:

"But it is not enough in their Lordship's opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business

[16] [1963] 1 All ER 223.

methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

b. Classification Of Strict Liability Offences

In **Sherras v De Rutzen (1895**), Wright J stated that apart from isolated and extreme cases like bigamy and abduction of a girl under sixteen, the principal classes of strict liability may perhaps be reduced to three:

- One is a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty (eg, the sale of adulterated food: **Roberts v Egerton, 1874)**.
- Another class comprehends some, and perhaps all, public nuisances: **R v Stephens (1866)** where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders.
- Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right (eg, see **Hargreaves v Diddams (1875**) as to a bona fide belief in a legally impossible right to fish).

But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence.

c. Examples of Acts imposing strict liability in Uganda are;

- The Traffic and Road safety Act, 1998 s.35 e.g, no person shall drive any class of motor vehicle, trailer or engineering plant on a road unless he or she holds a valid driving permit or a valid learner driving permit..
- Trading with the Enemy Act cap 364. s.2, any person who trades with the enemy within the meaning of the act commits an offense of trading with the enemy and is liable on conviction to imprisonment for a term not exceeding 7 years.
- Firearms Act Cap 299 any person found in possession of a firearm without a valid firearm certificate is guilty of an offense

- The Liquor Act cap 93, s.2 no person shall sell liquor anywhere in Uganda unless he or she is licensed to do so by a licensing authority under the act
- Penal code Bigamy, s.153, defilement s.129(1) any person who unlawfully has sexual intercourse with a girl under 18 commits an offense, abduction s.126
- S.129 of the Penal Code (Amendment) Act 2007. Any person who performs a sexual act with another person who is below the age of 18 years, commits a felony known as defilement and I son conviction liable to imprisonment for life.

d. How is a particular offense to be recognised as one of a strict liability nature?

The absence of a word or phrase imputing a requirement of a mental element such as knowingly, intentionally, recklessly is considered very important, but it is not a determining factor. There are cases where mensrea has been required to be proved where no such word was used in the statutory provision.

Cases:

Warner v MPC [1968] 2 All ER 356 (the first strict liability case to reach the House of Lords)

Alphacell v Woodward [1972] 2 All ER 475

Smedleys Ltd v Breed [1974] 2 All ER 21

R v Howells [1977] 3 All ER 417

R v Lemon; R v Gay News Ltd [1979] 1 All ER 898

PSGB v Storkwain [1986] 2 All ER 635.

Abdallah v R 1964 E.A 270

4.6 VICARIOUS LIABILITY

Vicarious liability, which is common in some areas of the law, refers to legal responsibility for the acts of another or liability for the acts of another. i.e, if a law holds X responsible for Y's actions, then X's liability is said to be vicarious. In Criminal law, vicarious liability may be intended to refer only to cases that hold X criminally responsible for Y's conduct based on the relationship between X and Y or sometimes the

term may be used to describe X having liability for Y's conduct even though X was not at fault.

Under any definition, criminal law disfavours vicarious liability. The general rule is that one is liable only for one's own actions and not for the actions of others. Some authors argue that vicarious liability and direct liability are confused. i.e. parents for example, sometimes face criminal liability for allowing their minor children to use guns or automobiles or to skip school. These crimes it is argued are examples of direct liability, not vicarious liability because the statues explicitly hold the parent liable for the parent's own act (e.g negligently storing a weapon) or omission.

Criminal law doesn't generally employ vicarious liability because in many respects vicarious criminal liability would violate either or both of two basic principles of the criminal law. According to the first principle, the actus reus requirement, a person cannot be guilty of a crime unless the persons' guilty conduct includes a voluntary act or omission. By holding a person liable for the conduct of another, vicarious liability undermines the principle of actus reus requirement. Just as importantly, vicarious liability may violate the second principle, that criminal liability must be based on personal fault.

Therefore it may be right for one to conclude that vicarious liability would often run afoul of basic precepts that require an actus reus and mensrea for criminal responsibility.

1. Vicarious Liability and Strict Liability distinguished

Vicarious liability should also be distinguished from the closely related concept of strict liability. Under strict liability, the defendant must engage in prohibited conduct, but the separate requirement that the defendant has a guilty mind- some degree of fault is removed. Vicarious liability, in contrast dispenses with the requirement that the defendant engage in the prohibited conduct, instead holding the defendant liable for the conduct of another. For example a law holding X liable for selling alcohol to Y, a minor,

even though X reasonably believed Y was over 21, imposes strict liability. A law holding W, X's employer, liable for X's sale to Y imposes vicarious liability.

Laws can and sometimes do impose strict and vicarious liability simultaneously- for example a law that held W liable for X's sale to a minor even though W and X had taken reasonable precautions to avoid such sales. However, laws can also impose either kind of liability separately.

A statute may require mensrea and yet impose vicarious responsibility. Or it may impose strict liability without imposing vicarious liability. i.e being in possession of a firearm without a license.

2. Vicarious liability operates generally on two principles

- Where the master delegates a duty imposed upon him on to a servant.
- Secondly where a master is held liable because acts which are done physically by the servant, may in law be the masters acts.

4.7 THE DELEGATION PRINCIPLE

Where a statute imposes a duty on a particular person, e.g the holder of a justices' license and that person delegates the performance of the statutory duty to another, he may be held liable for breaches of it committed by the delegate, even though mensrea is required. The mensrea of the delegate is sufficient to impose liability on the delegator for breach of the duty which is imposed on him and him alone.

A good illustration of the application of this principle may be found in the case of;
Allen v Whitehead[17]; Under the Metropolitan Police Act 1839, s.44, it is an offense to '**knowingly permit or suffer prostitutes** or persons of notoriously bad character to meet together and remain in a place where refreshments are sold and consumed'

[17] [1929] ALL ER 13

D the occupier of a café, while receiving the profits of the business, didn't himself manage it, but employed a manager. Having had a warning from the police, D instructed his manager that no prostitutes were to be allowed to congregate on the premises and had a notice to that effect displayed on the walls. He visited the premises once or twice a week and there was no evidence that any misconduct took place in his presence. Subsequently on eight consecutive days a number of women known by the manager to be prostitutes met and remained on the premises between 8pm and 4 am, indulging in obscene language. It was held by the divisional court that D's ignorance of the facts was no defense. The act of the servant and his mensrea were both to be imputed to his master, not simply because he was a servant, but because the management of the house had been delegated to him.

In the case of **Vane v Yiannapoulous**[18]

The respondent was the holder of a restaurant license. A condition of the license was that liquor should not be sold except to persons taking meals. The restaurant was on two floors. While the respondent was on one floor, conducting the business of the restaurant, a waitress on the other floor sold liquor to customers who had not ordered a meal. The waitress had been instructed to serve liquor only to customers ordering a meal. The respondent didn't know about the sales.

A charge of knowingly selling intoxicating liquor to persons to whom he was not entitled to sell, contrary to section 22 of the Act was dismissed by the justices. The prosecution appealed and its appeal was dismissed on the ground that the respondent had not delegated to the waitress the management of the business.

In this case the court stated that there had been no delegation of authority in the sense in which the word has been used in various cases, because in this case the licensee was himself controlling the premises and had given direct instructions to the persons in his

[18] [1964]3 W.L.R 12

employment (including the waitress who served the liquor) that these terms had to be strictly observed.

There was no delegation and therefore the master could not be held liable for the breach of his servant.

It should be noted that if the licensee's delegate sub-delegates his responsibilities, the licensee is liable for the sub-delegate's acts, but he is not liable for the acts of an inferior servant to whom control of the premises has not been delegated.

In the case of **R v Winson**[19] **,** The appellant was a director of a company which owned a club and the holder of a justices' on license in respect of the club. It was a term of the license that liquor should not be sold to anyone who had been a member for less than 48 hours. Liquor was sold in breach of this term. At the material times the club was run by a manager appointed by the managing director. The appellant who also held licenses in respect of three other premises, visited the club only occasionally. He was charged under s.161 (1) of the licensing Act.

Where there is true delegation then the knowledge of the servant or agent becomes that of the master or principal. Where a man wholly absents himself leaving somebody else in control, he cannot claim that what has happened has happened without his knowledge if the delegate has knowingly carried on in contravention of the license.

Lk at the case of Linnett v Metropolitan police Commissioner[20] Lord Goddard in this case said;

> 'The point doesn't depend merely on the fact that the relationship of master and servant exists; it depends on the fact that the person who is responsible in law as the keeper of the house, or the

[19] [1968] 1 ALL ER 197

[20] [1946] KB 290

licensee of the house if the offense is under the licensing act has chosen to delegate his duties, powers and authority to somebody else'.

When an absolute offense has been created by parliament, then the person on whom a duty is thrown is responsible whether he has delegated or whether he has acted through a servant; he is absolutely liable regardless of any intent or knowledge or mensrea. The principle of delegation comes into play, and only comes into play , in cases where though the statute uses words which import knowledge, or intent, nevertheless it has been held that a man cannot get out of the responsibilities which have been put on him by delegating those responsibilities to another

4.8 WHERE THE SERVANT'S ACT IS THE MASTER'S ACT IN LAW

The master will be held criminally responsible for those acts that may be committed by the servant where those acts are in law deemed to be acts of the master. This mostly arises where the offense is one of a strict liability nature. i.e where selling is the central feature of the actus reus, under acts like the sale of goods act cap 82. A sale under the sale of Goods Act consists in the transfer of property in the goods from A to B and the seller in law is that person in whom the property in the goods is vested at the commencement of the transaction. Therefore when goods are sold by a shop assistant, the seller is the owner of the goods, the employer. If the goods are sold with a false trade description, it is the owner of the shop who has so sold them, even if he is on holiday at a Miami Beach in florida at the time. Of course he has no mensrea, but if the offense is one of strict liability, that will not help him. He will be held to have committed the offense.

In the case of **Coppen v Moore[21];** D owned six shops, in which he sold American hams. He gave strict instructions that these hams were to be described as breakfast hams and were not to be sold under any specific name of place of origin. That is to say, they must not be described as Bristol, Bath, Wiltshire or any such title bust simply as breakfast hams. In the absence of D, and without the knowledge of the manager of the branch, one

[21] [1898] 2 QB 306

of the assistants sold a ham as a scotch ham. D was convicted under the Merchandise Marks Act of selling goods to which any false trade description is applied.

It cannot be doubted that the appellant sold the ham in question, although the transaction was carried out by his servants. In other words, he was the seller although not the actual salesman. The appellant had committed an offense of selling under a false trade description.

4.9 PARTIES TO A CRIME

Section 19 of the Penal Code provides:

(1) When 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 be charged with actually committing it—

(a) every person who actually does the act or makes the omission which constitutes the offence (Principal offender);

(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 or abets another person in committing the offence.

(2) Any person who procures another to do or omit to do any act of such a nature that if he or she had done the act or made the omission the act

or omission would have constituted an offence on his or her part, is guilty of an offence of the same kind and is liable to the same punishment as if he or she had done the act or made the omission.

Two distinct classes of parties can be identified as ‘principal offenders’ and ‘accomplices’. A principal offender is one who has actually committed the offence while the accomplice is the one who has helped in some way. The accomplices are further divided into abettors / counsellors or procurers. The difference between counselling and procuring on the one hand from aiding and abetting on the other is that the former occur before the act is committed while the latter occur at the scene of the crime. However, an

accomplice may aid the commission of an offence by supplying the necessary equipment, not withstanding that he is not at the scene of the crime. He may procure means to procure by endeavour. Lord Widgery CJ in the case *A.G's reference N0 2 of 1977* observed that you procure a scheme by setting out to see that it happens and taking appropriate steps to produce that happening. In this case the accused surreptitiously laced a friend's drink with a double measure of alcohol, knowing that the friend would shortly be driving home. The friend was convicted of drunken driving. The accused was charged as an accomplice of the offence. The trial judge acquitted the accused on the grounds of no case to answer. The court of appeal held that this submission should not have been allowed. It stated that the accomplice's act in procuration must be the cause in fact of the commission of the offence by the principle i.e. in this case the amount of alcohol supplied must be shown to have taken the principle blood to alcohol levels beyond the legal limit for driving. The court further held that as regards procuring there was no requirement to prove agreement or consensus regarding the commission of the offence.

5. AIDING

This involves helping in the commission of an offence e.g. if X is committing a burglary and Y is standing on the building watching for any people who could be coming, Y may be described as aiding in the commission of burglary by X. If a man X commits the offence of rape upon D while Y holds D, Y would be aiding X.

5.1 ABETTING

This implies encouragement like counselling. It is sufficient that the principle should be aware of the encouragement. There is no need to prove that the principle could not have committed the crime but for being abetted by the accomplice. There is no need to prove any consensus between the parties. In ***Wilcox V Jeffrey***[22], the proprietor of the publication entitled 'Jazz illustrated' who had written reports of musician Cole Man Hawkins arrived in UK and attended the concerts of which Hawkins delighted the crowd by getting upon on stage and playing his instrument the growing account of which

[22] [1951] 1 ALL ER 464

appeared in ‘Jazz illustrated’. Hawkins had been forbidden under the Aliens’ Order of 1920, from taking any erupt in the U.K. The Defendant was convicted of aiding and abetting Hawkins in the contravention of the Aliens’ Order of 1920. On appeal it was held that as it had been an illegal act for Hawkins to play and as the applicant clearly knew this was illegal, his payments for a ticket and presence on the concert were an encouragement to commit this illegal act.

5.2 PRELIMINARY OR INCHOATE LIABILITY

An inchoate offence is one that is "committed by doing an act with the purpose of effecting some other offence" (G. Williams, Textbook of Criminal Law). It is committed when the defendant takes certain steps towards the commission of a crime. Unlike liability for secondary participation in a crime, it is unnecessary that the main offence be committed.

