DETERMINING THE MENTAL ELEMENT OF SMUGGLING IN NIGERIA

By

Musa Omale Ph.D UNN;
Assistant Comptroller, Nigeria Customs Service,
Federal Operations Unit zone 'C' Owerri Imo State
email: musa_omale@yahoo.com
phone: 08033364734

Abstract

Crime is old as man. It is a product of society and no matter the level of sophistication, it is manifesting itself not only in public, but even in privacy where there is no one watching[1]. Different disciplines define crime from different perspective and the concept often tends to be difficult to grapple with. Crime however is off diverse dimensions, but our focus here is the crime of smuggling. The paper therefore examines the nature of the crime culminating in its elements with particular reference to the *actus reus*[2] and *mensrea*[3]. A distinction is also made of situations where the commission of the crime tend to be strict, which often seems a game of hazard. This therefore calls for a more authoritative legislative action[4]

1. Introduction

Smuggling is an old phenomenon. it is an illegal activity across frontiers of nations. It is usually defined as the taking of goods illegally from one country to another especially to avoid paying the necessary tax. It is not just avoiding payment of the necessary due but it is fundamentally a movement of contrabands, including hard drugs and other prohibited or restricted goods in and out of the country usually through unapproved entry points. The question is how and to what level has smuggling attained in Nigeria. It is infact a worldwide problem and has taken very complex dimension.

Nigeria is a country in which there is a very high taste for foreign goods. It has been estimated that 90% of Nigeria's demand for industrial consumer goods is met from foreign countries[5]. Smuggling has a long and controversial history, probably dating back to the first time at which duties were imposed in any form.

In Britain, smuggling became economically significant at the end of the 17th century, under the pressure of high excise taxes. In 1724 Daniel Defoe[6] wrote of Lymington, Wiltshire, on the South Coast of England:

[1] E. H. Ofori-Amankwah, criminal law in the Northern States of Nigeria, (Gaskiya Corporation Limited, Zaria, 1986) p.1
[2] That is physical element
[3] That is mental element
[4] E. H. Ofori-Amankwah, Ibid
[5] The Report of the study group on customs and smuggling presented to the head of state and commander in chief of the Armed forces October, 1984, p.127
[6] Defoe, A tour thro' the whole island of Britain, letter III (London, 1724)

> *I do not find they have any foreign commerce, except it be what we call smuggling and rouging, which I may say, is the reigning commerce of all this part of the English coast, from the mouth of the thames to the land's end in corn wall.*

The high rate of duty levied on wine and spirits and other luxury goods coming in from mainland Europe at this time made the clandestine import of such goods and the evasion of duty a highly profitable venture for impoverished fishermen and seafarer. The smuggling industry became more economically significant than legal activities such as farming and fishing[7].

In north America, smuggling in colonial times was also as a result of heavy taxes and regulations imposed by mercantilist trade policies. After American independence in 1783, smuggling developed at the edges of the United states at places like Passamaquoddy bay, St Mary's in Georgia, Lake Champlain and Louisiana. These same places became notorious for smuggling during Thomas Jefferson's embargo of 1807 – 1809. In 1907 president Theodore Rooseult tried to cut down smuggling by establishing the Roosevelt reservation along the united states-Mexico border[8]. Drug smuggling became a major problem after 1970 and in the 1990's when economic sanctions were imposed on Serbia,[9] a large percentage of the population survived by smuggling petrol and consumer goods from neigbouring countries. The Serbian government un officially allowed this to continue so that the economy would not collapse.

The word "smuggle" itself probably originated from the Scandinavian and the Danish "smugle" which literally means 'smugle' and the Swedish "smuga" which means a "lurking

[7] Paul Theroux, the Kingdom by the sea, 1983, the Kingdom refers to the various smuggler's inn by the Coast.
[8] Spangle, Steven L. (2008 – 02 – 11) "Biological opinion for the proposed installation of 5.2 miles of primary fence near Lukeville. Arizona http:www.fws.gov/southwest/es/Arizona/documents/biolopin/0800//-Lukeville primaryfence p.3.U.S. fish and wildlife service. Retrieved on 2008-10-11
[9] A land locked country located at the cross road of central and South East Europe.

hole" or "smugan" to "creep" and is probably cognate with the Icelandic prefix "smug" which stems from "smjuga' meaning "to creep through a hole"[10].

