SECTION 25 OF NIGERIAN CRIMINAL CODE IS A REINSTATEMENT OF THE ENGLISH COMMON LAW DEFENCE OF MISTAKE

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INTRODUCTION

The term Mistake connotes an erroneous mental condition, conception or conviction induced by ignorance, misapprehension or misunderstanding of the truth, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction but without the erroneous character being intended or known at the time.[1] Mistakes may either be as of facts or as of law.

The problem of mistake of criminal law is traditionally one of the key issues in criminal-legal science. Thousands of crimes that encroach on this or that group of social relations are committed in the world every day. Some crimes have simple corpus delicti, whereas others are committed with aggravating or extenuating circumstances. Law

[1] Ratanlal and Dhirajlal Thakore, The Law of Crime, 19th ed. 73

enforcement bodies have to classify each crime. Classifying a crime means identifying all the features of corpus delicti that are specified by criminal law.[2]

Mistake of criminal law is a situation in which the subject has such convictions that do not agree with facts or legal regulation of affairs.[3] Mistakes are especially relevant in criminal law when they demonstrate a state of conviction that disagrees with the law.[4] In UK as regards precedents includes a provision on mistake of fact, when a person's will is not directed at the committed act. This is sufficient reason for exempting the doer from criminal liability (prosecution). However, mistake of law cannot be sufficient grounds for exonerating anyone of a crime.[5] My task in this paper is to carefully appraise the defence of mistake in criminal law in a comparative manner, with England and Nigeria in mind.

MISTAKE UNDER ENGLISH LAW

In the Early period in the development of English Common Law, the idea came to be accepted that a man's conduct does not constitute a crime for which he may be liable to punishment, unless the man knew or was conscious that what he was doing was wrong. An embodiment of this idea was to be found in the Latin Maxim: "actus non facit reum nisi mens sit rea".[6] At that time, the rule meant that the accused person must have had a wicked mind at the time of doing the act, and his action must also be morally objectionable.

Mistake came to be recognized as one of the early factors, the existence or occurrence of which negatives the necessary *mens rea*, thereby constituting a good defence to the offence charged. In *R v Banks,*[7] the accused person was being indicted for being in possession of naval stores, contrary to a section of the Embezzlement of Public Stores Act, 1698.[8] The prosecution contended that since the Act made possession of Naval stores, marked with the King's mark the complete evidence of guilt, the accused committed the said offence, unless he could produce the certificate required under the Act. Lord Kenyon C.J. rejected this

[2] Meese III, E., & Larkin, Jr P. J. (2012). Reconsidering the Mistake of Law Defense. *J. Crim. l. & Criminology, 102*, 725–784.
[3] Robinson, Paul H., & Grall, Jane A. (1983). *Element Analysis in Defining Criminal Liability*: The Model Penal Code and Beyond, 35 STAN. L. REv., 681, 726-732.
[4] Simons, K. W. (1990). Mistake and impossibility, law and fact, and culpability: A speculative essay. *Journal of Criminal Law and Criminology, 81*, 447-517.
[5] Kuznetsova, N. F., & Tiazhkova, I. M. (Eds.) (2002). *A course in criminal law* (Vol. 1. General part. Theories of crime). Moscow: Zertsalo-M publisher.
[6] 3 Co. Inst. 6, 107 (1641), translated by Lord Kenyon in Fowler v. Padget, 7 Term Rep. 509, 514 (K.B. I798), as 'the intent and the act must both concur to constitute the crime.'
[7] 1794, 1 Esp. 145; 170 E. R. 307
[8] 9 and 10 Will. 3, C. 41

contention and held that an honest mistake that the person from whom the accused person acquired possession of the stores had such a certificate, was a good defence.

Mistake was closely allied to the doctrine of *mens rea*. Whenever *mens rea* was required to constitute the offence, the mistake of the accused as to the circumstances surrounding the particular situation, which is a denial of *mens rea* goes to negate the offence.