The taking of certain acts towards committing a “full” offence (e.g. theft) may render the actor liable for one or another of the “inchoate” (or “incomplete”) offences – conspiracy, incitement or attempt. Note that the labels “inchoate” or “incomplete” are misleading. Each of the “inchoate” offences is complete in itself, and possesses elements of actus reus and mens rea. It is the full offence that is incomplete.

The key question you should be asking in connection with each offence is “why is this conduct being criminalized”?

- **Forms of Preliminary offences:**

There are 3 preliminary offences i.e. incitement, conspiracy and attempt.

There are three main inchoate offences - incitement, conspiracy and attempt - and the nature of the requisite steps that need to be taken varies with each:

- With incitement the defendant must have tried to persuade another to commit a crime.
- With conspiracy at least two defendants must have agreed to commit a crime.

• With attempt the defendant must have tried to commit the offence and have got relatively close to achieving this objective.

- **Incitement**

This refers to intentionally instigating a person to commit a criminal offence. This is provided under section 21 of the Penal Code. Under the section, a person who incites another commits an offence. Whether an incitement is successful or not, such a person is punished. A person commits an offence of incitement when he does the following;

a) Influences the mind of another to commit a crime. One has to prove that the suggestion from the inciter has reached the mind of the incitee. There is no need to provide evidence that the incitee acted from the suggestion. See ***Race Relations Boad V Applin***[23] In this case the accused conducted a campaign against the white families fostering of black children and had been charged with inciting the commission of an offence under the Race Relations Act of 1968. Lord Denning stated that to incite means to urge or spur on by advice, encouragement or persuasion and not otherwise. The *measrea* must be the intention to influence, not necessarily to commit the crime.

b) Write or speak some word. This may be in form of a suggestion, proposal, persuasion or even a threat. In theory it is possible for a person to incite millions of others to commit an offence through a Newspaper or a TV broadcast. For example *R V Most* the accused was convicted of incitement to murder after publishing a Newspaper article inciting certain readers to rise up in a revolutionary ferment and kill their respective heads of state. Incitement may be express or implied. This may be through an advert to the public. It is important to note that the incitement must be communicated. There can be no incitement of any person unless the incitement whether by words or written matter, reaches a person who it is said, is being incited.

[23](1973) 1 QB 81.

5.3 INCITEMENTS

i) ACTUS REUS

The actus reus of incitement is the act of persuading, encouraging or threatening another to commit a crime. See:

Race Relations Board v Applin;[24] The defendant members of the 'National Front' had conducted a campaign against a Mr and Mrs W (a white couple) fostering black children. They had written threatening letters, distributed circulars and held public meetings in an attempt to persuade the married couple to stop fostering black children. The RRB sought a declaration that the defendants' acts were unlawful under s12 of the Race Relations Act 1968, which makes it unlawful to discriminate in the public provision of services, and an injunction restraining them from inciting a person to do an act which was unlawful under the 1968 Act.

It was held, by the Court of Appeal (Civil Division) that the defendants had 'incited' Mr and Mrs W, within s12 of the 1968 Act, to discriminate unlawfully. The word 'incite' in s12 was not limited to advice, encouragement or persuasion of another to do an act but included threatening or bringing pressure to bear on a person. Accordingly the defendants, bringing pressure to bear on Mr and Mrs W to take white children only, had 'incited' them to do so. It followed that, since it would have been unlawful discrimination under the Act for Mr and Mrs W to take white children only, it was, by virtue of s12, unlawful for the defendants to incite them to do so.

If the person incited agrees to commit the crime, both are liable for conspiracy. If the incitee actually commits the crime, the incitor will be liable as an accomplice to the complete offence. The mere incitement of another to commit an indictable crime is a common law misdemeanor, whether the incitement is successful in persuading the other to commit, or to attempt to commit the offence or not. If the offence incited is actually committed, then the inciter becomes an accessory before the fact to the felony or misdemeanour or as a principal as the case may be.

See. S. 21(1) of the PCA- the punishment for the inciter of an offence punishable with death is 10 years imprisonment.

[24] **[1973] 1 QB 815**

5.4 MENS REA

As in the case if an accessory before the fact, it must be proved that the incitor intended that as a result of his persuasion, the incitee will bring about the crime.

See: Invicta Plastics Ltd v Clare[25];. The defendant had advertised a device with a photograph showing a view of a speed restriction sign, implying that it could be used to detect police radar traps. It was not an offence to own one of these devices, but it was an offence to operate one without a licence. In confirming the company's conviction for inciting readers of the adverts to commit breaches of the Wireless Telegraphy Act 1949, the Divisional Court held that the mens rea involved not only an intention to incite, but also an intention that the incitee should act upon the incitement.

Generally, the incitee must know of the facts that make the conduct incited criminal. Hence, a defendant can only be guilty of incitement to handle stolen goods if the incitee knew or believed the goods in question to be stolen. (However, the incitor might still be guilty of attempted incitement here.)

See: R v Curr [1968] 2 QB 944.

If an innocent incitee actually committed the crime, the incitor could be liable as a principal offender acting through an innocent agent, if it is capable of being so committed.

5.5 IMPOSSIBILITY

There can be liability for incitement to commit the impossible only if the commission of the crime was possible at the time of the incitement. It is irrelevant that the crime incited is impossible of commission. If D incites E to attempt to steal from a pocket which D knows to be empty, he is asking E to do an act, which in the circumstances known to D, will amount to the misdemeanour of attempt. As a matter of fact, he is inciting to E to commit that misdemeanour, and there seems to be no reason why he should not be held liable in law for inciting to attempt.

[25] [1976] RTR 251

See: R v Fitzmauric[26];.

The defendant's father had asked the defendant to recruit people to rob a woman on her way to the bank by snatching wages from her. The defendant approached B and encouraged him to take part in the proposed robbery. Unknown to the defendant, no crime was to be committed at all; it was a plan of his father's to enable him to collect reward money from the police for providing false information about a false robbery. The defendant was convicted of inciting B to commit robbery by robbing a woman near the bank. He appealed against conviction on the ground that what he had incited had in fact been impossible to carry out.

The Court of Appeal dismissed the appeal. It was held that (1) At common law incitement to commit an offence could not be committed where it was impossible to commit the offence alleged to have been incited. Accordingly, it was necessary to analyse the evidence to decide the precise offence which the defendant was alleged to have incited and whether it was possible to commit that offence. (2) Since at the time the defendant encouraged B to carry out the proposed robbery the defendant believed that there was to be a wages snatch from a woman on her way to the bank, and since it would have been possible for B to carry out such a robbery, the defendant had incited B to carry out an offence which it would have been possible rather than impossible for B to commit. It followed that the defendant had been rightly convicted.

5.6 CONSPIRACY

This is covered under Section 390-392 of the Penal Code. This occurs when any person agrees with any other person/persons that a course of conduct should be pursued which will necessarily amount to or involve the commission of any offence / offences by one or more parties to the agreement, if the agreement is carried out in accordance with the intentions. In short, conspiracy consists an agreement between 2 or more persons to effect an unlawful purpose or a lawful purpose by unlawful means. "Unlawful" should in this case mean breaking the law, an immoral act or causing a mischief. This was

[26] **[1983] QB 1083**

emphasized by Simon in the case Crofter ***Handwoven Harris Iweed Co. Ltd. V. Vutch***[27]***;***. He stated that conspiracy when regarded as a crime is the agreement of two or more persons to effect any unlawful purpose. The crime is complete if there is such agreement. In most cases overt acts done in consequence of the combination are available to prove the fact of the agreement. The most important issue in cases of conspiracy is whether the parties were always working together with the union of mind with the accomplishment of common purpose or common plan.

Conspiracy is simply an agreement to commit a crime:-
In Crofter Hand Woven Harris Tweed Company Ltd v Veitch [1942] AC 439 it was stated that; 'Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose… and the crime is complete if there is such agreement…'

ii) Proof of Conspiracy

It can be proved by showing that; by the overt acts, the accused persons pursued the same object i.e. one performing one part and another, a different part with a view of attaining the same results. Section 10 of the Evidence Act allows the admission of anything said by one of the conspirators against the other. The acts of one of the conspirators are taken to be those of the other. However, this happens when the acts or words are in a furtherance of a common purpose.

So there must be proof of:-

(i) an agreement
(ii) which if carried out in accordance with the parties intentions
(iii) necessarily amounts to the commission of a crime

Categories of people who can be convicted of conspiracy:

[27] [1942] AC 432 at 439

1. Persons who enter into conspiracy before its objective is achieved.
2. Persons who enter into conspiracy after its formation.
3. Persons who enter into conspiracy after the offence has been committed.

It is important to note that a person can withdraw from the conspiracy by notifying the others that he would no longer participate. He must do this before the time of carrying out the purpose of the crime. In order to escape liability of conspiracy, a person who must take positive steps to show that he no longer participates.

5.7 ACTUS REUS

There must be an agreement between at least two persons. The parties must reach a stage where they agree to carry out the commission of the offence so far as it lies within their power to do so. Once agreement is reached it must be communicated between the parties. However, see the limitation in: **R v Chrastny,**[28] it was stated

"An agreement to conspire at common law excludes agreements between spouses because the two are considered to be one. In the case of **Mawji v R** [29] it was stated that the English rule that a husband and a wife could not commit conspiracy applied to all marriages valid by the local law of the land, even though such marriages are polygamous or potentially polygamous.

In R v Chrastny, [30] The defendant had been convicted of conspiracy to supply a Class A drug, and sought to challenge her conviction on the ground that the trial judge had erred in law in directing the jury that, although the defendant had only agreed with her husband that the offence should be committed, s2(2)(a) of the Criminal Law Act 1977 provided no protection where she had nevertheless known of the existence of the other conspirators. In dismissing the appeal, Glidewell LJ pointed out that the provision does not enable a wife to escape liability simply by taking care only to agree with her spouse,

[28] (1973) 1 QB 81.
[29] 23 E.A.C.A 609
[30] [1991] 1 WLR 1381

even though she knows of the existence of other parties to the conspiracy. Only where she remained genuinely ignorant of other parties to such a conspiracy would s2(2)(a) protect her.

5.8 MENSREA

In **R v Anderson [1986] AC 27,** the House of Lords held that it is sufficient for the prosecution to establish, by way of mens rea, that the defendant had agreed on a course of conduct which he knew would involve the commission of an offence and that it was not necessary to prove that he intended that it be committed.

See: R v Anderson [1986] AC 27 The defendant agreed for a fee to supply diamond wire to cut through prison bars in order to enable another to escape from prison. He claimed that he only intended to supply the wire and then go abroad. He believed the plan could never succeed. He appealed against his conviction for conspiring with others to effect the release of one of them from prison, claiming that as he did not intend or expect the plan to be carried out, he lacked the necessary mens rea for the offence of conspiracy. The House of Lords dismissed the appeal. Lord Bridge stated that beyond the mere fact of agreement, the necessary mens rea of the crime is established if it is shown that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. On the facts of the case, the defendant clearly intended, by providing diamond wire to be smuggled into the prison, to play a part in the agreed course of conduct in furtherance of the criminal objective.

In **Yip Chiu-Cheung v R [1994] ALL ER**

The defendant had entered into an agreement with an undercover police officer, whereby the officer would fly from Australia to Hong Kong, collect a consignment of heroin from the defendant, and return with it to Australia. In due course, however, the defendant was charged with, and convicted of, conspiring to traffic in dangerous drugs. He appealed on the ground that there could be no conspiracy as his co-conspirator had been acting to promote law enforcement, and that the officer's purpose had been to expose drug-

trafficking. The appeal was dismissed by the Privy Council. Even though the officer would have been acting courageously and from the best of motives, it had nevertheless been his intention, at the time the agreement was made, to take prohibited drugs from Hong Kong to Australia. If the agreement had been executed he would have committed a serious criminal offence. It followed that there had been a conspiracy and the defendant had been properly convicted.
Lord Griffiths emphasised that a conspiracy required at least two people who intended to carry out the agreement which necessarily involved the commission of the crime.

There must necessarily be two or more conspirators, so that if all other conspirators are acquitted, the other remaining conspirator must also be acquitted. But where A is charged with conspiracy with B and others unknown to commit an offence and there is evidence that others in addition to those named were involved, A may be convicted despite the acquittal of B.

Problems arising from multi-party conspiracies where some participants were convicted and others acquitted were considered in:- **R –v- James**[31]**:** the defendant and others worked for a company, Harrovian, which needed funds for a major redevelopment scheme. The prosecution alleged that over the period from 1 January 1989 to 31 August 1990 the company was at the centre of a mortgage fraud designed to extract borrowings from banks and building societies on false bases in order to support the financial demands of this scheme. James role, according to him, was mainly concerned with putting a package together for the financing of the redevelopment. Alternatively, his role was to assist other company representatives in dealing with Harrovian's lenders and in liaising with Harrovian's solicitor in relation to borrowings generally. Some of the parties to the fraud were convicted of conspiracy; others were acquitted; James was retried after the first jury failed to reach a verdict regarding him, and was convicted. The first question for the C/A was whether James' conviction was safe, given that some other alleged co-conspirators had been acquitted at the first trial. They HELD that it was, given that the participation of the acquitted parties was not a condition precedent to the

[31] [2002] EWCA Crim 1119

existence of a conspiracy. It was sufficient that James' had been proved to conspire with other named persons.

It follows that there must be knowledge of the criminality:-

R v Siracusa[32]**,** where the defendants conspired to import drugs into Canada via the UK in secret compartments of furniture. There was (incredibly) some argument about the defendant's knowledge as to the precise drugs crime to be committed. It was HELD that the defendant must know at the time of the agreement that it involved the commission of an offence, and that where the conspiracy was to import heroin, it was necessary to prove an agreement to import heroin.

5.9 IMPOSSIBILITY

There can be liability for a conspiracy even though there exist facts which render the commission of the offence impossible.