No wonder then, that smuggling was effected from France to united kingdom through the channel tunnel. In late January, 2006 the largest smuggling tunnel to date was found on the U.S. – Mexico border. The 2,400 foot-long tunnel runs from a warehouse near the Tiguana air port to a warehouse in sandiego. Authorities said it was unclear how long the tunnel has been in operation[11]. They suspected Tijuana's Arellano –Felix drug syndicate or other well-known cartel, to be behind the tunnel and its operations[12]. The combination of acknowledged corruption at the border of Mexico and high import tariffs led smugglers in the 1970s and 80s to fly electronic equipment in cargo planes from one country to clandestine landing strips in another thereby circumventing encounters at the frontier between countries[13].

During the siege of Sarajevo, Bosnia a tunnel underneath the no man's land of the city's closed airport provided a vital smuggling link for the beleaguered city residents. Guns where smuggled into the city and people were smuggled out. Smuggling tunnels connected Egypt and the Gaza strip, by passing the international border established by the Israel – Egypt peace treaty, the tunnels pass under the Philadelphia buffer zone known as "Philadelphia route" in Hebrew. With the beginning of the al-aqsa intifada (the war between Israel and Palestine) the tunnels were used mainly for smuggling of weapons and explosives used by Palestine militants.

[10] R. Gutteridge; Dorset smugglers (Red post books, 1983; referred to in www.burten bradstock.org.uk assessed on 26-10-2011

[11] "feds smoke out largest drug tunnel yet" (http://www/cnn.com/2006/us/01/26/maxico tunnel/index html) CNN.com Retrieved May I., 2007

[12] "Drug of Haul in secret tunnel" (http://nes.bbc.co.uk/2/hi/americans/4653536 stm) BBC" News retrieved May 1, 2007. That of U.S. Canada tunnel, in 2005 was uncovered. A group of Canadian drug smugglers constructed at tunnel between a green house in Langley, British Columbia and the basement of a house in Lynden Washington. Officials raided the house soon after and arrested them and they appeared before a court in scattle

[13] Miller; Tom on the Border, portraits of America' south west frontier, pp. 44-60

The underground railroad was a collective name for the overland routes taken by escaped slaves seeking emancipation in the free states of the northern united states and Canada. The title reflects the fact that the network was hidden from authorities in slave states. The railroad consisted of Clandestine routes, transportation, meeting points, safe houses and other havens. It is thought that 100,000 slaves were smuggled to freedom along this route[14].

Smuggling has also extended to missile technology. It was reported[15] that on March 14, 2008 an employee of the Indian embassy in Washington and Indian government agencies conspired with an Indian business man to obtain secret weapons technology from U.S. companies. The technology they tried to smuggle to India included microprocessors and electronic components used in the development of ballistic missiles, space launch vehicles and fighter jets.

In Nigeria, restricted importation of goods tends to encourage smuggling. Umar M. Birai[16] however states that since Nigeria is essentially a consumer import oriented economy, unrestricted importation of goods cannot be allowed. Even budgetary concessions to Nigerian manufactures, have been abused and turned to avenues "for over invoicing and smuggling". The border of African countries are artificial and more often the demarcations cut across language, culture and ethnic formations. A very good example as given by Umar[17] is the case of Bebe along Nigeria –Benin borders where some of them have their houses on one side and their farm on the other side. This kind of situation makes smuggling to thrive and enforcement becomes a problem. Bebe being an undefined area in Nigeria – Benin border at Idiroko, it becomes a centre of thriving smuggling activities. According to Umar[18], there was a particular warehouse' at Bebe with five stores, contrabands were stocked in the four store

[14] New world encyclopedia – http://www.newworldencyclopedia.org.entry/smuggling retrieved March 2008
[15] Indians "involved in missile technology smuggling. Dawn the internet edition http://dawn.com March 15, 2008 Saturday rabi-ul-auwal 6, 1429
[16] U. M. Birai, dimensions of smuggling and the Nigerian customs, in 100 years of Nigeria customs and Excise 1881 – 1991, I.E.S. Amadi (ed) ABUP, Zaria, 1991), p. 222
[17] U. M. Birai, dimensions of smuggling and the Nigerian customs. Op. cit 225 18. Ibid
[18] Ibid

on Benin side. Such goods were then transferred into the one store on Nigerian side through the ceiling and smuggling is completed. Nigeria's oil resources and lack of it in the neigbouring countries also guaranteed a good market for petroleum products smuggled into the neighbouring countries. The vanguard newspaper of September 7, 1991 reported the discovery of an illegal or deport at Gbethrome a coastal town in Badagry, where illegal export takes place through the sea. The point was well made in the report on customs and smuggling[19] where it was stated thus:

