

THE NEUROLOGICAL INCLINATION OF MENS REA OF AN OFFENCE*

Abstract

In the proof of criminal allegations in most proceedings, the physical element of the offence, to wit, the actus reus often time speaks for itself. Howbeit, conviction can never be sustained without the proof of guilty mind, to wit, mens rea as required by law. The mental element of the offence is the state of mind of the defendant as at the time of commission of the alleged offence. Mental creations, decision making, cognitions and conceptualization of ideas and purposeful execution are no doubt products of neurological activation of the brain. Therefore, this scholarly investigation is geared toward the critical examination of the relationship between mens rea and neural stimulation of brain neurons. The definitive intendment of the paper is to ascertain categorically whether mens rea is neuroscientific oriented in its conceptualization and utilization in criminal jurisprudence. The methodological approach adopted in outcropping the intention of the paper are meta-analytical and doctrinal methods, and as well the utilization of primary and secondary sources of information.

Keywords: Neurological, *Mens Rea*, Inclination, Offence

1. Introduction

It is a settled principle of law in Nigeria and all other commonwealth jurisdictions of the world that for an offence to be established in criminal jurisprudence, two principal factors, to wit, physical and mental elements of the alleged offence must be proved beyond reasonable doubt and to the satisfaction of the court. The former means guilty act and the latter is referred to as guilty mind. By this, it implies that the culpability of a defendant standing criminal trial can only be established and ascertained if and only if both elements have been proved beyond reasonable doubt.¹ The legal implication of the above expression is that, the slightest break in the cumulative chain of proof will lead to an outright acquittal. It is quite glaring that between the two elements mentioned hereinabove, the second carom, that is, guilty mind appears to be of more imperative in the determination of criminal responsibility. This is because in certain circumstances, the guilty act which speaks for itself might be established and proved as required by law, yet the defendant may be exculpated once the guilty mind is not proved. The guilty mind which is the linchpin in the determination of any alleged offence is the mental state or the actual state of mind of the defendant as at the time of commission of the offence. The mind is the thinking faculty of man, and the centre of thinking and decision making is the brain. The brain is a series of connected sensual neural correlates.² Mental as a neurological term is defined by the Longman,³ as that which is “relating to the mind and thinking, or happening only in the mind.” Obviously, modern philosophical and scientific findings have shown that thinking, decision making, cognition, aggression, conceptualization of ideas, and the flow of emotions and thoughts are direct functional products of the brain.⁴ It is the brain that processes and releases all decisions to the subject, that is, the defendant to carry out physically.⁵ The study of the compositions, structures and functions of the brain and its connecting neurons is referred to as neurology or neuroscience.⁶ The cerebral hemisphere of the brain, particularly, the frontal cortical regions and the limbic areas of the brain process decisions which are physically carried out and performed by humans.⁷ Flowing from this stream of consciousness, mental element of an offence which forms the crux of criminal law and its jurisprudence in Nigeria is a direct function of the brain. Being a direct proportional function of the brain, it is therefore neurological in nature, hence neuroscientifically oriented in all ramifications. This categorical assertion of this scholarly investigation shall be deliberated under the following sub-themes:

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¹The standard of proof required in criminal proceedings, see Section 135 (1) of the Evidence Act, 2011; which inter-alia states thus; ‘If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.’

²Dr Alimontaziba Ayibatonye Joseph, Consultant Neurologist, Niger Delta University Teaching Hospital, Okolobiri, Bayelsa State of Nigeria (An oral interview granted at his office at about 15: 30 hours Greenwich mean time (GMT) on March 2, 2022).

³Longman Dictionary of Contemporary English (New Edn. Pearson Education Inc. 2003), 1030.

⁴See also, B. O. Eboh, *Living Issues In Ethics* (Afro-Orbis Publications Limited, 2005); and J. I. Omeregbe, *Metaphysics Without Tears: A Systematic and Historical Study* (Joja Educational Research and Publishers Limited, 2006).

⁵P. S. Bhuiyan, and others, *Human Neuroanatomy: Fundamental and Clinical* (Ninth Edition, Jaypee Brothers Medical Publishers (P) Limited, 2014).