6. ATTEMPTS

An attempt is an act done with intent to commit a crime. It is done with series of acts which would constitute its (offence's) actual commission if it were not interrupted. When an act is done with intention of committing a crime in a manner impossible, it is not an attempt e.g. one cannot be charged with an attempted murder if he fired unloaded gun because the manner proposed for killing cannot kill. However, there can be attempt to commit a crime depending on the circumstances of a case.

In ***Edward s/o Michael V R***[33], Edward Paul was charged with attempting to sell diamond. He did not know that what he was trying to sell were not diamonds, but pieces of glass. Because he believed that what he was selling was actually diamonds, he was convicted of selling diamonds.

[32] **[1989] Crim LR 712 C/A**
[33] (1948) I.T.L.R. 308

iii) The Statutory framework

The Statutory framework is provided in sections 386, 387 and 388 of the Penal Code Act cap 120.

s. 386 of the Penal Code Act provides that;

(1) When a person, intending to commit an offence, begins to put his or her intention into execution by means adapted to his fulfilment, and manifests his or her intention by some overt act, but does not fulfil his or her intention to such an extent as to commit the offence, he or she is deemed to attempt to commit the offense.

(2) It is immaterial-

a) except so far as regards the punishment, whether the offender does all that is necessary on his or her part for completing the commission of the offence or whether the complete fulfilment of his or her intention is prevented by circumstances independent of his or her will, or whether the offender desists of his or her own motion from the further prosecution of his or her intention;

b) that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

The prosecution must prove that the defendant committed an act which was "more than merely preparatory". This is a question of fact for the jury to decide.

According to Lord Lane CJ in R v Gullefer (1990), the offence is committed when the merely preparatory acts come to an end and the defendant embarks upon the crime proper. When that is will depend upon the facts in any particular case.

See:

R v Gullefer (1990) 91 Cr App R 356

R v Jones (1990) 91 Cr App R 351

R v Campbell (1991) 93 Cr App R 350

Attorney-General's Reference (No 1 of 1992) [1993] 2 All ER 190

R v Geddes [1996] Crim LR 894

R v Tosti and White [1997] Crim LR 746

R v Toothill [1998] Crim LR 876

R v Nash [1999] Crim LR 308.

6.1 THE ACTUS REUS IN ATTEMPTS

The actus reus of attempt cannot be defined with the same precision as the actus reus of a substantive offence. The question of what is a sufficient actus reus in cases of attempt has given constant trouble. The difficulty is to distinguish between acts of preparation and the actual attempt. It is obvious that there may be many steps towards the commission of a crime which cannot properly be described as an attempt to commit it.

Look at such a scenario; D intending to commit a murder, buys a gun and ammunition, does target practice, studies the habits of his victim, finds a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but they could not properly be described as attempted murder.

D takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and pulls it. Certainly he has now committed attempted murder. But he might have been interrupted at any one of the stages described. The question is; At what stage had he gone far enough for his conduct to be described as an attempt?

Intent has been described as the principal ingredient of the offence of attempt. It is however not the only ingredient. Something must be done to put the intent into execution. The question is, HOW MUCH? The law has always tried to distinguish mere acts of preparation from attempts.

The law on attempts is to the effect that the act had to be sufficiently proximate to the complete offence. The only settled rule of common law was that if D had done the last act which, as he knew, was necessary to achieve the consequence alleged to be attempted, he was guilty. Every act preceding the last one might quite properly be

described as preparatory. It should be noted that not all preparatory acts are excluded; only those that are merely preparatory. i.e the assassin's crooking of a finger although preparatory may not be said to be merely preparatory. Whether the act is merely preparatory is a question of fact.

In R v Robinson; [34]The appellant was a jeweller who had insured his stock against theft. One day, he concealed some of it in his premises, tied himself up with a string and called for help. He told the policeman who broke in that he had been knocked on the head and his safe robbed. The safe was open and empty. He said, 'they have cleared me out'. He valued the jewellery at £1,500. The police man was not satisfied with the story, so he took him to the station and searched his premises. They found the jewellery concealed in a recess at the back of the safe. The appellant admitted that he had insured hi stock for £1200 and that he had staged the burglary with a view to making a claim. He was convicted of attempting to obtain the money by false pretences and appealed.

On appeal, he was acquitted of attempting to obtain money by false pretence on the ground that his act was remotely and not immediately, connected with the commission of the intended crime. He could have been guilty of an attempt if he had actually communicated the burglary to the insurance company and filed a claim. The appellant was merely preparing the evidence to support a false pretence which he never made.

Acts remotely leading towards the commission of the crime are not to be considered as attempts to commit it, but acts immediately connected with it are.

"Acts which are more than merely preparatory"

The main area of doubt is the extent to which the defendant must commit the actus reus of the full offence. In the case of **R v Gullefer**[35]**,** Gullefer jumped on to the track at a greyhound racing stadium and waved his arms in order to distract the dogs during the

[34] [1915] KB 342
[35] [1990] 1 WLR 1063

running of a race. He later admitted that he hoped that the stewards would declare no race so that he would recover from a bookmaker the stake he had placed on a dog that was losing. He was convicted of attempted theft of his stake from the bookmaker and appealed to the court of appeal.

The question for the judge to decide was whether there was evidence on which a jury could reasonably come to the conclusion that the defendant had gone beyond the realm of mere preparation and had embarked on the actual commission of the offence.

The defendant interrupted a greyhound race. He was trying to stop the race so that he could recover his stake money. He got no further than stopping the race: stewards apprehended him and minds turned towards how to make his actions criminal. He was convicted of attempted theft of the stake money, but it was HELD on appeal that, as he had not tried to claim the money back, he had only done acts preparatory to the commission of the full offence. He had jumped onto the track in an effort to distract the dogs, which in his turn he hoped would have the effect of forcing the stewards to declare 'no race' which would in turn give him the opportunity to go back to the bookmaker and claim his £18 he had staked. There was insufficient evidence for it to be said that he had, when he jumped on to the track, gone beyond mere preparation.

In the case of **R v Campbell**[36], where the defendant was arrested in front of a post office carrying an imitation gun and a threatening note. Had he done more than merely preparatory acts? HELD, that it would be difficult to uphold a conviction for an attempted robbery where the accused had not arrived at the place where the crime was to be committed – here, inside, rather than outside the Post Office, as robbery requires proof of the use/threat of force. Each case would depend on its' facts. The conviction was quashed.

Gullefer was applied in:-

[36] [1990] 1 WLR 1063

R v Jones[37]**,** where the defendant was convicted of attempted murder. He appealed, claiming that, though he was pointing a sawn-off shotgun at the victim, since he needed to perform three further acts - (a) removing the safety catch of the shotgun (b) putting his finger on the trigger and (c) pulling the trigger - to complete the full offence, his acts were merely preparatory. The C/A emphasized that the correct approach was to give the words of the statute their natural meaning; the words "more than merely preparatory" did not mean the "last act within his power". The appeal was dismissed.

In this case Jones got into a car driven by his ex-mistress's new lover, Foreman. He was wearing overalls and a crash helmet and carrying a bag containing a loaded sawn-off gun. He had bought the gun a few days earlier. Jones pointed the gun at foreman and said; 'you are not going to like this'. Foreman grabbed the end of the gun and, after a struggle, escaped unharmed.

It was stated that clearly his actions in obtaining the gun, in loading it, putting on his disguise and in going to the school could only be regarded as preparatory acts. But once he had got into the car, taken out the loaded gun and pointed it out at the victim with the intention of killing him there was sufficient evidence to convict for attempted murder.

This approach was followed in:-

AG's Reference (No 1 of 1992)[38]**:** the defendant had attacked the victim, a person known to him for several years. The evidence suggested that he was too drunk to penetrate the victim, and there was doubt as to whether he had tried fully to do so. The trial judge directed an acquittal, and the AG posed the following question for the C/A:-

"Whether, on a charge of attempted rape, it is incumbent on the prosecution, as a matter of law, to prove that the defendant physically attempted to penetrate the woman's vagina with his penis."

[37] [1990] 3 All E.R. 886 C/A
[38] [1993] 2 All E.R 190

The Court ruled that it was not. Lord Taylor CJ noted:-

"It is not, in our judgment, necessary, in order to raise a prima facie case of attempted rape, to prove that the defendant with the requisite intent had necessarily gone as far as to attempt physical penetration of the vagina. It is sufficient if there is evidence from which the intent can be inferred and there are proved acts which a jury could properly regard as more than merely preparatory to the commission of the offence. For example, and merely as an example, in the present case the evidence of the young woman's distress, of the state of her clothing, and the position in which she was seen, together with the respondent's acts of dragging her up the steps, lowering his trousers and interfering with her private parts, and his answers to the police, left it open to a jury to conclude that the respondent had the necessary intent and had done acts which were more than merely preparatory. In short that he had embarked on committing the offence itself."

6.2 WHICH FACTS DO AND WHICH DO NOT CONSTITUTE THE ACTUS REUS OF ATTEMPT?

s. 386(2) a) It is immaterial whether the offender does all that is necessary on his or her part for completing the commission of the offence, or whether the complete fulfillment of his or her intention is prevented by circumstances independent of his or her own motion.

i.e it can make no difference whether the failure to complete the crime is due to a voluntary withdrawal by the offender, the intervention of the police or any other reason.

In **R v Taylor**[39] On a charge of attempted arson, the facts proved were that i) the accused bought a box of matches; ii) he approached a haystack with matches in his pocket, and iii) he bent down near the stack and lit a match, which he extinguished on perceiving that he was being watched. Held: (i) and (ii) were not a sufficient actus reus but for (iii) the accused could be convicted of attempted arson.

[39] (1859) 1 F & F 511

Taylor had approached the stack of corn with the intention to set fire on it and lighted a match for that purpose but abandoned his plan on finding that he was being watched. He was guilty of attempting to commit the offence.

In R v Dhalla s/o Ismail [40]

The accused deliberately and knowingly made out false receipts and had them signed by representatives of native authorities. The receipts were false in that they purported to show that the accused had supplied 700 mattresses, stuffed with kapok when in fact they were stuffed with cotton, an inferior and less expensive article. On these facts it was held that the accused could be convicted of attempting to obtain money by false pretences from the native authorities.

Attempting the "impossible" crime is an offence:-
S.386(2)(6) of the Penal Code Act.

It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

It was thought at one time that there could be no conviction for an attempt to do an act which was impossible. This was ofcourse an error in law. So if D attempts to break open the front door of a bank, using an implement which is utterly inadequate for the purpose; if he attempts to poison P, using a dose which is far too weak to kill anyone, if he tries to deceive P into giving him money by a false representation about a matter as to which P happens to know the truth, in each of these cases the thing attempted is impossible, yet a conviction for an attempt to commit it would be proper.

These are cases of failure, where, if the defendant had succeeded, he would have committed a crime. The defendant in these cases intends to steal, murder and obtain money by false pretences. D has an objective and although he uses inadequate means to

[40] 20 K.L.R 59

achieve it, the objective were the circumstances have been different would have constituted the complete offence.

For example, D shoots at what he believes to be P with intent to murder him. In fact he is shooting at a block of wood. If he had achieved the consequence intended, he would have been guilty of murder. He is guilty of an attempt.

In the case of **R v Shivpuri [1985] 1 All ER 143 H/L**,

The appellant was arrested by customs officials while in possession of a suitcase. He admitted that he knew that it contained prohibited drugs. Analysis showed that the material in the suitcase was not a prohibited drug but vegetable matter akin to snuff. The appellant was convicted of attempting to commit the offence of being knowingly concerned in dealing with and harbouring prohibited drugs. It was HELD that he could be guilty of the attempted offence, even though commission of the full offence would have been impossible (reversing Anderton –v- Ryan [1985] AC 560 H/L).

6.3 CAN AN ACCUSED BE GUILTY OF AN ATTEMPT WHERE HIS OBJECTIVE IS IN FACT NOT CRIMINAL?

Examples:

- A man sees an umbrella and resolves to steal it. He takes it and carries it away and finds out that it is his own.

- D, who believes his wife A to be alive, goes through a ceremony of marriage with B. In fact, A was run over by a bus and killed five minutes before the ceremony. Is D guilty of attempted bigamy?

- D has sexual intercourse with a girl whom he believes to be an imbecile. She is in fact not an imbecile. Is he guilty of an attempt to have intercourse with an imbecile?

In each of these cases D has mensrea. If the facts had been as he supposed them to be, there would have been an actus reus and D would have been guilty of the complete crime, but in each case, an essential ingredient of the crime is missing. In fact the commission of the crime in all these cases is impossible.

There is a distinction between the group of cases of impossibility first considered above and the former. In the first group, if he had succeeded, he would have committed a crime would have been committed. In the second group however, if the defendant had succeeded, he wouldn't have committed a crime at all.

Where D succeeds in his objective and where the result is the actus reus of no crime, it is thought that there can be no conviction for an attempt. In these cases, the actor succeeds in doing the precise thing that he sets out to do. He accomplishes his objective. The transaction is complete and it is not a crime. These are cases neither of failure nor of a proximate step towards the successful commission of a crime.

1) The mens rea of attempt

The basic principle is that the defendant must have intended to commit an offence. This seems to require that s/he intend to commit the full offence which was in fact attempted. At common law:-

R v Mohan[41]**,** where the defendant drove his car at a policeman to effect an escape. He was charged with attempting to cause bodily harm to the officer. The trial judge directed the jury that they could convict if they were satisfied either (i) the defendant deliberately drove the car in the way he did, realising that such driving was likely to cause bodily harm, or being reckless as to whether such harm would be caused. He was convicted and appealed. HELD, that to prove an attempt it was necessary to prove a specific intent:-

[41] [1975] 2 All ER 193 C/A

" ... a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit, no matter whether the accused desired that consequence of his act or not" per James LJ. Conviction quashed.

