NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF ARTS AND SOCIAL SCIENCES

COURSE CODE: CSS 152

COURSE TITLE:
INTRODUCTION TO NIGERIAN CRIMINAL LAW

COURSE GUIDE

CSS 152
INTRODUCTION TO NIGERIAN CRIMINAL LAW

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Introduction

Welcome to CSS 152: Introduction to Nigerian Criminal Law. This course is a compulsory course in National Open University of Nigeria that you must offer in the Criminology programme. This course is offered in the first semester and it is a 3 credit unit course.

Course Aim

The aim of the course is to expose you to criminal law in Nigeria so that you will be able to avoid conducts that border on criminality, so that you will be able to identify what offences are.

This will be achieved by:

i. Introducing you to the meaning of crime
ii. Exposing you to the various elements that must be proved before an offence is alleged committed
iii. Preparing you to effectively handle criminal matters by liaising with the appropriate institutions saddled with law enforcement and the court
iv. Training you to understand and appreciate the domain of Criminal Law in Nigeria.

Course Objectives

In order to achieve the aims listed above, some general objectives as well as specific objectives have been set. The specific ones are listed at the beginning of each unit.

The general objective will be achieved at the end of the course material. At the end of the course material you should be able to:

i. Define the Sources of the Nigerian Criminal Law
ii. Define Crime
iii. Define the elements of an offence
iv. Know the relationship between elements of offence and classification of offences
v. Define the various offences
vi. Understand the central role of the police as an institution in law enforcement.

Course Materials

For this course, you will require the following materials:

1. The Course Guide
2. Study units which are fifteen (15) in all
3. Textbooks recommended at the end of the units and
4. The Assignment file where all the unit assignments are kept.

Study Units

There are fifteen study units in this course. They are as follows:

Module 1

Unit 1 History and Sources of Nigerian Criminal law
Unit 2 The Definition of Crime
Unit 3 Elements of an Offence
Unit 4 Classification of Offences
Unit 5 Homicide (General Aspects)
Unit 6 Parties to an Offence
Unit 7 Stealing
Unit 8 Obtaining by False Pretence

Module 2

Unit 1 Receiving Stolen Goods
Unit 2 Burglary and House Breaking
Unit 3 Treason
Unit 4 The Offence of Rape
Unit 5 Theories and Types of Punishments
Unit 6 General Principles of Sentencing
Unit 7 The Police and the Administration of Criminal Justice

Each unit contains some exercises on the topic concerned and you will be required to attempt the exercises. These will enable you evaluate your progress as well as reinforce what you have learnt so far. The exercises, together with the tutor marked assignments (TMAs) will help you in achieving the stated learning objectives of the individual units and the course.

Textbooks and References

You may wish to consult the references and other books suggested at the end of each unit to enhance your understanding of the material. Look at all the references and all other suggested readings to deepen your knowledge of the course.

Course Marking Scheme

Assessment	Marks
Assignment	**Best four assignments scores at 20% each = 30% of total course mark.**
Final Examinations	**70% of Total Course Mark**
Total	100% of Course Mark

Course Overview

Your assignment file contains all the details of the assignments you are required to submit to your tutor for marking. The marks obtained from these assignments will count towards the final mark you obtain for this course. More information on the assignments can be found in the file.

Unit	Title of Work	Weeks Activity	Assessment End of Unit
	Course Guide		
	Module 1		
1	History and Sources of Nigerian Criminal Law	1	
2	The Definition of Crime	1	
3	Elements of an Offence	1	Assignment 1
4	Classification of Offences	1	
5	Homicide (General Aspect)	1	Assignment 2
6	Parties to an Offence	1	
7	Stealing	1	
8	Obtaining by False Pretence	1	
	Module 2		
1	Receiving Stolen Goods	1	
2	Burglary and House Breaking	1	Assignment 3
3	Treason	1	
4	The Offence of Rape	1	Assignment 4
5	Theories and Types of Punishment	1	
6	General Principle of Sentencing	1	Assignment 5
7	The Police and the Administration of Criminal Justice	1	
	Revision	1	
	Examination **Total**	1 **15 weeks**	

Assessment

Your assessment for this course is in two parts: first is the tutor-marked assignments, and second is the written examination. You will be required to apply the information and knowledge gained from this course in completing your assignments. You must submit your assignments to your tutor in line with submission deadlines as stated in the assignment file.

Tutor-Marked Assignment

In this course, you will be required to study fifteen (15) units, and complete the Tutor Marked Assignments provided at the end of each unit. The assignment attracts 20 marks each. The best four of your assignments will constitute 30% of your final mark. At the end of the course you will be required to write a final examination, which counts for 70% of your final mark.

The assignments for each unit in this course are contained in your assignment file. You may wish to consult other related materials apart from your course material to complete your assignments. When you complete each assignment, send it together with a tutor marked assignment (TMA) form to your tutor.

Ensure that each assignment reaches your tutor on or before the deadline stipulated in the assignment file. If for any reason you are unable to complete your assignment on time contact your tutor before the due date to discuss the possibility of an extension. Note that extension will not be granted after the due date for submission unless under exceptional 2circumstances.

Final Examination and Grading

The final examination for this course will be for a duration of three hours and counts for 70% of your total mark. The examination will consist of questions that reflect the information in your course material, exercises and tutor marked assignments. All aspects of the course will be examined.

How to Get the Best from the Course

In distance learning there is limited interaction between the lecturer and you. Your course material replaces the lecture. However, there are provisions for the tutor to interact with you via the phone or you post the questions on the web i.e. NOUN web Gole's discussion board.

The practical strategies for working through the course are:

a. Read the course guide thoroughly

b. Organize a study schedule. Design a course overview to guide you through the course.
Note the time you are expected to spend on each unit and how the assignment relates to the units. Get details of your tutorials, which is available on the website, on the first day of the semester.

c. Once you have created your own study schedule, do everything to be faithful to it.

d. Turn to Unit 1 and read the introduction and the objectives for the unit.

e. Assemble the study materials you will need, the reference books in the unit you are studying at any point in time.

f. Work through the unit. As you work through the unit, you will know what sources to consult for further information.

g. Keep an eye on the web Gole for up-to-date course information

h. Before the relevant due dates (about 4 weeks before due dates), access the assignment file on the web Gole and download your next required assignment. Keep in mind that you will learn a lot by doing the assignment carefully. They have been designed to help you meet the objectives of the course and therefore, will help you pass the examination. Submit all assignment not later than the due dates.

i. When you are confident that you have achieved a unit's objective you can start on the next unit. Proceed unit by unit through the course and try to pace your study so that you keep yourself on schedule.

j. When you have submitted an assignment to your tutor for marking, do not wait for its return before starting on the next unit; keep to your schedule. When the assignment is returned, pay attention to your tutor's comment both on the tutor marked assignment form and also the written comments on the ordinary assignments.

k. After completing the last unit, review the course and prepare yourself for the final examination.

Facilitators/Tutors and Tutorials

There are 8 hours of tutorials provided to support this course. Tutorials are for problem solving and it is very important in the course of studying this course material. You arrange for the date and time of the tutorial with your tutor.

Your tutor will mark and comment on your assignments; do not hesitate to contact him on telephone, e-mail or discussion board in case of the following:

i. You do not understand any part of the study unit
ii. You have difficulties with the assignment
iii. You have a question or problem with an assignment

You learn a lot from participating in discussions and that is the reason why the issue of tutorials must be taken seriously.

Summary

Check that you have achieved the unit objectives (listed at the beginning of each unit) and the course objectives (listed in the Course Guide).

MAIN COURSE

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MODULE 1

UNIT 1 HISTORY AND SOURCES OF NIGERIAN CRIMINAL LAW

This unit will introduce the students to the History and sources of Criminal Law in Nigeria. It would enable the students to know the purpose of Criminal Law as well as the nature of crime. The unit is ramified as follows:

CONTENTS

1.0 INTRODUCTION

The Nigerian society is made of people with diverse cultures, behaviours and ways of life. The people relate with one another in the course of their daily existence. In this process, some people intentionally or advertently often step on the toes of others. A redress has to be put in place in order to check the excesses of the defaulting person or group of persons if peace and order are to be maintained in our organized society. It is on the foregoing premise that government has to put in place criminal law which regulates the conduct of the people against fellow citizens and government (public) and private establishments, and individuals.

Criminal Law which is the law of crime in Nigeria has a good history and was developed from sources, the subject matters or which will be examined in greater details in this unit.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

state the source of our criminal law
give account of the history of the criminal law in Nigeria
explain the whole essence of criminal law

show how crime could be identified and even distinguished from what it is not.

3.0 MAIN CONTENT

3.1 Sources of Nigerian Criminal Law

The important source of Nigerian Criminal Law is the English common law which is the law created by the custom of the people and decisions of judges in England.

But what appears to be the dominant source of Nigerian Criminal law are the various statutory enactments such as the constitution, the Acts of the National Assembly, the Government Councils and Subsidiary Legislations of government department. It may also include Decrees and Edicts on criminal matters promulgated during military regimes.

The above statutes which we have mentioned may be grouped into three distinct categories. The first are the many statutes made by the Federal, States and Local Government Councils in Nigeria which take care of various technical or specific offences whose purpose is to regulate the conduct of the people through sanctions or punishments contained in such offences.

The second category of criminal statutes are the Criminal Code Act, cap 77 Laws of the Federation of Nigeria and the Penal Code Law of 1959 which came into effect in 1960. While the Criminal Code applies in the Southern States of Nigeria, the Penal Code applies in the Northern States of Nigeria. These two codes criminalize many offences which are intended to regulate the conduct of the people.

Another source of Criminal Law, though secondary in classification, is judicial Precedent which manifests in courts decisions interpreted to give precision to some difficult legislative provisions.

SELF ASSESSMENT EXERCISE 1

1. What are the sources of Nigerian Criminal Law?
2. Can you validly say that our Criminal Law has an origin?

3.2 History of Criminal Law in Nigeria

In pre-colonial Nigeria, there was in existence, some systems of customary criminal law which regulated the standard of behaviour of the people. They were generally unwritten.

The Moslem community in the North had a highly developed system of Moslem law of crime with different schools, though; the maliki was the most dominant. Paganism was also practiced with its unique Paganism criminal law.

The Lagos colony had the modern English common is law which was introduced by ordinance No. 3 of 1863. The various political evolutions which went on in the various protectorates and colonies also led to the development of criminal law in Nigeria.

In 1904, Lord Lugard, the governor of the Northern protectorate introduced by proclamation a Criminal Code which incidentally was made applicable to the whole of Nigeria in 1916 after the famous amalgamation in 1914.

Following intense advocacy by the Northerners, the Penal Code Law, No. 18 of Northern Region was introduced in that Region. That exercise also restricted the Criminal Code of 1916 to apply only in the Southern part of Nigeria. The Penal Code was tailored against the background of the Cod of Sudan which itself had its origin from the Indian Penal Code of 1860.

Elsewhere in Nigeria and particularly in some part of the South, there was also the application of customary criminal law. At the 1958 Constitutional Conference, it was decided that Customary Criminal Law be abolished in Nigeria and that decision was articulated in the 1959 Bill of Rights developed by Nigerians and submitted to the Colonial Government in London.

The British Home Government approved the request and same was incorporated in section 22 (10) of the repealed 1963 Republican Constitution. That section of the constitution read "No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law".

The foregoing was the basis for the court's decision in the case of Aoko V.Fagbemi (1961) I All M 400. In that case, the court held that a woman cannot now be convicted for adultery (a morally reprehensible conduct) which has not been elevated to the level of a crime in the Criminal Code.

At the moment, Nigeria operates a dual Code system because of the applicability of the Criminal Code and the Penal Code. Furthermore, for effective administration of Criminal Law in our courts, the law of criminal procedure was codified as Criminal Procedure code of 1960 for

the North and the Criminal Procedure Act, cap 80, Laws of Federation of Nigeria 1990.

SELF ASSESSMENT EXERCISE 2

1. Trace the history of Criminal Law in Nigeria
2. Discuss the duality of Criminal Code in Nigeria.

3.3 Purpose of Criminal Law

Criminal law exists and it is studied in order to ensure true knowledge of the law by the people, to be familiar with the nature of crime, the proceedings to be adopted in prosecution and the punishments which the law has put in place against the offenders.

For example, the objects of criminal law according to the Wolfenden Committee on Homosexual offences and protection are:

a. To preserve public order and decency
b. To protect the citizens from what is offensive and injurious and
c. To provide sufficient safeguards against the exploitation and corruption of the more vulnerable members of the society.

SELF ASSESSMENT EXERCISE 3

What is the importance of Criminal Law to Nigerians?

3.4 The Nature of Crime

In order to understand the nature of crime, one has to look at the legal consequences which may follow it. For example, if the wrongful act or omission is capable of being followed by what is called criminal proceedings, that means it is regarded as a crime other wise, called an offence. If it is capable of being followed by la civil proceedings that means it is regarded as a civil wrong.

Crime or criminal wrong on the one hand and civil wrong on the other hand could be distinguished from each other. The true distinction between a crime and a civil wrong lies not in the nature of the wrongful act but in the nature of the proceedings and in the legal consequences that may follow.

SELF ASSESSMENT EXERCISE 4

1. How can you distinguish a crime from a civil wrong?

2. Write short notes on the varieties of punishment which the law has put in place for offenders.

4.0 CONCLUSION

In this unit, you have been exposed to the history and sources of Criminal Laws in Nigeria. It has also sufficiently demonstrated that nobody can be punished under the laws in Nigeria except the law is written and punishment defined.

5.0 SUMMARY

This unit has revealed the facts that

Nigerian Criminal Law developed from English common law

The sources of Nigerian Criminal Law are technical statutes on criminal matters as well as the Criminal Code and the Penal Code and that case law is a secondary source.

There was in existence unwritten and indigenous laws in Nigeria before the advent of British rule

The criminal law is instituted in order to regulate the conduct of the citizens.

It is the nature of proceedings and the legal consequences which follow particular conduct or omission which characterize the nature of crime.

6.0 TUTOR-MARKED ASSINGMENT

Carefully trace the evolution of Criminal Law in Nigeria.

7.0 REFERENCES/FURTHER READING

Okonkwo & Naish (1990). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing.

Karibi-Whyte, A.G. (1993). *History and Sources of Nigerian Criminal Law*. Ibadan: Spectrum Law Publishing.

Williams, G. (1982). *Learning the Law*. London: Stevens and Sons.

UNIT 2 THE DEFINITION OF CRIME

This unit will define crime to enable students to have a good understanding of the concept. In defining crime, three approaches to wit, the juristic, judicial and the statutory we shall adopt. An attempt would also be made to distinguish crime from sin or immorality.

CONTENTS

1.0 INTRODUCTION

The conduct of the people in any organized society must be regulated in order to ensure stability and social harmony. This is done through the mechanism of the law which has criminalized certain acts and omission as crimes. Crimes are those breaches of the law which the law forbids and also failing by way of missions to do, what the law has commanded. It follows that since different sets of people have defined crime according to their perceptions, we shall predicate our definition of crime on those perceptions in order to give a clearer understanding and right focus.

2.0 OBJECTIVES

The focus of this unit is to define crime. At the end of this unit, you should be able to:

define crime generally
explain how learned writers have defined crime
explain know how the courts, through cases, define crime state know how various statutes or enacted laws define crime distinguish crime from acts or omissions which are not crime but immoral.

3.0 MAIN CONTENT

3.1 Understanding Definitions of Crime

There have been problems in the definition of crime and the definition of crime and the consistent application of the components of such definition in tailoring the specific offences or crime i.e. the application of the definitions in the formulation of criminalization policy.

Though Criminal Law has been in operation in human communities for several centuries, yet lawyers have so far never agreed on any satisfactory definition of the word Crime. But lawyers cannot afford not to conform to the demands made upon sociologists by Emile Durkheim, namely that the first step of the sociologist … ought to be to define the things he treat, in order that his subject matter may be known. This is the first and most indispensable condition of all proofs and verification. The lawyers despite their quibblings in definition, however, seem to have accepted by conduct an operational definition, but expressed and explained in the words of Terrence Morris, that "crime is what society says is crime" by establishing that an act is a violation of the Criminal Law.

The Nigeria Criminal Code appears in effect to have adopted this approach when it defines an offence (or a crime) as an "act or omission which renders the person doing the act or making the omission liable to punishment under the code or under any order in council, ordinance, or law or statute.

The definition, according to Professor A.A. Adeyemi, is an approach which is a shining example of mental inertia, wrapped up in the cloak of an "a posteriori" rationalization, just like any of the other individual definition.

Another definition that is being suggested is a definition based on an "a priori" approach. This approach can be usefully employed in streamlining the criminal saw in a way that will better adapt it to the fulfillment of its role at the commencement of the Criminal process as a selection instrument. The a priori approach is suggesting a definition of crime based on morality. It is opined that criminal law must reflect the values and aspirations of the Community in which it operates in reflecting the Morality of that Community; it is thereby reflecting its culture. However, the argument must not be understood to mean that courts should be enforcing Morality per se. Rather, it means morality must be the basis of criminal law i.e. the criminality or otherwise of an act should depend upon the degree of its anti-sociality or otherwise of an act must be viewed with reference to the accepted rules of Morality of the community in question. It is on this basis that crime is defined as "an act or omission which amounts on the parts of the doer or omitter, to a disregard of the fundamental values of a society thereby threatening and/or affecting life, limb, reputation and property of another or the citizens, or the safety, security, cohesion and order (be this political, economic or social) of the community at any given time to the extent that it justifies society's effective interference through and by means of it appropriate legal machinery". This is an "a priori" definition

However, the failure of lawyers to agree on a particular satisfactory definition of crime has led to other multiplicity of definitions which are institution-based, they are within the acceptable limit and all have the colouration of the "a posteriori and "a priori" approach to the definition of crime.

3.2 Juristic Approach to the Definition of Crime

For the purpose of this lecture, the words "crime" and "offence" have the same meaning assigned to them because they mean one and the same thing.

Okonkwo and Naish in their books "Criminal Law in Nigeria" define crime as those breaches of the law resulting in special accusatorial procedure controlled by the state and liable to sanction over and above compensation and costs.

The above definition leads us to a distinction between the accusatorial procedure in which the accused is deemed not guilty until he is found guilty and inquisitorial procedure wherein the person is neither charged nor accused but an inquiry is made before commission for trial.

Richard Quinney, in his book "The Social Reality of Crime" (1970), defined crime as a human conduct that is created by authorized agents in a politically organized society.

The sociologists and Criminologists define crime to mean nothing other than a labeling process or that a crime is nothing other than a label attached to a behaviour by those in power. In addition, they hold the opinion that crime is the consequence of social interaction.

From the totality of the above definitions advanced by learned writers, it is suitable to say that crime is that act or omission which the state has prohibited or commanded.

SELF ASSESSMENT EXERCISE 1

What is the attitude of learned writers in the definition of crime?

3.3 Judicial Approach to the Definition of Crime

In the all important case of *R. V Tyler 2 QB 594,* crime was defined as an act committed or omitted in violation of public law either forbidding or commanding it. This is a definition, which has taken root from the

definition advanced by Blackstone in the book "Commentaries on the laws of England" vol. 4 at page 5.