> *In this regard smuggling is a two way traffic, our neighbours as well as Nigerians smuggle out of the country, the little we are able to produce ourselves and what we can import with our scarce foreign exchange . Again, because of the relatively more relaxed customs regulations of our neighbours, it is easy for smugglers to use their ports as staging points for smuggling imported goods, into the country through over-land and sea routes. In this time when foreign exchange is hard to come by, smuggling out of the country is a way for the individual to make it and this in turn is used to purchase few goods, which are also smuggled back into the country.*

Abuse of official position is a very serious dimension in the crime of smuggling. Government, high ranking officials use their position, they even claim a kind of immunity, and bring in smuggled goods. This no doubt, put the customs in a very difficult position to confront them. A clearing agent to this end, observed:

> *It is a well known fact that smuggling in Nigeria is being aided and abetted by Nigerians in high positions using such position to influence their way through*[20].

These are the salient factors that have come to underscore the dimensions of smuggling in Nigeria, thereby making it a serious crime that needs to be punished accordingly. This culminates in our effort to determine the elements of the crime of smuggling. The content of

[19] The report of the study group on customs and smuggling op.cit, p. 127
[20] The Report of the study group on customs and smuggling, op.cit. p.128

criminal law can be divided into two parts-. The general part,[21] dealing with basic concept of criminal liability and the defences, and the specific offences.

The general part shall form the focus in this paper with particular reference to the physical and mental elements. The basic elements for any criminal liability which come to form the bedrock for criminal liability to this day is embedded in the Latin maxim, Actus non facit reum nisi mens sit rea, meaning, "an act does not make a man guity of a crime, unless his mind is blameworthy[22].

Although subject to some exceptions, this is a general principle governing liability for crime. we shall therefore examine the maxim from the constitutent of the *actus reus* and the *mens rea.*

2. Physical Element of Smuggling

This is to the effect that for a person to be guilty of an offence, it must be clearly proved that he has done the act. A kind of muscular contraction or cause of physical harm. This is however not necessary in all cases, for example, the result of an act distinct from other factors as in a blow struck in hurt cases causing injury or death to the victim[23]. It was therefore stated that *actus reus* includes all the elements in the definition of a crime except the accuser's metal state[24]. It is generally made up of conduct and sometimes its consequences and also of the circumstances in which the conduct takes place (state of affairs), to the extent that they are relevant. These could be manifest in a gunshot (conduct) resulting in death (consequences). It could also take the form of an omission to act where there is a legal duty to do so. for instance, the act of failing to save life where there is a legal duty to do so or offences under

[21] Hereinafter *Actus Reus* and *mens rea* respectively
[22] J.C Smith and B. Hogan, criminal law, (London, Butterworths & Co (publishers) Ltd 7th edn 1992) p. 60
[23] K.S Chukkol: The law of crimes in Nigeria (Zaria, Nigeria ABU Press Ltd, 1998) pp 22-30
[24] Ibid p. 30

the Penal Code (PC)[25] where section 130 punishes public servants who abandon their pubic duties.

Under the Customs and Excise Management Act (CEMA)[26] there is liability for failing to deliver to the proper officer an entry outward in the prescribed form[27]. The *actus reus* of an offence as seen is all the external manifestations of the human conduct resulting in the forbidden act just short of the mental element[28].

An exception was however seen in the case *of R. v. Larsonneur*[29], where a French woman who entered the United Kingdom illegally was ordered to leave; but instead of complying went to Ireland where she was arrested and brought to London and successfully convicted of vagrancy, which need not strictly involve physical (i.e. muscular) movement at all.

It is worthy of note that gradually, the concept of *actus reus* began to change, largely as a result of increasing governmental responsibility to the generality of their subjects so as to protect them from unjustifiable harm.