It follows from this that to prove an attempt to murder, it is necessary to prove an intent to kill, and an intention to cause grievous bodily harm will not suffice. This was confirmed in:-

R v Walker & Hayles[42], where the defendants had dropped a man from a third floor balcony. He survived, and the defendants were charged with attempted murder. The trial judge directed the jury that the prosecution had to prove that the defendants recognised that there was a "very high degree of probability" that death would occur. They were convicted and appealed. It was HELD that a Nedrick-style direction was preferable, but what the trial judge had said was close enough, particularly as he had stressed that it was necessary to prove an intention to kill.

The Mens Rea for Aiding and Abetting an Attempt

R V O'Brien[43], where the defendant was convicted of aiding and abetting an attempted murder. He appealed on the basis that he could only be guilty if he knew that the principal intended to kill. HELD, that this was not so. The defendant was guilty of aiding and abetting an attempted murder where he foresaw that death or grievous bodily harm might have resulted from the common plan being carried out, and the jury were satisfied that the principal was guilty of attempted murder.

2) Punishing attempts

S. 388 PCA,

[42] [1990] Crim LR 44 C/A
[43] [1995] Crim LR 734 C/A

Where a person attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of death or imprisonment for more than 14 years, is liable if no other punishment is provided to imprisonment for seven years. (note that attempt to murder – sentence is life imprisonment s.204)

6.4 WITHDRAWAL

It is logical that, once steps taken towards the commission of an offence are sufficiently far advanced to amount to an attempt, it can make no difference whether the failure to complete the crime is due to a voluntary withdrawal by the defendant, the intervention of the police, or any other reason (Smith and Hogan, Criminal Law, Eighth edition, p327). See:

R v Taylor [44]

A. Proof of attempt

1. In order to be convicted of an attempt, the accused must have done all the acts tending to the commission of an offence.

R V Robinson (1915) 2 KB 342.
Gerald Gwayambadde (1970) HCB 156.

In *Uganda Vs Maku* (1968) HCB 228, the accused threw down the complainant girl and threatened her with a knife. He used the knife to tear her underpants. Before he undressed the girl, she got his penis and he could not unbutton his trouser. It was held that in order to constitute an attempt, there must be evidence that the accused did or was merely prevented from doing all the acts tending to the commission of an offence.

[44] (1859) 1 F & F 511

In *Amon V Uganda*[45] the accused got hold of a girl, threw her down, tore her underpants and just lay on top of her. He had not yet unbuttoned his trousers but simply run away.

It was held that his act was mere preparation.

Mwandikwa s/o Mutisya V R [46]and *R V Dahara s/o Isameil* 20 KLR

6.5 CORPORATE CRIMINAL RESPONSIBILITY

There are 2 types of associations i.e. an incorporated association and an unincorporated association. An unincorporated association is not a person under the law but an incorporated association is a person and can commit crimes like other persons.

A corporation is a legal person, distinct from the persons who are members of it. This means that a corporation is capable of suing and being sued in its own name. It is a person in law. A corporation has no physical existence; it only exists in law so how can it be held criminally liable for an offense if it has no physical existence? It cannot act or form an intention to commit an offense except through its members. Therefore, where the corporation incurs legal liability let it be civil or criminal, this liability will always in a sense be vicarious because it is necessarily incurred through the acts of its members.

In criminal law, the corporation will be held to be personally liable because the acts in the course of the corporation's business of those officers who control its affairs, and the intentions with which those acts are done, are deemed to be the acts and intentions of the corporation.

A corporation is not criminally liable for the acts of its members or employees who are not controlling officers, unless its an offense to which the rules of vicarious liability considered above apply i.e if it is a case of selling in breach of a statutory provision. The

[45] (1971) HCB 362
[46] (1959) EA 18

question that should always be considered is whether the status of the individual perpetrator is that of a controlling officer.

The acts of the controlling officers done within the scope of their employment, are the company's acts, and the company is held liable, not for the acts of its servants, but for what are deemed to be its own acts. A controlling officer of a company is that person who controls and directs the activities of a company and these persons acting in the company's business are considered to be the company for this purpose.

There are certain existing limitations about the liability of a corporation.
It can only be convicted of offenses which are punishable with a fine. These include most offenses but exclude murder, manslaughter as a principal or an accessory, because the mandatory sentence is death or life imprisonment respectively. A corporation is also incapable of being imprisoned. However nearly all crimes are punishable by a fine so this is not a serious limitation on the scope of its liability.

There are other offenses which it is quite inconceivable that a controlling official of a corporation should commit within the scope of his employment. i.e Bigamy, rape and incest, defilement, etc

However, though a corporation could not commit bigamy as a principal, it might do so if the managing director of an incorporated marriage advisory bureau were to arrange a marriage which he knew to be bigamous.

The social purpose underlying corporate criminal liability is rather difficult to discover. The basic principle underlying criminal punishment is the punishment of perpetrators of crime. So is it important to impose corporate criminal liability at all?

B. There are several issues related to liability of corporations;

1. Offences normally require *Mensrea*. So the issue is how can a group of people have *mensrea*?
2. Some crimes are personal e.g. murder and rape. The issue is 'can a incorporation rape'?
3. Whose act can make a corporation liable? i.e. who must have committed a crime?
4. If a corporation is alleged to have committed a crime; how can it be brought to court?
5. If a corporation is convicted, how can it be punished?

Under the Interpretation Act, the word person is defined to include any group, association or body of persons or corporations. Therefore 'person' includes any person or company and associations. Therefore associations can commit crimes and be prosecuted.

6.6 LIABILITY

Since corporations are persons under the law, they can commit offences. Some statutes specifically create offences for corporation e.g. under the Company's Act, a company can commit an offence if it makes false statements of its annual account. Under the Weights and Measures Act, a company can commit an offence if it uses misleading measuring scale.

A corporation cannot be liable for a personal crime e.g. rape, bigamy, etc. However, there are crimes of vicarious liability and hence if a servant commits an offence then the company is liable.

Who is to be arrested when a company commits an offence? The law is that the summons is directed to the Manager, Secretary or Director. If a company is convicted, usually it is fined because it cannot be arrested or imprisoned. ***R V ICR Haulage Ltd*** **(1944) IER 691**.

a. How to Locate Corporate *Mensrea*

1. While a corporation is charged with an offence requiring proof of fault, the traditional approach of courts has been to require the prosecution to prove those who can be regarded as directing minds of the company. It is stated that the knowledge of someone who was the directing mind or will or the ego or centre of personality of the company could be attributed to the company.

This principle was illustrated in the case of ***Tesco Supermarkets Ltd V Natrass*** [47] where the defendant company was convicted under Section 11 of the Trade Description Act of 1968. In this case, the company displayed a misleading price notice in the case of posters which had been placed in a store window advertising packets of washing powder for sale at 25 and 11d. Those in stock were being retailed at 35 and 11d. The company sought to rely on defence provided under section 24 of the Act to the effect that it had taken all reasonable steps to prevent the commission of the offence which had resulted from the act.

In allowing the company's appeal, the House of Lords held that a store manager, despite being an employee of the company was in law, another person within section 24 of the 1968 Act i.e. he was not the embalmment of the company. In locating *mensrea* within a company, Lord Diplok observed that natural persons are treated in law as being the company for the purpose of acts in the course of its business including the taking of precautions and the exercise of the diligence to avoid the commission of criminal offence is to be found by identifying those natural persons who by the Memorandums and Articles of Associations or as a result of action taken by the Directors or by the company in a general meeting pursuant the Articles, are entrusted with the exercise of the powers of the company. See ***Moore V 1 Bressel Ltd*** [48]

6.7 GENERAL DEFENCES

When a person is charged with a criminal offence, he can raise the following defences.

[47] (1972) AC 1 & 3
[48] (1944) 2 ALL ER 515.

I. LACK OF JURISDICTION

Jurisdiction of courts in criminal cases is provided under sections 4 and 5 of the Penal Code Act (Cap 120). According to *section 4,* the jurisdiction of the courts of Uganda extends to every place within Uganda. This means that a person can only be convicted of an offence which he commits within the boundaries of Uganda. However, there are exceptions. *Section 4 (2)* provides that the courts of Uganda shall have jurisdiction to try offences created under sections 23, 24, 25, 26, 27 and 28 committed outside Uganda by a Uganda citizen or person ordinarily resident in Uganda.

Section 5 deals with offences committed partly within and partly beyond the jurisdiction. Under this section, when an act which, if wholly done within the jurisdiction of the court, would be an offence is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does any part of such act may be tried and punished in the same manner as if such act had been done wholly within the jurisdiction.

II. THE DEFENCE OF ACCIDENT

According to *section 8(1) of the Penal Code*, a person is not criminally responsible for an act or omission which occurs by accident. An accident is an event which a reasonable man in the shoes of the accused would not have foreseen as likely or probable. An act is said to be an accident when the act by which it is caused is done with the intention of causing it and when its occurrence as a consequence of such act s not so probable that a person of ordinary prudence ought under the circumstances in which it is done to take reasonable precaution against. In ***Quninto Etum v. Ugandan***[49] the supreme court held that a person could not be held criminally liable for an act or omission carried out accidentally. However, a person accused may not be exonerated from criminal liability if the accident was caused by negligence on his part.

[49] *S.C.Cr. No. 19/1989*

An example of an accident is where A shoots a target on a rifle range but fires too high and the bullet kills B out of sight behind the target, A is not responsible for the death of B, for the death is an accident.

III. THE DEFENCE OF NECESSITY

Necessity may be a defence under the following circumstances:

- Where a person is confronted with a choice of evil and breaking the law and a person has to choose between two courses; either to break the law or save property or life;
- Where a person reasonably believes that some harm is inevitable;
- And he reasonably believes that his act or omission would avert greater harm.

An example is where a master of a ship makes an illegal entry into a port as a result of a storm, this is necessary for the preservation of the vessel, the cargo and those on board; or where a driver breaks the law on speed limit to take an injured person to the hospital. In ***R v Willer,***[50] the accused had driven recklessly to escape from a crowd of youths who appeared to have intent to cause physical harm to the passengers in his car; in ***R v Conway***,[51] the accused had driven recklessly to protect his passenger from what he had honestly believed was an assassination attempt. In both cases, the Court of Appeal ruled that the accused should have been permitted to put the defence of necessity before the jury, given the apparent threat of death or bodily harm created by the circumstances.

In ***R v Bourne***,[52] the accused gynaecologist performed an abortion on a young girl who had been raped. He had formed the opinion that she could die if permitted to give birth. The accused was found not guilty of "unlawfully procuring a miscarriage" following a direction from the trial judge to the jury that the accused did not act "unlawfully" for the purposes of section 58 of the Offences Against the Person Act 1861 (of UK) , where he acted in good faith, in the exercise of his clinical judgment.

The generally accepted position however is that necessity cannot be a defence to all criminal charges. The court has to consider the circumstances of the case including the

[50] (1986) 83 Cr App R 225
[51] [1988] 3 All ER 1025
[52] [1939] 1 KB 687, [1938] 3 All ER 615.

gravity of the threat posed and the available options to the accused. The leading case is ***R v Dudley and Stephens.***[53] The accused and a boy were cast adrift in a boat following a shipwreck. The accused agreed that as the boy was already weak and looked likely to die soon, they would kill him and eat him for as long as they could, in the hope that they would be rescued before they themselves died of starvation. A few days after the killing they were rescued and then charged with murder. The judges of the Queen's Bench Division held that the accused s were guilty of murder in killing the boy and stated that their obvious necessity was no defence. The accused were sentenced to death, but this was commuted to six months' imprisonment.

Lord Coleridge CJ, having referred to Sir Matthew Hale's assertion (The History of the Pleas of the Crown, 1736) that a man was not to be acquitted of theft of food on account of his extreme hunger, doubted that the defence of necessity could ever be extended to a accused who killed another to save his own life. After referring to the Christian aspect of actually giving up one's own life to save others, rather than taking another's life to save one's own, he referred to the impossibility of choosing between the value of one person's life and another's.

The principles to guide the court in deciding whether the defence of necessity is to succeed were stated in the case of ***R v Martin.***[54] In this case, the accused had driven his stepson to work although he was disqualified from driving. He claimed that he had done this because his wife had threatened to commit suicide unless he did so, as the boy was in danger of losing his job if he was late. The wife had suicidal tendencies and a doctor stated that it was likely that she would have carried out her threat. The Court of Appeal allowed the accused's appeal against his conviction. *Simon-Brown J* stated that the principles may be summarized thus:

[53] (1884) 14 QBD 273
[54] [1989] 1 All ER 652

‘First, English law does in extreme circumstances recognise a defence of necessity. It can arise from objective dangers threatening the accused or others in which case it is conveniently called "duress of circumstances".

Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

Thirdly, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: (1) Was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious injury would result? (2) If so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both these questions was yes, then the jury would acquit: the defence of necessity would have been established.’

IV. IGNORANCE OF THE LAW

Under *section 6 of the Penal Code,* ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence. This is expressed in Latin as *Ignorantia juris non excusat.* This implies that the defence of not knowing the law is not allowed or applicable.

The rationale behind the doctrine is that if ignorance were an excuse, persons charged with criminal offenses, they would merely claim they were unaware of the law in question to avoid liability. The best justification for this strict rule however is expediency. It would otherwise be very difficult to prove that an accused person in every case knew the law he violated. The qualification to the rule that ‘unless knowledge of the law by the offender is expressly declared to be an element of the offence’ is unimportant

as there is no offence in the code or else where which states knowledge of the law as an element of the offence.

Thus, the law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently. Even though it would be impossible, even for someone with substantial legal training, to be aware of every law in operation in every aspect of a state's activities, this is the price paid to ensure that willful blindness cannot become the basis of exculpation.

In an old English case of ***R.V Bailey,***[55] a sailor was convicted of contravening an Act of Parliament which he could not possibly have known since it was enacted when he was away at sea, and the offence was committed before the news of its commitment could reach him.

In ***Musa & Ors. v. R***,[56] a Member of Parliament gave a public speech in his constituency, in which he allegedly told the audience that the remedy for cattle theft which was common in the area was to raise an alarm whenever such a theft occurred, track down the thieves and kill them and that in the event people killed in a group they were acquitted in court, or no action was taken against them by the government.