Another case which has defined crime is *Conybeare v. London School Board (1961)1 QB 118* where Day, J. stated that a crime is an offence against the crown o\for which an indictment will lie. It appears that this definition is narrow because it seems to have ignored minor offences that can be tried summarily and not by indictment.

SELF ASSESSMENT EXERCISE 2

What is the dimension introduced into the definition of crime by the court?

3.4 Statutory Approach to the Definition of Crime

The Criminal Code Act, cap. 77 Laws of the Federation of Nigeria 1990 particularly in section 2 thereof has defined crime thus: "An act or omission: which renders the person doing the act or making the omission liable to punishment under this Code or under any Act or law is called and offence".

From the above definition, it can be seen that if a particular act or omission has not been criminalized as a crime by the Code or any other criminal statutes, such act or omission cannot be regarded as an offence in the eye of the law.

Furthermore, section 11 of the Criminal Code which deals with the effect of changes in law provides that a person shall not be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred. The Penal Code Law of Northern Region has also legislated elaborately on this; See S. 3(1) of the Penal Code Law.

The Constitution of the Federal Republic of Nigeria 1999 has provided for the definition of crime in its section 36 (12) when it says that subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and penalty therefore is prescribed in a written law which refers to an Act of the National Assembly or a law of State, any subsidiary legislation or instrument.

By the above provisions of the Constitution for any act or omission to constitute an offence, it must have been provided for a written law and punishment for such offence prescribed accordingly in a written law.

Section 36 (8) of the 1999 constitution states that no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitutes such as offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

The above section speaks against retro-active application for an offence or omission. It emphasizes the fact that a person can only be punished based on an existing law and on the punishment which that law has expressly provided for.

For more in this area of the law, see the cases of *Aoko v. Fagbemi* (1961) 1 All NLR 400 and *Udokwu v. Onugha* (1963) 7 ENLR P. 1

SELF ASSESSMENT EXERCISE 3

1. Can an act or omission not contained in any law and be regarded as a crime?
2. Can an accused person who has been convicted of an existing offence be sentenced to punishment which is not contained in the law creating that offence?

3.5 Crime Distinguished from Sin

We have seen crime to be an act of omission which the law has labelled as such. But immorality or sin is a different thing. It is an act which society or community abhors. It is an act of moral depravity. Thus it can be said that an act may be immoral but not a crime.

Though many illegal or criminal acts are immoral, not all immoral acts are criminal. For instance, in the Criminal Code which applies in the Southern States of Nigeria, adultery is not a crime though it is an act of immorality.

But conduct such as stealing may constitute both a crime and an immorality and that is not to say that crime and immorality are the same thing. They are not so and therefore cannot be.
The dictum of Lord Atkin in *Proprietary Articles Trade Association v. A.G. for Canada* (1931) AC. 310 at 324 said "Morality and Criminality are far from co-extensive, nor is the sphere of criminality necessarily part of amore extensive field covered by morality – "unless the moral code necessarily disapproves of all act prohibited by the State in which case, the argument moves in a circle."

Strictly speaking what the immortal words of Lord Atkin means is that crime and sin or immorality do not have the same scope and extent.

This means that as they are co-extensive, they are far from having the same scope extent and direction.

It is however, important to note that when the criminal law reflects the society's sense of morality, the task of law enforcement is likely to be easier. This is because members of that society would feel a sense of obligation to obey the law.

SELF ASSESSMENT EXERCISE 4

1. Is it proper for someone to be prosecuted in court for committing an immoral act?
2. Why do we say that crime and immorality are far from co-extensive?

4.0 CONSLUSION

This unit is very important in that attempts were made at defining crime. The different schools of thought tried to define crime from their own institutional and perspective view points. Having read through this unit you should be able to define crime and should be, able to discuss the relationship between your definition and what operates in Nigeria. As you go further in your studies these concept shall become clearer to you.

5.0 SUMMARY

The study of this unit highlights the following facts:

The word crime is not different from the word offence. That is if a particular law does not make a particular act or omission an offence, such act or omission cannot be regarded as an offence.
While the juristic approach defines crime as an offence against the State, the judicial approach defines crime as an act in which an indictment or an information will lie.
The Statutory approach emphasizes the criminalization of an act or omission for such to be regarded as an offence.
Crime and immorality belongs not to the same but to different regimes of behaviour.

6.0 TUTOR-MARKED ASSIGNMENT

1. Using known approached, critically examine the definition of crime
2. If an accused person is punished for an act which did not constitute an offence as at the time the offence was committed, what is the position of the law?

7.0 REFERENCES/FURTHER READING

Okonkwo & Naish (1990). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing.

Karibi-Whyte, A.G. (1993). *History and Sources of Nigerian Criminal Law*. Ibadan: Spectrum Law Publishing.

The Criminal Code Act, Law of the Federation of Nigeria Cap. 77

The Penal Code Law 1959 of Northern Region.

The Constitution of the Federal Republic of Nigeria 1999.

UNIT 3 ELEMENT OF AN OFFENCE

This unit will introduce you to the elements of an offence. The elements of an offence are contained in that particular offence depending on how such offence is worded. In other words, it is through a thorough comprehension of the definition of an offence that one will discover the elements of that offence. This unit is fashioned as follows:

CONTENTS

1.0 INTRODUCTION

In the accusatorial criminal system applicable in Nigeria, the prosecution must perforce prove all the elements of an offence for which an accused person is standing trial. Every offence has two elements, that is to say, the physical element and the mental element, except strict liability offences which are complete upon the manifestation of the physical element only.

The physical element is the act or omission done or omitted while the mental element is the intent to commit or omit the crime.

The English common law regarded the physical element to mean the actus reus which is a Latin expression meaning guilty act and the mental element otherwise known as the mens rea to mean the guilty mind.

While the physical element is manifested in the act complained of, the mental element requires the proof of knowledge and foresight on the part of the accused.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

explain what constitutes the physical elements of an offense and its various manifestations
identify the different states of mind which constitute the mental element of an offense

determine when there is the concurrence of the physical and mental elements as well as exceptions which have been developed through cases.

3.0 MAIN CONTENT

3.1 The Physical Element

The physical element of an offence may manifest by way of a positive act because intent alone, however wicked and condemnable cannot amount to an offence. For example, if I slap a person in a manner not justified by law, I have committed the offence of criminal assault against that person and that slap against him is the physical element.

Also, if I move a bag to the slightest degree with the intention of permanently depriving the owner of the use of that bag, I have committed the offence of stealing against you and the movement of your bag to the slightest degree from its original position is the physical element or the actes reus of that offence.

The physical element or the actus reus of an offence can manifest in words in respect of certain offences such as defamation, sedition, taking of unlawful oath and even conspiracy. These offences are committed by words of mouth. The physical element is constituted by words uttered by the accused person.

The physical element also known as the guilty act can also manifest by way of possession. It is immaterial that the accused has not begun to put that thing in his possession to any unlawful use. Section 148 (3) of the Criminal Code provides for unlawful possession of counterfeit coin or of a means of making them. Mere possession of the counterfeit coin is enough to constitute the physical element of that offence. It does not matter whether you have put the money to use by way of using it to buy.

For more on this, see sections 150, 154 (2), 155 (1), S. 209 and 213 etc of the Criminal Code Act.

Possession here may not be physical only; it can also be through the agency of another person in which case it will be constructive possession.

The physical element of an offence can also manifest by way of a passive state of affairs. If for example, a club or an association in which you have been a member is now banned by government, you are ordinarily supposed to stop forthwith your membership of such a club or

an association. But where you continue membership after the ban now becomes the physical element of that offence.

Also, the physical element of an offence can manifest by way of an omission. Omission is failing or omitting to do what that law has commanded you to do, the failure of which will ground criminal liability. The Criminal Code has criminalized such omissions to include duties imposed on peace officers (police officers) to suppress riot see S. 199 of the Criminal Code, duties imposed on members of the ship's crew to obey order and duty placed on a family head to supply necessaries for a child under fourteen years of age.

One underlying condition which must be present for omission to constitute the actus reus in criminal law is that such duties criminalized as omissions must be geared towards avoiding risk of serious harm to the person where a special relationship exists between the parties.

The mental element or the guilty act can also manifest by way of consequence. In some offences such as murder and manslaughter, it is the consequence (e.g. death) which results from the conduct of the accused person that constitutes the actus reus of such offences.

SELF ASSESSMENT EXERCISE 1

What are the various manifestations of the physical element?

3.2 The Mental Element

The introduction of mental element in crime may be attributable to ecclesiastics who regarded the conscience of men as prime importance. In their view, that which called for atonement was the evil intention or motive which prompted the harmful deed.

The mental element or the mens rea is a reference to the mental element which the prosecution must provide in any particular offence in order to secure a conviction.

It is not in every offence that a particular mental element must be proved. There are different species of variety of mental elements depending on how a particular offence is worded. That is to say, the mental element of an offence is derived not from elsewhere but from the way the offence is worded.

It is suitable to state that five basic concepts which may underline the particular conduct are worthy of mention.

These are

i. Intention
ii. Recklessness
iii. Negligence
iv. Accident and
v. Unconsciousness

i. Intention

This can only be derived from the circumstance of a particular offence. Intention here revolves around the issues of forseeability and desirability.

It simply stated that a man intends a consequence of his action when he foresees that it may result in harm and desires that he should do so. Therefore, desire of consequence is the hallmark of intention no matter how vague or unconscious that desire may be.

Thus if for example in the offence of burglary as contained in S. 411 of the Criminal Code, specific intents is to be proved by the prosecution, it must be strictly proved in accordance with the law. See for example the case of *R. v. Steane* (1974) KB 997.

There is however a distinction between the common law rules and intention can be seen in S. 24 of the Criminal Code. At common law, there is the doctrine of transferred malice as is illustrated in the case of *R. v. Latimer* (1886)17 QB 359. In Nigeria and particularly under S. 24 of the Criminal Code, a person must act dependently on the exercise of his will (i.e. with intention) before he can be guilty of the offence charged.

Compare the above case of Latimer with another case to wit; *R. v. Pemblition* (1874) LR 2 in which the court said that the intent to harm a group of people cannot be transferred to the breaking of a window.

a. Intention and Motive Distinguished

Having seen what intention is all about, it is sound to state that motive is reason for the accused person's conduct which has induced him to act unlawfully but which does not form part of the metal element of an offence.

Intention therefore must be distinguished from motive, for, according to the third limb of S.24 of the Criminal Code, unless otherwise expressly

declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial as regards criminal responsibility.

Motive may therefore take the form of love, fear, jealousy, anger, ambition, etc. Thus, if I kill my wealthy uncle in order to inherit his assets, the intention is manifested in the killing while the motive is the inheritance of uncle's assets.

But there are certain provisions of the Code in which motive is made the basis of criminal responsibility. See sections 10, 26, 316 (3) and 377 etc of the Criminal Code.

ii. Recklessness

Recklessness represents a situation where the accused person foresees the consequences of his conduct but decides nevertheless to risk it. In that premise, if the accused foresees a consequence which will arise from his conduct as a remote possibility, then he is not criminally liable but if he foresees it as certain to happen, the finding is that he desired the consequence and therefore intended and by extension will be criminally liable.

For a clearer understanding, read the case of *R. v. Okoni* (1938) 4 WACA 1 9 and *R. v. Idiong* (1950) 13 WACA 30.

iii. Negligence

In negligence, it is said that the accused is blameworthy because a reasonable man (predicating on objective test) ought to have foreseen the possible consequence which will arise form his conduct. Thus negligence is a possible result of one's conduct which makes him blameworthy.

Under the English law, the degree of negligence which attracts liability in a criminal offence is said to be higher than negligence that will attract liability in a civil matter. To this end, the case of *Dabholkar v. R.* (1948) AL 221 is illustrative.

In Nigeria within the regime of criminal law, there are degrees of negligence. For example, for a conviction to lie in the offence of manslaughter, the degree of negligence on the part of the accused must be gross or must be of a very high degree.

Thus, a person who drives fast and zigzags along the road in a built up area at night when pedestrians and other vehicles are about shows complete and criminal disregard for the life and safety of others and is guilty of gross negligence. (See *R. v Adenuga*) and *Akerele v. R* (1942).

There are certain offences in which negligence is made the mental element. For this we refer you to sections 138, 173 (2), 186, 344 etc of the criminal code. Also see the case of *Edu v. C. O. P* (1952) 14 WACA 16.

It should be noted that section 24 CC does not apply to offences in which negligence is an element. The case of *State v. Appoh* (1970) is instructive. In that case section 24 cc did not apply because the accused conduct of punishing the victim near a river was a negligent act and the consequence of his game with the victim was foreseeable by a reasonable third party.

See also *Opara v. The State* (1998). In this case, the accused drove his lorry in a high way at 5.30 a.m. zigzag from right to left, in a manner dangerous to the public, collided with an on-coming pick up from the opposite direction. The pick up burst into flames killing two people on the spot. The accused was charged with manslaughter, causing death by dangerous driving. In his defence, the accused said he had crossed the road, and parked his lorry when the pick up van ran into his lorry and hit the vehicle.

The trial court rejected his defence and convicted him on all the three counts. Allowing his appeal, the Court of Appeal said that the degree of negligence required to support a charge of manslaughter must amount to gross or criminal negligence, utter recklessness in disregard for the lives and safety of the road users.

Furthermore, you should regard the distinction between negligence required to establish a case of causing death by dangerous driving and that for manslaughter. The degree of negligence required to establish a case of causing death by dangerous or reckless driving falls short of that required for conviction for manslaughter. To sustain a charge of manslaughter, the negligence should be such as showed a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment (*Abdullahi v. Sate* (1985)).

iv. Knowledge

There are certain things in which the law requires that the accused person must have knowledge of a particular existing circumstance. In order to appreciate the enormity of the above mental condition, see the

cases of *R. v. Onuoha* (1983) 3 WACA 88 and *R. v. Obiase* (1938) 4 WACA 16.

v. Voluntary Conduct

An accused person can only be guilty of his voluntary conduct because he cannot be considered to be acting if his physical movement is unconscious or involuntary.

If a person does something in a state of mental blackout or his sleep, then in law, he is not acting and there is no criminal liability because of the involuntariness of his conduct.

In Nigeria, the law is well stated in section 24 of the criminal code and it provides that, except in negligent acts or omission, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an act or for an event which occurs by accident.

It is worthy to state that where the actor is completely unconscious of what he is doing, the physical element is said to be present but the mental element is lacking.

vi. Strictly Liability Offences

It is not in all offences that the prosecution is required to prove both the physical and the mental elements. There are some offences in which the law requires the prosecution prove the physical element only. Where this happens it is said that those offences are strict liability offences.

These therefore, are offences in which the enacting authority dispenses with the proof of the mental element. In strict liability offences a successful proof of the physical element is enough to secure a conviction against the accused person.

See the case of *R. v. Efana* (1972) 8 NLR 81 and search the Criminal Code of bring out strict liability offences.

SELF ASSESSMENT EXERCISE 2

1. Can we validly say that intention is the only concept of mental element?
2. Outline the various concepts relating to the mental element of an offence.

3.3 The Concurrence of the Physical Element and the Mental Element

The physical element must co-exist with the mental element and they must simultaneously or contemporaneously complement each other as a matter of law. This is an English Law concept and its import is yet to be firmly considered in Nigeria Law according to the learned authors of Okonkwo and Naish in their book *Criminal Law in Nigeria*.

It is another way of saying that both the actus reus and the mens rea of an offence correspond.

Exceptions

It is important to state that exceptions have been developed through case law to the principle of concurrence of physical and mental elements.

The first of such exceptions was developed by Lord Denning in the case of *Attorney General for Northern Ireland v. Gallagher* (1963) AL 349. In that case, the learned law Lord opined "Where a person whilst sane and sober forms an intention to kill and then prepares for it, knowing it to be a wrong thing to do, he cannot thereafter rely on self induced drunkenness as a defence to a charge of murder".

In the above Case, the House of Lords allowed the appeal on the basis that if before the killing, the accused had discarded his intention to kill or reserved it and got drunk, it would have been a different matter, but when he forms the intention to kill and without any interruption proceeds to get drunk and carries out his intention, then his drunkenness is no defence, moreso it is dressed up as a defence on insanity. There was no evidence in the present case of any interruption. Lord Denning said that the wickedness of the accused person's mind before he got drunk is enough to condemn him coupled with the act which he intended to do which he actually did.

The second of such exceptions is that if the actus reus is a continuing one, it is sufficient that the accused has mens rea during its continuance; mens rea gallops up to coincide with the actus reus.

The second exception, as highlighted above, can better be understood based on the decided case of *Fagan v. Metropolitan Police Commissioner* (1968) 3 ALL ER 442.

The third exception is that when the actus reus is part of a larger transaction, it is said to be sufficient if the accused possessed the intent

during the transaction, though not at the moment the actus reus was accomplished.

The Indian case of *Khandu* (1890) ILR Bombay 196 and the Rhodesian case of *Shorty* (1950) SR 280 were ordinarily decided on the basis of the principle of the concurrence of the physical and mental elements and the accused persons were not found guilty as charged. But the case of the *Thabo Meli v. R.* i1954) 1 WLR took a different view.

The Privy Council said that the actus reus which caused the death of the deceased by exposure is part of a larger transaction of an earlier intention to kill him with a strike.

See similar cases such as *State v. Maselina* (1968) 2 SA 558 and *R. v. Church* (1961) 1QB 59.

SELF ASSESSMENT EXERCISE 3

1. Discuss the principle of the concurrence of the physical and mental elements and the exceptions.
2. What is the ratio for the court's decision in the case of Khandu (1890) 1LR Bombay 196?

4.0 CONCLUSION

Human behaviour in every society is regulated by a minimum code of conduct and in the case of any behaviour outside the scope of this minimum conduct, an offence is presumed to have been committed. In this unit, we demonstrated your understanding of the importance of the application of the general criterion of the elements of offence and how it is used in solving disputes about the unlawfulness of a particular act which complies with the definitional elements of crime and whether certain conducts falls within the scope of a generally recognized ground of justification with reference to crime.

5.0 SUMMARY

From the study conducted in this unit, it is suitable to state that:

Every offence except strict liability offence has two elements.
Those two elements are known as the physical element and the mental element.
That there are various ways by which the physical element of an offence can manifest.
There are some concepts which underlie the mental element.

The principle of concurrence emphasizes the fact of simultaneous occurrence of the physical and mental element.

The principle of concurrence is not sacrosanct because of exceptions which have been developed over the years through case law.

6.0 TUTOR-MARKED ASSIGNMENT

"A" intending to kill "B" strikes him with a sharp knife and thinking that "B" is dead whereas he has not died, throws his body into Qua Iboe River and "B" is now dead due to exposure, what is the position of the law relating to the principle of concurrence.

7.0 REFERENCES/FURTHER READING

Fletcher, G. Rethinking Criminal Law.

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing.

Smith & Hogan Criminal Law.