By 1836[30] the problem was presented to Lord Maccauley and other law commissioners as to what extent omission should be made punishable offences. The law commissioners took a middle course and from then they proposed that where acts are made punishable on the ground that they have caused or have been intended to cause, or have been known to be likely to cause the same effect, they shall be punishable in the same effect, they shall be punishable in the same manner, provided that such omissions were on other grounds, illegal. An omission is illegal if it be an offence, if it be a breach of some direction of law, or if it be such

[25] Northern States provisions Act Cap. 345. Vol XIX 1990, LFN (Now Vol. 13, Cap p LFN, 2004)
[26] Cap. C.45 LFN, 2004
[27] section 50 CEMA
[28] Smith and Hogan op. cit. p.29
[29] (1933) L. T. 542
[30] A penal code was prepared by the India law commissioners (1836) Notem, 103 - 106

a wrong as would be good grounds for a civil action. The following illustrations will better drive home the point.

A omits to give B food and by that omission voluntarily causes B's death. Is it murder? it will be murder if A was under obligation of law to provide food for B. it is murder if B is the infant child of A and has therefore a legal right to sustenance, which right a civil court would enforce against A. It is not murder if B is just a beggar who has no other claim on A than on humanity. This reasoning informed the decision in *Alimi Akani and others. v. R*[31]. where Mbanefo, F. J. (as he then was) remarked:

> *The members of the crowd who stood by and watched the house in which they know an old woman was locked in and being burnt and did nothing behaved disgracefully, but that does not bring them within the provisions of section 7 CC*[32] *(dealing with principal offenders) as to be regarded as participants in the act of murder*

In conclusion and in proffering an answer to the question. when does an omission constitute an offence punishable by law? We submit that the position is jointly regulated by the common law and by both the CC and the PC[33]. An omission therefore, becomes punishable when there is deliberate refusal (or failure) to act where there is a duty to act. section 24 of the PC states that "except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions"

The position at common law and our statues is that where there is duty to act, failure to act may entail criminal liability just as in the case of a positive act or commission. The various duty situations depend largely on the facts of each case. The following situations may generally involve criminal liability:

[31] (1959) W.R.N.L.R 153 at 154
[32] Criminal Code, Cap 77 LFN 1990 (Now C. 38 LFN, 2004.
[33] See sections 24 - 26 & 29 PC. and for the CC provisions see extensive discussion in Okonkwo and Naish, criminal law in Nigeria excluding the north "Sweet and Maxwell" 1964.pp 49-51

i) failure to act where there is a statutory duty to act failure to assist a public servant, when bound by law to assist him creates liability[34] by law\

ii) failure to act where there is a contract

Thus in *R.v. Pittwood*[35] a gate keeper who left a gate at a railway crossing open was held responsible for the resultant injury to cart driver who was killed by a train while crossing. In *R. V. Lowe*[36] an engineer who deserted his post at a colliery, leaving an ignorant and incompetent boy in charge of machinery, was held guilty of the manslaughter of a collier who was killed through the failure of the boy to stop the engine properly.

iii) Failure to act where there is a special relationship. For example parent and child[37]. In *R.v. instan*[38] where a young woman who was dependant on her aunt, an aged hairless woman of 73 years of age, omitted to give the aged woman food, was found guilty of manslaughter where her omission accelerated death.

Apart from these three basic duties, there are a large number of other (miscellaneous) situations[39]

As discussed earlier, we stated that for a person to be guilty of an offence, it must be clearly proved that he has done an act. A kind of muscular contraction or cause of physical harm. With regard to the crime of smuggling; it is no exception, in that there must be an act or omission before it can be said to have occurred. For example, if a person imports anything whose importation has been prohibited under any order, (the *actus reus*) that person become guilty of the offence unless he can prove his innocence. If this is the case then it means that the *mens rea* has become subsumed in the *actus reus*. Therefore as soon as a person brings

[34] Section 150 PC Note: The Sudanese provision is wider than the PC for where the positive act of the Good Samaritan does not endanger the life of the Samaritan, then failure to act can in some case give rise to criminal liability. See section 30 of the Sudanese panel code, and commentary in Alan Gledhill, the panel code of Northern Nigeria and the Sudan, p.7

[35] (1902) 10 T.K.R 37

[36] (1850) 3 C & K 123 (T.A.C) contra: R.V. Rees (1886) C.C.S sess pap CIV 271 (T.A.C)