The brief material facts of this case point to the fact that as a result of this speech, an alarm-group which was formed after the next cattle theft, searched out and killed various individuals thought to be the thieves. Fourteen of the accused people were convicted of murder.

On appeal to the Court of Appeal for East Africa, it was argued on behalf of those convicted that the killing was a result of the effect of the Member of Parliament's speech which created such intention in the minds of the appellants, who were entitled to kill cattle thieves, because in effect the government had sanctioned it.

[55] 1800 R.& R.1
[56] [1970] E.A 42 (CA)

However, the Court of Appeal did not take on board this argument and rejected it altogether, holding that the state of things referred to must be a factual state and that a speech by a Member of Parliament asserting incorrectly that the law had been changed so that people could now kill cattle thieves would not result in a mistake of fact but in a mistake of law which was no excuse for a crime.

Similarly, misunderstanding the law is not a defence. In ***R v Reid (Philip),***[57] a constable saw the accused driving a car without a tax disc displayed on the windscreen. He stopped the accused and questioned him about it. The constable noticed that the accused's breath smelt of drink. The constable asked the accused to provide a specimen of breath. The accused refused to provide a specimen stating that the constable had no power to administer a breath test except after an accident, where there had been a moving traffic offence or where the constable had reasonable cause to believe from the manner of his driving that the driver had been drinking. The accused was arrested and charged with and convicted of failing, without reasonable excuse, to provide a specimen for a laboratory test, contrary to section 3(3) of the Road Safety Act 1967 (of U.K). He appealed contending, inter alia, that he had a reasonable excuse for failing to provide the specimen. The Court of Appeal held that the fact that the accused mistakenly believed that he was not legally obliged to provide a specimen did not constitute a 'reasonable excuse' for refusing to do so.

Read *Mangai v. R* [1965] E.A 667

When does the law come to the knowledge of the person?

Under article 28 (12) of the Constitution of Uganda, all criminal offences must be written down and their punishment specified.

V. MISTAKE OF FACT

Under *section 9 of the Penal Code*, a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not

[57] [1973] 3 All ER 1020.

criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he or she believed to exist.

This in short means that when the accused committed the unlawful act, he was mistaken as to a certain material fact or facts which negative *mens rea*. It must however not be a mistake of law or the consequences of the act.

Read *Leosoni Alias S/o Matheo v R* [1961] E.A 364

The defence of mistake of facts applies to matters of fact and not law as mistake of law affords no defence to criminal liability. The defence of mistake of fact to succeed the person raising it must prove that the mistake of fact was of such a character that had the supposed circumstances been real, they would have prevented the alleged liability from attaching to the person for doing what he did. The accused cannot be excused from liability if his conduct would still have been criminal and his mistaken belief been true.

It is important to note that the mistake must be bonafide. Also the test of a reasonable man must be applied. This test depends on the circumstances of the case. The standard of reasonableness varies with the circumstances of the accused. A mistake done by a village boy can not be like a mistake of a boy who has grownup from town.

In ***R v. Sultan Maginga***,[58] the deceased person and a woman were lying in a rice field after sexual intercourse. Sultan was going to guard his rice against wild pigs. He saw movement of grass and he called on to ask whether it was an animal or a person but there was no reply. Sultan threw a spear and killed a human being thinking it was a pig. The charge against him was not sustained as the killing was a result of a mistake.

- **Characteristics of a reasonable man**

- A reasonable man behaves rationally, thinks first and then acts;
- He has sound judgment;
- He acts according to the standard appropriate to the circumstances of the situation

[58] [1967] HCB 33

- He is of average standing;
- He acts customarily i.e. like other members of the community.

However, if no *mens rea* is required with regard to one element of the *actus reus* then even an honest and reasonable mistake with regard to that element will not negative liability. For example, in the case of ***R v Prince***,[59] the accused ran off with an under-age girl. He was charged with an offence of taking a girl under the age of 16 out of the possession of her parents contrary to section 55 of the Offences Against the Person Act 1861 (of UK). The accused knew that the girl was in the custody of her father but he believed on reasonable grounds that the girl was aged 18. It was held that knowledge that the girl was under the age of 16 was not required in order to establish the offence. It was sufficient to show that the accused intended to take the girl out of the possession of her father.

- **Burden of Proof and Mistake of Fact**

If a person raised the defence of mistake of fact, it is upon him to adduce sufficient evidence to satisfy the court that he had a mistake in looking at the facts. If he adduces this evidence, the case will proceed as if the facts were true. The facts adduced must convince court that he honestly and reasonably believed the facts to be true.

VI. NECESSITY

Necessity may be a defence where the accused is confronted with a choice of evils and he reasonably believes that some harm is inevitable and that he believes that his act or omission would avert a greater harm.

The defence of necessity is a common law defence where a man is compelled by physical force to go through the motions of an actus reus without any choice on his part.

Necessity will provide a defence where an actus reus is done to save life. In the case of ***F V West Berkshire Authority*** F, a female patient in a mental hospital aged 36, suffered

[59] (1875) LR 2 CCR 154.

from a very serious mental disability. F had formed a sexual relationship with a male patient. Medical evidence was that from a psychiatric point of view, it would be disastrous if she became pregnant. There were serious objections to all ordinary methods of contraception. She was incapable of giving consent to a sterilisation operation. Her mother acting as her next of kin obtained a declaration that the absence of her consent would not make sterilisation an unlawful act.

The house of Lords held that the operation was lawful because it was in the best interests of the patient. It was necessary to save her life.

In the case of Bodkin Adams[60], Devlin J directed the jury that there is no special defence justifying a doctor in giving drugs which shorten life in the case of severe pain. He went on to say that if life were cut short by weeks or months, it would be just as much murder as if it were cut short by years. In September 1992 Dr. Nigel Cox was convicted of attempted murder after he had administered potassium chloride to a patient B, a 70 year old woman in order to terminate the great pain from which she was suffering. B died within five minutes of the injection. She had pleaded with Dr. Nigel to end her life. He was not charged with murder because it was no longer possible to prove the actual cause of death.

Necessity provides no defence where an innocent person is killed or injured by the accused to prevent harm to himself. In the case of R v Bourne(supra), a reputable London surgeon performed the operation of abortion upon a girl, not quite fifteen years of age who was pregnant as a result of rape by a soldier. The burden was on the prosecution to prove that the accused was not acting in good faith to preserve the life of the mother. The accused was acquitted and it was stated that this was to be regarded as a case of necessity in that the surgeon faced with the choice of taking the life of the unborn child or of preserving the physical and mental health of its mother decided to destroy the life not yet in existence. In this connection, the penal code provides that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical

[60] [1957] CRIM LR 365

operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonably, having regard to the patient's state at the time, and to all circumstances of the case..

But where it is a case of one man's life or another's the law has not conceded the right to destroy a life in the interests of self preservation. Therefore necessity doesn't justify murder

In the case of ***R v Dudley and Stephens;***[61] Three men and a boy of the crew of a yacht were shipwrecked and had to take to an open boat. After 18 days in the boat, having been without food FOR EIGHT DAYS and without water for six days, the two accused suggested to the other man that they should kill the boy and eat his body. The other man declined to fall in with this plan but two days later, the accused killed the boy who was now in a very weak condition. And unable to resist but didn't assent to being killed. The three men then fed on the boy's body and blood for four days, when they were picked up by a passing vessel and rescued. The jury found that the accused would not have survived if they had not acted as they did. They found that the men would probably have died within the four days had they not fed on the boy's body and that the boy would have probably died before them, and that at the time of killing, there was no appreciable chance of saving life except by killing one for others to eat.

The court found that the defence of necessity should not be afforded in such cases. They thought first that it would be too great a departure from morality and secondly that the principle would be dangerous because of the difficulty of measuring necessity and of selecting the victim. The seamen were convicted of murder but the death sentence was later commuted to six months imprisonment.

Killing one that others may live will not afford the accused the defence of necessity. The killing of one to save the lives of others cannot be justified or excused.

[61] (1884) 14 Q.B.D

At the inquest into the deaths caused in the Zeebrugge disaster of 1987. Evidence was given that one man a corporal in the army and a number of other people apparently dozens of them were in the water and in danger of drowning, but they were near the foot of a rope ladder up which they could climb to safety. On the ladder petrified with cold or fear or both was a young man unable to move up or down. No one could get passed him. The corporal shouted at him for 10 minutes with no effect. Eventually he instructed someone else who was nearer to the young man to push him off the ladder. The young man was then pushed off the ladder and he fell into the water and as far as is known was never seen again. The corporal and others were then able to climb up the ladder to safety.

The question is whether the corporal and the other men could raise the defence of necessity against the charge of murder and whether the man who pushed him off the ladder could raise the defence of superior orders.

The killing of the man was neither justifiable nor excusable. But because there was no proof that the man was in fact killed, a conviction of murder could not stand. There must be clear proof that a person was in fact killed. The killing of one to save the lives of others cannot be justified or even excused.

VII. BONAFIDE CLAIM OF RIGHT

According to Section 7 of the Penal Code, a person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud. Bonafide claim of right is closely related to the defence of mistake of fact only that in this case, the accused is only mistaken in his belief that he is entitled to claim some property. It is a defence in a charge relating to an offence relating to property. The accused has to show that he was acting with respect to any property in exercise of an honest claim of right and without intention to defraud e.g. a person seizes the complainant’s property in order to enforce payment of the debt.

In ***Francisco Sewava v. Uganda***,[62] the appellant was acquitted on appeal when he had been convicted of stealing doors and roofing materials that he claimed as his and which claim he had put forward at his trial at his trial. It was held that however unfound the claim might be, the appellant should not have been convicted.

VIII. INSANITY

There are several statutes that deal with insanity in Uganda and they include the following:

- Mental Treatment Act, Cap 279;
- The Magistrates Courts Act, Cap 16; part XIII
- Trial on Indictments Act, Cap 23 part VI
- The Penal Code Act, Cap 120, sections 10 and 11

Under the Mental Treatment Act, magistrate, chiefs, police and relatives play a part in dealing with unsound minded persons. Under this if a person knows that another is of unsound mind and unable to look after himself, the person may inform the magistrate about the condition of the mad person. The magistrate interviews the person and if is satisfied that the mad person needs treatment he will be sent to the hospital. However, before sending him to the hospital, the magistrate has to appoint the practitioners to examine the person separately. If the practitioners' certificate is that the person is of unsound mind the magistrate makes a reception order to the mental hospital, entrusts the person with a police officer who takes him to the hospital.

If a person is looking after a person of unsound mind he is required to report the matter to the magistrate if he feels that he is unable to control that sick person who has become dangerous to himself and to other persons. This means that a duty is imposed on all those who look after mad people to report to the same magistrate if they become dangerous; otherwise, it is unlawful to keep a person of unsound mind in the house without reporting the same.

[62] MB 60/66

Under the Trial on Indictments Act and the Magistrates Courts Act, if such a person commits an offence and the magistrate finds that he is unable to follow the proceedings, he is required to inquire into the matter of the accused. If it is found that he is of unsound mind, he must postpone the trial and send the file to the DPP to see which action to take. Normally, he is sent to the mental hospital. Resumption of the case depends on the DPP. Then if the magistrate he is still insane, he sends the file back to the DPP.

What happens where the accused he did what he did because he was insane?
In this case, Sections 10 and 11 of the Penal Code apply. Section 10 puts a presumption that is of sound mind, and was of sound mind at any time which comes in question, until the contrary is proved. However, Section 11 provides that a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he or she is through any disease affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his or her mind is affected by disease, if that disease does not in fact produce upon his or her mind one or other of the effects mentioned in this section in reference to that act or omission.

An accused may have committed a crime when actually insane. This issue is covered by the *M'Naghten Rules*, which although they deal with what they describe as insanity, it is insanity in the legal sense and not in the medical or psychological sense. The Rules were embodied in replies given by the judges of that day to certain abstract questions which were placed before them (***M'Naghten's Case***[63]). The accused in this case intended to murder Sir Robert peele but instead killed the statesman's secretary by mistake. He pleaded the defence of insanity. The basic propositions of the law are to be found in the answers to Questions 2 and 3 raised at the trial were:

> "… the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground

[63] (1843) 10 C & F 200

of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong."

The other rule stated in ***M'Naghten's Case*** is that where the accused is suffering from an insane delusion, he must be considered in the same position of responsibility as if the facts with respect to which the delusion exists were real e.g. an accused will have a complete defence of insanity if by reason of such insanity he is deluded into thinking that a man is attacking him to take is life and he kills that man.

- **What Constitutes a Disease of Mind?**

Whether a particular condition amounts to a disease of the mind within the Rules is not a medical but a legal question to be decided in accordance with the ordinary rules of interpretation. It seems that any disease, which produces a malfunctioning of the mind, is a disease of the mind, and need not be a disease of the brain. It covers any internal disorder, which results in violence and is likely to recur.

In ***R v Sullivan***,[64] Lord Diplock explained that:

> 'If the effect of the disease is to impair the faculties of reason, memory and understanding so severely as to have either of the consequences referred to in the later part of the M'Naghten Rules it matters not whether the aetiology of the impairment is organic as in epilepsy or functional or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act.'

In ***R v Kemp,***[65] the accused during a blackout, attacked his wife with a hammer causing her grievous bodily harm. The medical evidence showed that he suffered from arterial-sclerosis, a condition which restricted the flow of blood to the brain. This caused a

[64] [1984] AC 156
[65] [1957] 1 QB 399

temporary lapse of consciousness. Devlin .J ruled that for the purposes of the defence of insanity, no distinction was to be drawn between diseases of the mind, and diseases of the body affecting the operation of the mind. Also, it was irrelevant whether the condition of mind was curable or incurable, transitory or permanent. The jury returned a verdict of guilty but insane. Devlin J further said 'the law is not concerned with the brain but with the mind, in the sense that "mind" is ordinarily used, the mental faculties of reason, memory and understanding.'