Ignorance implies a total want of knowledge in reference to the subject matter. Mistake admits knowledge, but implies a wrong conclusion.[9] Ignorance or mistake of fact is very often an excuse for what would otherwise be a crime. A street car conductor, for example, who forcibly ejects a passenger from the car under the honest and reasonable (though mistaken) belief that his fare has not been paid, is liable to the passenger in a civil action but not guilty of criminal assault and battery.[10]

Other examples of mistakes of fact sufficient to disprove a charge of assault and battery, include such cases as that of the railroad employee who forcibly removed from the platform one who was there as a passenger but was believed to be there for an unlawful purpose;[11] the police officer who arrested a person for being intoxicated on a public street, mistakenly believing him to be drunk;[12] and the householder who wounded a member of a crowd thought to be making a felonious assault upon the dwelling at night, although the shots by members of the crowd were fired, not at the house, but 'only in the spirit of frolic.[13] In addition there are numerous cases recognizing mistake of fact as an excuse in prosecutions for other offenses.[14]

"Ignorantia facti excusat",[15] however, is obviously too sweeping even for a general statement of law, because it is clear (to mention only one point for the moment) that if a certain deed would constitute exactly the same crime under either of two factual situations, it will be no excuse that one was mistaken for the other.[16] Hence some modification is needed, such as that "in some cases *ignorantia facti* doth excuse", or an honest mistake of fact will

[9] Hulton v. Edgerton, 6 S. C. 485, 489 (1875).
[10] State v. McDonald, 7 Mo. App. 510 (1879).
[11] Commonwealth v. Power, 7 Metc. 596 (Mass. 1844).
[12] Commonwealth v. Presby, 14 Gray 65 (Mass. 1860).
[13] State v. Nash, 88 N. C. 618 (1883).
[14] *Carrying concealed weapons:* Miles v. State, 52 Tex. Cr. R. 561, l08 S. W. 378 (1908). See also State v. Williams, 184 Iowa 1070, 169 N. W. 371 (118).
[15] Farrell v. State, 32 Ohio St. 456, 459 (1877).
[16] Regina v. Lynch, I Cox C. C. 361 (1846).

generally shield one from a criminal prosecution."[17] To be more specific, it may be stated as a general rule that mistake of fact will disprove a criminal charge if the mistaken belief is honestly entertained, based upon reasonable grounds and of such a nature that the conduct would have been lawful had the facts been as they were reasonably supposed to be.[18]

Mistake and Ignorance of law

In *Esop,*[19] the accused was convicted of an offence under English law, buggery; under his personal law no such offence existed. Accordingly, where the accused has the relevant *actus reus* and *mens rea* for the crime, he is guilty even though he did not know that the *actus reus* was forbidden by the criminal law. He was mistaken as to the rules of English law. Moreover, ignorance of the law is no defence.[20] The accused was convicted of a crime which Parliament had created while he was on the high seas, and there was no way of finding out that a law had been enacted. The case has been taken to hold that impossibility is no defence. However, it may be that the case of *Bailey* should be read differently. The case was referred to all the judges. They recommended a pardon.

Since at that time a pardon was the sole way of reversing the first instance decision, it may be that they disagreed with the proposition that ignorance of the law was no defence. *Bailey* has nevertheless been treated as deciding that, and the rule has been accepted in *Carter* v *McLaren.*[21] The rule was stated by the Court of Appeal in *Lightfoot*[22] '. . . Knowledge of the law . . . is irrelevant . . . The fact that a man does not know what is criminal and what is not . . . cannot save him from conviction if what he does, coupled with the state of his mind, satisfies all the elements of the crime of which he is accused.'

An illustration is the case of *Broad,*[23] the defendants were convicted even though they were ignorant of the law. They did not know that what they were making was a controlled drug proscribed by criminal law. Certainly it is not always easy to discover that a Bill has been enacted or that a statute has come into force. If the accused believes that he is using force to prevent a crime, but there is no such crime, he has made a mistake as to the law and has no defence.

