STRICT LIABILITY OFFENCES IN NIGERIA: DELIMITING THE SCOPE*

Abstract

Crime is devoid of exact precision. However, certain elements must be present in an attempt to define crime. Elements such as mens rea and actus reus is a desideratum in the definition of crime. Strict liability offences are created in Britain in the 19th century to improve working and safety standards in factories. These laws are applied either in regulatory offenses enforcing social behavior where minimal stigma attaches to a person upon conviction, or and concerned with the prevention of harm, and wishes to maximize the deterrent value of the offense. The article critically examined strict liability in Nigeria and other jurisdiction especially England, the rationale of strict liability, statutory interpretation, purpose in imposing strict liability, public danger posed by defendant's conduct, drugs and guns reform under the English law, arguments for and against strict liability. The article concludes that to punish conduct without reference to the actor's state of mind is both infectious and unjust. It is infectious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy.

Keywords: Strict liability, Offences, Delimiting and Statutory Regulations

1. Introduction

Strict liability is the term used to describe the imposition of criminal liability without proof of fault on the part of the defendant. As such it represents an exception to one of the basic principles of criminal liability, that *actus reus* and *mens rea* must be proved. It was suggested earlier that it is the presence of the defendant's *mens rea* or 'fault' that can be said to justify the punishments imposed under the criminal law. If this is correct, then it would appear that to punish a defendant for the commission of a strict liability offence is, per se, unjust. Some reported cases do indeed give this impression[1], but as will be seen from what follows, the court rarely interpret an offence as being one of truly absolute liability (i.e. requiring no *mens rea* whatsoever), and where liability without fault is imposed, it tends to be for quasi-criminal, or 'regulatory' offences, the punishment for which rarely involves loss of liability. The history of the concept of strict liability is but the history of the doctrine of *mens rea*.[2] For, as observed, strict liability offences are no more than offences for which no *mens rea* need be proved. The origin of the concept that no man should be convicted of an offence unless not only the *actus raus*, but also *mens rea* were proved against him, may be traced back to early law, 'Early Law' as used here refers to early English Law. The recourse to English Criminal Law here for a proper grasp of the historical locus of strict liability is anything but surprising. The substantial fabric of Nigerian Criminal Law today is contained in two codes, to wit, the Criminal Code and the Penal Code[3]. Both codes owe their origin to English Criminal Law. For instance, the Criminal Code introduced in 1916 was modeled closely on the code introduced into the State of Queensland, Australia, in 1899[4]. The Penal Code, on the other hand, was based on the Sudanese Code which was modelled on the 1860 Indian Penal Code which in turn owed its origin to a draft prepared by Lord Macaulay. As adumbrated above, early English Law recognized the concept of *mens rea* for some offences. But there also existed cases in which there were convictions without proof of any intent on the part of the accused. Wrote Professor Seyre[5]:

> In seeking to determine the part played by intent in the early Criminal Law… one must guard against drawing too sweeping conclusions from evidence which is admittedly extremely meagre. What the record fragments of early law seem to show is that criminal intent was not always essential for criminality and many malefactors were convicted on proof of causation without proof of any intent to harm. But it also appears that even in the very earliest times, the intent element could not be entirely disregarded, and, at least, with respect to some crime, was of importance in determining criminality as well as in fixing the punishment.

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[1] see *R v Larsonneur* (1933) 4 Cr App R 24

[2] Sweet v. Parsley (1969) All ER 342

[3] The Queensland code, in turn, was based mainly on a Criminal Code drafted by a prominent English Criminal Lawyer, Sir. James Fitstephen, in 1878

[4] Ibid

[5] Ibid

Deducible from the foregoing is the fact that the concept of strict liability and the concept of *mens rea* have indeed been enjoying a kinship since early law. By and large, historically, the starting point of strict liability in England is oftentimes traced to the English case of *Woodrck*[6]. Here, a licensed tobacco dealer was convicted of having an adulterated tobacco in his possession even though it was proved that the tobacco had been adulterated in the course of manufacture and that the dealer, who had bought it in good faith, neither knew nor had any reason to suspect the adulteration. The concept arose in the American Jurisdiction about the sometime. The American development is traced to *Barnes v. State*[7] in which it was held that the offence of selling liquor to a common drunkard was committed even if the seller did not know that the buyer was a common drunkard. Similar developments took place in other countries like Australia and Canada.

