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## AN EXAMINATION OF THE DRAFTING STYLE OF STRICT LIABILITY OFFENCES IN NIGERIA

BY

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**Abstract**

There is a longstanding societal consensus that there should be no criminal punishment without moral blameworthiness. Nevertheless, a new dimension to the basic principles of criminal responsibility emerged, making it possible for a distinct group of offences to be punishable without regard to any mental element. These are known as strict liability offences. This paper seeks to examine the drafting provisions of Section 11 (1) of the Violence against Persons (Prohibition) Act, 2015, Section 31 of the Child's Rights Act 2003 and Section 363 of the Criminal Code Act vis-à-vis the parliamentary intention and consequent judicial interpretation. The paper adopts the doctrinal methodology of research as it examines different statutes<sup>233</sup> where strict liability offences have been drafted. This paper finds that the principles governing the physical and mental element of any crime in Nigeria are strictly statute based, and may be extracted upon a true construction of the words of the law creating the offence. Therefore, this paper recommends that legislative drafters ought to be extremely careful when drafting strict liability offences because a strict or literal rule of interpretation is used as seen in the provisions examined. Where there is ambiguity in the drafting provisions of a law, the courts will always interpret a statute in favor of an accused person.

**Key words:** *Mens rea*, Drafting, Strict Liability, *Actus reus*.

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<sup>233</sup> Section 11 (1) of the Violence against Persons (Prohibition) Act, 2015, Section 31 of the Child's Rights Act 2003 and Section 363 of the Criminal Code Act

## 1.1 Introduction

The basic elements of a crime are criminal act (*Actus reus*) and criminal intent (*Mens rea*). Criminal punishment is ordinarily directed at who intentionally, knowingly, or negligently harm other individuals or their property. Unless an offence is a strict liability one, the prosecutor must prove intention before he can establish liability of an offence. Accordingly, when penal provisions are been drafted, it is important to take into cognizance whether the offence is to be one of strict liability or is one to require a degree of a guilty mind. Strict liability applies to offences for which the prosecution is not required to prove mens rea for one or more elements of the offence<sup>234</sup>. What the defendant knew, believed, or intended is unlikely to be relevant. Guilt can therefore be established by the commission of an act regardless of mindset.<sup>235</sup> Strict liability runs against the presumption that criminal offences require proof of both actus reus and mens rea. From the foregoing, drafters must be absolutely clear in their own minds whether they are creating criminal offences or imposing penalties recoverable under civil proceedings and then ensuring that they express their intentions clearly. This is because strict liability are interpreted strictly and any ambiguity found in the provision will be resolved in favor of the accused person.

## 1.2 Strict Liability

Strict liability refers to a legal doctrine that holds an individual or entity liable for the consequences of their actions or behavior, regardless of their intent or level of fault<sup>236</sup>. Under strict liability, the focus is on the act itself and the resulting harm, rather than the defendant's state of mind or degree of negligence. A crime in Nigeria does not exist except it is codified. Similarly, strict liability offences must be clearly defined and penalties prescribed in a written law. Section 36(12) of the 1999 Constitution of the Federal Republic of Nigeria (as altered), provides inter alia thus:

Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or

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<sup>234</sup> Vincent Akpotaire, "Strict liability and the Nigerian Criminal codes; A Review" (2018) available at <<http://nigerianlawguru.com/articles/criminal%20law%20and%20procedure/strict%20liability%20and%20the%20nigerian%20crimina>> accessed 25 October, 2024

<sup>235</sup> Lexisnexis, "Strict Liability offences in Nigeria", available at

<<https://www.lexisnexis.co.uk/legal/guidance/strictliability>> accessed on the 26 October, 2024

<sup>236</sup> Goldberg, J. C., & Zipursky, B. C (2016) 'The Strict Liability in Fault and the Fault in Strict Liability' available at < <https://doi.org/10.2139/ssrn.2871328>> accessed 26 October, 2024

a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

One of the basic rules of statutory interpretation is the presumption in favour of mens rea. Where a statutory provision creates a criminal offence but no reference is made to the mens rea that must be established, the courts will nevertheless assume that Parliament intended the offence to involve the proof of some degree of mens rea, unless there is sufficient evidence to the contrary by the drafting style<sup>237</sup>. Lord Nicholls observed that where a statute was silent as to the mens rea required:

“...the starting point for a court is the established common law presumption that a mental element is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. The common law presumes that, unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence”<sup>238</sup>.