[17] People v. Cohn, 358 Ill. 326, 331, 193 N. E. 150, 153 (934).
[18] Regina v. Tolson, **23** Q. B. D. i68, i9o (I889) ; Marmont v. State, 48 Ind. **21, 3,** (1874).
[19] (1836) 173 ER 203.
[20] *Bailey* (1800) 168 ER 657
[21] (1871) LR 2 Sc & D 120
[22] (1993) 97 Cr App R 24
[23] [1997] Crim LR 666 (CA)

Mistake of fact

English law draws a sharp line between mistake of law (guilty) and mistake of fact (usually not guilty), yet the line is not always clear. According to the House of Lords in *Brutus v Cozens*,[24] a case on the meaning of 'insulting' within Section 5,[25] which has since been repealed, the construction of an ordinary word in a statute is a matter of fact, not of law, though the rule seems to have been honoured in the breach more than in the observance. Two cases which are hard to reconcile are *Norton* v *Knowles*[26] and *Phekoo*,[27] both of which concerned the term 'residential occupier'. In the former case whether the accused believed his victim to be a residential occupier was an issue of law and therefore he had no defence; in the latter the term was held to be a question of fact and accordingly the accused had a defence where he believed that the victim was a squatter and not a residential occupier.

It is postulated that mistake of fact is a defence because as with some other defences punishing the accused would not deter him. This rationale is said to derive from J. Bentham,[28] Chapter 13, Section 3, though it can be argued that, while punishing a mistaken person would not deter him, it might deter others. Logically mistake of fact should negate *mens rea,* i.e. the prosecution has not proved this element. There is nothing special about mistake. In this sense mistake is not a defence. The courts have, however, developed special restrictive rules. Three reasons might be hypothesised to explain this development.

First, in the nineteenth century the current theory of subjective *mens rea* had not been formulated; therefore, the courts missed the opportunity of stating that mistake was incompatible with the fault element.
Secondly, the judges were anxious not to let off an accused who, though telling the truth, had formed his opinion negligently. Thirdly, judges were worried that juries would accept bogus defences.

Accordingly they laid down the rule that mistakes had to be reasonable. More recently the courts have brought mistake generally speaking more in line with *mens rea*. It should be remembered that while the courts have moved away from the requirement that a mistake had to be made on reasonable grounds, Parliament can stipulate that a mistake must be a

[24] [1973] AC 854
[25] Public Order Act 1936
[26] [1967] 3 All ER 1061
[27] [1981] 1 WLR 1117
[28] *An Introduction to the Principles of Morals and Legislation* (Methuen, 1982, first published 1789).

reasonable one. An example was Section 14(3) of the Sexual Offences Act 1956 which is defence to a charge of the then existing crime of indecent assault when his marriage to a girl under 16 is invalid 'if he believes her to be his wife and has reasonable cause for the belief.'

Mistake of Fact and Mistake of Law under Common Law

Sometimes, it is not easy to distinguish between Mistake of Facts and Law because some propositions of Law are based on the existence of facts. In the case of *R v Wheats and Stocks*,[29] a man believing himself to be lawfully divorced went through a second marriage with another woman. He was charged with the offence of bigamy and convicted. His mistake was described by Dr. Stallybrass as a mistake of Law.[30]

The case of *The State Government v Rangaswami*[31] is an illustration of a statement of fact; the accused and some others went out to shoot a hyena on a rainy day when visibility was poor. The accused saw an object moving in the bushes and assumed it was a hyena and shot at it, but it turned out to be a human being. In the absence of negligence, it was held that the accused could benefit from the defence of mistake.