UNIT 4 CLASSIFICATION OF OFFENCES

The purpose of this unit is t examine the classification of offences and the basis of criminal responsibility. This is predicated on the fact that responsibility or liability shall lie where it shall happen to fall and shall not be shifted elsewhere. This unit shall be examined on the following items:

CONTENTS

Introduction

1.0 INTRODUCTION

It is a known phenomenon in criminal law that offences are classified into different categories. The classifications are not contained in the sections creating the offence; they are contained in the punishments attached to the offences. A person should be punished for the offence which he or she committed which is the basis of criminal responsibility. Such a person cannot properly in law be punished for another person's offence except where there is vicarious liability permitted by law.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

show how offences are classified
explain the basis of criminal liability
define the concept of no liability without fault.

3.0 MAIN CONTENT

3.1 The Classification of Offences

In English law, there is the classification of offences into common law offences and statutory offences. Common law offences are those offences which were developed from the customs and tradition of the English people. Statutory offences are offences which were put in place by the various enacting authorities in England.
In Nigeria, the classification of offences is contained in S. 3 of Criminal Code. That section provides for classification into felonies, misdemeanour and simple offences and it applies only in the southern part of Nigeria

A felony is any offence which is declared by law to be a felony, or is punishable without proof of previous conviction, with death or with imprisonment for three years or more.

A misdemeanour is any offence which is declared by law to be a misdemeanour, or is punishable by imprisonment for not less than six months, but less than three years.

All offences other than felonies and misdemeanours, are simple offences. Section 3 CC.

This division of crimes into felony, misdemeanor and simple offence applies only in the Southern part of Nigeria.

In the northern part of Nigeria where the Penal Code applies, no such classifications have been made. But these classifications as above, covers all manner of offences in Southern part irrespective of whether such offences are contained in the Criminal Code or not.

It is suitable to note that no section creating an offence has clearly declared such offence to be a felony, misdemeanor or simple offence. The gravity of the offence and the punishment allayed to it informs the class into which a particular offence belongs.

We shall now approach section 3 of the criminal code in order to discover the three classifications. That section defines a felony, as any offence which is declared by law to be a felony or is punishable without proof of previous conviction, with death or with imprisonment for three years or more.

A misdemeanor is defined as any offence which is declared by law to be a misdemeanor or is punishable by imprisonment for not less than six months but less than three years. And finally that section concludes by providing that all offences, other than felonies and misdemeanor are simple offences.

There are certain consequences which result from the above classification. They are both procedural and substantive. In terms of procedure, the power of a private person to arrest a suspected misdemeanant is more limited than his power to arrest a suspected felon. Similarly, the granting of a bail is lot more limited than when the offence involved is a felony. The substantive consequence of classification into felonies, misdemeanors and simple offences are: first that it is only in respect of felonies that we have offences such as compounding felonies (see S. 127 of Criminal Code) and neglect to prevent the commission of an offence (i.e. neglect to prevent felony as contained section 515 of the Criminal Code).

Again, the punishment for attempts or conspiracies to commit offences and for being an accessory after the fact will vary in accordance with

whether the substantive offence, if committed, was a felony, misdemeanor or simple offence.

Furthermore, certain defences are available on charges of assault of more serious harm which result in death committed by public officers or private citizens in preventing the escape of a felon that are not available to other murder. See section 271 and 272 of the Criminal Code.

3.2 The Principle of no Liability without Fault

The learned authors, Okonkwo and Naish, submit that all legal systems have to some degree or other incorporated the simple moral idea that no one should be convicted of a crime unless he willed the fault and same attributed to him.

An illustration will explain the foregoing. If A kills B; A's fault of killing B cannot be transferred to his father because there was no fault on his father's part which will make the latter liable despite the fact that the father has a moral duty to bring up A well just as his child.

In order to prove that the accused is liable, it is left for the prosecution to prove the existence or otherwise of mens rea and it is analytical to state that the mens rea doctrine is used to describe the statutory principle under the common law situation, which runs through all offences.

SELF ASSESSMENT EXERCISE 1

What do you understand by the principle of liability without fail?

3.3 Sources of the Principle

There are two sources to which the principle of no liability without fault could be traced. The first is predicated on English law as a source and the second is anchored on Nigerian law as a source.

a. English Law as a Source

Okonkwo and Naish have said that in English law, the scope of the doctrine of mens rea (guilty mind) depends on whether a particular crime is a common law offence or a statutory offence. It is worth recapitulating that common law offences derive from the customs and tradition of the English people while statutory offences are those contained in enacted statutes.

At common law, there is a legal presumption that an accused person is innocent until he or she is proved guilty. An offence requires proof of a guilty mind but if the offence is constituted, there is a factual presumption or presumption of fact that proof of guilty mind depends on whether the statute requires such proof or not. In Nigeria, every offence by whatever mode it is constituted, is a statutory offence and must be written and therefore known to law.

The mens rea doctrine was decided upon in the case of *Lim Chik Aik v. R* (1963) AC 160. In that case, the Judicial Committee of the Privy Council accepted the immortal words of Wright J in the often cited case of *Sherras v. de Rutzen* (1895) 1QB 918 to the effect that "there is a presumption that mens rea or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence.

"But that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered".

But there are certain offences in which mens rea doctrine is displaced in which case it will be said that liability is strict. It is strict because in such offences, the law does not require the proof of mental element or the guilty mind. The proof of actus reus or the guilty act is enough for the conviction of the accused person.

Foster Sutton, P. in *Amof a v. R* (1952) 14 WACA 238 said that in order to determine whether mens rea (that is to say a guilty mind or intention is essential element of the offence charged), it is necessary to look at the object and terms of the law hat creates the offence.

b. Nigerian Law as a Source

The principle that no person should be punished without being guilty is contained in section 24 of the Criminal Code and it states that:

> "subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident."

Under this category, the accused would have acted or omitted to act under a condition which is involuntary…. – i.e. independently of his/her will. This defence is separate from the defence of accident and should be treated as such. The defence comes under the generic term 'auto

malison' – an involuntary occurrence such as somnambulism, black out, convulsion, spasm etc.

There are two arms in the above section, these are:

a. a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will.
b. a person is not criminally responsible for an event which occurs by accident.

This is a defence of accident. It is not a mater of absence of will or consciousness but an event which was unexpected.

You should try to distinguish between the two defences of auto malison and accident. Suppose you are working with a matchet in a field in the company of other workers. You are suddenly stung by a bee in the back. In a quick reaction, you tried to use the flat side of the matchet to hit that part of the body to get rid of the bee. The matchet lands on the head of a co-worker either by slipping of your hand or because of the swift manner you swung around.

Although you had the will to swing around to make use of the matchet, the result of what you did was an event which occurred suddenly and unexpectedly. It is an accident.

Again suppose you suddenly have a spasm which swung you round unconsciously resulting in the matchet landing on the head of the co-worker. This is not an accident. It is auto malison. The act of swinging round occurred independently of the exercise of your will. It was an unwilled act negating any mental sate of voluntariness.

The case of *Opara v. State* (1998) 2 NWLR (pt 536) 108 reinforced the new position on the degree of Negligence required to support the case.

The word "act" which is contained in section 24 of the criminal code is the physical element (guilty act) within the surrounding circumstances in which the act or omission occurs.
Also the word "event" as contained in section 24 of the criminal code means the result of human conduct. Thus, on the facts of *Timbu Lohan v. R* (1968) 42 A;JR 259 at 303, Waindeyer L. said that "an event in this context refers to the outcome of some action or conduct…". In that case the striking of the baby on the head was an "act" and the death of the baby an "event". An event which occurs by accident connotes an act totally unexpected, unwilled, unintentional and without any fault as against an act which is deliberative, willed or intentional (*Thomas v. State* (1994)).

Opera v. State (Supra) The utter recklessness in disregard for lives and safety of other road users was said to be negligent.

Again the word "accident" which is contained in section 24 of the Criminal Code deserves a discussion. "An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it …" See Stephen's Digest of Criminal Law, 9th Ed. p.260.

Generally, accident (not traffic accident) means a fortuitous circumstance, event, or happening without any human agency, or if happening wholly or partly through human agency, an event which, under the circumstances, is unusual and unexpected by the person to whom it happens. The word may be employed as denoting a calamity, casualty, catastrophe, disaster, an undesirable or unfortunate happening, any unexpected personal injury resulting from any unlooked for mishap or occurrence, any unpleasant or unfortunate occurrence that causes injury, loss, suffering or death. An event that takes place without one's foresight or expectation, an undersigned sudden and unexpected event. (*Agwu v. State* (1998)

Defence of accident under section 24 CC. applies even though the act done is unlawful: (*R v. Martyr* (1962), *Festus Amayo v. The State* (2001) 18 NWLR p. 745 251 and *Agwu v. The State* (1998) 4 NWLR (pt. 544) 90.

The word "will" which is also contained in section 24 of the Criminal Code should similarly be examined. An intended act in the sense that the actor intended by his action to achieve the full operation of that action as it proved to be and in fact, must necessarily be regarded as a willed act. See Barwick C. J in *Timbu Kilian v. R* (supra).

It seems plain that the Common Law principle of mens rea (i.e. no liability without fault) is the same with section 24 of the Criminal Code. Okonkwo and Naish have argued and rightly too that the words "mens rea" should not be used in our Criminal law because the criminal code which we use, has already provided in S. 24 what the mens rea doctrine does in common law in relation to the principle of no liability without fault. They argue that the need to import it into our criminal law therefore has been defeated by S. 24 of the Criminal Code and that section 24 of the criminal code is eider in scope and applicability.

Where the court held that the situation reflected in S. 24 of the Criminal Code is that no criminal responsibility is due to a person for an event which occurs by accident. This involves a voluntary act, but where the voluntary act results in an event which was neither intended nor

foreseen, the consequences is an accident. The court defined accident as contained within section 24 of the Criminal Code as an act totally unexpected, unwilled, unintentional and without any fault as against an act which is deliberative, willed or intentional (*Thomas v. State* [1994] 4 NWLR (pt 337) 129.

See the case of *Agwu v. State* (1998). Here, the appellant and his deceased brother had a melee, struggled over a rod, resulting in some vandalism and the deceased sustained some injuries, bled from upper shoulder and subsequently died. Neither party showed satisfactorily how the deceased got the fatal injury. The trial court convicted the appellant but the Court of Appeal in a unanimous judgement allowed the appeal.

You should remember that the onus is on the prosecution to disprove the defence of accident. If the prosecution therefore failed as in the instant case, to show satisfactorily how the deceased got the fatal injury in the scuffle and the true cause of the injury or hurt was unknown, then the hurt or injury would qualify as and be called an accident. The Court of Appeal held as the defence of accident, like all other defences, presupposes that the accused physically committed the offence but should be acquitted because it was an accidental act.

This principle is further illustrated in the case of *Amayo v. The State* (2001). In that case, a policeman at a road block ordered a pick-up van to stop. The driver tried to move on. Another policeman (accused) emerged, just then, there was a gunshot. A bullet from the gun fired fatally hit the conductor. The policeman was charged with murder. His defence was that his rifle fell from him, hit the ground and exploded just on the pick-up van which was passing by. He said he had no intention to fire, let alone kill. Hid defence was one of accident. But the High Court and the Court of Appeal rejected this defence, convicted him of murder and sentenced him to death. The accused further appealed to the Supreme Court.

The issue canvassed before the Supreme Court was whether the appellant was exculpated from criminal responsibility for the death of the deceased by virtue of the provisions of section 24 cc.

The Supreme Court held that no act is punishable if it is done involuntarily. And an involuntary act in this context (otherwise known as ‘auto malison’) means an act which is done by the muscles without any control by the mind. Or done by a person who is not conscious of what he is doing. The Supreme Court unanimously allowed the appeal and substituted a conviction of manslaughter for murder.

We shall discuss this further when we come to study defences to criminal responsibility.

SELF ASSESSMENT EXERCISE 2

What is the relevance of the case of *Timbu Kian v. R* (1982) to our Criminal Law?

4.0 CONCLUSION

Essentially, the purpose of offences being defined with commensurate punishment attached if for certainty in the society. In this unit, you were exposed to the fact that offences are classified based on the weight of their criminal responsibility. This unit is very important in that we discussed law, offences and punishment. It helps you to know the consequences of certain acts and that a person can only be punished for the alleged offence committed not on another one.

5.0 SUMMARY

Offences are classified into felonies, misdemeanor and simple offences.
The classification is determined by the nature of punishment attached to a particular offence.
That a person can only be punished for his fault and not the fault of others.
That the English law and Nigerian law provide sources for the principle of no liability without fault.
That except, there is negligence, section 24 of the criminal code provides a defence to an accused person who successfully pleads it.

6.0 TUTOR-MARKED ASSIGNMENT

1. If I strike my brother with a sharp knife in a manner not justified by law, it is an act, and if death results from my act, it an event. Discuss the above statement.
2. What are the consequences of classification of offences in our law?

7.0 REFERENCES/FURTHER READING

Stephen's Digest on Criminal Law 9th Edition.

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria.* Ibadan: Spectrum Law Publishing.

Smith & Hogan Criminal Law.

UNIT 5 HOMICIDE (GENERAL ASPECT)

Unit 5 is so designated to teach you the general aspect of Homicide which is criminalized offence in Nigeria. It would enable you to know when a particular wrongful act resulting in the death of the victim will be regarded as Homicide and when it cannot be so regarded.

CONTENTS

1.0 INTRODUCTION

The offence of Homicide is frowned upon in our society.

In the olden days, any person who killed another was made to pay the supreme price, i.e. death on the culprit. As the society develops, killing one another in a manner not justified by law was criminalized and it became an offence. The law, since then, has introduced or imposed sanction against the accused and has also spelt out the ingredients of the offence.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

give a general explanation of homicide
explain what constitutes the guilty act of the offence
determine when not to act in manners which will amount to unlawful homicide in breach of the law.

3.0 MAIN CONTENT

3.1 Homicide (General Aspect)

1. Homicide means the killing of a person in a manner not justified by law. In the olden days, the laws was so strict that it did not matter or not whether you foresaw or intended the death which occurred, but would be punished directly if death occurred from your act.

2. The offence of Homicide is unique because it is something much more than personal injury. It is a violation of the sanctity of human life.

3. It is often said that because of the damnable nature of the acts, the law in Nigeria, through the Criminal Code Act chapter 77 laws of the Federation of 1990 particularly in section 319 thereof, has prescribed death as a penalty for the act of homicide. The reason for making homicide an offence punishable by death in our law is predicated on the principle of fair deserts as a theory of punishment.

4. in modern times however, resort is often used for the physical element (guilty acts or actus reus) and the mental element (guilty mind or mens rea) in order to determine the degree of liability of the offender, and this has gone to modify it as it used to be and as our fore bearer used to know it.

3.2 The Physical Element in Homicide

To amount to "physical element" in homicide, one must be responsible for the cause of the death of another person in the manner not justified by law. Thus, once there is death by an unjustified act of one against the deceased, there is said to be the physical element (actus reus) of homicide. It follows from the above that the victim of homicide is a human being and not otherwise. The question that readily follows is: what categories of human beings qualify to be victim of homicide? If for example A kills F child through abortion, a father's question is: Has the child become a human being? The answer can be taken from a careful reading of S. 307 of the criminal code which reads "A child becomes a person capable of being killed when it has completely proceeded in a living state form the body of its mother, whether he breathed or not and whether it has an independent circulation or not and the x naval string is severed or not".

The above quoted section of the criminal code is explained to mean that a child becomes a human being when it comes out completely out of the mother's womb alive. Thus, the law is that the child must have been completely removed from its mother's body as was decided in the case of *R. v. Poulton* (1. 32) 5C & x.329 and it is enough that life should exist in a child at the time he was born.

SELF ASSESSMENT EXERCISE 1

What is the nature of homicide involved in S. 307 of the criminal code?

3.3 The Issue of Causation

The question which arises for consideration here is: when will death occur so as to amount to homicide according to law. In order to answer the question, it is necessary to explore the provision of section 314 of the criminal code which says that "a person is not deemed to have killed another if death of that other person does not take place within a year and a day of the cause of death". That section goes on to state that such period is calculated to include the day on which the last unlawful act contributing to or resulting in the cause of death was done. For more elaborate reading, see S. 314 generally and case of *R. v. Dead son* 1908 DB 454.

Section 308 of the criminal code reveals that death could be caused directly by any means whatsoever. One can thus see that from the wording of section 308 of Criminal Code, it seems plain to say that section 24 of the Criminal Code is moribund if death occurs directly by any means in accordance with the said Section 308 of the Criminal Code. Still within the meaning of the general aspect of homicide, section 310 says that a person who by threat or intimidation or by deceit causes another person to do act or make omission which results in the death of that other person, he is deemed to have killed him.

From the way section 310 of the Criminal Code is worded, two situations which may arise for consideration are:

i. Where the accused intends that the deceased should do an act after a threat.
ii. When the accused only comes to intimidate and goes away thereafter. For this see the case of *R. v. Nwaoke* (1939) 5 WACA 120.

Again, a look at section 311 of the Criminal Code reveals acceleration of death and it says that a person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission id made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.
This could happen in a situation where a person strangulates a patient in a hospital bed or the victim at an accident scene. On a general note, sections 300, 301, 302, 309 also treat issues relating to the above broad subject matter.

3.4 Unlawful Homicide (Murder)

There are two types of homicide, namely, lawful and unlawful homicide. The law relating to unlawful homicide is contained in S. 306 of the Criminal Code. That section states categorically that "It is unlawful to kill any person unless such killing is authorized or justified or excused by law".

The section by implication means that some homicides are lawful while others are unlawful. It is lawful when authorized by law in a situation where a hangman hangs a condemned criminal, where a soldier in action kills, where a soldier shoots and kills a condemned armed robber tied to a stake or a police officer kills a fleeing robber suspect or where a peace officer kills a person who has committed a felony as contemplated by s. 271 of the Criminal code.

While section 315 of the Criminal Code defines murder or unlawful homicide, S. 283 of the Criminal Code defines provocation, which when successfully raised as a defence may reduce homicide to manslaughter, which itself is a lesser offence constituted in section 317 of the Criminal Code.

S. 316 of the Criminal Code deals with six circumstances that can constitute the offence of a murder. Section 316 (1) says that it is murder if the offender intends to cause the death of the person killed or that of some other person. And by S. 316 (2), if the offender intends to do to the person killed or to some other person some grievous harm.

Section 316 generally cannot be discussed without references to intention. Intention means desire of consequence, and it could be derived from the circumstance of a particular case. See the classical case as *Edington v. Fitzmaurice* (1855) 1 CH.D 459 and the Nigerian cases of *R.v. Omoro* (1961) 1 All NLR 233 and *Nungu v. R.* 14 4ACA 374.

From S. 316 of the Criminal Code, it is clear that for the offence of murder to occur, there must be killing or death must occur and the offender must intend to do the person killed, or some other person, grievous bodily harm, often shortened as GBH. Section 1 of the Criminal Code defines grievous (bodily) harm as "any harm which amount to a maim or dangerous harm as defined in this section or which seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, member or sense.

In *R. v. Ntah,* (1961) 1 All NLR 590, it was made clear that if the intention of the accused is not to cause grievous harm but so results to it.

such an accused should not be convicted of murder under S. 316 (2) of the Criminal Code. For a contrary view, see the case of *R. v. Vickens* (1957) NLR 326. Section 316 (3) of the Criminal Code says that if death is caused by means of an act done in the prosecution of an unlawful purpose which act is of such nature as to be likely to endanger human life, the person who caused the act is similarly guilty of murder.