⁶Dr. Omekwe Dakoru Edoghotu, Consultant Neuro Surgeon, Federal Medical Centre Yenagoa, Bayelsa State (An oral interview granted at his office at about 11: 45 hours Greenwich mean time (GMT) on February 28, 2022).

⁷B. Y. Gupta, *Foundation of Human Neurophysiology: Clinical Approach* (Medical Publication Incorporated, 2015).

2. Drafting of Offences in Criminal Legislations

In achieving this height to unveil the neurological inclinations of *mens re* in criminal law and its jurisprudence in Nigeria, the draftsmen, in drafting the definition of offences under the Criminal Code use the following adverbs such as: wilfully, knowingly, intentionally, unlawfully, negligently, fraudulently, corruptly, falsely, recklessly, maliciously, deliberately, consciously,⁸ and etcetera to unfold the state of mind of the defendant. These listed phonemes that particularly appear in almost every definition of an offence in Nigeria intended to outcrop the mental element of an offence is referred to as specific *mens rea* or mental element. The mental element of an offence involves covert decision making which is the functionality of the brain. It is the stimulation of the brain that results to the performance of any physical act or behaviour in humans.⁹ The internal decisions of the defendant are being ascertained by the specific mental elements which occur in each definition of an offence. The occurrence of such adverbs in the definition of every offence in Nigeria eliminates the general common law concept of *mens rea*, and replaces same with specific mental elements that underscore the definition of offences in all criminal legislations in Nigeria. Streaming from the established modulating wave lengths of this scholarly investigation, it can be asserted firmly that all offences in Nigeria are exclusively written in statutes and punishments prescribed thereto.¹⁰ Specific mental elements such as: wilfully, knowingly, intentionally, unlawfully, negligently, fraudulently, corruptly, falsely, recklessly, maliciously, deliberately, albeit not exhaustive, but inclusive of others are used to reveal the guilty mind of the defendant. An example of how an offence is defined and punishment prescribed thereat in a criminal legislation using specific *mens rea* is demonstrated thus:¹¹ The mental element of an offence is exclusively internal neurological functions and operations of the brain neurons. Therefore, it is a sound premise to opine hereto that the entire spirit and philosophy behind criminal jurisprudence, and its practice and procedure in Nigeria is wholesomely neuroscience. Since it is neuroscientific oriented, determination of offences in Nigeria is a direct function of the brain. This is simply because whenever the mental element of an offence in Nigeria is not proved as required by law, the defendant shall not be convicted. He must be discharged and acquitted from the webs of the law.

3. Prominence of *Mens Rea* over *Actus Reus*

In demonstrating the superiority of mental element (*mens rea*) of an offence over and above the physical element (*actus reus*), of the same offence. The researcher shall use an unreported criminal case decided in the Bayelsa State High Court of Justice to illustrates its prominence in criminal trials. A defendant was arraigned for stealing, armed robbery and illegal possession of firearms under the Robbery,¹² where the trial court relied on the following provisions of Act for its decision, which inter-alia provide as follows: Section 11¹³

Stealing means to take or convert to one's use or the use of any other person anything other than immoveable property, with any of the following intents

- (a) an intent permanently to deprive the owner of the thing of it;
- (b) an intent permanently to deprive any person who has any special property in the thing of such property, the term "special property" here including 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;
- (c) an intent to use the thing as a pledge or security;
- (d) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
- (e) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; and
- (f) 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.

⁸These adverbs used in the drafting and definition of offences are often described as specific *mens rea aimed at* outcropping the real intention of the defendant at as the time of commission of the offence.

⁹Dr. Omekwe Dakoru Edoghotu, Consultant Neuro Surgeon, Federal Medical Centre Yenagoa, Bayelsa State (An oral interview granted at his office at about 11: 45 hours Greenwich mean time (GMT) on June 20, 2020).

¹⁰Section 36(12) of the Constitution of the Federal Republic of Nigeria (CFRN), 1999 (as amended) which provides 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 a Law of a State, any subsidiary legislation or instrument under the provisions of a law.'