A case of mistake of mixed law and fact is illustrated by the case of *R v Vega,* the accused person took control of some old corrugated sheets believing them to be abandoned goods, which in law, cannot be object of theft. The question whether the corrugated sheets was abandoned or not was a question of fact, while the question whether the accused had a right to appropriate the corrugated sheets is a question of law.

The requirements for the plea of mistake of fact under English Common Law are that the mistake must firstly, be honest and secondly, that had the real state of things been as the accused believed them to be, his act would not have amounted to an offence. A third requirement is that the mistake must be reasonable.

This third requirement has been a subject of debate between many scholars who have argued whether reasonableness should be a requirement or not. Kenny[32] expressed the view that for mistake to constitute an offence, it must be reasonable, while Tunner[33] is of the opinion that reasonableness is only a matter of evidence.

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[29] 1921, 2 K. B. J19
[30] 56, L.Q.R. P 64-67
[31] A.I.R. 1952, Nagpur 268
[32] Kenny, Outlines of Criminal Law, 1952, 16th Edn, p 76
[33] Tunner J.W.C, Kenny's Outlines of Criminal Law, 1962, 18th Edn, p 52

Lastly, if the real state of things had been as the accused believed them to be, his act should not constitute an offence. In *R v Tolson,* the accused contracted a second marriage after her husband had been missing for a considerable length of time. She had given him up for dead. She was charged with the offence of bigamy when her first husband reappeared. In acquitting her, Cave, J. summed up the position of the law under English Common Law when he said:

> At Common Law, an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence.[34]

Under the Common Law, mistake of law, reasonable or not, is not acceptable as constituting defences. It was held in one of the early decisions that a person even on the high seas could not claim ignorance of an Act which was passed while he was still on the high seas.[35]

MISTAKE UNDER THE NIGERIAN LAW

Section 22 of the Criminal Code provides A person who does or omits to do an act under an honest and reasonable but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

Section 24 of the Criminal Code state a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

From the foregoing provision and the doctrine of mes rea, there is no legal fault in any case in which the accused person is not aware of the facts bringing him within the definition of an offence. This lack of awareness is provided by the provision of Section 25, to the effect that the accused thought otherwise because he had made a mistake

[34] 1882 23, Q.B.D. 168 at 181
[35] *R v Bailey* (1800) R. and R. 1; 168, E.R. 651

There are two kinds of Mistake that is mistake of law and mistake of facts.

Mistake of Law

Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence Mistake of Law, also called ignorance of law, is an invalid defence. Except where knowledge of the law is an element of the offence charged. Thus a mistake of Law would be a valid defence in the following cases where in an action from a bona fide claim of right,[36] action from execution of an erroneous sentence, process or warrant,[37] action from Sentence or Process or warrant without jurisdiction[38] and action from Irregular process or warrant.[39]

To avail a defence in such cases, the accused must act in good faith and in the belief that the sentence, process or warrant was issued with authority. In *Ogbu v R,*[40] O was alleged to have given a bribe to D in order to induce him (D) to appoint O a village head and therefore a tax collector. O and D were both charged. O pleaded a mistake of law, contending that he did not know it was an offence to so bribe D and was acquitted. On appeal by the other accused (D). The Federal supreme Court expressed its opinion that it was not satisfied that the trial court was right in law in acquitting the first accused on those findings.

Ignorance of law is a good defence where knowledge of the law by the offender is expressly declared to be an element of the offence. Examples are: receiving stolen property, not knowing them to be stolen or Uttering Counterfeit coins, not knowing them to be counterfeits.