In order to answer the question whether "the act" and "the unlawful purpose" as contained above are the same thing, see the case of *R. v. Nichols* (1958) Qd EN 46, in which the Circuit Court held that since the act which caused death, i.e. setting fire to the hotel, was also the unlawful purpose, section 302 (2) of Queensland Criminal Code, which is similar to S. 316 of our Criminal Code, was inapplicable.

SELF ASSESSMENT EXERCISE 2

Mention six instances in which murder can manifest within the meaning of S. 316 (1) of the Criminal Code.

CONCLUSION

In this unit we showed that the Law must continually strike a balance between the conflicting interests of individuals or between the conflicting interests of society and the individuals. We demonstrated that when certain conduct is branded unlawful by the Law, this means that according to the legal conviction of society certain interests or values protected by the Law (such as life, property and dignity) are regarded as more important than others. In order to determine whether conduct is unlawful one must therefore enquire whether the conduct concerned conflicts with the legal conviction of the society.

You should understand by now that the grounds of justification must be seen as practical aids in the demonstration of unlawfulness. It is against this background that the study of this unit becomes very significant.

5.0 SUMMARY

Homicide is the killing of a human being by another in the manner not justified by law.
The physical element in Homicide is death which has resulted from the act.
The act of the accused must contribute to the death of the victim.
Unlawful Homicide which is murder which means the killing of a person in such a way which is not excused by law.

There are several instances in which unlawful homicide can manifest.

Homicide may be lawful as when a policeman shoots and kills a fleeing felon or when a hangman hangs a condemned criminal.

6.0 TUTOR-MARKEDASSIGNMENT

If a man kills his brother during a brawl, can his wife who was away in the market at that time be charged alongside her husband with the offence of murder?

7.0 REFERENCES/FURTHER READING

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria.* Ibadan: Spectrum Law Publishing.

Criminal Code Act, Cap 77, Laws of the Federation of Nigeria 1990.

UNIT 6 PARTIES OF AN OFFENCE

This unit will introduce you to the parties to an offence. You will learn about principal offenders as well as accessory after the fact to the offence already committed. The schematic approach of the unit is set thus:

CONTENTS

1.0 INTRODUCTION

In the commission of an offence, a number of persons may be involved and the level of their involvement may not be the same. The law, on that premise, will have to decide the extent of one's criminal liability. According to the criminal code, two classes of parties have been identified. They are the principal offenders and the accessory after fact.

The provisions of the code which deals substantially with parties of offences are sections 7, 9 and 10. Sections 510-521 also of the Criminal code are instructive. All the provisions of the Criminal Code relating to parties to offence apply to all categories whether many offences are contained in the code or any other law or enactment.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

tell who a party to an offence is
explain why such a person should be regarded as a party to an offence
state types of principal offenders
explain the liability of an accessory after the fact.

3.0 MAIN CONTENT

3.1 Liability Affecting a Principal Offender

Within the meaning of a principal offender, four categories have been highlighted by section 7 of the criminal code. That section provides thus: "when an offence is committed, each of the following person is deemed to have taken part in committing the offence and to be guilty of an offence, and may be charged with actually committing it, that is to say;

a. every person who actually does the act or makes the omission which constitute an offence;
b. every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
c. every person who aids another person in committing the offence;
d. any person who counsels or procures any other person to commit the offence.

3.2 Classes of Principal Offenders

Section 7 (a) of the Code provides for every person who actually does the act or makes the omission which constitutes the offence. This contemplates the person who for example slaps another thereby committing a criminal assault. It also has to do with the man who set fire to a house thereby committing the offence of arson.

The man, who makes the omission, is for example, the family head who fails to provide the necessaries of life of a child under the age of fourteen contrary to section 301 of the Criminal Code.

Sometimes it could be that the person who does the act is acting innocently in furtherance of any other person's criminal intention, in such a situation, the man (person who does the act) is not criminally responsible for the act complained of. Instead, the man who used him (the principal) will be liable for the act done in accordance with section 7(d) of the criminal code.

Also, a child who is an infant is covered by section 30 which grants him the status of immaturity, any person who uses him for the commission of any offence, will not be liable for counseling and procuring under section 7(d) of the Criminal Code.

Section 7(b) of the Criminal Code involves on who des or omit; to do any act for the purpose of enabling or aiding another person to commit the offence.
Under section 7(b) of the Criminal Code, the act of assistance is given before the act constituting the offence. It is manifested by any form of assistance given prior to the act of the crime. When it comes to assistance, it does not mater that the assistance given is of no help to the person committing the crime.

Section 7(c) of the Criminal Code talks about every person who aids another person in committing the offence. When it comes to assistance, the West African Court of Appeal held thus "We are of the opinion that to bring a person within this section (that is to say S. 7(c) of the

Criminal Code), there must be clear evidence that the appellant did something to facilitate the commission of the offence – see the case of *Enweonye v. R.* (1955) WACA 1.

The law is that, if the aid or the assistance is given while the commission of the offence lasts, the aider will equally be criminally liable. See the case of *R. v. Johnson* (1973) Wd R 303 as well as the case of *R. v. Mayberry* (1 1; 73) Qd R 211.

It is settled law that mere presence at the scene of the crime without more does not make the man a party to an offence. In the cases of *Azumah v. R* (10, 50) 13 WACA 87, the court said "mere presence is not enough, a person must be purposely facilitating or aiding the commission of a crime by his presence before he can be regarded as an accomplice".

Thus, a man can only be liable as a party if he is present and intentionally does an act which, in law, can be regarded as a facilitation of the crime.

An interesting issue which calls for an examination is what will be the situation where all the parties are caught and at the trial, some are acquitted, by the court. In order to properly examine the above, it is suitable to take a look at the case of *R. v. Okagbue* (1958) 13 FSC 27, the facts of which is that three accused persons were found not guilty by the court, the third accused person was convicted for aiding them. The Federal Supreme Court allowed the appeal of the third accused person, who was convicted by the court below. The appellate court relied on the earlier English case of *R. v. Rowley* (1948) 1 All ER 570. In the said English case (Rowley), the court of Criminal Appeal said that "It would be absurd to say that he (appellant) assisted and comforted persons, who he knew, committed a felony.

The law as expounded above illustrates the fact that the aider can only be convicted if the named principal is also convicted but if the principal is not named, the aider cannot be convicted on the basis that the principal is not known and is said to be at large.
It is worthy to mention that because of immaturity contained in S. 30 of the Criminal Code, if a person is not criminally responsible and aided to commit an offence, it is good law to say that, no offence has been committed and S. 7 of the Criminal Code cannot apply:

S. 8: Offences Committed in Prosecution of Common Purpose

The Criminal Code provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in prosecution of such purpose an offence is committed

of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence see *Alagba & Org. v. The King* (1950) 19NLR 124, and *R. v. Atanyi* (1955) 15 WACA 34.

Proof of Common Intention

Common intention is to be distinguished from common object: it may be inferred from circumstance disclosed in the evidence, and need not be express agreement, but a presumption of a common intention should not be too readily applied see *R. v. Offor and Offor* (1955) 15 WACA 4; *Mohan v. R* [1967] 2 AC 187. In the case above two persons were charged jointly with murder, it was established that each had struck the deceased a violent blow with intent, at least to cause grievous bodily harm and also established which blow had, infact, caused death, but the evidence was open to the construction that the intention of each accused was suddenly formed and formed independently of each other, it was held that the judge's failure to give himself a proper direction expressly as to the common intention invalidated the conviction of the appellant who struck the blow which did not cause death and a conviction against that appellant of attempt murder was substituted for one of murder.

SELF ASSESSMENT EXERCISE 1

Will it be proper in law to convict a person who was merely present at the scene of the crime but did nothing to facilitate the commission of the crime?

Section 7(d) of the cc

Section 7(d) of the Criminal Code provides for any person who counsels or procures any other person to commit the offence.

Here, apart from proof of intention on the part of the procurer and counsellor, words alone will be adequate for criminal liability. The words of couselling or procuring must involve some positive act of encouragement to those who actually committed the offence.
The law is that, tacit acquiescence or ordinary words amounting to a mere permission, are not enough to amount to counseling. See *Idika v. R* (1959) 4 FSC 106.

Again if an accused person has counseled or procured the commission of an offence, it does not matter if he was not physically present at the commission of the offence by his confederates and that it was committed on a day different from the one he contemplated.

The question to be asked and answered here is what happens where the police set a trap for animals.

The court however accepts the strategy, whereby the police set a trap for criminals as a way of arresting them and facilitating the administration of criminal law. Under the circumstance, the initiative to commit the crime must come from the criminal and the police following that initiative, sets up the trap in order to ensnare the criminal and then tame the tide of crime to the society.

3.3 Liability as an Accessory after the Fact

Section 10 of the Criminal code provides for the above and states that any person who receives or assists another, who is to, his knowledge guilty of an offence, in order to enable him to escape punishment is said to become an accessory after the fact to that offence.

The punishment attached to an accessory is less in terms of gravity to that attached to the actual offender. For example, while the principal offender is liable to full punishment for the actual or real offences, the punishment of an accessory after the fact is normally lesser, also in terms of gravity. The distinction is that if the substantive offence committed is a felony, two years maximum imprisonment will be imposed on the accessory but if the substantive offence is a misdemeanour or a simple offence, the punishment attached to an accessory is one half (1½) of the punishment for the substantive offence.

The acts reus for the offence of an accessory is the receipt or the assistance given to the suspect after he has allegedly committed an offence and the offender now runs away for protection. A monetary reception of the suspect by the accessory will be enough in the eyes of the law provided by accessory knows that; the person received or assisted committed the offence.

3.4 Limitation to Liability as an Accessory

Section 10 of the Criminal Code applies, to all manner of offences however criminalized and whether contained in the code or any other enactments.

A closer look at the second limb of section 10 of the criminal code shows that a wife is not an accessory if she assists her husband to escape punishment and the husband is not similarly liable for assisting his wife

because of emotions such as love, fear or compassion may galvanize or rouse either of them into such help or assistance.

In institutionalizing this limitation, the code therein in section singled out a husband and wife of a Christian marriage for favour or protection and discriminates against other forms of marriages however well contracted and well intentioned.

SELF ASSESSMENT EXERCISE 2

Why has the law treated every other type of marriage, except Christian marriage, with total disfavour within the, meaning of section 10 of the Criminal Code.

3.5 The Mental Element of Principal Offenders

A man can lonely be liable for an act or omission which occurs dependently of the exercise of his will and cannot be liable for any act or omission which occurs independently of exercise of his will. He cannot be liable for the act of another person unless he has willed those acts.

For further reading see section 25 of the Criminal Code and the Queensland case of *R. v. Solomon* (1959) Qd. R 123.

4.0 CONCLUSION

In this unit we were able to demonstrate abundantly that a party to an offence is a person whose conduct the circumstances in which it takes place (including where relevant, a particular description with which he as a person must according to the definition of the offence, comply) and the culpability with which it is carried out are such that he satisfies all the requirements for liability contained in the definition of the offence. Or if, although his own conduct doesn't comply with that required in the definition of the crime, he acted together with one or more persons and the conduct required for a conviction is imputed to him by virtue of the principles relating to the doctrine of common purpose.

5.0 SUMMARY

There are four types of Principal offenders as can be seen in section 7 of the Criminal Code

Their unique role in a given crime determines the class in which they belong.

That, mere presence at the venue of the crime does not make a person a principal offender unless he does some thing to facilitate the commission of the offence.

That, it is lawful for the police to set a trap in order to ensnare a criminal and the police officer must not be a party to the crime.

That a person who receives another who has committed an offence and ran away from justice and having knowledge that the other person has committed the offence for which he is wanted, is an accessory to the fact of the main or actual offence.

That protection has been given by the code to spouses of Christian marriage who have assisted either their husbands or wives to escape punishment after the commission of an offence.

6.0 TUTOR-MARKED ASSIGNMENT

1. Is the word "guilty" as used in the first limb of section 10 of the criminal code the proper word for that section?
2. If, I slap a man in a manner not justified by law, I have committed the offence of criminal assault but in what class of an offender can I be classified?
3. Does the act of a police officer on road block in a highway who collects ₦50.00 notes for his personal use forma commercial driver who has no vehicle particulars at all a police trap in the eyes of the law?

7.0 REFERENCES/FURTHER READING

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria.* Ibadan: Spectrum Law Publishing.

Smith & Hogan Criminal Law.

Glanville Williams Textbook of Criminal Law.

UNIT 7 STEALING

This unit will introduce you to stealing as a topic in criminal law. You will learn what stealing is, how it is different from other subjects in criminal law.

CONTENTS

1.0 INTRODUCTION

To steal is both morally reprehensible and criminally wrong. The offence of stealing is contained in the criminal and penal codes. From the way it is constituted, stealing can manifest in various acts and such acts have been spelt out elaborately in this work.

2.0 OBJECTIVE

At the end of this unit, you should be able to:

expressly state which acts constitute the offence of stealing and which acts do not.

3.0 MAIN CONTENT

3.1 Definition

Ordinarily, stealing means the wrongful taking away of the goods of another. It could also mean to take away dishonestly or wrongfully especially secretly.

Stealing is defined in the Criminal Code thus: “a person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any person anything capable of being stolen, is said to steal that thing”. See section 383 (1) of the criminal code. Certain key words like “taking” and “converting” are critical in the discussion of the offence of stealing.

3.2 Taking

For there to be taking in the eyes of the law, the thing must be moved or caused to be moved. See section 383 (6) of the Criminal Code. There are two known types of taking: The first one is actual taking, which

occurs when a person comes into physical or bodily possession of the property. The second is where someone else is caused to take it on your behalf. Under the second category of taking, there must be control over the person doing the taking by the principal.

3.3 Converting

Conversion is not defined in the Criminal Code. According to the renowned authors, Okonkwo and Naish, in their book, Criminal Law in Nigeria, the definition of conversion is to be and should be taken from the area of torts. Thus, in the all-important case of *Lancashire Railway Company v. Macnicol* (1919) 88LJKB 601 and 605, conversion was looked at as a dealing with goods in a manner inconsistent with the rights of the true owner, provided that it is also established that it is also an intention on the part of the defendant, in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right. See also Street on Torts at page 44, as well as the view, as well as the view of the court in the case of *Mills v. Broker* (1919) 1 KB 555. If we therefore relate the above definition to the subject at hand, it is fitting to say that for conversion to amount to stealing, it must be done with one of the fraudulent intents provided in section 383 (2) of the Criminal Code.

With a view to deciding whether a conversion is fraudulent, Section 383 (4) of the Criminal Code provides that it is immaterial that the person converting had an innocent possession of that property or that he held a power of attorney for its disposition or was otherwise authorized to dispose of the property.

3.4 Specific Intents in Stealing

Six intents have been criminalized by section 383 (2) of the criminal code and to the analysis of these intents, we now turn:

1. Section 383 (2) (a) of criminal code provides for an intent permanently to deprive the owner of the thing, of it. Here, the law emphasizes permanent deprivation and not temporary deprivation. See the unreported case of *State v. Otaru* in charge No. U/6C/67 decided in Midwest High Court.

The law does not regard as amounting to stealing where there is a conditional taking with intent to keep only of the goods that are valuable. The case of *R. v. Easom* (1971) 2 All ER 945 is important here. We are of the opinion that if a conditional taking does not amount to stealing as we have seen in the case of Easom, it could pass section 4 of the criminal code.

There is stealing where the accused fraudulently deceives the owner of goods to buy such goods which already belong to him or to which he already has a valid title. See the case of *R. v. Hall* (1894) 2 C 947. Motive of gain is not important or central in order to determine whether a permanent deprivation is fraudulent. See *R. v. Cabbage* (1815) R&S 292.

2. Next is section 383 (2) (b) of the Criminal Code, which provides for an intent permanently to deprive any person who has any special property in the thing of such property. According to the code, the phrase "special property" as contained herein includes any charge or lien upon the thing in question, and any right arising from or dependent upon holding possession of the thing in question whether by the person entitled to such right or by some other person for his benefit. This limb of section 384 (2)(b) is designed to protect the right of a person who is not the owner of the property but has some special interest in the thing he must have power to exercise physical control over that thing. Therefore, if you are a finder of a lost property or goods or a pledge of goods, the law recognizes you as having special property in the article.

3. The third is contained in section 383 (2) (c) of the Criminal Code and it deals with an intent to use the things as a pledge or security. The general rule is that a person who is not the owner of a property and who pledges that property to another as a security has committed the offence of stealing. To every general rule, the law recognizes exception(s). The exception here is in the case of extreme necessity and on condition that he would retrieve such goods almost immediately, but unfortunately, is unable to do so. Here, the law will not regard that, as the offence of stealing because intention which is an essential ingredient is considered lacking.

4. Section 383 (2) (d) deals with intent to part with it on a condition as to its return which the person taking or converting it may be unable to return.

   Here, the accused takes one's property for a transaction but loses such property in the cause of such transaction and therefore is unable to such property to the owner.

5. The intent here revolves round dealing with one's property in such a manner that it cannot be returned in the condition in which it was at the time of taking or conversion. The point of note here is that the thing taken or converted cannot be returned by the

accused in substantially the same condition. The facts of any similar case will be of great assistance. This was decided in the case of *R. v. Bailey* 1924 QWN 38.

6. The last intent is set out in section 383 (2) (f) of the Criminal Code and it states thus: in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner. The law contained in section 383 (2) (f) of the criminal code was the basis of court's decision in the case of *R. v. Orizu* (1954) 14 WACA. In that case, the court held that accused liable for offence of stealing and convicted him accordingly.

SELF ASSESSMENT EXERCISE 1

Mention six intents criminalized in the code which would make taking or conversion fraudulent and therefore criminal in the eye of the law.

3.5 Things Capable of Being Stolen

For one to be convicted of having stolen anything, such a thing must be one capable of being stolen. It then follows that it is not everything which is capable of being stolen. Section 383 of the criminal code relates to the issue of things capable of being stolen. From that section, it is obvious that things that are inanimate which are the property of any person and which are movable, are things capable of being stolen.

In law, there are certain things which are not capable of being stolen. Such things are land and property not owned by anybody. The common law position is that, a corpse is not capable of being stolen. But the law has been developed to the effect that if a corpse possesses peculiar attributes as to justify its preservation on scientific or other grounds and some work of skill have been performed on such corpse, and it is an unlawful possession of a person or authority, it may amount to stealing if such a corpse is disposed of in a manner constituting the offence of stealing.

4.0 CONCLUSION

In this unit, we demonstrated that for a property to be capable of being stolen, it must be:

Belong to somebody else
Moveable
Corporeal

In order for the act to be unlawful, the act of stealing must take place without the permission of the person who has a right to possess it.

In the unit, we demonstrated that to have the intention required for theft it must relate to the act, the nature of property, and to the unlawfulness. Further more, the intention must be to permanently deprive the person entitled to the possession of the property.

5.0 SUMMARY

Stealing is an offence which when committed, attracts punishment, as contained in the code.

It is not every act of the accused that constitutes the offence of stealing.

For an act to be regarded as stealing, it must be accompanied by any of the specific intents contemplated in section 383 (2) (a)-(f) of the code.