2. Strict Liability in Nigeria

In Nigeria, the law relating to crime is substantially contained in two main codes[8]. The Criminal Code as observed above is a facsimile of the Queensland Criminal Code[9]. The relevant section of the code is section 24 which excludes criminal responsibility for unwilled acts. This provision, like its counterpart in the Queensland Code, is said to perform a function akin to the English Doctrine of *mens rea.* On the other side of the argument, it has been consistently stressed that since all offences in Nigeria are statutory[10], wholesale reliance must not be placed on English doctrines, decisions, etc., in interpreting the express provision of the codes[11]. Therefore, it is very more as good a rule in Nigeria as it is in Queensland Australia that recourse to the English doctrine of *mens rea* is so Lucian. The relevant question to ask then is whether the accused person did the act in question independent of the exercise of his will or not. Delimiting the scope of strict liability in Nigeria is made difficult because of a class of offences in the codes for which no specific mental elements have been prescribed. Is the point that the provisions of section 24 (first limb) play an identical role as the English doctrine of *mens rea* and enough to import *mens rea* into these offences as integral ingredients of the offences so as not to impose strict liability? We shall come back to this issue among, but before then, let us take few examples from the codes. Under the two cases, most offences are defined in terms of specific mental elements. For this purpose, qualifying epithets such as 'knowingly', 'intentionally', 'willfully', 'advisedly', 'maliciously' etc., are employed to denote the requisite mental attitude forbidden in respect of the offences. Indeed, the several epithets used vary largely from one offence to another both in type and complexity. The mental element required for the offence of receiving stolen property, for instance, is simply knowledge that the property is stolen. That required for being an accessory after the fact to an offence is knowledge that the other is guilty of an offence and the intention is enable him escape punishment[12]. These examples are but classes of offences for which there have been clearly prescribed specific intention. It is then clear that strict liability is not sable on such offences. The real problem lies in those other offences in the codes for which no clear or express mental elements are discernible in the definition section creating the offences. A few examples of this category of offences may suffice here. Under section 181 of the Criminal Code, any person who by stopping or loitering on the premises of a Post Office obstructs the business of the office is guilty of an offence under the section. No specific mental element is required here. Similarly, the selling of a white phosphorus match is oil that is, prime facie, necessary for the prosecution to prove to establish the offence under section 240 of the Criminal Code. How are Nigeria Courts to interpret the provisions of these sections? It is clear that imposition strict liability on these offences mainly on the platform of the reason that no clear-out mental elements have been prescribed, is a wrong approach. This is the essence of the provisions of section 24 of the Criminal Code[13]. But, does this mean that the prosecution must necessarily bear the primary evidential burden of showing that the accused willed the act in respect of these offences? Put another way, who as between the prosecution and the accused person, ought to bear the evidential burden of the first limb of section 24 Criminal Code? It is settled that the court is under a duty to consider any defence open to an accused person[14]. Where, however, an accused person who has been charged with an offence under the code for which no specific mental element has been prescribed stands most or says nothing in his defence, is the burden on the prosecution to introduce evidence to show that the accused willed the act? It is clear that in such a case, the court would be contrived to convict the accused on the basis of the physical elements of such offence, thereby making the offence seems as one of strict liability. The point being made here is that the provisions of section 24 of the Criminal Code do not exactly

[6] (1969) 2 AC 256

[7] (1968) 2 All ER 356

[8] Ibid

[9] Queensland Criminal Code are section 23 and 24

[10] Section 24 Criminal Code L.F.N 2004

[11] Ibid

[12] Section 24, of the Nigeria Criminal Code

[13] Ibid

[14] Ibid

perform the same function as the English doctrine of *mens rea* and it is, therefore, an incorrect interpretation of its provisions to equate it with the English doctrine of *mens rea*. The reason is that it is the rule in English that the prosecution must import some mental elements into every offence, since it is a presumption to impose strict liability is patently evinced. In Nigeria, however, it is submitted that the provisions of the first limb of section 24 do not impose an evidential burden on the prosecution. The prosecution is not bound to import the first limb of section 24 into such an offence is wanting to establish the ingredients of the offence[15]. However, where the accused person introduce evidence which indicates that the accused is suggesting that he may have done the said act independent of the exercise of his will, then the Onus is shifted to the prosecution to show otherwise.