[37] *R.v. Gibbins and proctor* (1918) 82 J.P 287, 12 criminal APP.R. 13

[38] (1893) IQ.B 450

[39] G. Williams, criminal law the General part (1961) pp.4 – 8

an item of goods into the country, he is presumed guilty of an offence by virtue of section 190 of CEMA. This was the decision of the supreme court in the case of Board of customs and Excise v. Alhaji Ibrahim Barau[40], which has decided under the 1958 CEMA. The relevant section then was section 168. Which provides:

> *In any prosecution for an offence under the customs and excise laws, it shall not be necessary to prove knowledge or intent, but where the prosecution is in respect of an offence of doing anything knowingly or recklessly or with a specified intent, the onus of disproving that he did such things knowingly or recklessly or with such intent shall be on the defendant.*

The court held that by reason of the provisions of section 168 of the Act, in a criminal prosecution under any of the provisions of the Act, such as the case at hand, once the prosecution has proved that the carpets in question where imported by the respondent into the country the law presumes in favour of the prosecution that:

> *(a) As alleged in the two counts, the importation of the carpets is absolutely prohibited (see section 166 (2) (g) which is now section 188(1) (g)*
>
> *(b) In respect of an offence punishable under section 145 (b) now section 164 (b) of the Act, the respondent was knowingly concerned in a fraudulent evasion of the import prohibition order.*
>
> *(c) In respect of an offence under section 44(1) (b) now section 47 (1) (c) thereof the respondent intended to evade the prohibition imposed on the importation of carpets and was consequently concerned in the importation of the carpets*

The constitutional provision in section 36(5) however, provides for presumption of innocence. It is however, not strange that section 190 of CEMA as contended has reversed the burden of proof. This is the case as contended by Ezike[41] where he referred to public officers (investigation of assets) decree No. 5 of 1966 to the effect that the onus of proving

[40] 1982 NSCC 154: 1982 ISC 84

[41] Ezike E. O., "Appraisal of legislative of institutional development of anticorruption laws

that there ws no unjust enrichment lies on the public officer[42]. It was also acknowledged that the use of presumption, the reversal in the burden of proof are some innovations introduced by corrupt practices and other related offences Act, 2000[43].

The supreme court then came to the conclusion that the prohibition of the importation of carpets into Nigeria having regard to the clear provisions of section 1 sub-section 1 of the prohibition order, is absolute and that this does not allow for any other interpretation notwithstanding the use of the word "trade", after the heading entitled "Absolute prohibition" in part II of the prohibition order.

The Supreme Court held further the use of the word, 'trade', cannot and does not reduce the impact or effect of the mandatory provisions of section 1, sub-section 1 of the order. The word "trade" and indeed the other words, "other than trade" added after the words "absolute" prohibition: in part of the same first schedule are superfluous.

This was the decision of the Supreme Court as decided then and that has continued to be the position. The *mens rea* being subsumed in the *actus reus,* the offence of smuggling is said to have taken place.

The dissenting view of Bello J.S.C is however commendable and we agree with him, to the effect that, the most essential element of the offence under section 145(b) of the Act is being "Knowingly concerned" in a fraudulent evasion of the import prohibition order 1978". The element of the offence appear to mean that the offender must have knowledge of the prohibition order and must also have knowledge that its fraudulent evasion is taking place. Consequently, knowledge of the law is expressly declared by the section to be an element of the offence, section 22 CC to this end provides:

[42] Section 3(2) Decree No. 5 1966

[43] B.Ige, "fighting corruption and sharp practices in the ports system" An address by the then Attorney General and minister of justice on a stakeholders summit organized by Nigeria ports Authority 24th – 26th October (Hey Gate Press Ltd Lagos) p. 10

> *Ignorance of the law does not afford any excuse for any act or omission which otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence*

That being the case, ignorance of the prohibition order is a defence. Akinola Aguda[44] commenting on this case agreed with the dissenting view of Bello J.S.C and stated that:

> *This is one case in which the majority of the members of the Supreme Court allowed themselves to be swept off their feet by cold principles of law and justice*.