Therefore, before a Court of competent jurisdiction would give an interpretation to any penal provision dispensing with the necessity of *mens rea* and vice versa, it has to be satisfied that the Parliament so intended. See *Nnaji v. F.R.N.*<sup>239</sup> where the Court of Appeal held:

“In the discharge of its interpretative function, courts are concerned with finding the intention of the legislature and giving effect thereto”.

The principles governing the physical and mental element of any crime in Nigeria are strictly statute based, and may be extracted upon a true construction of the words of the law creating the offence. Hence, the need to give Penal Statute a narrow or strict interpretation cannot be overemphasized as this was the position of the Court of Appeal, in *Atuche v. F.R.N.*<sup>240</sup> where the court in handing down its wisdom held thus:

The correct position of interpretation of penal statute is to give it a narrow or strict construction or interpretation by sticking to the literal meaning of the words of the enactment. A section creating an offence should be construed like any other section in any statute according to its language and in light of the context. It should neither be stretched nor whittled down for the sake of convicting or of acquitting.

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<sup>237</sup> Ekatite, Anya, “Strict liability offences in Nigeria: Delimiting the scope” *Nigerian Journal Online*, Vol 1. pg 56, available at <<https://www.nigerianjournalonline.com/index.php/AFJCLJ/article/download/2742/266>> accessed 23 October, 2023

<sup>238</sup> *Ibid*

<sup>239</sup> (2019) 2 NWLR (Pt. 1655) 157 at 170-171, paras, G-C

<sup>240</sup> (2015) 4 NWLR (Pt. 1449) 306 at 332, paras, C-E

However, if it is fairly open to two interpretations, the one that favours the defendant should be adopted. That is the right view of saying that a section on crime should be strictly construed.

Similarly, in *Oyeyemi v. State*<sup>241</sup>, the Supreme Court on the relevance of *mens rea* in a crime held thus:

Intention or malice no longer governs criminal responsibility as they are common law concepts. It is a fundamental principle of criminal law that a crime consists of both a mental and a physical element. *Mens rea*, a person's awareness that his or her conduct is criminal, is the mental element, and *actus reus*, the act itself, is the physical element. The concept of *mens rea* began to hold that an act alone could not create criminal liability unless it was accompanied by a guilty state of mind. The degree of *mens rea* required for a particular common law crime varied then. In other words, *mens rea* is a criminal intention or knowledge that an act is wrong, and today most of the crimes are defined by statutes that generally contain a word or phrase indicating the *mens rea* requirement. Thus, a typical statute may require that a person acts knowingly, purposely, or recklessly.

From the foregoing, it goes without saying that the judicial interpretation of any penal provision for purposes of ascertaining the parliamentary intention to such provision, will be to ascribe the narrow, ordinary and plain meanings to the words contained in the said provision where the words used in the said statute are clear.

This cardinal principal of interpretation was reinforced by the court in *Texaco Panama Inc. v. Shell P.D.C.N Ltd*<sup>242</sup> where the court held thus:

The cardinal principle of interpretation of statutes is that where the ordinary plain meaning of the words used in a statute are very clear and unambiguous, effect must be given to those words without resorting to any intrinsic or external aid. The duty of the court under those circumstances is to interpret the words strictly giving them their intended meaning and effect. However, where such literal interpretation may result in any ambiguity or injustice, the court may seek internal aid from other parts of the statute itself or external aid from interpretation given to a provision which is in *pari materia* with the statute under construction.

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<sup>241</sup> (2023) 7 NWLR (Pt. 1882) 181 at 203, paras, D-H

<sup>242</sup> (2002) 5 NWLR (Pt. 759) 209

### **1.3 Critical Examination of the Drafting Provisions of Section 11(1) Of The Violence Against Persons (Prohibition) Act, 2015 in Juxtaposition with Section 31 Of The Child’s Right Act, 2003 and Section 363 Of The Criminal Code Act Vis-À-Vis Parliamentary Intention and Judicial Interpretation**

It is an established fact that the principles governing the physical and mental element of any crime in Nigeria are strictly statute based. Therefore, in the case of *Tafida v. F.R.N*<sup>243</sup> the court held that the interpretation of a penal legislation would not be left to the whims and caprices of any Judge called upon to interpret the legislation, rather such legislation shall be strictly construed as per the exact wordings contained in the provision if the true parliamentary intendment is to be achieved.