- **Who can Raise the Defence of Insanity**

Usually, the defence is raised by the accused himself. The High Court of Tanganyika in *R v. Mandi S/o Ngonda*[66] considered that it was questionable whether, even if it were permissible for the prosecution to raise the issue of insanity in the course of the trial, it was proper for the case to be presented at the outset as one in which the only verdict asked for was that of guilty but insane. In *Phillip Muswi S/o Musele v. R*[67] it was held that as a general rule, evidence as to an accused's state of mind should be called by the defence and not by the prosecution. Where the accused is however represented, the interest of justice might require that the prosecution should call evidence as to his state of mind.

- **Proof of Insanity**

According to section 10 of the Penal Code, every person is presumed to be of sound mind at any time which comes in question until the contrary is proved. Under section 11, it is for the accused to setup the defence of insanity. The prosecution is not allowed to state that the accused did commit the crime because he was insane. The prosecution is not allowed to adduce evidence of the accused. Even the judge or magistrate is barred from raising the issue of insanity. This is for the reason that if the accused denies having committed the offence, the issue of insanity will be prejudicial to him.

[66] [1963] EA 153.
[67] (1956) 23 EACA 622.

The burden of proof of insanity is not beyond reasonable doubt. The accused is to prove his insanity on a balance of probabilities. The judge or magistrate must ascertain that it was most probable that the accused was insane. He establishes this on a preponderance of evidence.

- **Methods of Proof of Insanity**

Courts can use two methods to prove insanity

1. Medical Evidence

Once the accused pleads insanity as his defence, he is medically examined by a psychiatric who gives evidence in court. However, the evidence of the doctor is not conclusive. The judge or the magistrate can reject the evidence of the doctor. In ***Ellis v. R***[68] the East African Court of Appeal quoted the following passage of the judgment of the English Court of Criminal Appeal in ***R v. Rivett***[69] with approval:

> It is for the jury and not the medical men of whatever eminence to determine the issue… the court will not usurp the functions of the jury, though it may by virtue of the Criminal Appeal Act set aside the verdict if satisfied that no reasonable jury would have found a verdict of guilt in a particular case. The jury, no doubt, had the opinion of the medical men of undoubted integrity and whose qualification none could question. But had also the facts and the undisputed facts of all the surrounding circumstances…. This is not a case where a scientific witness can say with certainty, as in a case of bodily disease from specific symptoms such as rash, a coma or other physical signs that a disease exists. The jury, have heard the indications that have led to medical witnesses to the conclusions. They have also heard the other facts relating to the man and the crime, that he knew he had done wrong is evidenced by the fact that he not only told his friend what he had done and indicated the consequences that would follow to himself, but gave himself up to the police for having committed murder. Let it be assumed that he killed the girl on a sudden impulse; the jury of this

[68] [1965] EA 744 at 751.
[69] 34 Cr. App. R. 87

country is satisfied that he was responsible, and it is not for this court to say that he was not.

2. Examination of the Behavior of the Accused

This involves the examination of the behavior of the accused prior to the commission of the offence and contemporaneous to the commission of the offence. In the case of ***Nyinge S/o Suwatu v R***,[70] under the delusion that an inspector of police was plotting his death, the appellant killed him. He then surrendered to the police and stated that having killed the inspector, I have come here to be killed because they wanted my head.' The issue was whether the appellant could raise the defence of insanity. Court held that if a person under an insane delusion as to the existence of facts commits an offence in consequence thereof is thereby excused but that the answer depends on the nature of the delusion. The statement that I have come here to be killed indicated clearly that he knew that what he had just done was wrong and that he accordingly not merely admitting a justifiable killing such as killing by accident or one in justifiable defence.

In the Kenyan case of ***Karioki v R***, [71] it was held that it is not always necessary to have evidence of a doctor if from the circumstances in which the accused committed the crime shows that he was insane and that the doctor need not have been summoned. In this case, the accused having been found guilty of arson by the first grade magistrate was also found to have been insane as to be not responsible for his action. There was no medical evidence as to the accused's mental state in April when the crime was committed. Medical evidence showed no signs of insanity from 28th May to date of the trial in August.

The accused had been placed under the observation as a suspected lunatic between 31st January and 6th February when he was discharged normal. The only evidence of the accused's mental state at the time the crime was committed was that of the accused himself corroborated by the defence witness who stated that she saw the accused at the time of the crime behaving like a drunken man tottering about and that he was known in

[70] [1959] E.A 974
[71] 25 KLR 164

his village as a man who has mad fits. It was held that medical evidence was not essential to prove insanity.

IX. DIMINISHED RESPONSIBILITY

Diminished responsibility is a defence to murder which, if proven, reduces liability for unlawful homicide from murder to manslaughter. It is based on a general principle of our criminal law that a person's responsibility for committing a serious offence should be assessed in light of any substantial mental impairment which that person suffered. The central feature of diminished responsibility is the existence of a mental disorder which can be shown to have substantially impaired the accused's mental responsibility at the time of the killing.

Under section 194 of the *Penal Code,* where a person is found guilty of the murder or of being a party to the murder of another, and the court is satisfied that he or she was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder, the court shall make a special finding to the effect that the accused was guilty of murder but with diminished responsibility.

However, it is for the defence to prove that the person charged was suffering from such abnormality of mind. Given that the standard of proof which the accused has to achieve is the balance of probabilities, he will have to obtain cogent medical evidence as to his condition. Where a special finding is made under above provision, the court does not sentence the person convicted to death but orders him or her to be detained in safe custody.

- **Abnormality of Mind**

An abnormality of mind is a state of mind which the reasonable man would consider abnormal. It is thus defined widely. The meaning of the phrase was considered by the Court of Appeal in ***R v Byrne***.[72] In this case, the accused had strangled a young woman

[72] [1960] All ER [1960] 2 QB 396.

and then mutilated her body. He claimed he was subject to an irresistible or almost irresistible impulse because of violent perverted sexual desires which overcame him and had done so since he was a boy. There was evidence that he was a sexual psychopath, and could exercise but little control over his actions. The defence of diminished responsibility was rejected by the trial judge, and the accused was convicted of murder. The Court of Appeal allowed the accused's appeal on the basis that the trial judge had been wrong to exclude, from the scope of the defence, situations where the accused was simply unable to exercise any self-control over his actions. (This would cover the irresistible impulse situation.) Lord Parker CJ stated: [73]

> "Abnormality of mind"…….means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts.

Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicted above is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it.'

Abnormality of mind arises from either a condition of arrested or retarded development of mind, any inherent causes, disease or injury. Although this excludes drink or drugs, it does cover disease caused by long term alcoholism or drug-taking. Alcoholism is enough if it injures the brain, causing impairment of judgment and emotional responses, or

[73] [1960] 2 QB 396 at 403

causes the drinking to become involuntary. In ***R v Tandy,***[74] the accused was an alcoholic who had drunk much more than normal and then strangled her 11 year old daughter. She did not claim that she could not stop herself from drinking, and admitted that she was able to exercise some control over her drinking initially. The trial judge withdrew the defence of diminished responsibility. She appealed but failed. The Court of Appeal accepted that where a accused could show that she was suffering from an abnormality of the mind, that it was induced by disease (namely alcoholism), and that it substantially impaired her responsibility for her actions, then the defence of diminished responsibility would be made out. In the present case, the craving for alcohol did not render the use of alcohol involuntary - she was in control when she started voluntarily drinking, and that therefore her state of mind was merely induced by the alcohol.

The principles developed in ***Tandy*** have been extended to other types of substance abuse. For example, long term use of heroine and cocaine in ***R v Sanderson.***[75]

Read ***R v Shekanga***[76] The issue was whether deserted spouses or disappointed lovers or a person in a state of depression can plead diminished responsibility.

The defence of diminished responsibility has at various times been the subject of controversy. Some have suggested that it is both unnecessary and undesirable to provide for diminished responsibility as a partial defence to murder. Others have criticised the current legislative formulation of diminished responsibility on the grounds that it is out of touch with medical notions of mental impairment, that it generates a high level of disagreement amongst expert witnesses, and that it is too complex.

X. INTOXICATION

Intoxication is as a general rule not a defence to criminal responsibility. Intoxication as a defence is dealt with under *section 12 of the Penal Code Act*. Under this section, it is provided that except as provided in this section, intoxication shall not constitute a

[74] [1988] 1 All ER 267.
[75] (1994) 98 Cr App R 325
[76] (1948) 15 EACA 158.

defence to any criminal charge. Intoxication shall be a defence to any criminal charge if by reason of the intoxication the person charged at the time of the act or omission complained of did not know that the act or omission was wrong or did not know what he or she was doing and the state of intoxication was caused without his or her consent by the malicious or negligent act of another person; or the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

Evidence of intoxication negativing *mens rea* is a defence only to crimes requiring specific intent. But it is important to note that a distinction has to be drawn between being drunk and being intoxicated. A drunken man may commit acts whilst under the influence of drink or drugs that he would never commit whilst sober, but he will not be able to raise the defence of intoxication if he is nevertheless, still capable of forming the necessary *mens rea* for the crime with which he is charged. It was stressed in ***R v Sheehan and Moore***,[77] that "a drunken intent is nevertheless an intent." It is also important to note that an intoxicated accused is one who is shown to have been incapable of forming the necessary *mens rea* due to the effect of drink or drugs. In ***R v Stubbs***,[78] it was stated that the intoxication needed to be "very extreme."

On the basis of the House of Lords decision in ***DPP v Majewski***,[79] following the decision in ***DPP v Beard***,[80] self-induced intoxication can be raised as a defence to crimes of specific intent, but not to crimes of basic intent. A basic intent crime is one where the mens rea does not exceed the actus reus. i.e. the accused does not have to have foreseen any consequence or harm beyond that laid down in the actus reus; e.g. common assault, battery, manslaughter rape etc. A specific intent is where in theory the mens rea goes beyond actus reus e.g. murder, grievous bodily harm etc. Self-induced intoxication will operate as a partial or complete defence to a crime of specific intent if the accused can show that he lacked a specific intent due to the drink or drug. The effect of the accused successfully relying on the defence will be to reduce his liability to the "lesser included"

[77] [1975] 1 WLR 739
[78] (1989) 88 Cr App R 53
[79] [1977] AC 142
[80] [1920] AC 479

basic intent crime. For example, in the case of murder, the accused's liability will be reduced to that of the "lesser included" basic intent crime of manslaughter. Where there is no "lesser included" offence however, the accused should be completely acquitted, as would be the case with theft, burglary with intent to steal, and obtaining property by deception.

In ***DPP v Majewski***[81]**,** the accused had been convicted of various counts alleging actual bodily harm, and assaults upon police officers. The offences had occurred after the accused had consumed large quantities of alcohol and drugs. The trial judge had directed the jury that self-induced intoxication was not available as a defence to these basic intent crimes. The accused was convicted and appealed unsuccessfully to the Court of Appeal and the House of Lords.

Lord Elwyn-Jones LC referred to the case of ***D.P.P v.Beard***[82] in which Lord Birkenhead LC concluded that the cases he had considered establish that drunkenness can be a defence where the accused was at the time of the offence so drunk as to be incapable of forming the specific intent necessary for such crimes. *Lord Elwyn-Jones LC* then said that before and since Beard's case, judges had taken the view that self-induced intoxication, however gross and even if it produced a condition akin to automatism, cannot excuse crimes of basic intent. With crimes of basic intent, as his Lordship explained, the "fault" element is supplied by the accused's recklessness in becoming intoxicated, this recklessness being substituted for the *mens rea* that the prosecution would otherwise have to prove.

In case of intoxication, the court considers the conduct of the accused before and after the commission of the crime. In ***A-G for N. Ireland v Gallagher***,[83] the accused decided to kill his wife. He bought a knife and a bottle of whisky which he drank to give himself "Dutch Courage". Then he killed her with the knife. He subsequently claimed that he was so drunk that he did not know what he was doing, or possibly even that the drink had

[81] [1977]A.C 142.
[82] [1920] A.C 479.
[83] [1963] AC 349.

brought on a latent psychopathic state so that he was insane at the time of the killing. The House of Lords held that intoxication could not be a defence in either case as the intent had been clearly formed, albeit before the killing took place. Lord Denning stated:

> "If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to a charge of murder, not even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of forming an intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do."

Sir Mathew Hale held that drunkenness may produce a defect of reason in three ways:

a) It may impair powers of perception so that the actor cannot measure the consequences of his actions as he would have done if he were sober, nevertheless he is held accountable as a reasonable man would be who was not befuddled by drink;

b) It may impair his moral sense but he is not allowed to setup his self-induced want of moral sense as a defence

c) It may impair his power if self-control but again that is not a defence.

He further stated that there are exceptions to these general propositions of the law.

a) If the particular offence charged requires a specific intent, then drunkenness which renders him incapable of forming that intent is an excuse;

b) If a man by drinking brings a distinct disease of mind so that he is temporarily insane within the M'Naghten Rules, he has a defence on the ground of insanity.

In the case at hand, the accused whilst sober was suffering from a disease of the mind but he knew what he proposed to do- to kill his wife- and he knew that it was wrong, then got himself drunk and while drunk as a combination of both the drink and mental disease, he did not know that what he was doing was wrong. The defect of reason was induced by a drink hence, he is guilty of murder.