With regard to the above, we submit that the courts as indicated by the judgment of the Supreme Court, have misunderstood the provisions of section 145 of the Act[45]. We hope that either through legislative review or even judicial pronouncement the issue will in the near future be put in proper pedestal.

The point was made earlier that the notion of criminal responsibility generally requires the *actus reus* and the *mens rea*[46]. The mental element becomes very important and unless it is clearly dispensed within a criminal statute, there is every reason to import it as an ingredient in the offence charged. We also saw its application to the crime of smuggling especially instances where the *mens rea* become subsumed in the *actus reus* thereby culminating in liability.

It must however he stressed that the requirement of *mens rea* is not absolute in all cases. And although the tendency is to enlarge rather than restrict its requirement, yet in a few cases the mental element can be dispensed with. This leads us to the concept of strict liability offences[47] such as driving a car without license[48].

3. Strict liability of smuggling

[44] T. Akinola Agudu, "recent cases and comment: Nigerian current law review
[45] Now section 164 of 2004 Act
[46] J.C Smith and B. Hogan, op.cit p. 60
[47] Smith and Hogan, criminal law. 3rded (1974) p. 66
[48] E. O. Fakayode, criminal code companion, Ethiope, 1977

At common law *mens rea* will generally be read into an offence unless it is clearly excluded. To this end Lord Goddard C.J. said in *Brend v. Wood*[49] that

> *It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as a constituent of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind*

Inspite of the tendency to restrict strict liability offences, there are a few areas where they still apply. Thus, the privy council observed in *Limchin Aik .v.R*[50] that in determining when am offence can be said to be strict liability, a court must ascertain whether:

(i) It is a regulation which is made in the interest of the public to deal with a grave social evil; and

(ii) That the putting of the defendant under strict liability will assist in the enforcement of the regulation, for example, will make him carry out his work more efficiently through supervision, inspection or the improvement of his business method[51].

Thus, in *Cundy .V. Lecocq*[52], a man who sold intoxicating liquor to a drunken man without knowing that he was already drunk was held guilty of an offence under section 13 of the licensing Act of 1872, which was interpreted to create a strict liability offence.

Since strict liability offences are mostly regulatory and prohibitive, the main areas of their application include statutory offences, offences in their social context, road traffic offences and a variety of other miscellaneous offences like smuggling. Under the CEMA, it seems the

[49] (1946) 175 L.T 306 at p.307. see also *Sweet .v. Parseley* (1969) All E. R. 342
[50] (1963) 1 AIL E. R. 223
[51] See Fakayode, op.cit. p.10
[52] (1884) 12 Q.B.D 207 see also *R.V. Prince* (1875) L.R. 20 C.R 154. See Archbold criminal pleadings evidence and practise, 37th ed. para 2715. p. 857

unlawful importation of prohibited goods tends to be strict liability[53]. Similarly, it has been held that using a vehicle to convey smuggled goods, renders the vehicle liable to confiscation[54]. It was held in the case of Kayode Ilesanmi V. B.O.C & E[55] that the law regarding forfeiture of goods is absolute, which means that any vehicle used in conveying any smuggled goods, becomes liable to forfeiture. The statutory provision is in section 169 of CEMA.

Section 169 (1) provides:

> *without prejudice to any other provision of this Act, where anything has become forfeited under the customs and excise laws-*
>
> *(a) any ship, aircraft, vehicle animal, container (including any article of passenger's baggage) or anything whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so forfeited either at a time when it was so liable or for the purpose of the commission of the offence for which it later become so forfeited, and*
>
> *(b) any other thing mixed, packed or found with the thing so forfeited, shall also be forfeited.*
>
> *(2) where any ship, aircraft, vehicle or animal has become forfeited under the customs and excise laws whether by virtue of subsection (1) of this section or otherwise, all tackle, apparel or furniture thereof shall also be forfeited.*

This is the provision of the law and as was held in the case of Ilesanmi[56], that it is absolute thereby making the offence strict liability. we submit that the above decision is rather too harsh and the court ought to look at the circumstance of each case. what of a situation where a person uses a vehicle in carrying contraband goods without the knowledge and consent of the owner of the vehicle or where a contraband are found in the Luggage of a passenger in a passenger vehicle unknown to the driver of the vehicle. In these situations, we think that the

[53] see Hubbard J. in *Olayinka Dosumu .v. Controller of Customs and Excise* (1956) L.L.R. 41
[54] Section 169(1) (2). CEMA. cap. c. 45 L.F.N. 2004
[55] (1982) 2 NCR 161
[56] Supra

rigorous provisions of section 169(1) should not apply. It was held in *B.O.C & E v. Bolarinwa*[57] that a common carrier or the driver or owner of a passenger vehicle or omnibus would not known what is being carried as in the case of a private car owner who has in his vehicle contraband goods. We are not unmindful of the provisions of sections 24 and 48 of the CC and PC respectively in this regard.