It is not everything that is capable of being stolen; for example, land and ownerless properties cannot be stolen.

The things stolen must be moved to the slightest degree with the intent of permanently depriving the owner of the use of such things or with any of the specified intents.

6.0 TUTOR-MARKED ASSIGNMENT

1. Can a person who has entered my plot of land located at Abuja metropolis without my permission and plucked an orange from an orange tree planted on the land charged with the offence of stealing?

2. If, as my intimate friend, I give you money to deliver to my mother at the village but you use the money to pay your school fees and now cannot refund it to me upon demand, have you committed a criminal offence in the eyes of the law?

7.0 REFERENCES/FURTHER READING

Okonkwo & Naish (1990). *Criminal Law in Nigeria.* Ibadan: Spectrum Law Publishing.

Karibi-Whyte, A.G. (1993). *History and Sources of Nigerian Criminal Law.* Ibadan: Spectrum Law Publishing.

Williams, G. (1982). *Learning the Law*. London: Stevens and Sons.

UNIT 8 OBTAINING BY FALSE PRETENCE

In this unit, you will know that obtaining by false pretences is a felony whose main ingredient is intent to defraud and is geared towards anything capable of being stolen. This unit is patterned as follows:

CONTENTS

1.0 INTRODUCTION

The offence of obtaining by false pretences is commonplace to the extent that it is gaining increasing notoriety in Nigeria. The offence is so widespread that governments at all levels are doing everything possible by way of legislation to check its wanton occurrence.

2.0 OBJECTIVES

What this unit seeks to achieve is for you to appreciate the ingredients of the offence of false pretence. This will enable you to have a firm grounding on the topic and also widen your intellectual frontiers within the greater regime of criminal law. The high incidence of the offence and the negative image it has given Nigeria in the international scene makes it imperative for you to be systematically instructed on it.

At the end of this unit, you should be able to:

expressly state what false pretense is.

3.0 MAIN CONTENT

3.1 Definition

Obtaining property by false pretence is committed when a person by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen. The punishment for

obtaining by false pretences and the offence itself are contained in section 419 of the Criminal Code.

It does not matter that the thing is obtained or its delivery induced through the medium of a contract induced by false pretence. The offender cannot be arrested without warrant, unless found in the very act of committing the offence.

3.2 Obtaining

For "obtaining" to take place, one must induce the owner of the property to transfer his/her whole interest in the property. The usual distinction which must be drawn is between "possession" and "ownership". Thus if by an act of any accused person possession only is transferred, then the proper offence is stealing. If, however, both possession and ownership are transferred, then the proper offence is obtaining by false pretence – see *Akosa v. Commissioner of Police* (1950) 13 WACA 43.

Okonkwo and Naish submit that on the principle of Oshin (*Supra*), the case of *State v. Osuafor* (1972) 2 FCSLR 412, in which accused was convicted of obtaining by false pretence, was wrongly decided. They submit that the proper offence in Osuafor's case was stealing because only possession was obtained by the accused.

The learned authors also submit that the case of *Abasi v. COP* (1965) NWLR 461 was wrongly decided because the offence committed was obtaining by false pretence and not stealing as was held by the court because both possession and ownership were involved.

The practice known as money doubling is offence of obtaining money by false pretence. See *R. v. Adegboyega* (1973) 3 WACA, 199. Compare this case with section 385 of the Criminal Code, which deals with fund under direction. If only a bailment of property is obtained, false pretence is not committed.

Illustration

If A by false pretence obtains the hire of B's bicycle for a day and returns but does not pay the hire charge, this is not obtaining of the bicycle by false pretence because what A obtains was only a ride on the bicycle (possession) and not B's entire interest (ownership) of it.

Furthermore, in *R. v. Kilham* (1870) 1 CCR 261, K obtained hire of a horse by false pretence, returned the horse without paying the cost of the hire. It was held that K's conduct did not amount to obtaining by false pretence. See also the case of *R. v. Boulton* 1 Den. 508 and *R. v. Chapman* (1910) 4 Cr. App R 276.

If a person obtains a loan of money by false pretence even though he intends to repay it, the offence of obtaining by false pretence will lie against the offender or the accused because ownership in the particular money lent has passed to him. See *R. v. Ogbanna* (1941) 7 WACA 139. The property (ownership) in the goods must be obtained from the general owner or from someone who has power to pass the property. See *R. v. Ball* (1951) 2 KB 129. If the accused by false pretence obtains property from a bailee with intent to deprive the owner permanently, this is stealing.

The owner of land has special property (interest) in things found on his land and same is applicable to a finder of lost articles. It may be false pretence to induce them to give out their entire interest in such goods or articles.

If a customer pays a forged cheque into a bank account and the bank makes an entry crediting him with the amount on the cheque, he is not guilty of obtaining money from the bank by false pretence and this offence can only crystallize when the bank actually hands over or pays the money to the customer, irrespective of how much it credited in favour of the customer in his account because property in the money still resides with the bank.

The offence under discussion cannot be examined properly without the expression "inducing deliver". There is therefore, a great chasm between "obtaining and inducing deliver". Obtaining means obtaining for oneself and inducing delivery covers a situation whereby A induces B to deliver to himself to C.

Inducing delivery in the crime of false pretence means inducing delivery of ownership and if there is merely a delivery of possession of accused that will amount to stealing.

3.3 The Pretence

A pretence is any representation which can manifest by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact and which the person making it knows to be false or does not believe to be true. It is important to note however

that a pretence can be inferred from the conduct of the accused and circumstance of the case.

3.4 Past and Present Matter

The representation must refer to a matter of fact either past or present. If it relates only to a future matter, the offence of obtaining by false pretence is not committed. Thus in *Achonre v. Inspector General of Police* (1958) 3 FSC 30, it was held that the accused was not guilty of obtaining money by false pretence because the representation related only to a future matter. *Inneh v. Commissioner of Police* (1959) WRNLR 204, it was held that the giving of a post dated cheque implies a future representation.

But if the drawer has no account at all at the bank, then there is a false representation on an existing fact. If the false representation consists partly of a statement of a past or present matter and partly of a statement relating to the future, an offence is committed by false pretence, provided the former statement is a material contributory factor inducing the representee to part with his property.

In the English case of *R. v. Jennison* (1862) L & C 157, the accused, a married man, represented himself as being single and induced a girl to give him money promising that he would use the money to furnish a house and thereafter marry her. He was convicted of obtaining money by false pretence. In the above case, although there was a future promise, yet the statement that the accused was single related to an existing fact and was an important factor which induced the girl to part with her money.

Sometimes a promise to do something in the future may involve a false pretence that the promisor has the present means and ability to do that thing. If this is so, then there is representation of an existing fact. See *R. v. Dent* (1955) 2 ALL ER 806.

3.5 Falsity of the Pretence

The law is that the pretence must not only be false but it must be false to the knowledge of the maker, or at least, he must not believe it to be true. If the accused honestly believes in the truth of the statement which unfortunately turns out not to be so, this is no false pretence but merely an expression of opinion. It is only a statement of fact that cannot, which in law constitute a false pretence.

Illustration

If a butcher represents the meat he sells as the best in the market and it turns out to be so, this is no false pretence but merely an expression of opinion. But if a trader knowingly makes a false statement of fact concerning his product, that is false pretence in the eyes of the law. The prosecution has a heavy burden of proving the falsity of the pretence and if the pretence is shown to be false, it is no defence that the person defrauded, parted with his property in order that it might be put to an unlawful purpose.

3.6 Intent to Defraud

There must be intent on the part of the accused to defraud, though it is not necessary to allege an intent to defraud any particular person. An intent to defraud is an intent to induce another by deceit, to act to his detriment or contrary to what would otherwise be his duty and it is immaterial that there is no intention to cause pecuniary or economic loss. See the case of *Welhem v. DPP* (1961) AC 103. Thus if A obtains money from B by false pretence, the intent to defraud is not negative by showing that the money so obtained is nothing more than a suitable reward for the services rendered by A to B. See the cases of *R. v. Anijoloja* (1936) 13 NLR 85 and *R. v. Abuah* (1961) All NLR 635.

3.7 Effect of Pretence

The law is that the pretence must have induced the owner to part with his goods. It must be shown clearly that the alleged false representation weighed on the mind of the representee and therefore made him to part with the goods. If the representations consist of variety of statements wherein one of such statements is false, by the authority of *R. v. Jenisson* (1862) L & C 157, the representee will be guilty if that false statement is an effective cause of the transfer of ownership.

Where there is no express request for the transfer of ownership, the pretence may be implied from the conduct of the accused. If the person to whom the false pretence or representation is made is aware that the said representation by the accused is false or where he is not deceived by it, but nevertheless, he parts with his property, the offence of obtaining by false pretence is not committed. At most, the accused may be convicted of attempting to obtain by false pretence. See *Omotosho v. Police* (1961) 1 All NLR 693.

4.0 CONCLUSION

We discussed S. 419 of the Criminal Code, which is obtaining under false pretence which is the unlawful and intentional making of a

misrepresentation which causes actual prejudice or which is potentially prejudicial. The effort here is to show that there are differences in the content of the offence of stealing and obtaining by false pretence.

5.0 SUMMARY

This offence is committed with false pretence.
The owner of the thing or property must transfer his whole interest in the property to the accused.
Obtaining by false pretences is different from stealing.
The false pretence can manifest by words, writing or conduct.
The representation must refer to a matter of fact either past or present.
There must be intention to defraud.
The effect of pretence is that it must have induced the owner to part with the goods.

6.0 TUTOR-MARKED ASSIGNMENT

1. Mr. A recently converted a warehouse belonging to him into his residence and resides there. At about 7p.m yesterday, Mr. B broke and entered the said warehouse with intention to steal and broke out this morning by 4.30a.m. What crime has Mr. B committed?
2. How can you distinguish the offence of obtaining by false pretence from stealing?
3. When can you say that a pretence is false and that there is intent to defraud?

7.0 REFERENCES/FURTHER READING

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria.* Ibadan: Spectrum Law Publishing.

Smith & Hogan Criminal Law.

Glanville Williams Textbook of Criminal Law.

MODULE 2

Unit 1 Receiving Stolen Goods
Unit 2 Burglary and House Breaking
Unit 3 Treason
Unit 4 The Offence of Rape
Unit 5 Theories and Types of Punishment

UNIT 1 RECEIVING STOLEN GOODS

This unit is premised on the fact that a person who receives any stolen goods has committed an offence known as receiving stolen goods. The commission of this offence pre-supposes the fact that there is already in existence stolen goods before such goods are received which results in the offence under discussion. This unit is arranged as follows:

CONTENTS

1.0 INTRODUCTION

The offence of stealing cannot be discussed properly without a follow up discussion on the offence of receiving stolen goods. The law here is that the goods received must first have been stolen before they are received with the knowledge that they are stolen goods.

2.0 OBJECTIVES

The objectives of this topic is to lead you, by way of teaching, into the realm of stealing as an offence and thereafter lay bare to you the offence of receiving stolen goods which cannot be committed in law unless stealing occurs first. At the end of this lecture, you will have a sound knowledge of the law regarding the subject matter.

At the end of this unit, you should be able to:

state and explain the law that relates to receiving stolen goods.

3.0 MAIN CONTENT

3.1 Elements of the Offence

The statutory provision for this offence is contained in 427 of the criminal code. In order to sustain the offence of receiving stolen goods, there are two basic elements that must be proved:

a. There must be receiving, and
b. The goods must have been stolen.

To prove receiving, it is sufficient to show that the accused has either alone or jointly with some other person had the thing in his possession or has aided in concealing it or disposing of it. For this, see the 4th limb of section 427 of the criminal code.

Assuming, there is no aiding to conceal the property, for the accused to be connected, or convicted, it must be shown that he had the property in his possession. Possession can either be actual or constructive. Actual possession means being in physical possession of property, while constructive possession means holding it through a servant or other agent(s). The principal must have control over the property (thus excluding section 24). In other words, there must be control over the movement of the property.

See the case of *Olujomoye v. R* (1963) 3 WACA 71. This case deals with the elements of control. The accused must have control over the movement of the property. The case also deals with a joint possession between the receiver and the thief.

Where the receiver pays for the goods but the thief agrees to keep the goods, it is said in law that the receiver has constructive possession while the thief has physical or actual possession. If the thief has exclusive possession, the receiver cannot be said to have possession and thus cannot be charged for receiving. See *R. v. Osakwe* (1963). There are situations where the thief can also be charged with receiving the same goods alleged to be stolen by him within the context of the provisions of section 7 of the criminal code. See *R. v. Saliba* (1973) QDR 142.

3.2 Receiving Dishonestly

It is not sufficient to just receive, the accused must receive with dishonest intent i.e. the receiver knows that the goods have been stolen and intended to appropriate it to his own use or to the use of any person other than the owner. Okonkwo and Naish, in their book on Criminal Law, have agreed that this aspect of receiving dishonestly is not stated in section 427 of the criminal code but that it is implied in it. They support their argument with the English case of *R. v. Matthews* (1980) 1 All ER 137 at 138 per Lord Goddard.

3.3 Property Received

The property received must have been stolen or obtained by means of an act constituting or amounting to a felony or misdemeanour. A spouse of a Christian marriage cannot steal property belonging to her husband. Thus another person cannot be guilty of receiving from her. See *R. v. Geamet* (1919) 1 KB 564. Also a person cannot be charged with receiving a property purportedly stolen by a child of 7 years. See *Walter v. Lint* (1951) 2 All GR 645. See section 30 of the criminal code. It is note worthy that it is not sufficient to show that the goods have been previously stolen, they must continue to be stolen goods at the time the accused person received them, and therefore the goods would cease to be stolen goods as soon as they are recaptured by the owner or by the police on his behalf. Any person who receives it thereafter is not guilty of receiving stolen goods. See *R. v. Villensky* (1892) 2 QB 597 and *R. v. King* (1938) 2 All ER 622.

Section 429 of criminal code provides that if a stolen property passes to another person who acquires a lawful title, subsequent receiving of the goods will not amount to receiving stolen goods. A lawful title may be acquired by limitation or through a sale in market overt. Where a property is acquired from a market overt and the thief is convicted, the title in property reverts to the true owner.

3.4 Element of Guilty Knowledge

The prosecution must prove that at the time of receiving the goods, the accused knew that they were stolen or obtained by means of an act constituting a felony or misdemeanour. Guilty knowledge may be proved directly by way of confession or in any of the following ways:

1. By lies told by the accused person.
2. By any suspicious circumstance surrounding the transaction. For example, if the goods were sold secretly in the night or they are sold by a person who ordinarily would not have been in a position to sell them. Reference may be made here to the case of *Lawani v. Police* (1952) 20 NRL 87 or if they were sold at a price fixed by the person receiving, see *R. v. Braimah* (1943) WACA

197, or at a very low price, see *Gfeller v. R.* (1942) 9 WACA 12 (PC).

In view of section 47 of the Evidence Act, if a person is standing trial for receiving any property, known to have been stolen or for having in his possession, stolen property, in order to prove guilty knowledge, evidence will be led at any stage of the proceeding to show the following:

a. The fact that other property stolen, within the period of 12 months preceding the date of the offence charged, was found or had been in his possession.

b. The fact that within 5 years preceding the date of offence charged, he was convicted of any offence involving fraud or dishonesty.

Before leading evidence on (b) above against the accused, the prosecution must:

i. Give seven days notice in writing to the accused, stating therein that the proof of such previous conviction is intended to be given at the trial and

ii. Evidence has been given that the property in respect of which the offender is being tried was found or had been found in his possession.

It should be borne in mind that (ii) above is intended to be used as proof of guilty knowledge and not the fact of receipt.

Under the doctrine of recent possession as contained in section 149 of the Evidence Act, the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or he received the goods knowing them to be stolen, unless he can account for his possession. The doctrine of recent possession is not an evidence shifting device. The burden of proving guilty knowledge always remains on the prosecution and this doctrine does not operate to shift the burden of proof onto the accused. If the prosecution cannot prove its case against the accused beyond reasonable doubt, the accused is entitled to acquittal.

What amounts to recent possession in respect of the doctrine, depends on the circumstance of each case and the nature of goods. See the case *State v. Aiyeola* (1969) 1 All NLR 303. There is therefore no hard and

fast rule associated with it. See the case of *R. v. Iyakwe* (1944) 1 WACA 180.

3.5 Stolen Property into Another's Property

Under Nigerian law, if a stolen property is converted into another's property, then the accused cannot be guilty of receiving stolen goods. Thus if A steals a sum of money and offers it to B who knowingly receives it, B is guilty of receiving stolen property. But the reverse will be the case if A uses the money to buy a television set and B receives it knowingly; in that case, B is not guilty of the offence of receiving stolen goods; the television set is not a stolen good. The money which is the stolen property has been converted into another property, i.e. television set.

On a comparative basis, in England, the law is that B in the above illustration, will be guilty of receiving stolen property even if the original goods (money) have been converted into the present goods received (television set). The same position applies in Australia (Queensland).

3.6 Being in Possession of Goods Reasonably Suspected to have been Stolen

This offence is criminalized in section 430 (1) of the criminal code and it states that any person who is charged before any court with having in his possession or under his control in any manner or in any place or that he at any time within three moths immediately preceding the making of the complaint, anything which is reasonably suspected of having been stolen or unlawfully obtained and he does not give an account to the satisfaction of the court as to how he came by the same, is guilty of an offence. One may quickly add here that section 430 (1) of the criminal code is designed to cover cases where at the time of arrest, the police cannot show that the goods were stolen but they reasonably suspect them to have been stolen or unlawfully obtained, it does not apply to any case where the goods are known to have been stolen and the owner is traced. See the case of *Oguntolu v. Police* (1953) 20 NLR 128. The suspicion expected from the prosecution is that of a reasonable man, warranted by facts from which inferences can be drawn: *Boulos v. R* (1954) 14 WACA 543.

As a result of the tendency by the police to abuse the provision of section 430(1) of the criminal code, it has been held that in order to avoid the visitation of hardship and mischief on innocent persons, its application should be done with the greatest caution in order to bring about the real intendment of the section. See case of *R. v. Ayanshina* (1951) 13 WACA 260.

4.0 CONCLUSION

The correct, complete name of this crime is "receiving stolen goods knowing it to have been stolen." We showed in this unit that a person who commits this crime renders himself, at the same time, guilty of being an accessory after the fact to theft. You should understand that the crime can be committed only in respect of property that is capable of being stolen. For one to be liable for this offence, he must know that the property is stolen, or he must foresee the possibility that it may be stolen and reconcile himself to such possibility.

5.0 SUMMARY

The offence of receiving stolen goods is closely associated with the offence of stealing: first, the goods alleged to have been received must first be shown to have been stolen or illegally obtained. Secondly, the goods must be sold and received not in a proper place (market overt) but secretly and sometimes at a derisive price.

The receipt of the stolen goods must be done dishonestly.

Guilty knowledge could be proved by way of lies told by the accused person and by suspicious circumstances surrounding the transaction

Section 430 (1) of the criminal code relating to being in possession of goods reasonably suspected to have been stolen should be treated with considerable caution.