¹¹For an example, Section 216 of the Criminal Code Act, provides thus: 'Any person who unlawfully and indecently deals with a boy under the age of fourteen years, is guilty of a felony and is liable to imprisonment for seven years.'

¹²Robbery and Firearms (Special Provisions) Act.

¹³*Ibidem*.

Section 1 (1)¹⁴ Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less than twenty-one years.

(2) If-

(a) any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any person so armed; or

(b) at or immediately before or immediately after the time of the robbery, the said offender wounds or uses any personal violence to any person;

the offender shall be liable upon conviction under this Act to be sentenced to death.

Section 2 (3)¹⁵ Any person found in a public place in possession of any firearms whether real or imitation and in circumstances reasonably indicating that the possession of the firearms is with the intent to the immediate or eventual commission by that person or any other person of any offence under section 1 of this Act or under the foregoing provisions of this section shall upon conviction under this Act be sentenced to imprisonment for not less than fourteen years, but not more than twenty years.

In the case, *The State vs Amaeabi Turner*,¹⁶ involved the chairman (PW1) and the vice chairman the (defendant) DW1 of Izon Youth Congress (IYC) central zone. In one of their meetings at Erapa Road Yenagoa, Bayelsa State, an altercation arose between the duo, subsequently the defendant was arrested on February 10, 2018 and was detained in prison custody and by the 14th day of February 2018, the special prosecutor of the Bayelsa State Government proffered a three-count charge of robbery, armed robbery and illegal possession of firearms. The property allegedly stolen was PW1's android phone worth of four hundred and twenty thousand (₦ 420, 000.00) naira only contrary to Sections 1 (1), (2) (a) and (b); and (2) (3),¹⁷ respectively and was arraigned in the Bayelsa State High Court of Justice. In the course of proceedings, the special prosecutor on his own volition discontinued counts one and three of the charges. Both parties led evidence in support of their distinct cases. During cross-examination of PW1, the supposedly victim of the armed robbery, PW1 admitted hook line and sinker that the defendant returned the android phone to him the same day it was allegedly taken away from him. At the conclusion of evidence, the learned trial Judge, Coram Eradiri, J., relying on the Section 11,¹⁸ which is the interpretation section of the Act, held that the act of returning the allegedly stolen android phone to PW1 which he acknowledged during cross-examination obviated the defendant from any fraudulent intent (guilty mind) of armed robbery and to permanently deprived PW1 of the use of his android phone. I also considered to convict the defendant of the lesser offence of robbery under the provisions of Section 1 (1).¹⁹ Still the available evidence and ingredients proved before me cannot sustain allegation of robbery in that the android phone was returned to the victim (PW1) by the defendant. From the totality of the evidence by the prosecution actual violence or threat of it were not proved, coupled with the voluntary withdrawal of counts one and three of the charges by the prosecution. I am unable to see any evidential link of armed robbery under the Robbery and Firearms (Special Provisions), Act against the defendant. I hereby found the defendant not guilty of the only surviving charge of armed robbery. I therefore, discharge and acquit the defendant of the alleged offence of armed robbery punishable with death.

It might be quite instructive to assert hereto that the government special prosecutor, the State or the prosecution is yet to appeal against the final decision of Eradiri, J., delivered on December 18, 2018. And by the provisions of the extant laws in Nigeria the State is statute barred and had permanently lost the right to appeal against the judgement of the trial high court. This is because the right of appeal for all allegations of offences leading to capital punishment or verdict of manslaughter, or culpable homicide punishable with death which judgement is against the State is only seven (7) days. The statutory window period of seven (7) days to appeal against judgement of acquittal of a competent court or tribunal does not allow the State or the Prosecutor, the prosecution an application for leave to appeal outside the mandatory period of seven (7) days. This is the settled position of the law wherein the Supreme Court, in *The State vs Omoyele*,²⁰ held as follows:

Now, this instant case, being one in which, the respondent was acquitted of the murder charge against him, the State, which is the prosecutor, has right to appeal against such acquittal within seven days only. By virtue of the provisions of Section 4 of the Judicial, etc Officers and Appeal By Prosecutors Act, No 10 of 1963, in the Act, subsection 3 of Section 4 of the Act

¹⁴ Robbery and Firearms (Special provisions) Act.