- **Involuntary Intoxication**

Involuntary intoxication is narrowly defined. A person who knew he was drinking alcohol could not claim that the resulting intoxication was involuntary because he underestimated the amount of alcohol he was consuming or the effect it would have on him. In ***R v Allen***,[84] the accused had drunk wine not knowing that it was extremely strong home-made wine. He then committed sexual offences, but claimed that he was so drunk that he did not know what he was doing. The Court of Appeal held that this did not amount to involuntary intoxication. He was thus treated as if he were voluntarily intoxicated

Involuntary intoxication is confined to cases where the accused did not know he was taking alcohol or an intoxicating drug at all, as where his food or drink is laced without his knowledge. In such cases, the House of Lords in ***R v Kingston***[85] has held that involuntary intoxication is not in itself sufficient to negative the necessary mental element of an offence unless the intoxication is such that the accused could not form any intent at all. In this case, the accused, who had paedophiliac homosexual tendencies, was blackmailed by two former business associates who arranged for another man, Penn, to photograph and audio-tape him in a compromising situation with a boy. Kingston and Penn were charged with indecent assault. Sedative drugs were found in Penn's flat when it was searched and the prosecution claimed that Penn had laced the boy's drink. Kingston's defence was that Penn had also laced his drink. His evidence was that he had seen the boy lying on the bed but had no recollection of any other events that night and had woken in his own home the next morning.

The trial judge directed the jury that they should acquit Kingston if they found that because he was so affected by drugs he did not intend or may not have intended to commit an indecent assault on the boy, but that if they were sure that despite the effect of any drugs he still intended to commit an indecent assault the case was proved because a drugged intent was still an intent. The accused was convicted.

[84] [1988] Crim LR 698
[85] [1994] 3 All ER 353.

This direction was approved by the House of Lords. It was held that provided the intoxication was not such as to cause automatism or temporary insanity, involuntary intoxication or disinhibition was not a defence to a criminal charge if it was proved that the accused had the necessary intent when the necessary act was done by him, notwithstanding that the intent arose out of circumstances for which he was not to blame. However, the offence was not made out if the accused was so intoxicated that he could not form an intent. According to *Lord Mustill*, the general nature of the present case was clear enough. In ordinary circumstances the accused's paedophiliac tendencies would have been kept under control, even in the presence of the sleeping or unconscious boy on the bed. The ingestion of the drug (whatever it was) brought about a temporary change in the mentality or personality of the accused which lowered his ability to resist temptation so far that his desires overrode his ability to control them. Thus the case was one of disinhibition. The drug was not alleged to have created the desire to which the accused gave way, but rather to have enabled it to be released.

- **Burden of Proof**

The burden rests on the accused to provide some evidence of intoxication which can be put before the assessors; the onus will then be on the prosecution to establish beyond all reasonable doubt, that despite such evidence, the accused still had the necessary *mens rea*. In ***R v Pordage***,[86] the court held that the key question to be asked was, taking into account the accused's intoxicated state; did he form the necessary specific intent?

Read

- ***R v Amin bin Abdalla*** **(1942) 11 EACA 39**
- ***R v Odima*** **(1941) 8 EACA 29**
- ***R v Mwita*** **(1944) EACA 75**
- ***Nyakite v R*** **[1957] EA 322**

[86] [1975] Crim LR 575

XI. SUPERIOR ORDERS OR OBEDIENCE TO ORDERS

As a general rule a person is not criminally responsible for an act or omission in obedience to an order, which he is bound by law to obey, unless the order is manifestly unlawful. Obedience means compliance with an authoritative command. In other words, obedience is a duty. In some circumstances, obedience to orders of a superior may be relevant in negating *mens rea.*

There is little authority as to how far superior orders excuse a man of criminal responsibility. The defence of obedience to orders rarely affords any defence in English law.

In **Keighly v Bell**[87] it was confirmed that the better opinion is that an officer or soldier acting under the orders of his superior not being necessarily or manifestly illegal would be justified by his orders. However if an officer or soldier unlawfully inflicts harm to another person, he can not plead as a defence merely that he was acting under orders from his superior officer. Of course if the orders are not obviously unlawful, the inferior officer may be able to raise a defence under some general rule of law of superior orders.

If the public servant or inferior officer shows that he obeyed an unlawful order from his superior under a reasonable but mistaken belief that they were lawful, he may be afforded the defence of superior orders. The inferior officer must show that there was an obligation upon him to obey the directions of his superior.

Persons in the navy, military or air force may find themselves in a difficult position if superior orders are given to them to carry out something which seems contrary to the ordinary criminal law of the land.

In the case of **Uganda v Kadiri Matovu & Anor**[88] Karokora Ag J held:

[87] (1866) 4 F & F
[88] [1983] HCB 27

only lawful orders of superior officers must be obeyed by inferior officers, therefore a servant would not be liable if he committed a crime in obedience of a lawful order from his master.

In Magayi v Uganda [89]

Where an order is plainly unlawful, a person cannot shelter behind it to escape criminal responsibility.

To what extent is a junior officer responsible for the unlawful act? If the order is obviously illegal, is the junior officer protected?

This one depends on the order. Most examples include soldiers and policemen in cases of suppressing riots. In ***Ededey v State***,[90] the appellant an acting chief superintendent of police of police led the mobile police force which was under him on a wide spread assault and looting in order to recoup himself of money stolen from his wife near the market. He was convicted of assault and stealing. On appeal, he argued that his subordinate officers who took part in the raid and who testified against him were accomplices whose evidence required corroboration. Rejecting the appeal, it was held that it is wrong for the order to police officers to assault and plunder innocent citizens whom they had a duty to protect. It was manifestly unlawful to assault them.

XII. IMMUNITY

This refers to the condition of being exempt from some liability. Instances of immunity include the following:

- **Presidential Immunity**

The president under the Constitution of Uganda under article 98 (4) can not be arrested and tried for alleged offence

- **Diplomatic Immunity**

Under the Diplomatic Privileges Act, diplomats in Uganda cannot be arrested and tried for any offence they commit. However, the diplomat must have committed the offence in

[89] [1965] E.A 667
[90] [1972] 1 All NRL 15.

the course of performing his duty. If he commits the offence while not on his duties, he can be declared be declared *a person non grata* in which case he is given a period in which he should leave Uganda.

Those who are protected include ambassadors, high commissioners, heads of international organisations and staff of embassies and international organisations. In case of a serious offence, diplomatic immunity can be waived only by the accredited diplomatic agent of the country.

- **Judicial Immunity**

Under *section 13 of the Penal Code*, it is provided that a judicial officer is not criminally responsible for anything done or omitted to be done by him or her in the exercise of his or her judicial functions, although the act done is in excess of his or her judicial authority or although he or she is bound to do the act omitted to be done.

XIII. SELF DEFENCE, DEFENCE OF PERSON, PROPERTY AND PUBLIC INTEREST

According to section 15 of the Penal Code subject to any express provisions in the Penal Code or any other law in force in Uganda, criminal responsibility for the use of force in the defence of person and property is to be determined according to the principles of English law.

The ingredients of the defence of self defence were re stated in the case of ***Uganda v. Dick Ojok*** [91]as follows;

a) There must be an attack on the accused
b) The accused must have as a result believed on reasonable grounds that he was in eminent danger of death or serious bodily harm.
c) The accused must have believed it necessary to use force to repel the attack made upon him.
d) The force used by the accused must be such force as the accused believed on reasonable grounds to have been necessary to prevent or resist the attack.

[91] [1992-93] H.C.B 54

Under the principles of English law, the defence of self-defence operates in three spheres. It allows a person to use reasonable force to:

a) Defend himself from an attack.

b) Prevent an attack on another person, e.g. ***R v Rose***,[92] where the accused who had shot dead his father whilst the latter was launching a murderous attack on the accused's mother, was acquitted of murder on the grounds of self-defence.

- **Reasonable Force**

The general principle is that the law allows only reasonable force to be used in the circumstances and, what is reasonable is to be judged in the light of the circumstances as the accused believed them to be (whether reasonable or not). In assessing whether the accused had used only reasonable force, *Lord Morris* in ***Palmer v R***[93] felt that a jury should be directed to look at the particular facts and circumstances of the case. His Lordship made the following points:

- A person who is being attacked should not be expected to "weigh to a nicety the exact measure of his necessary defensive action".
- If the jury thought that in the heat of the moment the accused did what he honestly and instinctively thought was necessary then that would be strong evidence that only reasonable defensive action had been taken.
- A jury will be told that the defence of self-defence will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not by way of self-defence.

For excessive use of force not being a defence at all, see R v Clegg [1995] 1 All ER 334 (fourth bullet fired at a car which did not stop at a checkpoint was not fired in self-defence).

The issue of a mistake as to the amount of force necessary was considered by the Court of Appeal in R v Scarlett:

[92] (1884) 15 Cox 540
[93] [1971] AC 814

In ***R v Scarlett***,[94] the accused sought to eject a drunken person from his premises. The drunken person made it clear that he was not going to leave voluntarily. The accused believed that the deceased was about to strike him and so he put his arms around the drunk person's body, pinning his arms to his sides. He took him outside and placed him against the wall of the lobby. The drunken person fell backwards down a flight of five steps, struck his head and died. The jury were directed that if they were satisfied that the accused had used more force than was necessary in the bar and that had caused the deceased to fall and strike his head he was guilty of manslaughter. The accused was convicted and appealed on the ground that he honestly (albeit unreasonably) believed the amount of force he had used to evict the drunken man from his premises was necessary. In allowing the appeal, Beldam LJ gave the following direction for juries:

> "They ought not to convict him unless they are satisfied that the degree of force used was plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he was not to be convicted even if his belief was unreasonable."

Note that in ***R v Owino***,[95] the Court of Appeal firmly denied that *Scarlett* is to be interpreted as permitting a subjective test in examining whether force used in self-defence is reasonably proportionate. The true rule is that a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be.

- **A Duty to Retreat**

There is no rule of law that a person attacked is bound to run away if he can. A demonstration by the accused that at the time he did not want to fight is no doubt, the best evidence that he was acting reasonably and in good faith in self-defence; but it is no more than that. A person may in some circumstances act without temporising, disengaging or withdrawing; and he should have a good defence.[96] This statement was

[94] [1994] Crim LR 288
[95] [1995] Crim LR 743
[96] Smith and Hogan, Criminal Law, 1996, p264.

approved in ***R v Bird.***[97] In this case, the accused had been slapped and pushed by a man. She was holding a glass in her hand at the time and she had hit out at the man in self-defence without realising that she still held the glass. The trial judge directed the jury that self-defence was only available as a defence if the accused had first shown an unwillingness to fight. The Court of Appeal quashed the accused's conviction saying that it was unnecessary to show an unwillingness to fight and there were circumstances where an accused might reasonably react immediately and without first retreating. It was up to a jury to decide on the facts of the case.

It is therefore, a matter for the assessors to decide as to whether the accused acted reasonably in standing his ground to defend himself, or whether the reasonable man would have taken the opportunity to run away.

- **Imminence of the Threatened Attack**

It is not absolutely necessary that the accused be attacked first. As *Lord Griffith* said in ***Beckford v R,***[98] "a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."

In ***Attorney-General's Reference (No 2 of 1983)***,[99] the accused made ten petrol bombs, during the Toxteth riots after his shop was damaged and looted, "to use purely as a last resort to keep them away from my shop". The expected attack never occurred. He was then charged with an offence under section 4(1) of the Explosive Substances Act 1883 of possessing an explosive substance in such circumstances as to give rise to a reasonable suspicion that he did not have it for a lawful object. It was a defence under the terms of the section for the accused to prove that he had it for a lawful object. The Court of Appeal held that there was evidence on which a jury might have decided that the use of the petrol bombs would have been reasonable force in self-defence against an apprehended attack. If so, the accused had the bombs for a "lawful object" and was not guilty of the offence charged. However, it was assumed that he was committing offences

[97] [1985] 1 WLR 816
[98] [1988] AC 130
[99] [1984] 2 WLR 465

of manufacturing and storing explosives contrary to the Explosives Act 1875. The court agreed with the Court of Appeal in Northern Ireland in ***Fegan***,[100] that possession of a firearm for the purpose of protecting the possessor may be possession for a lawful object, even though the possession was unlawful, being without a licence. Lord Lane CJ said:

> 'There is no question of a person in danger of attack "writing his own immunity" for violent future acts of his. He is not confined for his remedy to calling in the police or boarding up his premises. He may still arm himself for his own protection, if the exigency arises, although in so doing he may commit other offences. That he may be guilty of other offences will avoid the risk of anarchy contemplated by the Reference.'

XIV. DEFENCE OF PROPERTY

Under the Penal Code, it is unlawful to unlawfully injure, destroy and damage another's property. The issue is whether you can raise the defence of self defence in defence of property. In the case of ***Marwa S/o Robin v R***,[101] where the son-in-law went to claim his cattle from his father-in-law and he killed him, the issue was whether the killing was excusable or atleast reduced from murder to manslaughter. Referring to the principles of English common law, it was held that use of force in defence of property is an acceptable defence but the force must not be excessive. The court further held that in driving off the cattle, the deceased was committing a trespass but the means adopted by the appellant to resist the taking of the cattle seems to have to have been utterly out of proportion to the tort which had been committed.

It can rarely, if ever, be reasonable to use deadly force for the protection of property. In ***R v Hussey***,[102] the accused was barricaded in his room while his landlady and some accomplices were trying to break down his door to evict him unlawfully. The accused had fired a gun through the door, and wounded one of them. He was acquitted of the

[100] [1972] NI 80
[101] [1959] EA 660,
[102] (1924) 18 Cr App R 160

wounding charge on the grounds of self-defence. It was stated that it would be lawful for a man to kill one who would unlawfully disposes him of his home.

It is important to note that today it would seem difficult to contend that such conduct would be reasonable because legal redress would be available if the householder were wrongly evicted.

Thus, only reasonable force may be used. It would seem clear, for instance, that despite a common belief to the contrary, one is not at liberty to shoot dead a burglar wandering around one's house if one does not fear for one's own life (Clarckson and Keating, Criminal Law, 1994, p301). In ***Forrester***,[103] it was held that a trespasser can plead self-defence if the occupier of the house uses excessive force to try to remove him.