Also in *Sweet v Parsley*<sup>244</sup> where Lord Reid commented thus-

Our first duty is to consider the words of the Act. If they show a clear intention to create an absolute offence then that is the end of the matter. But such cases are rare. Sometimes the words in the section that creates a particular offence make it clear that mens rea is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases, there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say 'must have been' because it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favorable to the accused must be adopted.

From the foregoing, the literal rule of interpretation will be used to examine the drafting provisions of Section 11(1) of the Violence against Persons (Prohibition) Act, 2015, Section 31 of the Child’s Right Act, 2003 and Section 363 of the Criminal Code Act. The provisions would be examined individually before a comparison is made.

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<sup>243</sup> (2014) 5 NWLR (Pt. 1399) 129

<sup>244</sup> (1970) AC 132

**a. Section 11 (1) of the Violence Against Person (Prohibition) Act, 2015 provides that:**

**A person who causes mischief or destruction or damage to property of another with intent to cause or knowing that it is likely to cause distress or annoyance to the victim, commits an offence and is liable on conviction to a term of imprisonment not exceeding 2 years or to a fine not exceeding N300,000.00 or both.**

Following the literal interpretation of this provision, it is crystal clear that the parliamentary intention in respect of this section expresses the requirement of both *mens rea* and *actus reus* which refers to a person's awareness that his or her conduct is criminal (guilty mind). See *Olaiya v. State*<sup>245</sup> where the court held thus:

Mens rea simply means a guilty mind. The principle is that the guilty mind instigates the guilty act or flows into the guilty act. Intent can be proved either positively where there is proof of the declared intent of the accused person or inferentially from the overt act by the accused. Therefore, in law an accused person is taken to intend the consequences of his voluntary act, when he foresees that it will probably happen, whether he desires it or not. A person has mens rea for murder if, when he does the act which kills, he knows that it is highly probable that he will cause death or grievous bodily harm. In the instant case, from the evidence adduced at the trial court, there was adequate proof that the victim's death was caused as a result of the gun shots fired at him by the appellant. The appellant admitted that he fired some gun shots on the day of the incident, albeit, without intent to kill the deceased, but to scare the crowd. Therefore, the appellant was deemed to intend the natural consequences of his acts.

This *mens rea* which is the mental element and the *actus reus*, which is the physical element have to jointly exist for purposes of grounding a conviction for an offence which requires both the mental and physical element as in the instant provision. Applying the provision of Section 11(1) of the VAPP Act, to the well settled principle of law that a Penal Statute should be given a strict and narrow interpretation and the reinforcement this principle of law has received in a plethora of judicial authorities such as *Atuche v. F.R.N*<sup>246</sup> and *Oyeyemi v. State*<sup>247</sup>, the said provision does not intend to create a strict liability offence, rather it creates an offense requiring the existence of both the mental and physical element in order to ground a conviction.

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<sup>245</sup> (2018) 10 NWLR (Pt. 1626) 1

<sup>246</sup> (2018) 10 NWLR (Pt. 1626) 1

<sup>247</sup> (2018) 10 NWLR (Pt. 1626) 1

Suffice to say that requirement for the existence of both mental and physical elements in the provision under reference, is evidenced by the used of the words “*with intent to cause or knowing that it is likely to cause distress*”. It is worthy of note at this point, to commend the drafters of the said provision for avoiding the use of words such as “*willfully*” and “*intentionally*” as more often than not, certain difficulty could arise from the usage of such words. Accordingly, the deliberate use of the words “*with intent to cause or knowing that it is likely to cause distress*”, adequately takes care of the pitfalls that is associated with the usage of words such as “*willfully*” and “*intentionally*”.