The argument preferred above may be summed up thus: Offences in the Coast for which no specific mental elements are prescribed are not offences of strict liability, the reason being that, first limb of section 24 of the Criminal Code provides a defence of a lack of intention to the accused. Nevertheless, the first limb of section 24 of the Criminal Code does not perform the same function strictly speaking with the English doctrine of *Mena Res*. The former, unlike the latter, does not operate like a presumption. It nearly provides an accused with a defence. On the whole therefore, because of the provisions of section 24 of the Criminal Code (first limb)[16], offence of strict liability is rare. Thus, for an offence to pass as one of strict liability in Nigeria, apart from the absence of any specific mental intent, it must by its wordings, also clearly exclude the operation of section 24 of the Criminal Code[17]. Regrettably, however, Nigerian Court have tendered to rely more on English decisions on strict liability than on the provisions of section 24.[18] In *R v. Efana*[19], the accused had made an innocent entry in a bill of lading and consequently held guilty of the offence, even though his act was innocent, the court holding that *mens rea* was not required to prove the offence charged[20]. It is hoped that more attention would be focused by Nigerian Courts on the provision of section 24 as it is of immense moment in determining criminal responsibility in Nigeria.

3. The Rationale of Strict Liability

The purpose of imposing strict liability is to place the onus upon those who engage in a particular activity to ensure that they do not transgress the prohibitions laid down by the law. In simple terms, the law is suggesting that those who are in any doubt as to whether their actions will fall foul of the law should avoid such activities. It was observed[21] that if the imposition of strict liability caused injustice to the defendant, one way for him to avoid it was to desist from the activity that involved him in the commission of offences, and that this might be the view taken by the courts where the activity was viewed as unnecessary or inefficient. Hence, the person selling food to the public must accept that the onus is upon him to ensure that it is fit for consumption. If this increases the cost of his product, then that should be passed on to all his consumers. Should he not be able to comply with the law and operate as a commercially viable outfit, then he should cease trading. The man attracted to a young girl is taking the risk that, although she consents to sexual intercourse with him, she may be below the age of consent. He can avoid the risk, ultimately, by remaining celibate. Similarly, the individual asked to carry another's bag through customs without having the opportunity to ascertain its contents can avoid liability by refusing to act as a courier. One of the factors behind the court's decision in *Kirkland v Robinson* (considered below) was that there was no social utility in the defendant's possession of wild birds:[22]

4. Statutory interpretation

Given that strict liability offences are almost invariably created by statute, the manner in which they will operate rests to a large extent on how the courts decide to interpret them. 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. 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,

[15] I am reinforced in this view by the provisions of section 149(1) of the Evidence Act[15]. The provision of section 24 should be seen in the light of a defence and not as an integral part of offences.

[16] Ibid

[17] Ibid

[18] Nigeria Criminal Code

[19] (1959) W.R.N.L.R. 247

[20] *CLECC v. COP* (1949) 12, WACA, 479; *Arab Transport Ltd v Police* (1952) 20 NLR, 65

[21] by Lord Hailsham in *Smedleys Ltd v Breed* [1974] AC 839

[22] See further *R v Blake* [1997] 1 Cr App R 209.

unless Parliament indicated otherwise, the appropriate mental element is an unexpressed ingredient of every statutory offence[23].'

Some of the factors considered by a court in deciding whether an offence is one of strict liability are considered below, but before turning to them it should be understood that a court's finding that an offence does require proof of some *mens rea* does not necessarily mean that *mens rea* will have to be proved in relation to every element of the *actus reus.* Under section 5 of the Sexual Offences Act[24] it is an offence for a man to have sexual intercourse with a girl under the age of 13. Lord Steyn, in the course of his speech in *B v DPP,* observed that section 5 'plainly creates an offence of strict liability'. Perhaps it does not regard age, the element of *mens rea* most likely to be considered. But what of the defendant who claimed h honestly believed he was having sexual intercourse (i.e. anal intercourse) with a boy? Is *mens rea* required s regards the gender of the victim? Alternatively, (although not realising he was having sexual intercourse? Must the defendant at least be aware of the risk that he has penetrated the victim vaginally or anally?