Mistake of Facts

"I made a mistake" is a defense in some jurisdictions if the mistake is about a fact and is genuine.[41] The defense is most often used in conjunction with another defense, where the mistake led the defendant to believe that their actions were justifiable under the second defense. For example, a charge of assault on a police officer may be negated by genuine (and

[36] Section 23 of the Criminal Code.
[3737] Section 257 of the Criminal Code.
[38] Section 258 of the Criminal Code.
[39] Section 260 of the Criminal Code.
[40] (1959) N.R.L.R 22 at 24 – 25 (FSC)
[41] *DPP v. Morgan and others* [1976] AC 182, where an RAF man told three officers to have sex with his wife and she would pretend to refuse just to be stimulating. They pleaded mistake, and the jury did not believe them.

perhaps reasonable) mistake of fact that the person the defendant assaulted was a criminal and not an officer, thus allowing a defense of use of force to prevent a violent crime (generally part of self-defense/defense of person).[42]

A person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is nor criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist, Section 25, Criminal Code Where there is a reasonable and honest mistake of fact the offence is treated as if the fact had been true. For instance, B reasonably mistakes D's bicycle for his and takes it. In *Thomas v. R,*[43] a belief that a decree absolute had not been made by a court was held to be a question of fact. Dixon J held that a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law.

The mistake must be such that any reasonable man would be likely to make the same mistake. It is a defence when the accused believes in a state of affairs, which if true, would justify the act done. In other words, an actor is not responsible for the consequence, which ultimately follow his/her act which results from a mistake on his/her part. Where Amuda shoots and kills at an object which he thinks is a dog or a ghost which turns out to be a man, he would not be treated as though he killed a dog or a ghost as the case may be. Note the limitation of the defence: the operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

It must be noted, that a mistake must be both honest and reasonable. In *Gadam v. R,*[44] the accused believed that the miscarriage and mortal illness of his wife was due to the witchcraft of an old woman, and he killed the latter with a hoe. It was a finding of fact, which was not disputed, that the accused's belief was bona fide and that a belief in witchcraft was prevalent in the community in which he lived. The West African court of Appeal against the conviction for murder, holding that the mistake was to be unreasonable. They further cited an unreported case of *Ifereonwe v. R* which was also decided by The West African Court of Appeal which had held that where a man kills another in the belief that he is bewitched by him, the mistake could not be regarded as reasonable.

[42] *R v. Williams* [1987] 3 All ER 411
[43] (1937) 59 C.L.R 279.
[44] (1954) 14 W.A.C.A 442.

CONCLUSION

As a general principle of criminal responsibility, no person is criminally responsible for any act or omission unless it is voluntary and intentional except as expressly provided by statute, or for an event which occurs by chance. A mistake of law is an excuse only where the law so prescribes but a mistake of fact, generally, is a defence.

Mistakes of law and of fact are dealt with, as are mistakes as to an 'irrelevant' element of the offence definition. Mistakes of fact may provide a defence but not if they are to the strict element (one to which no *mens rea* is attached) of an offence. The mistake of fact need usually only be one honestly made but bigamy provides the exception: the mistake must be one made on reasonable grounds.

Mistake of criminal law is an incorrect (erroneous) view of a person as to the actual substance of his/her act and specific characteristics of the social relations protected by the criminal law which are damaged as a result of the crime. Moreover, mistake of criminal law is divided into two kinds: mistake of law and mistake of fact. A mistake of law is mistake on the type or extent of punishment, the illegality of an act and classification of the crime. Mistake of fact is a misapprehension of the person about the factual circumstances of a crime.

The fact of mistake of criminal law has a considerable influence on the classification of crime. Mistake of law and mistake of fact play a significant role in establishing the intent of an act, which, in turn, predetermines the form of guilt, penalty for the crime or attempted crime, the fact of aggravating or extenuating circumstances. Mistake of law with regard to illegality of an act or the classification of crime affects the classification of crime, whereas mistake of law as to the type or extent of penalty does not affect the classification of crime. Specific influence of this or that type of mistake of fact depends on the end result of a crime.

From the forgoing, it can safely be contended that the defence of mistake in Nigerian criminal jurisprudence is a reinstatement of the English common law defence of mistake. However, as can be seen from the statutes and case law, different elements or wordings are operational in the applicability of the relevant law on mistake in England and Nigeria.