#### **1.4 Pitfalls associated with the use of the words Willfully or Intentionally in drafting strict liability offences**

These words are commonly used to express the requirement of mens-rea. The prosecution must prove them once they are used. Two cases suffice to illustrate the difficulty that can arise from using the word *willfully or intentionally*. In *Arrowsmith v Jenkins*<sup>248</sup>, a crowd gathered around a campaigner for nuclear disarmament while she (willfully) held a public meeting on the highway. The crowd obstructed the highway. The question for the court was whether she had obstructed the highway. Upholding her conviction, Lord Parker CJ said

“If a person, without lawful authority or excuse, intentionally as opposed to accidentally, that is, by exercise of his or her free will, does something or omits to do something that will cause an obstruction or the continuance of an obstruction, he or she is guilty of an offence.”

In other words, the defendant had willfully held the meeting, so it was irrelevant whether she also intended (or willed) the ensuring obstruction.

In *Cotteril v Penn*<sup>249</sup>, the defendant deliberately shot a bird that he believed to be a wild pigeon, but which was, in fact a house pigeon. (Shooting wild pigeons was not an offence, but shooting house pigeons was). He was convicted of willfully killing a house pigeon, because his act of shooting was willful (in the sense of not being accidental).

In order to avoid these pitfalls, Lord Diplock suggested that in order to give the word “*willfully*” any effect beyond excluding mere accidents, it ought to be understood as implying a requirement of proof of knowledge of something beyond the mere doing of the act. Unfortunately, drafters cannot be confident that all advocates and all courts will know, and rely upon Lord Diplock’s comment, so whenever mens rea is required, it is good drafting practice to specify its nature as clearly as possible.

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<sup>248</sup> (1963) 2 QB 561

<sup>249</sup> (1936) 1 KB 53

**b. Section 31 of the Child’s Right Act, 2003 provides that:**

- (1) No person shall have sexual intercourse with a child
- (2) A person who contravenes the provision of subsection (1) of this section commits an offence of rape and is liable on conviction to imprisonment for life.
- (3) Where a person is charged with an offence under this section, it is immaterial that
- (c) The offender believed the person to be or above the age of eighteen years; or
- (d) The sexual intercourse was with the consent of the child.

The Parliamentary intention behind the said provision, is to make the offence of rape one of strict liability. This is deducible from the wordings deployed in sub-section (3) of the said section; “*where a person is charged with an offence under this section, it is immaterial*”, shows that the requirement of a guilty mind is inconsequential to the commission of the offence of rape under section 31 of the Child’s Right Act.

Furthermore, the use of the phrase *it is “immaterial”* is pointer to the fact that the Parliamentary intention in respect of the said provision, is to make the offence of rape a strict liability offence regardless of the intent of the offender. The requirement created by this provision for the prosecution to prove in order to secure a conviction of any person charged with the offence of rape under this section, is the actual prove of penetration which is the *actus reus* simpliciter. Be it noted that the requirement of a guilty mind which is the *mens rea* or mental element for committing the offence of rape becomes totally unnecessary as same is completely dispensed with by the wordings of the said provision.

From the construction of the wordings of Section 31(1), (2) and (3), of the Child’s Right Act, 2003, the offence of rape created therein, is one of strict liability requiring only the physical element and nothing more. See *Adeyemo v. State*, where the Supreme Court held thus:

“The offences of causing death by dangerous driving and dangerous driving created in sections 5 and 6 of the Federal Highways Act are strict liability offences. In other words, the crime does not require proof of mens rea”.

**c. Section 363 of the Criminal Code Act provides that:**

In the case of proceedings in respect of an offence under section 362 of this Code-

- (c) It is immaterial that the offender believed the girl to be of or above the age of sixteen years;

(d) It is immaterial that the girl was taken with her own consent or at her own suggestion.

It should be noted that Section 363 of the Criminal Code Act, is in relation to the offence of abduction of girls under the age of sixteen years as provided for in Section 362 of the Criminal Code Act. Section 362 of the Criminal Code Act creates the offence of abduction of girls under the age of sixteen years as well as prescribe the punishment to be meted out to anyone that is liable, whilst Section 363 of the Criminal Code Act is to the effect that ignorance of age of the girl, or consent of the girl shall not be in favour of a person charged under the section. It is crystal clear that the intentment of the Parliament at the time of creating the offence of abduction of girls under the age of sixteen years pursuant to Section 362 of the Criminal Code Act, was to make the offence a strict or absolute liability offence by virtue of Section 363 of the Criminal Code Act.