The statute must be read as a whole

In determining whether the presumption in favour of *mens rea* is to be displaced, unlawfully selling alcohol to an intoxicated person was adjudged contrary to section 13 of the Licencing Act 1872. On appeal, the defendant contended that he had been unaware of the customer's drunkenness and thus should have been acquitted. The Divisional Court interpreted section 13 as creating an offence of strict liability since it was itself silent as to *mens rea*, whereas other offences under the same Act expressly required proof of knowledge on the part of the defendant. The conclusion was that where Parliament had intended *mens rea* to be proved under the Act it has stated much. A similar approach may be taken by the court when dealing with an offence which is silent as to *mens rea*, but in relation to which Parliament has enacted a specific statutory defence. In *Kirkland v Robinson* [25]the defendant's conviction for unlawfully possessing four wild goshawks was upheld, despite his honest belief that they had been bred in captivity. Not only did the statute in question, the Wildlife and Countryside Act 1981, create other offences which expressly required proof of knowledge, but it provided a statutory defence to the offence with which the defendant had been charged, under section (3). The Divisional Court concluded, therefore, that Parliament had intended there to be an absolute prohibition on the possession of such birds, subject only to the defendant bringing himself with the terms of the statutory defence.

Even the statutory defence may be construed in very narrow terms where the courts sense this is warranted by the context. Hence in *Smedleys Ltd v Breed* (above)the House of Lords upheld the defendant's conviction under section 2(1) of the Food and Drugs Act 1955 ('selling food not of the substance demanded by the purchaser'), which had resulted from complaints that four tins of peas produced by the defendants had contained caterpillars. The 1955 Act had contained a statutory defence in section 3(3), where it could be shown that the presence of the extraneous matter was an unavoidable consequence of the manufacturing process, but it was held, interpreting the provision literally, that the defence was of no avail to the defendants, as the presence of the caterpillars could have been detected by means of a visual check of every tin. Neither their Lordships moved by the submission that there had been only four complaints in respect of approximately 3,500,000 tins, the paramount purpose of the legislation was seen as being the protection of the public, which would be respected even where it led to the imposition of impossibility high standards upon the defendants; see further *Alphecell Ltd v Woodward*[26] (imposition of strict liability for river pollution despite the taking of all reasonable precautions). There is, arguably, a greater tendency on the part of the courts to regard a statute as imposing strict or absolute liability where the offence crated is viewed as being 'regulatory' or 'quasi-criminal' in nature. As Lord Evershed observed in *Lim Chin Aik v R*[27]

> Where the subject matter of the statute is the regulation for the public welfare of a particular activity – statutes regulating the sale of food and drink are to be found among the earliest examples – it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumptions of *mens rea*. Thus sellers of meat may be made responsible for seeing that the meant is fit for human consumption and it is no answer for then to say that they were not aware that it was polluted … the distribution of bad meat (and its far-reaching consequences) would not be effectively prevented.

[23] *B v DPP* [2000] 1 All ER 833

[24] 1956 (now s91) Sexual Offences Act 2003),

[25] [1987] Crim LR 643

[26] [1972] AC 824

[27] [1963] AC 160:

Other areas where the courts have adopted this approach are offences created under building regulations: *Gammon Ltd v Attorney-General for Hong Kong*[28] supplying controlled medicines without a valid prescription: *Pharmaceutical Society of Great Britain v Storkwain*[29]; carrying out unauthorized work on a listed building: *R v Wells Street Metropolitan Stipendiary Magistrate City Council*[30]

There must be some purpose in imposing strict liability

The courts will be reluctant to construe a statute as imposing strict liability upon defendant, where there is evidence to suggest that despite his having taken all reasonable steps, he cannot avoid the commission of an offence.[31]
In *Sherras v De Rutzen*[32] the defendant was convicted of selling alcohol to a police officer whilst on duty, contrary to section 16(2) of the Licensing Act 1897. The police officer had not been wearing the arm band that would have indicated that he was on duty. The Divisional Court held that the conviction should be quashed, despite the absence from section 16(2) of any word importing proof of *mens rea* as an element of the offence. Wright J expressed the view that the presumption in favour of *mens rea* would only be displaced by the wording of the statute itself, or its subject matter. In this case the latter factor was significant, in that no amount of reasonable care would have prevented the offence from being committed. This approach was approved by the Privy Council in *Lim Chin Aik v R*[33] where by the defendant had been convicted of contravening an order prohibiting, in absolute terms, his entry into Singapore, despite his ignorance of the order's existence. In allowing the defendant's appeal, Lord Evershed expressed the view that the imposition of strict liability could only really be justified where it would actually succeed in placing the onus to comply with the law on the defendant. As he explained:

> … it is not enough … merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victims … [w]here it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social ill, strict liability is not likely to be intended……seems so their Lordships that, where a mane is said to have contravened an order or an order of prohibition, the common sense of the language presumes that he was aware of the order before he can be said to have contravened it.