6.0 TUTOR-MARKED ASSIGNMENT

1. What do you understand by the doctrine of recent possession
2. Assuming you are the prosecution in a case of receiving stolen goods, how would you prove guilty knowledge in order to secure the conviction of the accused person?
3. The learned authors Okonkwo and Naish are of the opinion that section 430 (1) of the criminal code should be relied upon the police with caution. Do you agree?

7.0 REFERENCES/FURTHER READING

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing.

Smith & Hogan Criminal Law.

Glanville Williams Textbook of Criminal Law.

UNIT 2 BURGLARY AND HOUSE BREAKING

This unit attempts to groom you on the offences of burglary and house breaking. The unit is sub-divided as follows:

CONTENTS

1.0 INTRODUCTION

The content in this unit is predicated on two offences: burglary and house breaking. The time in which the act is done determines whether the offence is burglary or house breaking. Burglary is committed at night while house breaking occurs in the day time.

2.0 OBJECTIVE

At the end of this unit, you should be able to:

present the essential elements of the offences of burglary and house breaking.

3.0 MAIN CONTENT

3.1 Background

The offences of burglary and house breaking are contained in sections 410-417 of the Criminal Code. Section 411 says that any person who breaks and enters the dwelling house of another with intent to commit a felony therein or having entered the dwelling house of another with intent to commit a felony therein or having committed a felony in the dwelling house of another, breaks out of the dwelling house is guilty of felony and is liable to imprisonment for fourteen years.

If the offence is committed at night, it is called burglary and the offender is liable to imprisonment for life. Furthermore, section 412 of the Criminal Code provides for the offence of 'Entering dwelling-house' with intent to commit felony. It says that "any person who enters or is in the dwelling-house of another with intent to commit a felony therein is guilty of a felony and is liable to imprisonment for seven years. If the offence is committed in the night, the offender is liable to imprisonment

for fourteen years. Time is the major determining factor in distinguishing between the offence of burglary and house breaking. Section 1 of the Criminal Code defines "night time" as meaning the interval between 6.30p.m and 6.30a.m. Burglary is committed in the night (that is, between 6.30p.m and 6.30a.m) while house breaking is committed in the day time (i.e. between 6.30a.m and 6.30p.m).

3.2 Breaking

If breaking is in the day time and entry is at night or vice versa, the offence is not burglary. Also breaking and entry need not necessarily occur in the same night. See the English case of ***R. v. Smith***. In that case, breaking was on a Friday night and entry on Saturday night. But a question would arise where the accused person's time piece is defective. It is submitted that the accused would be liable to the extent of mistake. See section 25 of the Criminal Code.

By section 411(2) it is burglary if "any person who having entered the dwelling-house of another with intent to commit a felony therein, or having committed a felony in the dwelling-house of another breaks out of the dwelling-house".

Thus provision of the Code contemplates a situation where a person enters a dwelling house with a license or permission and without intent to steal but later finds something attractive, and steals it and then breaks out. The time of breaking out would determine whether the offence is house breaking or burglary. It contemplates also a situation where breaking in with intent to commit a felony was involved.

Breaking may be actual breaking or constructive breaking.

Actual Breaking

It amounts to actual breaking, when a person who breaks any part, whether external or internal, of a building or opens by unlocking, pulling, pushing, hitting or any other means whatever, any door, window, shutter, cellar flap or other thing, intended to close or cover an opening in a building or an opening giving passage from one part of a building to another.

Constructive Breaking

He/she breaks in "who obtains entrance into a building by means of any threat or artifice used for that purpose or by collusion with any person in the building or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, but not intended to be

ordinarily used as a means of entrance". See section 410 and the case of *R. v. Boyle* (1954) 2QB 292.

Thus, if an accused, by deception poses as a sanitary inspector and enters into a dwelling-house in order to commit a felony and the owner of the house knows of his criminal intent, but allows him in, in order to trap him, there is no breaking in the eyes of the law. But see the case of *R. v. Chander* (1913) 1 KB 125.

For the prosecution to ground a conviction for the offences of burglary and house breaking against the accused person, breaking which is an essential element or ingredient must be proved.

3.3 Entering

According to section 410 of the Criminal Code, "a person is said to enter a building as soon as any part of his body or any part of any instrument used by him is within the building". Thus, the mere putting of limb or stick or instrument inside the building (dwelling house) is enough to constitute entry. Similarly, if in the process of opening, the accused person's hand or finger or key or object projects into the room, this amounts to sufficient entry.

Under the common law, Smith and Hogan in their book Criminal Law at p.583 argue that there is a distinction between insertion of a limb and the insertion of an instrument. The learned authors contend that insertion of limb for the purpose of breaking constitutes an entry while the insertion of an instrument for the same purpose of breaking does not. They argue that insertion of an instrument could only constitute entry if it was done for the purpose of committing the ultimate felony in respect of which accused intended to enter the dwelling house.

3.4 Intent

For the offences of burglary and house breaking to succeed, the intent to commit a felony, (not necessarily stealing) must exist at the time of breaking and entry. The felony contemplated here may be murder, arson or rape, etc.

With respect to existence of intent at the time of breaking and entry, if one night A, honestly believing that B's house is on fire, breaks open a front door in order to put out the fire and discovers that there is not fire, but he is then tempted to steal and does in fact steal in the dwelling house, he is not guilty of burglary, unless if after committing the felony he breaks out through another part of the building.

3.5 Dwelling House

Section 1 of the Criminal Code defines a dwelling house to include any building or part of a building or structure which is for the time being kept by owner or occupier for the residence therein of himself, his family or servant, or any of them and it is immaterial that is from time to time inhabited.

Also a building or structure adjacent to, and occupied with a dwelling house is deemed to part of the dwelling house if there is a communication between such building or structure and the dwelling house either immediate or by means of covered and enclosed passage leading from one room to the other but not otherwise. In order to determine what constitute a dwelling house, the test is not what the building or house is built for, but what it is used for.

Illustration

If a building was initially built as a warehouse but I now habitually sleep in it and use it as my residence, it is a dwelling house. Provided, therefore, that the building is a dwelling house, it does not matter that the owner is temporarily away, may be on holidays or on a course elsewhere.

In *R. v. Rose* (1965) QWN 35, the court held that a structure such as a caravan which is kept by the occupier for the residence of himself is a dwelling house. Similarly, in *R. v. Halloran* (1967) QWN 59 a motel unit occupied by a lodger for a week was held to be dwelling house.

Section 413(1) of the Criminal Code provides for the offence of breaking into other buildings and to commit a felony therein. For what constitute other building, it is pertinent to note that school house, ship, warehouse, office or counting house, etc, come within that meaning. See section 413(2) of the Criminal Code. Section 313 of the Criminal Code deals with building used as a place of worship. In this offence, there must be: (1) breaking (2) entry and (3) commission of felony. In the alternative, there may be no breaking but an entry, commission of a felony and breaking out. See also section 416 of Criminal Code.

4.0 CONCLUSION

In the unit, you were made to understand that for the offence of house breaking and burglary to be proved, the following elements of the crime must be present:

Breaking and entering A
building or structure
Unlawful and intentional

The element of time also has to be put into consideration in defining the type of crime committed. The unit demonstrates for your understanding the requirements for certain crimes against property by considering the possible liability to an accused for the crime of house breaking and burglary with intent to commit a crime.

5.0 SUMMARY

Burglary and house breaking are offences commonly committed by criminals in our society.
Time of breaking in and breaking out of the premises determines whether the offence committed is burglary or house breaking.
While breaking in, the intention of the accused must be to commit a felony.
Breaking by the accused can be either actual or constructive breaking.
Entering occurs whenever any part of the accused body or any part of the instrument used by him projects into the building.
The offences are said to be committed in a dwelling house.

6.0 TUTOR-MARKED ASSIGNMENT

1. If I break into a house with no intention of committing felony therein, have I committed any offence? If so, why, if not so, why?
2. How can you distinguish between the offences of house breaking from burglary?
3. The purpose of a dwelling house is different from that which is not. Discuss.

7.0 REFERENCES/FURTHER READING

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing.

Obilade, T. A. *Nigerian Legal System.*

Fakayode. Nigeria Criminal Code Companion.

Criminal Code Act 1990, cap 77 Laws of the Federation of Nigeria.

UNIT 3 TREASON

This unit is an attempt to analytically examine the offence of treason and it will be treated against the backdrop of the following items:

CONTENTS

1.0 INTRODUCTION

Treason is a felony and it is committed against lawfully constituted government of the State or the Federation of Nigeria.

It is committed when the accused does everything possible to ensure the overthrow of a lawfully constituted government and begins to manifest same by some over acts.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

show what constitutes the offence of treason
show when it can be said that a person has committed the offence of treason or treasonable felonies
explain what amounts to, waging of war in the offence of treason.

MAIN CONTENT

Criminalisation

The offence of treason is contained in section 37(1) of the criminal code. That section states that any person who levies/wages war against the State in order to intimidate or overawe the President or the Governor of a State, is guilty of treason, and is liable to the punishment of death.

Any person conspiring with another person, either within or without Nigeria to levy war against the State with the intent to cause such levying of war as would be treason if committed by a citizen of Nigeria, is guilty of treason and is liable to the punishment of death. See section 37(2) of the Criminal Code.

In *Enahoro v. R* (1965) 1 All NLR 125, the court held that a conspiracy to levy war against the State, which is treason under section 37(2) of the Criminal Code should be charged under that section and not under

section 516 which deals with conspiracies generally. This means that section 37(2) was the appropriate section on which the accused could be properly charged.

3.2 Levying War

In order to constitute a levying of war, it is not necessary that the accused persons should be members of a military force or even trained in the use of arms. The type of weapon used also is immaterial as the smallness of the number of persons engaged in levying the war.

In *R. v. Gallagher* (1883) the court held that the phrase "Levying of war" is general and descriptive. It was obvious that war might be levied in different ways and by different ages of the world".

The above dictum was cited with approval in the celebrated case of *R. v. Enahoro* (1963) LL 91 at 312.

The war levied by the accused must be for a general and public purpose. If it is done merely for a private purpose, the offence may be termed as a riot. See *R. v. Hardie* (1821) 1 St. Tr 609.

The question now is whether upon a charge of treason under section 37(1) "it must be proved by the prosecution that the President or the Governor was personally intimidated or overawed". The Supreme Court in rejecting this line of reasoning stated that there is no difference between intimidating and overawing the State and doing the same to the Head of State (President) for the President is the embodiment of the State and to intimidate him is the same as intimidating the State. See *R. v. Boro* (1966) 1 All NLR 266.

The decision of the apex court has been criticized on the ground that having regard to the wordings of the offence of treason under section 37(1) of the Criminal Code, the prosecution must prove in addition to other ingredients, that the President was personally intimidated and overawed. For example, the State Nigeria is a different person from whoever occupies the office of President. If the prosecution proves that war has been levied against the State and that person has intimidated and overawed the President, conviction will lie against the accused.
It seems plain that the above decision was predicated on policy with a view to guarding against the untoward conduct of treason against the State but was not based on the proper interpretation of section 37(1).

Under section 40, of the Criminal Code, any person who becomes an accessory after the fact to treason or knowing that another person intends to commit treason, fails to give prompt information thereof to

the appropriate authority or fails to use other reasonable endeavours to prevent the commission of an offence is guilty of a felony and is liable to imprisonment for life.

3.3 Treasonable Felonies

If any person forms an intention for the purpose of removing the President of the Federation or the Governor of a State, otherwise than by constitutional means of for purpose of levying war against Nigeria in order to compel the President to change his measure (polices) or counsels in order to put any force or constraint upon or in order to intimidate or overawe the National Assembly or any other legislature or legislative authority or to instigate any foreigner to make any armed invasion of Nigeria or any of the territories (States) thereof, and goes further to manifest such intentions by an overt (positive) acts, such a person is guilty of a felony land is liable to imprisonment for life. See section 41 paragraphs (a)-(d) of the Criminal Code.

3.4 Limitation of Time

A person cannot be tried for treason, treasonable felony, concealment of treason and promoting inter-communal war (native war) unless the prosecution is commenced within two years after the offence is committed.

On the strength of evidence to be adduced by the prosecution against the accused for any of the foregoing offences see section 179(2) of the Criminal Procedure Act.

4.0 CONCLUSION

This crime is only committed if (in addition to the other requirements) the action of a person or group assume serious proportions. One of the reasons for the existence of the crime is to protect the state or lawful constituted authorities from intimidation and harassment. In this crime, intent is the form of culpability required. The individual accused must have been aware of the nature and purpose of the action of the group and her participation in the activities of the group must be intentional. You should be able to distinguish between treason, treasonable felony and inter-tribal wars.

5.0 SUMMARY

Treason or treasonable felonies are heinous crimes.
In waging war, the accused need not be a member of a military force or trained in the use of arm.

The war must be levied for a general or public purpose.
The prosecution of an accused for the offences of treason, treasonable felony etc., must be commenced within two years after the offence is committed.

6.0 TUTOR-MARKED ASSIGNMENT

1. Distinguish between treason and treasonable felony.
2. Can it be said that a person has committed treason if by his act. the President of Nigeria is not overawed or intimidated?
3. What is the strength of evidence to be added by the prosecution before a conviction can be sustained on any of the foregoing offences?

7.0 REFERENCES/FURTHER READING

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria.* Ibadan: Spectrum Law Publishing.

Smith & Hogan Criminal Law.

Glanville Williams Textbook of Criminal Law.

UNIT 4 THE OFFENCE OF RAPE

In this unit, you will be exposed to the offence of rape which is rarely reported amongst the adult and which is more often committed particularly against very young girls. This unit will examine the following sub-themes:

CONTENTS

1.0 INTRODUCTION

The offence of rape very frequently occurs but is very rarely reported. This centres on the fact that very often the victims, usually female adults, protect their personality and integrity and therefore shy away from laying complaint against the accused.

The offence is committed when the accused, usually a male, without the consent of the victim or through consent obtained by fraud or intimidation, has a carnal knowledge of the complainant.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

explain what constitutes the offence of rape
identify the circumstances under which it could be said that the offence of rape has been committed.

3.0 MAIN CONTENT

3.1 Detailed Facts

In discussing the offence of rape, particular reference shall be paid to sections 30, 6, 357 and 358 of the Criminal Code which border respectively on capacity, carnal knowledge, consent and punishment for rape.

Section 357 of the Criminal Code defines rape and it has this to say: "Any person who has unlawful carnal knowledge of woman or girl without her consent or with her consent, if the consent is obtained by force or by means of false or fraudulent representation as to the nature of act, or in the case of a married woman by impersonating her husband, is guilty of the offence which is called rape".

Furthermore, section 358 states that "any person who commits the offence of rape is liable to imprisonment for life, with or without canning". In discussing the offence of rape as contained in section 357 of the Criminal Code, there are basic issues worth considering.

3.2 Capacity

The provision of section 30 of the Criminal Code says that "a male person under the age of 12 years is presumed to be incapable of having carnal knowledge". It follows from this that he cannot be guilty of the offence of rape or attempted rape, although on such a charge, he may be convicted of indecent assault. See section176 of the Criminal Procedure Act Cap 80 of the Federation of Nigeria 1990.

The presumption is one of law and cannot be rebutted by showing that the accused has reached the full state of puberty even though he is below the age of 12 years. The prosecution cannot be allowed to adduce evidence to rebut that presumption.

Still under capacity, the question is, whether a woman is capable of being convicted for the offence of rape? The answer is that it is an impossibility having regard to the definition of rape as contained in section 357 of the Criminal Code. The definition of rape in section 357 makes no reference to a woman or girl. Apart from that biologically, only the males are equipped to achieve penetration by virtue of section 6 of the Criminal Code. But all the same, it does not mean that a woman cannot be charged as a principal offender under section 7 for aiding, counseling or procuring the commission of the offence of rape. On this issues, see the case of *R. v. Ram* (1893) 17 COX 609. In that case, a husband raped a maid. The wife was convicted as principal in the 2nd degree.

From the foregoing, it is clear that for the offence of rape to succeed, the accused must possess the capacity to commit it. Furthermore, another question may be whether a husband can be guilty of rape upon his wife?

According to Hakins in Criminal Law, sexual intercourse by husband and wife is sanctioned by law and all other intercourse is unlawful. For our purposes, the answer is that a husband cannot be guilty of rape upon his wife because of the second limb of section 6 of the Criminal Code provided there is a valid subsisting marriage at the time of the purported commission of the offence. But if there is no such valid and subsisting marriage and they are merely living as concubines, the so called husband can be charged with the offence of rape. This is understandable since there would have been no contract or marital relationship between them.

The case of *R. v. Clarke* (1949) 33 Cr. APP R. 448 per the judgment of Byne, J adopts the view of Hale as to why a husband cannot be guilty of rape upon his wife. The reason is that, if the marriage has been dissolved, or if a competent court has made a separation order containing a non-cohabitation clause: that the spouse be no longer bound to cohabit with her husband, the implied consent to intercourse at marriage is revoked while the order is in force, it will be rape for the husband to have intercourse with the spouse without her consent. Also, if there is a decree absolute, then the husband can be charged with rape, as the marital link would have ceased to exist. It may be borne in mind that an undertaking by a husband (in lieu of injunction) not to assault, molest or otherwise interfere with his wife… is equivalent to an injunction and has the effect of revoking the implied consent to intercourse. See *R. v. Steel* (1977) Crium. LR 290.

However, the mere fact that a wife has presented a petition for divorce does not by itself revoke the implied consent to intercourse. See the case of *R. v. Miller* (1954) 2 282. In that case, the complainant had left the accused, her husband, and had filed a petition for divorce on the ground of adultery. The hearing started and was adjoined so that the accused might attend and give evidence. Later, the accused had intercourse with his wife against her will. He was charged with rape and assault occasioning actual bodily harm. It was held that the accused was not guilty of rape but of common assault.

Following Lynskey, J. in the Miller's case (supra), until that valid subsisting marriage is dissolved; he cannot be convicted of rape. If there is non-cohabitation clause, the clause in effect puts the relationship into abeyance and so the husband can in this regard be convicted of rape. See *R. v. Miller* (Supra) and *R. v. Steele* (Supra).

Again, if there is a decree of nullity or what one considers to be no marriage at all, the charge of rape can be brought against him. If a man is suffering from venereal disease and inflicts it upon his wife, it does not amount to rape, but at best, it would amount to cruelty. See the case of *R. v. Clarence* (1888) 22 QBD 23. In that case, the accused was charged for an offence under the Pensions Act 1861, particularly under sections 20 and 47. He was alleged to have had intercourse with his wife while suffering from gonorrhea which he communicated to her. He was convicted. On a case stated for the opinion of the crown court, the conviction was quashed.

On a comparative dimension, the Californian Penal Code makes a provision for rape committed by the husband upon his wife. Equally, as far back as 1952, the Israeli Legal system was trying to propound a law of rape by husband upon his wife. The English Court lately adopts this view.

In order to find out what a woman is, Omrod J. in *Cobett v. Corbett* (1970) 2 All ER 33 gave certain criteria or features of a woman as follows:

1. To look for the presence of chromosome factors.
2. To look for the presence or absence of testes or ovaries.
3. To look for the genital factor including the internal sexual organs.
4. The psychological factors.