¹⁵ *Ibidem*.

¹⁶ Charge No. YHC/116^C/2018, Unreported Judgement of the Bayelsa State High Court, delivered by Honourable Justice Eradiri, j., on December 18, 2018.

¹⁷ Robbery and Firearms (Special provisions) Act.

¹⁸ *Ibidem*.

¹⁹ *Ibidem*.

²⁰ [2017] 1 NWLR (Part 1547) 341 SC; [370-371, paras. E-G], per *Sanusi*, JSC.

provides that a prosecutor, such as the appellant in this appeal, has only seven days within which to give its notice of appeal or to seek leave to appeal in any case which involves or could involve a sentence of death or a verdict of guilty of manslaughter or culpable homicide. The Act even went further to provide that the seven days period shall not be extended. That, is the law, as it is now, period! ... We should not lose sight of the fact, that the Judicial, etc Officers and Appeal By Prosecutors Act, No 10 of 1963,²¹ is a special legislation promulgated to limit and narrow the scope of application of such cases involving sentence of death or verdict of guilty of manslaughter such as the situation in this instant appeal. Therefore, the period of appeal which has been constricted to only seven days within which a prosecutor can appeal against such sentence, is aimed at encouraging a prosecutor to be up and doing and appeal immediately if he is dissatisfied with the judgement so that the appeal is heard with minimum of delay and also forestall the possibility of, the offender or convict lingering in prison for a long period without his fate being determined finally and expeditiously too. That is moreso, when the Act even prohibits courts to grant or entertain application for extension of time in such situations. Therefore, once a prosecutor fails to appeal within the seven days stipulated by the Act, that is the end of it.²²

From the evaluation and assessment of evidence of this case, Turner's case supra, it is crystal clear that the only reason why the defendant was acquitted of armed robbery was the prosecution's failure to establish and prove the mental element (guilty mind) of the offence. The android phone was actually taken from PW1, but the returning of the phone, the same day it was taken exculpated the defendant from the punitive venom of the State from being sentence to death. Wherefore, the failure to establish the mental element (guilty mind) of the offence of armed robbery by the prosecution is fatal. This automatically led to the outright discharge and acquittal of the defendant, hence the supremacy of the mental element (guilty mind) over and above the physical element (guilty act) of the offence. Obviously, the mental element of an offence has been found in this academic investigation as wholesomely neurological, which is a direct neural function of the brain, being the functionality of the brain, it is neuroscience oriented. Therefore, the scientific knowledge, techniques, and advancements derivable from the study of neuroscience and its allied behavioural biological sciences could be used adequately in the assessment, evaluation, and the determination of criminal responsibility (liability) in Nigeria as being covertly operated.

4. Conclusion

From the light of the foregoing submissions, it has been convincingly established that the jurisprudential basis of *mens rea* in the realm of criminal law practice, procedure and its jurisprudence is absolutely neuroscientific oriented in all spheres. Prominently, in the determination of criminal responsibility, the mental element of the offence is more important than the physical element in that the physical element (*actus reus*) which always speaks for itself is always available and proved at sight, but if the guilty mind (*mens rea*) is not proved beyond reasonable doubt as required by law, the offence shall not be established and the defendant must be acquitted of the offence. Since *mens rea* is the linchpin in the determination of any alleged offence, and *mens rea* is demonstrated to be neurological in its ramification. It therefore, follows that the assessment and evaluation in the ascertainment of *mens rea* is absolutely neuroscience which is absolutely endogenous, hence *mens rea* is neuroscientific and brain oriented in its conceptualisation.

²¹The Act, Judicial, etc Officers and Appeal By Prosecutors Act, No 10 of 1963 is an existing Act of the National Assembly ably protected, saved and preserved by the provisions of Section 315 (1)(a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

²²See also *Queen v Nda* (1957) 2 FSC 29; *Frubide v The State* (1959) 1 All NLR 255; *Ojojo v The State* (1970) 1 All NLR 33; *Okodon v The State* (1980) 9 SC 1; *The State v Adili* [1989] 2 NWLR (Part 103) 305.