Similar considerations motivated the House of Lords in *Sweet v Parsley*[34] to quash the conviction of a defendant who, following a police raid on a house which he had let out to students, had been prosecuted under section 5(b) of the Dangerous Drug Act 1965 of 'being concerned in the management of premises used for the smoking of cannabis'. The defendant had not known that drugs were being consumed there. As Lord Reid observed:

> If this section means what the Divisional Court have held that it means, then hundreds of thousand s of people who sublet part of the premises or take in lodgers or are concerned in the management of residential premises or institutions are daily incurring a risk of being convicted of a serious offence in circumstances where they are in no way to blame. For the greatest vigilance cannot prevent tenants, lodgers or inmates or guests whom they bring in from smoking cannabis cigarettes in their own rooms. It was suggested in argument that this appellant brought this conviction on herself because it is found as a fact that when the police searched the premises there were people there of the 'beatnik fraternity'. But surely it would be going a very long way to say that persons managing premises of any kind

[28] (1984) 80 Cr App R 194;

[29] [1986] 1 WLR 903

[30] (1986) The Times 22 May; breach of an enforcement notice: *R v Collett* and selling lottery tickets to purchasers under the age of 16: *Harrow London Borough Council v Shah*

[31] In the Nigerian context, reported cases on strict liability are rare. This is largely because of the view our Judges have taken of the provisions of section 5-24 of the Criminal Code. By virtue of its provisions, Nigerian courts have been reluctant in holding that certain offences for which no clear mental elements are prescribed are offences of strict liability. I shall consider the attitude under the heading strict liability.

[32] [1895] 1 QB 918

[33] [1963] AC 160,

[34] [1970] AC 132

> ought to safeguard themselves by refusing accommodation to all who are of slovenly or exotic appearance, or who bring in guests of that kind. And unfortunately drug taking is by no means confined to those of unusual appearance.[35]

The courts may also be unwilling to interpret an offence as one imposing strict liability where it is drafted in terms so widely drawn that the offence potentially covers too wide a range of activities. In *B. v DPP*[36] Lord Nicholls rejected the contention that there was any necessary implication that the offence created by section 1(1) of the Indecency with Children Act 1960[37] was one of strict liability. He was persuaded to this conclusion because of the serious nature of the offence, the severity of the punishment following conviction, the stigma attaching to a convicted person and the fact that the offence embraced such a potentially wide range of conduct from 'predatory approaches by a much older paedophile to consensual sexual experimentation between precocious teenagers of whom the offender may be the younger of the two'. He added: 'The conduct may be depraved by any acceptable standard, or it may be relatively innocuous behaviour in private between two young people. These factors reinforce, rather than negative, the application of the presumption in this case.' His Lordship rejected the argument that the operation of the criminal law could be hindered by the burden placed upon the prosecution of having to prove *mens rea* as to the age of the complainant. He saw this as evidence of a mistrust of the tribunal of fact and felt that this could not of itself be a good reason for displacing the presumption in favour of *mens rea*. In any event he was convinced that strict liability actually furthered the enforcement of the law in this area. By contrast in *R v Elvin*[38], where the appellants were each convicted, at separate trials, of being the owner of a dog which, whilst dangerously out of control in a public place, had injured a person contrary to section 3(1) of the Dangerous Dogs Act 1991, the court was persuaded that the imposition of absolute liability would serve a useful purpose. In dismissing the appeals against conviction, the court held that the presumption against strict liability was rebutted by the fact that: (a) the Dangerous Dogs Acts 1991 addressed a matter of social concern and public safety; (b) the court was satisfied that the imposition of strict liability would encourage greater vigilance by owners in seeking to prevent the commission of prohibited acts, i.e. the court felt that it was proper to put the onus on the dog owner to prevent the occurrence of harm; and (c) the statute, when read as a whole indicated that section 3(1) imposed absolute liability, since section 3(2) afforded a defence where D left the dog in the charge of a fit and proper person, and section 3(3) impliedly required *mens rea* where it referred to an owner 'allowing' a dog to be in a non-public place. Not that the court declined to deal with one of the more interesting points argued on appeal, i.e. what would the appellant's lability have been if a property secured dog, released from the appellant's premises following a burglary, had caused injury to a member of the public whilst loose? Clearly such a question goes to the heart of the issue as to whether or not it was the intention of Parliament to incriminate 'blameless' dog owners.