3.3 Carnal Knowledge

In an offence of rape, carnal knowledge of the woman by the man must be proved. Section 6 defines carnal knowledge and it states that when the term carnal knowledge or the term carnal connection is used in defining offence, it is implied that the offence so far as regards this element is complete upon penetration.

The Supreme Court explained what constitutes penetration in the case of *Iko v. The State* (2000) as follows:

> "In legal parlance, any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm or by means of false and fraudulent representation as to the nature of the act is guilty of the offence of rape (see section 357 cc). Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina (see *R. v. Marsden* (1981)) and *Rutherford v. Rutherford* (1923), *R. v. Kufi* (1960).

It has however been held that even the **slightest penetration** will be sufficient to constitute the act of sexual intercourse. The fact that a prosecutrix, who is alleged defiled, is found to be virgointcta (i.e. a virgin) is not inconsistent with partial sexual intercourse and the court will be entitled to find that sexual intercourse has occurred if it is satisfied on the point from all the evidence led and surrounding circumstance of the case. Where penetration is proved but not of such a depth as to injure the hymen, it was held sufficient to constitute the crime of rape. Proof of the rupture of the hymen is therefore unnecessary to establish the offence of rape".

For purpose of rape therefore, the most important ingredient is penetration and unless penetration is proved, the prosecution must fail. But penetration, however slight, is sufficient and it is not necessary to prove injury or the rupture of the hymen or that there has been an emission of semen.

It is settled law that the act of sexual intercourse which follows is part of the offence itself, so that aid given after penetrating makes the aider a party to the offence. See *R. v. Mayberry* (1973) QDR 211 and note as well the dissenting view of Skerman, J. at p. 161. See Okonkwo's Criminal Law in Nigeria.

3.4 Consent

On a charge of rape, absence of consent is very important and the prosecution has to prove that the accused had carnal knowledge of a woman or girl, despite her age, without her consent. It is no excuse that the complainant is a common prostitute or that she has consented to intercourse with the accused person as a concubine. However, these facts may persuade the court not to believe the complainant's denial of consent. Consent obtained by force or by means of threats or intimidation or fear of harm is no consent. Consent given because of exhaustion after persistence struggle or assistance would appear to be no consent. Usually evidence of some struggle or resistance by the complainant may be the best proof of lack of consent but this is not always necessary.

The law is that for one to have a carnal knowledge of a sleeping woman, one is said to have committed the offence of rape. It is also rape to have carnal knowledge of woman by impersonating her husband. Submission by a person of weak intellect or a person who is young to understand the nature of the act done is no consent. It must be stated that, no consent is effective which is obtained by fraud relating to the nature of act. See the case of *R. v. Flattery* (1877) 2 QBD 17.

As to the issue of consent, the prosecution need not prove a positive consent by the woman, it is sufficient if the woman did not accept. Thus the next is not, the act was against her will? But, was it without her consent? Perhaps the question to be asked is whether she did accept or did not accept.

In *Tamaitirna Kaitamiki v. The Queen* (1984), the accused was charged with rape. It was alleged that he broke into a woman's flat and twice raped her. There was no dispute that sexual intercourse had taken place on two occasions but he contended that the woman consented or he honestly believed that she was consenting. On the second occasion, and after he had penetrated her he became aware that she was not consenting but he did not desist from intercourse.

In confirming the conviction by the lower courts, the Judicial Committee of the Privy Council restated that sexual intercourse was complete upon penetration and it was a continuing act only ending with withdrawal. Consequently, the appellant was liable where he continued intercourse after he realized that the woman was no longer consenting.

Some people have argued that it is impossible for a woman who has not accepted or consented to be raped, since before acceptance of the penis, there must be the lubrication of the vagina. That is to say: "there could only be an absence of consent of the prosecutrix's mind had been overborne by fear of death of duress."

This argument however, runs counter to judicial decisions. In *R. v. Olugboja* (1981), the Court of Appeal (U.K) held that the offence of rape was having sexual intercourse against the woman's consent: that the offence was not limited to cases where sexual intercourse had taken place as a result of force, fear or fraud; and that the trial judge had properly directed the jury that, although the complainant had neither screamed nor struggled and she had submitted to sexual intercourse without the defendant using force or making any threats of violence, they had to consider whether the complainant had consented to sexual intercourse.

It is argued that submission which is got by way of duress is not consent because there is a distinction between submission and consent. Not every submission is a consent, e.g. pointing a flick knife to secure submission as in *R. v. Mayers* (1872) (supra). Mere animalistic instinct would not be sufficient to constitute rape and a misrepresentation that is not fundamental in respect of the identity of the person e.g. saying he is a wealthy person does not violate consent so as to amount to rape (*R. v. Clarence* (supra)).

SELF ASSESSMENT EXERCISE

1. What are the ingredients for rape?
2. Can rape be committed if penetration is not deep enough?

3.5 The Mental Element Required for Commission of the Offence of Rape

If the accused person believed that the woman was consenting, he would not be guilty of rape even though he had no reasonable grounds for his belief. The mental element of rape is intention to have sexual intercourse without the woman's consent or with indifference as to whether the woman consented or not – see *DPP v. Morgan* (1975) 2 All ER 347 to the effect that a man cannot be convicted of rape, if he believed albeit mistakenly that the woman gave her consent, even though he had no reasonable ground for the belief.

The position of the law in *DPP v. Morgan* (supra) is valid and good law in Nigeria because if an accused person pleads that he believed the woman was consenting, he does not thereby bear the burden of establishing the defence of honest and reasonable mistake of facts as articulated in section 25 of the Criminal Code.

3.6 Attempted Rape

Any person, found guilty of attempted rape is liable to a term of imprisonment for 14 years with or without whipping. See section 25 of the Criminal Code. In *R. v. Offiong* (1936) 3 WACA 83, the accused was said to have entered a lady's room uninvited, took off his clothes, expressed a desire to have sexual connection with her and actually caught hold of her. Upon a charge of attempted rape, the court held that these facts did not constitute the offence or attempted rape because, the facts adduced merely indicated that the accused wanted to have and made preparation to have sexual connection with the complainant.

The case of *Jegede v. The State* (2000) may be instructive. The accused was alleged to have grabbed a school girl under 13 years and raped her in a disused school toilet. The sexual attack was alleged to have taken place on 24th May. The medical examination which took place on the 26th found evidence of tender vagina, purplish blue mucosa, staphylococcus and yeast cells. The pathologist opined that these might be due to traumatic inflammation and "forceful penetration of the genital trait".

The accused denied the allegations and intended that the school girl was his pupil at a private tuition school and her father owed him unpaid fees which the girl too denied. Her father was not called as a witness, and worked in the same hospital as the pathologist.

The trial court convicted the accused of rape. The Court of Appeal quashed the conviction and sentence and substituted a conviction for attempted rape. Dissatisfied, the accused further appealed to the Supreme Court. The Supreme Court observed:

i. That there was no evidence of age of the prosecutrix; that her hymen was torn during the alleged rape or whether or not she was a virgin
ii. That there must first be proof of penetration
iii. That penetration of the vagina must be linked with the appellant irrespective of whether the prosecutrix was a minor or an adult.

Absence of such evidence was fatal to any charge of rape. The Supreme Court also considered the conviction for attempted rape as 'unfortunate' adding that to constitute an attempt, the act must be immediately connected with the commission of the particular offence charged and must be something more than mere preparation or the commission of the offence. See *R. v. Eagleton* (1855), *Ozigbo v. COP* (1936) and *Orija v. IGP* (1957).

Where the other ingredients of rape are present but the facts of penetration is lacking or cannot be proved, the accused may be convicted of attempted rape.

3.7 Evidential Corroboration in Sexual Offences

There are certain sexual offences with which the accused cannot be convicted upon the uncorroborated testimony or evidence of one witness. These are offences bordering on defilement of a girl under thirteen. See section 218 of the Criminal Code.

For defilement of girls under sixteen and above thirteen and idiots, see section 211 of the Criminal Code; procuration of a girl or woman for unlawful carnal knowledge or for prostitution whether in Nigeria or else where, see section 223 of the Criminal Code and procuring defilement of a woman by threat or administering drugs. See section 224 of the Criminal code.

In other sexual offences where the law has not specifically said the accused cannot be convicted upon the uncorroborated testimony of one witness, the courts are reluctant to convict upon the uncorroborated

testimony of a complainant. It is not a rule of law that an accused person in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecutrix.

But it is an established practice in Criminal Law that though corroboration of the evidence or the prosecutrix in a rape case is not essential in law, it is in practice always looked for and it is also be practice to warn the jury (or the judge to warn himself) against the danger of acting upon her uncorroborated testimony or that it is unsafe to convict on the uncorroborated evidence of the prosecutrix. (*Ibeakanma v. The Queen* (1963).

The court may after paying due attention to the warning nevertheless convict the accused person if it is satisfied with the truth of her evidence. The reluctance of the courts to convict upon uncorroborated testimony of one witness is not predicated on law but on a rule of thumb or practice. But the court may after warning itself nevertheless convict on an uncorroborated evidence of a prosecution if it is satisfied of the truth of her evidence. See the cases of *Summonu v. Police* (1957) WRNLR 23 at 24 and *R. v. Ekelagu* (1960) 5 FSC 217.

The danger sought to be obviated by the requirement of corroborative evidence is that the story told by the prosecutrix may be deficient, inaccurate, suspect or incredible by reasons not applicable to other competent witnesses. All that is required is confirmation and support from some other source that is sufficient, satisfactory, credible and corroborative that the suspect witness is telling the truth in some part of her story which goes to show that the accused person committed the offence with which he is charged. Corroborative evidence merely goes to support or strengthen the assertions of the complainant.

It is not enough that the evidence tends to corroborate any part of the story told by the complainant. It must corroborate substantially her evidence. Indeed, it is trite law that evidence in corroboration must be independent testimony, direct or circumstantial, which confirms in some material particular not only that an offence has been committed but that the accused has committed it. On a charge of rape, therefore, the corroborative evidence must confirm in some material particular than

i. Sexual intercourse has taken place
ii. It took place without the consent of the woman or girl, and
iii. The accused person was the man who committed the crime.

Lord Reading, summed up what evidence constitutes corroborative evidence this way: “Corroboration must be independent testimony, which affects the accused by connecting or tending to connect him with

the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within that class of offence for which corroboration is required by statute or as a matter of practice.

4.0 CONCLUSION

Rape is a crime and in this unit we have explained the requirement for liability for certain sexual crimes by considering the possible liability of an accused for rape, attempted rape, etc. We have been able to explain the punishment for rape and attempted rape and how the crime of rape can be proved in the law court.

5.0 SUMMARY

Consent to intercourse with a woman amounts to no rape.
If the woman does not consent to the offence, rape is committed.
If the consent is obtained either by force, threat, intimidation impersonation or misrepresentation, there is not consent at all.
The offence of rape is complete upon the slightest penetration of the penis into the vagina.
The accused must have the capacity to commit the offence.

6.0 TUTOR-MARKED ASSIGNMENT

1. If a beautiful lady whom you have been admiring walks down your office in her nakedness, and having been thrown into a romantic trance, you pounce on her, throw her on the ground and without her consent, you now have a sexual intercourse with her, have you committed the offence of rape?

2. In Nigeria, the law is that the offence of rape is complete upon the slightest penetration of the penis into the vagina. What happens if a person cheers up the accused who has already achieved penetration and who is now working towards ejaculation?

3. Is there any justifiable ground why it could be said that a man cannot rape his lawful wife?

7.0 REFERENCES/FURTHER READING

G. Fletcher, Rethinking Criminal Law.

Okonkwo C. O & Naish (1990).*Criminal Law in Nigeria.* Ibadan: Spectrum Law Publishing.

Smith & Naish, Criminal Law, Cases Material.

UNIT 5 THEORIES AND TYPES OF PUNISHMENT

The essence of this unit is to acquaint you with the theories and types of punishment. If the court finds the accused person who was standing trial before it to be guilty of the offence for which he is being charged the court will then decide on the type of punishment to visit on the accused persons depending however on the provision of the law. This unit is treated thus:

CONTENTS

1.0 INTRODUCTION

The essence of punishment in a criminal trial is to subject the accused to some form of deprivation in as much the same way as it will also satisfy the aspiration of the complainant. The punishment to be meted out by the court is not at the whims and caprices to the court. The court itself is guided by certain principles while awarding punishments which are treated in this topic. The court will also look at the sanction provision of the enactment which creates the offence in question.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

state theories of punishment
explain the principles behind the theories
explain the notion that liability can only lie against the accused
give the reasons for the various theories
explain the viability or otherwise of the theories.

3.0 MAIN CONTENT

3.1 Retribution (Fair Deserts)

Under this heading the punishing authority looks back at the circumstances of the crime committed and decides what type of punishment the accused deserves for his conduct, having regard to his responsibility for the crime. This approach involves retribution or the wreaking of vengeances and infliction of injuries by society on behalf of their injured individual, on the wickedness of the offender.

Therefore, punishment is imposed in order to relieve the indignant feelings of the public or it could be imposed to mark the level of revulsion with which the public regards the crime. The purpose of capital punishment contains the notion of extra punishment which is also implicit in hard labour as distinct from ordinary imprisonment. This stems from the feelings that a more wicked man should suffer more severe pain.

The effect of retribution, may be that the offender by undergoing punishment is offered a chance to expiate (make amends for) his wickedness, to relieve his conscience and to pay for what he has done. Since retribution is essentially a non-utilitarian principle, it cannot be disapproved but only accepted or rejected as a matter of emotional preference.

In retributive (backward-looking) punishment there is the underlying and universal notion that punishment must be just and fair – which means that the offender should not be punished more than his offence deserves. It may be difficult to decide what is a fair proportion between a crime and the punishment attached to it, taking into consideration all the circumstances of a case but there is an assumption that there exists general notions in given community of what is just desert (appropriate punishment).

The principle of fair desert is that a person should be punished only if he has actually committed an offence as defined by law (thereby emphasizing judicial precedent) and offences of unequal culpability should be treated differently.

See the case of *Maizako v. Superintendent General of Police* (1960) WRNLR 188. In that case, the sentence of one accused was upheld because he had a record of burglary, but that of the other was reduced because he had no previous conviction. Similarly, in *Enahoro v. R* (1965) NMLR 25 at 283, the court reduced sentence imposed on lieutenant (assistant) because it was heavier that that imposed on the leader.

Thus, the significance of the just desert notion lies in the fact that it acts as a check on the principles of deterrence (which are forward looking principles) or reform. It may well be added that a punishment may be justified by the aims it hopes to achieve, but it can also be fair and imposed on conduct, in such manner which the citizen has a responsible ground of knowing such conduct to be criminal.

3.2 The Notion (Idea) of Responsibility

Closely related and germane to the principle of retribution is the notion of responsibility or culpability. This is also because a man deserves punishment only to the degree which he was responsible for his criminal acts. For e.g. if a person who was suffering from insanity kills another, we do not hang him in return, instead he may be ordered to be put in an asylum for observation and that does not amount to paying him back for killing another, but it is designed to protect other persons from possible future attacks.

The notion of responsibility can be said to arise at three different stages in a criminal trial. First, the court would decide the straight forward factual issue whether the accused did act or make the omission with which he is charged. Here, doing the act or making the omission conjures the accused person's responsibility.

The second stage of the trial is used to describe the finding that not only did the accused do the act or make the omission with which he is charged but also that in the eyes of the law, he is responsible for it. The third stage is that of sentence. Here punishment may be mitigated (lessened or reduced) on the ground that his responsibility though proved, was not very great and at this stage, there are degrees of responsibility.

Sometimes, at the third stage (during punishment), there may be diminished responsibility as when a man steals to feed his starving children, he may receive an acquittal, usually at the discretion of the court. But please bear in mind that you cannot be availed of responsibility, if upon a charge for murder you are pleading provocation. Because the concept of responsibility rests on a reasonable amount of freedom of choice and capacity to regulate one's conduct.

A number of controversies have arisen as to the standards of responsibility to be adopted (see Okonkwo and Naish's opinion). See the opinion of Professor Brett in his book "An Inquiry into Criminal Guilt" pt. 42 at 101.

Further, on the standards of responsibility, Lord Coleridge C. J handed down a dictum which though leading was also flexible. For that dictum, see the case of *R. v. Duiley and Stephens* (1884) 14 QBD 273 at 288.

On the whole, it is argued that, it is safer to anchor the standard of responsibility on the standard of an ordinary man. When the standard of responsibility commensurate reasonably well with the standard of the ordinary man, then this ensures that we can plan our lives so as to avoid liability if we are involved in breach of law by genuine mistake or accident. See section 25 and 24 of the Criminal Code respectively.

3.3 Utilitarian Objects of Punishment

The point must be recognized that utilitarian principles of punishment are essentially forward-looking. It is forward looking because punishment is imposed with an eye to its future results, the basic aim being to prevent further crime.

There are about four utilitarian principles and to the analysis of these, we now turn.

3.4 Disablement

This is a principle which seeks to disable the offender through the imposition of capital punishment or imprisonment for life. The principle seems to be saying that the more willing is the danger a crime is thought to present, the more willing is the society that the offender be shut off for a considerable time. Thus in *R. v. Adebesin* (1940) 6 WACA 197. On appeal sentences imposed after a conviction for armed robbery and burglary, the Court of Appeal increased the sentences of the two accused persons of 10 years and 8 years imprisonment respectively to 15 years and 12 years. The court said that for the protection of the public, the offenders should be sent to prison for even longer terms than those imposed by the trial judge.

3.5 Deterrence

This is regarded as the most potent and vibrant principle of punishment and it takes two forms. In the first form punishment may be imposed in order to deter the particular accused from offending again or in the second form, it may be imposed with the more general view of deterring the public from doing what the accused did. The court adopted the more general view in the case of *State v. Okechukwu* (1965) 9 EALR 91 at 94. In the case, Nkemena J. imposing a sentence of nine years in a case of manslaughter by a medical quack said this type of offence is very common nowadays and a deterrent sentence is called for in this case.

Ignorant persons should not be allowed to experiment with the lives of others".

It is a truism that the general theory of deterrence runs counter to the notion of fair deserts (earlier examined) than it appears. That more favoured judicial approach by the court. Regarding the issue whether deterrence as a utilitarian object of punishment really has the deterrent capacity or the capacity to deter, it may be said that, there is concrete fact that some criminals who actually commit crimes are not deterred by fear of punishment which explains why heinous crimes like robbery are on the increase in spite of the deterrent punishment attached to it.

Deterrent punishments are most often imposed on offenders who are believed to be professional criminals but career criminals are not likely to be deterred by it. It is thus argued that it is not the fear of punishment that deters a calculating criminal from crime, so much as the fear of detection.

Okonkwo and Naish submit that the principle of deterrence does not play any useful part in punishment and so should be applied with caution.

3.6 Rehabilitation or Form

The essence of this method of punishment is not to punish an offender by imposing some unpleasantness upon him but rather to prevent him from offending again by transforming his attitude so that he himself will voluntarily refrain from offending again.

The most notable method of rehabilitation is probation. Here, the only unpleasantness imposed on the offender is to place him under the supervision of a probation officer, though he is otherwise free to pursue his normal life. The essence of the rehabilitation principle is to build up the offender's personal sense of responsibility.