The element of *mens rea* which is the intent to commit (guilty mind of the offender) is completely dispensed with by the use of the word it is “immaterial” in *paragraphs C and D* of Section 363 of the Criminal Code. All that is required under Section 363 of the Criminal Code Act, is the prove of the *actus reus* which is the physical element and in the instant case, the fact that the offender unlawfully took an unmarried girl under the age of sixteen years out of the custody or protection of her father or mother or other person having the lawful care or charge of her, and against the will of such father or mother or other person and nothing more.

### **1.5 Comparison of the drafting provisions of Section 11(1) of the Violence against Persons (Prohibition) Act, 2015 in Juxtaposition with section 31 of the Child’s Right Act, 2003 and Section 363 of the Criminal Code Act**

From the foregoing, it is obvious that the parliamentary intention behind the drafting provision of Section 11(1) of the VAPP Act, 2015 is to create an offence which requires the existence of both the mental and physical elements to wit; *mens rea* and *actus reus* in order to secure a conviction for the offence provided therein. The plain wordings used by the parliament in drafting this provision speaks to the requirement of the presence of a guilty mind as a necessary ingredient for the commission of the offence created within. The said provision shall enjoy the literal judicial interpretation that it deserves. *See F.B.N Plc v. Maiwada*<sup>250</sup> where the court held on the issue of the construction of clear and unambiguous words of a statute in handing down its wisdom held thus:

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<sup>250</sup> (2013) 6 NWLR (Pt.1348) 348, paras, D-F

“Generally, where the words of a statute are clear and unambiguous, the court should give them their ordinary Literal interpretation. This is often referred to as the Literal Rule. It is the most elementary rule of construction and Literal construction has words”.

Whereas, from the provisions of Section 31 of the Child’s Right Act and Section 363 of the Criminal Code Act respectively, it is clear that the intention of the parliament is to create offences that are of strict liability in nature. Just at a glance of the wordings of both drafting provisions, the usage of the phrase “*it is immaterial*” can be easily identified and flowing from the submissions made in respect of these two drafting provisions, the purport of the use of the phrase “*it is immaterial*”, is to completely dispense with the *mens rea* which is the intention, mental element and/or guilty mind to commit the said offence. Thus, it is immaterial whether or not the offender had the guilty mind to commit the offence, all that is required by the extant provisions, is the existence of the *actus reus* which is the physical element for the commission of the offences contained within the respective provisions. Going by the plain, express and clear wordings of Section 31 of the Child’s Right Act and Section 363 of the Criminal Code Act which are devoid of ambiguities, it flows logically that the judiciary would have no difficulty in according the said provisions their ordinary, natural, plain and literal interpretation whenever it is called upon to so do in accordance with well settled principles of law and the judicial authorities in support of same.

It is commendable that the drafters of Section 11(1) of the VAPP Act, Section 31 of the Child’s Right Act and Section 363 of the Criminal Code Act were clear as the intent of legislation.

## **1.6 Conclusion**

It has been established that the principles governing the physical and mental element of any crime in Nigeria are strictly statute based, and may be extracted upon a true construction of the words of the law creating the offence. It is commendable that the drafters of Section 11(1) of the VAPP Act, Section 31 of the Child’s Right Act and Section 363 of the Criminal Code Act were clear as the intent of legislation. Accordingly, when penal provisions are been drafted, it is important to take into cognizance whether the offence is to be one of strict liability or is one to require a degree of a guilty mind. The drafters are also commended for the avoidance of the use of the words such as willfully and intentionally as certain difficulties could arise from the usage of such words as expounded above. This paper recommends that legislative drafters ought to be extremely careful when drafting strict liability offences because a strict or literal rule of interpretation is used when interpreting

strict liability offences. Drafters should ensure that the provision is clear as to whether the offence is of strict or absolute liability, or is to require in some degree a guilty mind.

- 1) In drafting strict liability offences, a drafter should ensure that words such as “*willfully*” and “*intentionally*” are avoided because these words are commonly used to express the requirement of mens-rea. The prosecution must prove the use of this word once they are used.
- 2) A draftsman should endeavor to undertake a study on existing legislation related to similar offenses to understand how strict liability has been implemented in similar contexts. The draftsman should analyze the effectiveness and fairness of those provisions to inform his or her drafting process.