Public danger posed by defendant's conduct: drugs and guns

As a general rule, the more serious the criminal offence created by statute, the less likely the courts are to view it as an offence of strict liability. However, the courts are sometimes persuaded to impose strict liability after concluding that the possible unfairness that this might involve for the defendant is outweighed by the potential harm to the public posed by his conduct. Hence in *R v Howells*[39] the defendant was convicted of possessing an unlicensed firearm, contrary to section 58(2) Firearms Act 1968, despite his honest belief that it was an antique and thus exempt from the provisions of the Act. as Browne LJ observed:

> … the danger to the community resulting from the possession of lethal firearms is no obviously great that an absolute prohibition against their possession without proper authority must have been the intention of Parliament when considered in conjunction with the words of the section … to allow a defence of honest and reasonable belief that the firearm was an antique and therefore excluded would be likely to defeat the clear intentions of the Act.

The balancing of priorities that has to be carried out, in a sense, raises the same issue; what knowledge, if any, must a defendant have in order for the court to conclude that he was in possession of the drugs or guns? In *Warner v MPC*[40], an authority from which it is extremely difficult, if not impossible, to extract a clear ratio, a majority of their Lordships appeared to hold that section 1 of the Drugs (Prevention of Misuse) Act 1964, under which it was an offence to be in unlawful possession of a prohibited drug, did create an offence of strict liability as regards the nature of the substance in the defendant's possession, but it nevertheless had to be proved that he knew he was in

[35] See also *Gammon Ltd v Attorney-General for Hong Kong* (above).
[36] Ibid
[37] (Now section 9(1) Sexual Offences Act 2003)
[38] [1994] 1 WLR 1057
[39] [1977] 3 All ER 417
[40] [1969] 2 AC 256

possession of 'something'. Hence, if drugs were slipped into a defendant's pocket without his knowledge he could not be guilty under section 1 because he would not have known he was in possession of anything. If, however, he was knowingly in possession of a package of some sort, but was ignorant of the fact that it contained cocaine powder, it became necessary to look at the defendant's knowledge as to the nature and quality of the package's contents. Where he was mistaken as to the nature of its contents, for example where he honestly believed it to contain boiled sweets, it would appear from the speeches of the majority that he was to be acquitted, although this may have been subject to such factors as the defendant's opportunity to check the contents, and the existence of any factors that should have made him suspect that it might contain drugs. Where, on the other hand, he knew the nature of the contents but was mistaken as to its quality, for example, where he believed the package to contain sherbet powder, it would appear that he could be convicted:[41]. In the controlled drug is not in a container of any sort, it is submitted that knowledge on the part of the defendant that he is in possession of 'something' will suffice. Applying these principles, the defendant in *R v Marriot*,[42] was convicted of unlawful possession of a prohibited drug, when he was found to have two milligrams of cannabis smeared on the blade of a penknife in his possession. The conviction was upheld, on the ground that although he had not smeared on the blade of the knife. With a view to removing some of the complexities introduced into this branch of the law by *Warner v MPC*, Parliament enacted the Misuse of Drugs Act 1971. Section 5 of the 1971 Act creates the offence of possessing a controlled drug, but section 28(3)(b)(i) goes on to provide that a defendant should be acquitted if: '… he proves that he neither believed nor suspected nor had reason to suspect that the substance … in question was a controlled drug.'

The Court of Appeal in *R v McNamara*[43] held that as far as the 'container' cases were concerned, Parliament, in enacting section 28, had not intended to relieve the crown of the initial burden of proving that the defendant had known he was in possession of a container holding 'something', and that it in fact held a controlled drug.[44] With respect this is a helpful classification of the law, but the point still appears to cause difficulty. In *R v Lewis*[45], the Court of Appeal held that a defendant could be in possession of drugs where they were found in his houses, despite the fact that he had not known that that they were there, because he had had an opportunity to find them. The difficulty with this ruling is that it is not analogous to the case of the defendant who has a box which he knows to contain *something*, but who fails to inquire as to what it is; Lewis did not discover the drugs because he did not know there was anything in the house to go searching for! See further *R v Conway and Burke*[46]. What is clear, however, is that it is not open to D to contend that he was not in possession of cocaine because he honestly believed he was in possession of heroin:[47]