- **Mistake as to Self-Defence**

It is possible that the accused might mistakenly believe himself to be threatened or might mistakenly believe that an offence is being committed by another person. On the basis of ***R v Williams (Gladstone)***[104] and ***Beckford v R***,[105] it would appear that such an accused person would be entitled to be judged on the facts as he honestly believed them to be, and hence would be permitted to use a degree of force that was reasonable in the context of what he perceived to be happening. In ***R v Williams (Gladstone)***, a man named Mason had seen a youth trying to rob a woman on the street, and had chased him, knocking him to the ground. Williams, who had not witnessed the robbery, then came onto the scene and was told by Mason that he was a police officer (which was untrue). W asked M to produce his warrant card, which he was of course unable to do, and a struggle ensued. W was charged with assault occasioning actual bodily harm, and at his trial raised the defence that he had mistakenly believed that M was unlawfully assaulting the youth and had intervened to prevent any further harm. The trial judge directed the jury that his mistake would only be a defence if it was both honest and reasonable. The Court of Appeal quashed the conviction and held that the accused's mistaken but honest belief that

[103] [1992] Crim LR 792
[104] (1984) 78 Cr App R 276
[105] [1988] AC 130

he was using reasonable force to prevent the commission of an offence, was sufficient to afford him a defence. *Lord Lane CJ* said:

> In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the accused believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the accused's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury came to the conclusion that the mistake was an unreasonable one, if the accused may genuinely have been labouring under it, he is entitled to rely upon it.

In the case of ***Han v R***,[106] it was stated that it is a well established proposition of common law that if persons quarrel and afterwards fight and one of them kills the other, in such a case if there intervened between the quarrel and the fight a sufficient cooling time of passion to subside and reason to interpose, the killing is murder, but if such time had not intervened, if the parties in their passion fought immediately upon the quarrel, they went out and fought in the field (this deemed a continued act of passion), the killing in such a case will be manslaughter only whether the party killing struck the first blow or not.

- **Burden of Proof**

In all cases where the evidence adduced disclosed a possible defence of self defence, the onus is on the prosecution to prove that the accused did not act in self defence. It is the duty of the accused to raise the defence. The magistrate or the judge considers the facts as they are laid down in the evidence.

[106] 21 EACA 276

- **Effect of the Defence of Self-Defence if Established**

Where self defence has been established, the accused is acquitted. For example, where a person kills another in defence of himself, relatives, any other person or his property, such a killing is an excusable homicide. However, if it is established that the accused killed the deceased in self defence but the accused used excessive force, he will be found guilty of manslaughter.

Read ***Mengi v R*** [1964] EA 289

Yusufu S/o Lesso v R 19 EACA 249

XV. IMMATURE AGE/ THE DEFENCE OF INFANCY

There is an irrebuttable presumption of law that a child under 7years of age is not responsible for any crime. There is also a rebuttable presumption of law that a child under 12 years of age is not responsible for any crime unless it is proved that at the time of committing the crime he had capacity to know that what he was doing was wrong.

The distinction between the two is that for a child under 7 years, no offence can be committed and no criminal liability can arise. For a child under 14 but above 7 years, liability may arise if there is evidence that the child knew or had capacity to know that whatsoever he was doing was wrong. According to section 88 of the Children Act, the minimum age of criminal responsibility is twelve years. It follows that a father cannot be held guilty of receiving stolen property from his son aged under 12 because the property was not stolen in law.[107]

In R v. F.C (Juvenile)[108] a boy aged 10 years found a wrist watch at a swimming bath and took it home. His mother told him to take it back and instead the boy cut off the wrist strap, put the watch in a box and took it to a shop to sell it. The boy told the shop keeper that he had been given the watch as a present, but as he had 2 watches already, he wanted to sell it. When the shop keeper demanded a note to authenticate his story, the accused got a friend of his aged 14 years to forge one and on the strength of the forged note, the watch worth $8 was sold for $1. Because of the falsehoods told by the accused as well as

[107] See Walters v. Lunt, 53 Cr. App. R. 94.
[108] 2 N.L.R 185

the deceit practiced by him, the judge concluded that the boy had capacity to know that what he was doing was wrong and he was found guilty of theft.

In case a child is charged, he has to be tried by a family and children court which has jurisdiction to hear and determine cases against a child except where the offence is punishable by death or any offence for which a child is jointly charged with a person over 18 years of age. Under the Children Act, a child is defined as a person below the age of 18 years.

- **Proof of Age**

It will seldom occur in Uganda that a birth certificate can be produced but a relative of the child might be able to provide evidence of the precise age of the child or be able to testify that the child was born on some date to him unknown but which date can easily be ascertained by the court because the witness mentions some notorious national event and adds that was when the child was born. The court may have to call medical evidence. Whatever means of finding out the age of the child is used, the court has the duty of judiciary determining and recording the age of the child whenever it might be relevant, and it always is so when a young child is charged with an offence. It is not merely enough for the court to accept bindingly the age given on the charge sheet. In most cases this will only be a guess by the policeman.

Any reasonable doubt as to the age of the child is to be resolved in his or her favour and it need hardly be said that if the capacity to know that he or she ought not to do the act, at the time that he or she did it, the child is entitled to be acquitted because the burden of proving any additional essential ingredient, (whatever the charge might be) will not have been discharged by the prosecution. No onus rests on the defence.

XVI. COMPULSION/ DURESS

The general nature of the defence of compulsion or duress is that the accused was forced by someone else to break the law under an immediate threat of serious harm befalling himself or someone else, i.e. he would not have committed the offence but for the threat.

Duress is a defence because "… threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance should be accepted as a justification for acts which would otherwise be criminal."[109]

According to section 14 of the Penal Code, a person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or her or do him or her grievous bodily harm if he or she refuses; but threats of future injury do not excuse any offence.

- **The Threat**

The defence must be based on threats to kill or do serious bodily harm. If the threats are less terrible they should be matters of mitigation only. For example, in ***R v Singh***,[110] the Court of Appeal held that a threat to expose the accused's adultery would not be sufficient grounds to plead duress. In ***DPP for N. Ireland v Lynch***,[111] Lord Simon stated obiter, that the law would not regard threats to a person's property as a sufficient basis for the defence.

It is generally accepted that threats of violence to the accused's family would suffice, and in the Australian case of ***R v Hurley***,[112] the Supreme Court of Victoria allowed the defence when the threats had been made towards the accused's girlfriend with whom he was living at the time.

The threats must be directed at the commission of a particular offence. In ***R v Coles***,[113] the accused was charged with committing a number of robberies at building societies. At his trial he sought to adduce evidence that he had acted under duress. The basis for the defence was that he had owed money to money-lenders who had threatened him, his

[109] Attorney-General v Whelan [1934] IR 518, per Murnaghan J (Irish CCA)
[110] [1973] 1 All ER 122
[111] [1975] AC 653
[112] [1967] VR 526
[113] [1994] Crim LR 582

girlfriend, and their child with violence if the money was not repaid. The trial judge ruled that the facts did not give rise to the defence as the threats had not been directed at the commission of a particular offence, but to the repayment of the debt. The accused's appeal against conviction was dismissed. It was held that the defence of duress by threats was only made out where the threatener nominated the crime to be committed by the accused. In the present case the threatener had indicated that he wanted the accused to repay the debt, an action that, if carried out, would not necessarily involve the commission of an offence.

- **The Test for Duress**

The two-stage test for duress is contained in ***R v Graham***.[114] In this case, the accused (G) lived in a flat with his wife and his homosexual lover, K. G was taking drugs for anxiety, which made him more susceptible to bullying. K was a violent man and was jealous of the wife. One night after G and K had been drinking heavily, K put a flex round the wife's neck, pulled it tight and then told G to take hold of the other end of the flex and pull on it. G did so for about a minute and the wife was killed. Both were charged with murder. The accused pleaded not guilty and said that he had complied with K's demand to pull on the flex only because of his fear of K. The judge directed the jury on the defence of duress but the accused was convicted. The Court of Appeal, in confirming the conviction, laid down the model direction to be given to a jury where the defence of duress was raised. This was subsequently approved by the House of Lords in ***R v Howe***.[115] The jury should consider: (1) Whether or not the accused was compelled to act as he did because, on the basis of the circumstances as he honestly believed them to be, he thought his life was in immediate danger. (Subjective test)

(2) Would a sober person of reasonable firmness sharing the accused's characteristics have responded in the same way to the threats? (Objective test)

[114] [1982] 1 WLR 294.
[115] [1987] AC 417

The jury should be directed to disregard any evidence of the accused's intoxicated state when assessing whether he acted under duress, although he may be permitted to raise intoxication as a separate defence in its own right.

- **Immediacy**

The threat must be "immediate" or "imminent" in the sense that it is operating upon the accused at the time that the crime was committed. If a person under duress is able to resort to the protection of the law, he must do so. When the threat has been withdrawn or becomes ineffective, the person must desist from committing the crime as soon as he reasonably can. As Lord Morris said in ***DPP for N. Ireland v Lynch,***[116] the question is whether a person the subject of duress could reasonably have extricated himself or could have sought protection or had what has been called a 'safe avenue of escape'.

- **What is the position if the accused has an opportunity to seek help but fears that police protection will be ineffective?**

In ***R v Hudson and Taylor***,[117] two teenage girls committed perjury during the trial of X. They claimed that X's gang had threatened them with harm if they told the truth and that one of them was sitting in the public gallery during the trial. The accused were convicted of perjury following the trial judge's direction to the jury that the defence of duress was not available because the threat was not sufficiently immediate. Allowing the appeals, Lord Widgery CJ stated:

The threat was no less compelling because it could not be carried out there if it could be carried out in the streets of the town the same night. The rule does not distinguish cases in which the police would be able to provide effective protection, from those when they would not. And that the matter should have been left to the jury with a direction that, whilst it was always open to the crown to shown that the accused had not availed themselves of some opportunity to neutralize the threats, and that this might negate the

[116] [1975] AC 653
[117] [1971] 2 QB 202

immediacy of the threat, regard had to be had to the age and circumstances of the accused.

XVII. LIMITATIONS

Duress is considered to be a general defence in criminal law, but there are a number of offences in relation to which duress cannot be raised as a defence:

a) Murder

Duress and murder is now governed by the House of Lords' decision in ***R v Howe and Others***,[118] in which it was held that duress would not be available to an accused who committed murder either as principal or accomplice. In this case, two appellants, Howe and Bannister, participated with others in torturing a man who was then strangled to death by one of the others. These events were repeated on a second occasion but this time it was Howe and Bannister who themselves strangled the victim to death. They claimed that they had acted under duress at the orders of and through fear of Murray who, through acts of actual violence or threats of violence, had gained control of each of the accused. The House of Lords dismissed their appeals against conviction. Lord Hailsham LC made the following points:

- Hale's Pleas of the Crown (1736) and Blackstone's Commentaries on the Laws of England (1857) both state that a man under duress ought rather to die himself than kill an innocent.
- If the appeal (and consequently the defence) were allowed the House would also have to say that R v Dudley and Stephens was bad law (which it was not prepared to do). A person cannot be excused from the one type of pressure on his will (ie, duress) rather than the other (i.e., necessity).
- In the present case, the overriding objects of the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility.
- In the case where the choice is between the threat of death or serious injury and deliberately taking an innocent life, a reasonable man might reflect that one innocent

[118] [1987] AC 417

human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means.

- If a mandatory life sentence would be harsh on any particular offender there are effective means of mitigating its effect - the trial judge may make no minimum recommendation, the Parole Board will always consider a case of this kind, and the prerogative of mercy may be used.

b) Attempted Murder

In ***R v Gotts***,[119] the accused, aged 16, seriously injured his mother with a knife. In his defence to a charge of attempted murder he claimed that his father had threatened to shoot him unless he killed his mother. The trial judge ruled that such evidence was inadmissible since duress was not a defence to such a charge. The accused pleaded guilty and then appealed. The House of Lords held that the defence of duress could not be raised where the charge was one of attempted murder. Lord Jauncy stated:

The reason why duress has for so long been stated not to be available as a defence to a murder charge is that the law regards the sanctity of human life and the protection thereof as of paramount importance. Does that reason apply to attempted murder as well as to murder? As Lord Griffiths pointed out [in Howe] … an intent to kill must be proved in the case of attempted murder but not necessarily in the case of murder. Is there any logic in affording the defence to one who intends to kill but fails and denying it to one who mistakenly kills intending only to injure?

It is of course true that withholding the defence in any circumstances will create some anomalies but I would agree with Lord Griffiths (Reg. v Howe) that nothing should be done to undermine in any way the highest duty of the law to protect the freedom and lives of those who live under it. I can therefore see no justification in logic, morality or law in affording to an attempted murderer the defence which is held from a murderer.

[119] [1992] 2 AC 412

The intent required of an attempted murderer is more evil than that required of the murderer and the line which divides the two is seldom, if ever, of the deliberate making of the criminal. A man shooting to kill but missing a vital organ by a hair's breadth can justify his action no more than can the man who hits the organ. It is pure chance that the attempted murderer is not a murderer. …"

- **Burden of Proof**

The accused bears the burden of introducing evidence of duress and it is then up to the prosecution to prove beyond reasonable doubt that the accused was not acting under duress. If a defence is established it will result in an acquittal.

Read *Nasur Abdula v. Uganda* MB 142/70

XVIII. DOUBLE JEOPARDY

The general rule is that a person shall not be punished twice under any law for the same offence; S.18 Penal Code Act. Double jeopardy is a procedural defense and a constitutional right which forbids the accused to be tried twice for the same crime. The accused can plead *autrefois acquit* or *autrefois convict*; meaning the accused has been acquitted or convicted of the same offense. Article 28 (9) of the Constitution provides that a person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

The two defences of autrefois acquit and autrefois convict operate as a technical bar i.e. objections made by an accused at the time he is called upon to plead the charges. In ***R v. Thomas***[120] it was held that an acquittal or a conviction by court with no jurisdiction is not a bar to a subsequent charge; reason being such acquittal or conviction is of no legal conse

[120] (1949) 2 ALL ER 662