The principle of rehabilitation designed to protect the society and it is applied most frequently to those offenders who are regarded not to present a very grave threat to the community but on the contrary for whom there is the greatest hope of rehabilitation e.g. juveniles.

3.7 Educative Principle

Closely related to both the deterrent and rehabilitative aspects of punishment is the educative aspect. The essence of this type of punishment is to educate people out of a certain way of behaviour which is prevalent. Thus the mere fact that a part of the community denounces

a particular conduct so strongly as to render it liable to punishment will not only deter others from committing it; it will also make them come to see that such conduct is wrong. For example, slavery, when first prohibited was commonplace in many areas in Nigeria but at present slavery is relatively a rare occurrence because of the community's attitude towards the practice.

4.0 CONCLUSION

In this unit, we exposed the fact that punishment is to serve 3 purposes:

Rehabilitation
Reformation and education of the offender.

The tripod on which justice is hung i.e. justice to the victim, justice to the accused and justice to the society was also held in a delicate balance by the various themes and types of punishment as exposed by the unit. The effort here is to show that punishment serves a correctional role in out legal system.

5.0 SUMMARY

The essence of punishment is to subject the accused person to some measure of deprivation.
These are some underlying principles associated with punishment.
A man deserves punishment only to the degree which he was responsible for his criminal act.
The utilitarian principle is essentially forward looking because the punishment it imposes is designed to achieve future results.
In disablement, capital punishment is imposed in order to disable the accused from offending again.
The essence of deterrence is to deter the offender and attune him to the path of proper conduct.
Rehabilitation is designed to transform the attitude of the offender.

6.0 TUTOR-MARKED ASSIGNMENT

1. Why is it necessary to study the various theories of punishment?
2. Critically examine the notion of responsibility in the theories of punishment.
3. Is capital punishment a desideratum in our legal system?

7.0 REFERENCES/FURTHER READING

G. Fletcher, Rethinking Criminal Law.

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing

Smith & Naish Criminal Law, Cases Material.

UNIT 6 GENERAL PRINCIPLES OF SENTENCING

In this unit attempt will be made at examining the principles of sentencing on a general note. This unit would therefore be categorized thus:

CONTENTS

1.0 INTRODUCTION

Sentencing is the process of pronouncing a particular punishment on the accused person who has been found guilty by the trial court. The sentence on the accused is based on the principle law which has created the offence and which has also provided for the sanction provided in that particular offence.

However, greatly though, it is a decision based on the discretion of the court, which influences the court's decision on the sentence against the accused. It is a natural process of handling the society.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

state the principles of sentencing
explain idea behind the principles of sentencing
decide on the particular principles of punishment in order to ultimately decide on the nature or types of sentencing.

3.0 MAIN CONTENT

3.1 Detailed Work

Sentencing is the way in which principles of punishment are applied to individual cases for the desired results. The law as contained in the constitution and other enactment is that the penalty for an offence must be prescribed in a written law. That means that the law sets down the maximum punishment for an offence depending however on, the seriousness or otherwise of the offence committed or complained of.

In practice, maximum punishment prescribed by law in respect of certain offences are very rarely imposed, because in most cases, a large area of discretion is left with the courts to decide what the exact nature and extent of a sentence will be. In exercising their discretion, the courts must not exceed the maximum punishment prescribed by the law or the limits to their own powers and jurisdiction.

Okonkwo and Naish submit that sentencing ought to be a rational process in the sense that a sentence should be passed with a specific principle or principles (which have been discussed earlier). Thus the principle to be applied and the type of sentence to be given may vary according to the needs of each particular case.

Sentencing therefore depends on the nature of the offence committed by the offender. For example, for a minor offence where deterrence is though appropriate and likely to be effective, a fine may be sufficient. Where the offence is grave but it is still felt that consideration of the individual offender is paramount, then there may be committal to some sort of reformative institution. Where the court considers that the need of the community must override the individual's then the severer the penalty permitted by law for example imprisonment may be imposed.

The courts are often thrown into grave decision of policy at the two stages of sentencing process. In the first place, they have to decide from amongst the conflicting principles of punishment which they should apply to the facts of a particular case. In the second place, having settled for a particular principle, to apply, they must discover which type and what quantum (measure) of sentence will be accorded with it. But it seems plain to say that all too often, a punishment is imposed because it is the traditional one for that type of offence and some busy judges and magistrates do not see the need for a conscious and deliberate thought about the philosophy and practice of punishment when handing down their sentences.

However, one is quick to add that the selection of the appropriate penalty is not an easy matter, for the courts must bear in mind, the effect of the penalty both on the offender and the society.

3.2 The English Position

In England, the Streatfield committee of 1961 suggested inter alia that a principle for all sentencing should be predicated on the fact that the court should have reasonable grounds for believing the sentence is likely to have the desired effect – which is believed to be based on properly marshaled observation of the results of similar sentences imposed in similar circumstances in the past.

3.3 The Nigerian Position

In Nigeria, at the moment, although a court must give adequate reason (ration) for its decision on a point considered sound, it is not forced to give reasons when it sentences.

It is stated here that the courts, in sentencing, should be guided by the appropriate principles of punishment, so that such sentencing should provide the desired results intended by the court and the intended effects on the offender and larger society.

4.0 CONCLUSION

Sentencing is not a mechanical process as the judges themselves are not mechanical calculators. They apply the principle of laws to diverse cases and this informs different results as a result of surrounding circumstances of each case. Sentencing is not an arithmetical act with a predetermined result.

5.0 SUMMARY

Sentencing is a punishing mechanism
The sentence is predicated on the principal law.
The principle to be applied in sentencing depends on each particular case.
The penalty to be visited on the offender should have rehabilitative effect on the offender and positive impact on the society.
In Nigeria, the court is not compelled to give reasons when it sentences.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the process by which a convicted criminal could be made to pay for his misconduct?

2. Mention the organ properly constituted and authorized to sentence an offender.
3. What is the view of English Streatfield committee of1961 on sentencing?

7.0 REFERENCES/FURTHER READING

Okonkwo & Naish (1992). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing.

Whyte, Karibi A.G. (1993). *History and Source of Nigerian Criminal Law*. Spectrum Law Publishing.

Williams G. (1992). *Learning the Law*. Stevens and Sons.

UNIT 7 THE POLICE AND THE ADMINISTRATION OF CRIMINAL JUSTICE

In this unit, you will be introduced to the institution called the police and the role it plays in the administration of criminal justice in Nigeria. This unit is summarized as follows:

CONTENTS

1.0 INTRODUCTION

The Nigeria Police Force is a constitutional creation. It is saddled principally with maintenance of law and order and the prevention, detection and suppression of crimes in or society. It also has a principal role to play in the administration of criminal justice in Nigeria. From the complaint stage up to the point of trial and conviction, the police is involved.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

show that the Police Force is an important institution in Nigeria
show that the Police Force plays a significant role in criminal justice administration in Nigeria
explain that the functions bestowed on it by the enacting authority are intended for maintenance of law and order.

3.0 MAIN CONTENT

3.1 Historical Evolution

The Nigeria Police Force is a government agency whose sole responsibility is to enforce and maintain laws and orders. The Black's Law Dictionary 6th Edition at p. 1156 defines the police as "The Branch of government which is charged with the preservation of public order and tranquility, the promotion of the public health, safety and morals, and the prevention, detection and punishment of crimes".

The Longman dictionary of Contemporary English defines the police as an official body of men and women whose duty is to protect people and property, to make everyone obey the law, to catch criminal etc.

The Nigeria Police has an antecedent that cannot be forgotten too soon. According to historical analysis, it is often said that even in the unrefined pre-colonial Nigeria, there existed institutions that played the roles of keeping the peace, preventing crimes.

This moved from the very unrefined era up to the twilight era. Writing in his book - Constitutional Law in Nigeria – particularly at p. 433 Professor Oluyele said it all thus "Although it is arguable, the tribes, individuals, communities and towns in the land area now known as Nigeria, had their own system of police force… the truth is that the Nigerian Police Force found in our statute books today, was introduced into this country by the British".

Therefore it is apt to opine that the origin, development and the role of the British inspired police system was shaped by the nature of European interest in this part of the world and the reactions of native communities. Thus when Mecoskry, the British Consul discovered that king Dosumu and his chiefs opposed the annexation of Lagos and situation was rather dangerous for his safety, he began to establish a police force. That exercise began the fist modern police force in the history of the colony of Lagos. It was also the first modern police force in the territories later designated as Nigeria.

3.2 Establishment

The Nigeria Police Force is established by section 214 of the 1999 Constitution and that section provides thus "There shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provision of this section, no other police force shall be established for the federation or any part thereof".

Section 214(2) of the Constitution afore said provides that subject to the provisions of the Constitution (a) the Nigeria Police Force shall be

organized and administered in accordance with such provisions as may be prescribed by an Act of the National Assembly.

Against the background of the foregoing there is the Police Ac, Cap 359 LFN 1990. Section 4 of that Act has spelt out in detail the duties of the police. That section reads "The police shall be employed for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of life and property and the due enforcement of all laws and regulations with which they are directly charged, and shall perform such military duties within or without Nigeria as may be required of them by or under the authority of this or any other Act."

From the above provisions of section 4 of the Police Act, it is apposite to say that the police is an indispensable tool in the administration of criminal justice in Nigeria.

The duties of the police are summarized as follows

3.3 Arrest

This is the logical starting point in criminal proceedings. It is the act of securing the appearance of the offender before a court of competent jurisdiction. An arrest is effected by the police officer or officers making the arrest actually touching or confining the body of the person to be arrested, unless there is submission to the custody by words of mouth or action.

Except where the person to be arrested submits to the custody of the officer effecting the arrest when he is informed unequivocally that he is under arrest, an arrest cannot be effected by mere words of mouth. The person to be arrested must actually be touched or his body confined or whichever is suitable at any given circumstances.

The case of *Sadiq v. The State* (1982) 2 NCR 142 graphically illustrate what constitute arrest in the eyes of the law. In that case, the accused was invited by a police officer to the police station for questioning over the commission of an alleged offence. The accused refused to accompany the police officer to the police station. Thereafter, other officers were sent to the accused and she was persuaded to accompany them to the police station. The accused was charged and convicted of the offence of resisting police arrest. On appeal against her conviction, the appellate court held that the appellant was never arrested by the police officers because there was no restraining of the appellant.
There are two ways by which an arrest can be made:

Arrest with Warrant and
Arrest without Warrant

3.3.1 Arrest with Warrant

A warrant of arrest is an authority issued by a court to a police officer to arrest an offender. It is directed to a police officer ordering such officer to arrest the offender and bring him before the court to answer the allegations made against him. It is usually issued by a magistrate or a judge of a High Court after receiving complaint on oath that a person has committed and offence. A warrant may be executed on any day including Sunday or a public holiday, at any time and in any part of the State other than within the actual court room in which the court is sitting. See section 28(1) and (2) of CPA cap80 LFN 1990, and section 63 of CPC, cap 81 LFN 1990.

3.3.2 Arrest without Warrant

This is the commonest method of bringing an offender before the court. In order to avoid any ugly situation of allowing offenders to escape arrest, powers to instant arrest are necessary for the effective administration of criminal justice. The police are generally and generously endowed with three powers by the CPA, CPC and the Police Act.

Furthermore, sections 10, 11 and 55 of the CPA, section 24 of the Police Act, section 26 of the CPC and column 3 of Appendix A to the CPC, collectively empowers a police officer or officers to arrest a suspect without a warrant of arrest.

Under section 10(1) of the CPA, any police officer may without an order from a magistrate and without a warrant arrest:

Any person whom he suspects upon reasonable grounds of having committed an indictable offence against a federal law against the law of a state unless a written law creating the offences provides that an offender cannot be arrested without a warrant.

Any person who commits any offence in hi presence (I hold the view that in view of (a) above, (b) there should be properly re-couched in order to take care of the exception provided in (a) above).

Any person who obstructs a police officer while in the execution of his duty or who has escaped or attempt to escape from lawful custody.

Any person in whose possession anything is found which may reasonably be suspected of having committed an offence with reference to such a thing.

Any person whom he suspects upon reasonable grounds of being a deserter from any of the armed forces in Nigeria. See further sections, f, g, h, I, j of the CPA.

The power conferred on a police under section 10 (1)(b) of the CPA and section 26(a) of the CPC to arrest any person who commits an offence in his presence is an absolute power and therefore it is not subject to any limitation contemplated in section 10(1)(a) of the CPA. Thus even where the statute creating the offence provides that a person who commits the offence cannot be arrested without a warrant, that limitation is ineffective if the offence is committed in the presence of a police officer. See section 10(1) (b) of the CPA.

In exercising the power given in section 10(1)(a) of the CPA, the grounds for reasonable suspicion may be either a police officer's own knowledge or facts stated to him by another person – see the case of *IGP vs. Ogbomor* (1957) WRNLR 200 where it was held that under section 10(1)(a) of the CPA, a police officer could arrest without a warrant a person on whom he knows there is a pending charge for an indictable offence, and for whom the police are looking, such knowledge affording the ground for reasonable suspicion.

Section 11 of the CPA and section 26 of the CPC gives the police the power to arrest any person suspected of having committed an offence who refused to give his name and address and may eventually give information that is false.

Section 55 of the CPA and section 26(e) of the CPC gives the police power to arrest any person known to be designing to commit any offence, it is appears to the officer that the commission of the offence cannot otherwise be prevented.

3.3.3 Life Span of Warrant of Arrest

A warrant of arrest once issued remains in force until the offender is arrested or the judge or magistrate vacates it or cancel it - see section 25(2) of the CPA and section56(2) of the CPC. It therefore does not cease to be valid after any period of time before its execution.

However, if any arrest has been made on its authority and the person arrested is later released, the warrant is no more a valid authority for re-arresting him. A new warrant has to be issued.

3.4 Searches

When a person is arrested by the police for having committed an offence, it may be necessary for the police to conduct a search of the person depending on the nature of the offence alleged against him. The search may be necessary in order to obtain evidence to be used at the trial of the offender.

A search may be conducted on persons and on things. With regard to search of a person, see section 29 of the Police Act provides "A police officer may detain and search any person whom he reasonably suspects of having in his possession or conveying in any manner anything which he has reason to believe to have been stolen or otherwise unlawfully obtained".

In conducting search, the police has the authority to remove everything with the accused apart from the apparel he was wearing – see section 6(1) of CPA and section 44(2) of he CPC.

Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman. Further, the search of female suspect shall be with strict regard to decency. In other words, it is the female officers who should search female suspects.

Search of Premises

The general rule is that for a premise to be searched, a warrant must be obtained by the police. However, if a person to be arrested under a warrantofarrest is suspected of being in a premise, a search of the premise may be conducted for the persons being sought without a search warrant. See section 7 of the CPA and section 34 of the CPC. Thus, a warrant of arrest is also an authority to search a premise.

A search warrant may be issued by a magistrate when he is satisfied upon oath and in writing that there is a reasonable ground for believing that any building, ship, carriage, receptacle or place is being used for the commission of an offence – see section 107(1) of the CPA.

A police officer of the rank of cadet ASP can issue a search warrant but this power is not wide as that of a magistrate. The reason is that he can only issue search warrants on any shop, warehouse or other premises which within the proceeding of 12 months was in occupation of any person convicted of receiving stolen property or harbouring thieves or fraud or dishonesty and is liable to be imprisoned – see section 24 of the Police Act.

On the time for execution of a search warrant, I refer you to section 111 of the CPA and for the execution of search warrant generally, see section 112 of the CPA and sections 78(1), 79 and 81(1) of the CPC.

3.5 Prevention of Crime

In order to play their role in the administration of criminal justice, the police is conferred with certain powers in relation to prevention of crimes by some statutes. Let us now examine them thus:

Section 4 of the Police Act provides inter alia that the police shall be employed for the prevention and detection of crimes, the apprehension of offenders and the preservation of law and order.

Also, section 53 of the CPA provides that a police officer may intervene for the purpose of preventing and shall to the best of his ability prevent the commission of an offence.

For more see also sections 54 and 55 of the CPA.

Again, section 275 of the criminal code particularly in its 2nd limb says that is lawful for a peace officer or police officer who witnessed a breach of the peace, and for any person lawfully assisting him, to arrest any person whom he finds committing it, or whom he believes on reasonable grounds to be about to join in or renew the breach of the peace.

3.6 Granting of Police Bail

Any person arrested by the police without a warrant on suspicion of having committed an offence must be taken to court by the police within one day (24 hours) if there is a court of competent jurisdiction within a radius of 40 kilometers of the place of the alleged commission of the offence. In any other cases, a period of two days (48 hours) or such longer period as in the circumstances may be considered by the court to be reasonable – see section 35(5) (a) and (b) of the 1999 Constitution and section ---- of the CPA.

The issue of police bail arises after a person arrested without a warrant of arrest is taken to the police station. The officer in charge of the police station may admit the suspect to bail pending subsequent investigation into the matter. The suspect is usually granted bail upon his entering into a bond or recognisance with or without sureties to appear at the police station at such time as are named in the bond. See section 17 and 18 of the CPA. The bail granted by the police while investigations are continuing into the allegation against the accused is to enable him to

secure his release on condition that he will return to or appear at the police station at the specified time in the bond.

But in practice where a capital offence i.e. murder is alleged against a person detained by the police, the police has certainly be detaining the person longer than 24 or48 hours as the case may be but this is against the provisions of the constitution (1999) and there should be a refrain by the police.

3.7 Institution and Conduct of Criminal Proceedings

This duty of the police is contained in section 35 of the Police Act which states "Subject to the provisions of section 150 and section 195 of the Constitution of Nigeria 1999 (which relates to the power of AG of the Federation and AG of a state to institute and undertake, take over and continue or discontinue criminal proceedings against any person before any court of laws in Nigeria) any police officer may conduct in person all prosecutions before any court whether or not the information is laid in his name.

From the foregoing, a police officer can institute proceedings against any person in all courts of law in Nigeria, thereby undertaking his duty of due enforcement of all laws and regulations with which he is charged. But in practice, a police officer's duty to institute criminal proceedings in the superior courts and sometimes in magistrate courts in serious cases.

4.0 CONCLUSION

This unit has stressed the importance of the Nigeria Police in the criminal justice system in Nigeria. It also stresses the reason behind the numerous statutory powers conferred on the Police i.e. power of arrest, search, prosecution, detain, grant bail, prevention of crime and the centrality of the Police to good governance and accountability.

5.0 SUMMARY

The Nigeria Police Force is created by law to maintain law and order in the society.
Section 24 creates the Nigeria Police Force.
The Police has authority to arrest suspected criminals.
It also has the power to search.
It prevents crimes in the society.
It can also grant bail whenever the need arises.
It has the power to institute and conduct criminal proceedings.

6.0 TUTOR-MARKED ASSIGNMENT

1. Trace the historical evolution and establishment of the Nigeria Police Force.
2. Under what circumstances can the police arrest a suspect without a warrant?
3. What are the duties of the Police Force in Nigeria?

7.0 REFERENCES/FURTHER READING

Okonkwo C. O & Naish (1990). *Criminal Law in Nigeria*. Ibadan: Spectrum Law Publishing.

Smith & Hogan, *Criminal Law*.

Glanville Williams, Textbook of Criminal Law.