In *R v Bradish*[48] the appellant was convicted of possessing a prohibited weapon (a CS gas canister) contrary to section 5(1) of the Firearms Act 1968, despite his assertion that he had not known that then canister contained CS gas. Auld authorities on possession of firearms, the appellants were a 'container' case, and as such the authorities dealing with possession of dangerous drugs should be applied. The court noted the social dangers presented by offensive weapons; the absence of any mental element in the wording of the offence; the reference to the defendant's state of mind in *other* sections of the Act; and the provision of specific defences in analogous legislation, but not in the 1968 Act. in particular, the court refused to follow the 'half-way house' approach to *mens rea* and possession adopted by the majority in *Warner*, because it was decided before the enactment of the 1968 Act, and it was thus significant that the legislature, when passing that Act, made no provision clarifying the position as to the need or not to prove *mens rea* in relation to possession. As Auld J observed:

> … the possibilities and consequences of evasion would be too great for effective control, even if the burden of proving lack of guilty knowledge were to be on the accused. The difficulty of enforcement, when presented with such a defence, would be particularly difficult where there is a prosecution for possession of a component part of a firearm or prohibited weapon, as proved for by section 1 and 5 when read with section 57(1) of the 1968 Act. it would be easy for an accused to maintain, lying but with conviction, that he did not recognise the object in his possession as part of a firearm or prohibited weapon. To the argument that the innocent possessor or carrier of firearms or prohibited weapons or parts of them is at risk of unfair conviction under these provisions there has to be balanced the important public

[41] see further *R v Fernandez* [1970] Crim LR 277

[42] [1970] 1 all ER 595

[43] (1988) 87 Cr App R 246

[44] Once the prosecution had established these matters, however, the onus was then upon the defendant to bring himself within the terms of section 28(3)(b)(i).

[45] (1987) 87 Cr App R 270

[46] [1994] Crim LR 826

[47] see *R v Leeson* (1999) The Times 2 November.

[48] (1990) 90 Cr App R 271

> policy behind the legislation of protecting the public from the misuse of such dangerous weapons. Just as the Chicago-style gangster might plausibly maintain that he believed his violin case to contain a violin, not a sub-machine gun, so it might be difficult to meet a London lout's assertion that he did not know an unmarked plastic bottle in his possession contained ammonia rather than something to drink

5. General Devices Employed in Holding that Liability is Strict or Not

Generally, the following devices are descrambling in the attitudes of the courts in all the jurisdictions considered above in determining whether liability is strict or not. First, is the language or wording of the definition? Where clear words importing *mens rea* like 'knowingly'. 'intentionally', etc., are used, no intention to create strict liability is shown. But where such words are absent, the courts have tended towards imposing strict liability. However, *Sweet v. Parsey*[49] establishes the rule that the fact that one section contains the word 'knowingly' and the other does not, cannot by itself be held to mean that the latter requires no *mens rea* or is one of strict liability. Second, the subject matter of the Act and the social danger involved may be considered before reaching an inference that Parliament intended to impose strict liability. This embodies the principle that liability is intended to be strict in offences which affect public welfare e.g. sale of food, drinks, etc. Lastly, where the punishment for the offence is grave or severe, the courts are disinclined to impose strict liability. Here, distinction is often drawn between crimes that are *Mela inse* and crimes that *Mala prohibits*. For the former, strict liability is rarely imposed, while the reverse is the case for the later. The devices employed in holding that liability is not strict may be distilled as: First, in England, the presumption under the general doctrine of *mens rea*; in Nigeria, the provisions of the first limb of section 24 of the Criminal Code;[50] Second, there is the rule expressed by Lord Reid in *Sweet v. Parsley*[51] that if a provision is capable of two interpretations, that more favourable to the accused is to be preferred.

6. Arguments For and Against Strict Liability

Should strict liability be a basis for criminal liability? The arguments for and against strict liability are diverse and varied enough to form the subject matter of a separate paper. The attempt here would be to present some of these salient arguments. To start with, there is the argument from history. It is contended that since the concept of strict liability originated in both England and United States about the same time and it is common in most criminal law jurisdiction, there is a strong indication that it is of immense social relevance. According to Seyre, 'the interesting fact that the same development took place in both England and the United States at about the same time strongly indicates that the movement has been not merely an historical accident but the result of the changing social conditions and beliefs of the day'[52]. The historical argument in favour of strict liability is refuted with the counter argument that it is at best an explanation and not a justification for strict liability. Also, there is also the point that the argument from history comes to an end with history. Here, it is argued that even if the historical argument is accepted as far as it goes, it might be maintained that however inevitable the doctrine may have been in bygone times, strict liability at the present day is but an unjust anachronism standing against the mainstream of development at the Criminal Law. The second line of argument is from the point of view of legislative intention. Here, it is argued that strict liability offences are a creation of the legislative and not the courts. The point is made here that if the legislature creates and defines a statutory offence without inserting into the definition any words indicative of an intention that no one should be convicted of that offence unless proved to have been at fault, then it is beyond the proper constitutional function of the courts to imply any such words in defiance of the plain statement in the statute, this argument is refutable clearly on the score that the court's function is interpreting offences in statutes is not confirmed to carrying out a mechanical construction of the words used therein i.e. in the definition section *simpliciter*. The statute must be constrained in its entirety. Indeed, as Glanvile Williams observed:

> Every criminal statute is expressed elliptically. It is not possible in drafting to state all the qualifications and exceptions that are intended. One does not, for instance, when creating a new offence, enact that person under eight years of age cannot be convicted. Nor does one enact that defence of insanity or duress. The exemptions belong to the general part of the criminal law, which is implied into specific offences …where the criminal law is codified… this general part is placed by itself in the code and is not repeated for each individual crime. Now the law of *mens rea* belongs to the general part of the criminal law, and it is not

[49] Ibid, the decision of the Supreme Court of the U.S in *United State v. Dotterweich, St. Margaret's Trust* (1958) 2 All E.R.289

[50] In Queensland Australia, the provisions of the first limb of section 23 of the Queensland Criminal Code.

[51] Ibid

[52] 33 *Columbia Law Review* 67

> reasonable to expect (the legislature) every time it creates a new crime to enact it or even to make references to it[53].

Another argument put forward by the defenders of strict liability is that it imposition is respect of regulatory offences serves as an effective deterrent to potential wrong doers, Remarked Dean Roscoe Pound. 'Such statutes are not meat to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals[54]'. This argument countered with the point the deterrence theory does not generally offer a satisfactory explanation or principle for punishment. It is clear, even from the points of view of crimes for which Capital Punishment is imposed, that such punishment does not have any significant deterrent effect upon the rate of incidence of the crimes.

Again, there is the utilitarian argument in favour of strict liability. Here, it is claimed that the interests of the Public require that the highest possible standards of care be exercised by people engaged in certain forms of conduct. This, is utiliterism terms, is the greater good to be achieved by occasionally convicting someone who may have taken all reasonable care to abide by the law; this greater good could not achieved to some extent, if, for example, the defence of lack of intention were available[55]. This informs the prevalence of strict liability in offences regarded as regulatory or public welfare offences. The argument is also preferred that strict liability offences are not real crimes; that strict liability offences should be termed 'Civil Offences'. This contention is also found on the imposition of the concept only on regulating on Public Welfare Offences, and that, if confined to this sphere, there is rustication for retaining the concept in our criminal jurisprudence.

The most pungent criticism of strict liability is from the moral prism. It is considered unjust that a person should be convicted of an offence without any moral blameworthiness on his part. A man could have taken all reasonable care to avoid committing the offence and yet be held liable. This, it is argued, does not induce respect for the law. H. Packer observed in his article '*Mena Res and the Supreme Court'*[56] thus:

> To punish conduct without reference to the actor's state of mind is both infectious and unjust. It is infectious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy.

7. Conclusion

The attempt made in this paper has been to present an expose on strict liability offences in general; with a view to helping to delimit the scope of these abnormal run offences within the sphere of Nigerian Criminal Law. As we have seen, the Nigeria legal system has erroneous attitude in relying on English decisions on strict liability without been objectively proactive to the facts of the Nigeria context.

[53] Glanville Williams, Criminal Law; the General Part (2nd ed) 259-260

[54] The Spirit of the Common Law, 52, quoted by Delvin J. in *Reynolds v. Austin* (1951) 2 K.B. 135 at 149

[55] S. Nemerson, Criminal Liability without Fault; A Philosophical Perspective' (1975) *Col. L.R*. 1517

[56] Ibid (1972), Ct. Rev. 107, at 109, cited in *Criminal Law Act and Material*, 174, by Clarkson Keating