Section 24 CC provides:

> *Subject to the express provisions of this code relating to negligent act and omissions a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.*
>
> *Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention is immaterial so far as regard criminal responsibility.*

Section 48 PC provides:

> *Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution*.

Although, it is true that subject to the express provision of the Act, a man is not criminally responsible for an act or omission which occurred independent of the exercise of his will or an event which occur by accident there are situations where the provisions of an Act may be strict in relation to certain offences. One of such is section 46 (a), (b), (c), (d) and (f) of CEMA which provides;

Where

[57] (1971) 1 ALR 237 at 245

> *(a) except as provided by or under this Act, any imported goods being goods chargeable with a duty of customs, are without payment of that duty landed or unloaded in Nigeria, or removed from their place of importation or from any approved wharf, examination station, customs station or customs area; or*
>
> *(b) any goods are imported landed or unloaded contrary to any prohibition; or*
>
> *(c) any goods, being goods chargeable with any duty or goods the importation of which is prohibited are found whether before or after the unloading thereof, to have being concealed in any manner on board any ship or aircraft or in any vehicles; or*
>
> *(d) any goods imported concealed in a container holding goods of a different description; or*
>
> *(f) any imported goods are found whether before or after delivery, not to correspond with the entry made thereof.*
>
> *Those good shall be forfeited.*

As seen above, the mental element of committing the offence is not expressly provided for. This is as opposed to section 46 (e) which provides:

> *(e) any imported goods are concealed or packed in any manner appearing to be intended to deceive an officer*

In the case of *Board of Customs and Excise .v. Okon Etim Uyah*[58], Senlong J. held that the court has discretion in a matter of forfeiture and whether a vehicle should be condemned as forfeited depends on the circumstances or facts of each case. In the instant case, since the applicant pleaded guilty to the charge and was convicted the strict rule of section 169(1) (a) of CEMA should apply and the Peugeot 504 Saloon car forfeited. The learned judge referred to the case of *BO.C.E. v. Aro Olajide*[59] quoting Ayinde J. thus:

> *For how can the owner of a vehicle lose that vehicle merely because it was used by his driver in carrying contraband or uncustomed goods without his knowledge and consent, or will it not be travesty of*

[58] FHC/CA/27C/92
[59] (1984) FHCLR 1

> *justice for the driver of a passenger vehicle or omnibus who does not normally know that contents of the Luggage of the passengers in his vehicle to forfeit that vehicle merely because contraband or uncustomed goods were found in the luggage of one of the passengers.*

We are proposing that a clause be added to section 169 of CEMA to the effect that unless it is established that ownership of the means of conveyance is different from the ownership of the goods forfeited and that the act of the owner of the goods is without the knowledge and consent of the owner of the means of conveyance, in that the means of transport shall not be subject to forfeiture[60].

We conclude here by saying that strict liability is an area largely shrouded in uncertainty and vagueness as seen in the crime of smuggling as seen in the crime of smuggling under the CEMA. While indeed, there is room for "Judicial activism as seen above, the position is unacceptable since it may involve a game of hazard, and an accused person may not reasonably known his chances of acquittal. There is, therefore, need for more authoritative legislative action[61].

4. Mental Element of Smuggling

In the medieval criminal law strict accountability was the rule. It was enough if the wrongful act satisfied the requirements of causation. Once the forbidden act could be traced to the conduct of the accused person there was liability without proof of any blame worthy state of mind[62] following a wave of petitions which were addressed to the Lord chancellor as keeper of the king's conscience requiring the rigour of the law to be tampered with mercy, and with the successful intervention of the court of equity, it soon became accepted that *mens rea* was to be presumed to be a necessity in any crime created by statute. In *Fowler, v. Paget*[63]. Lord

[60] Ofor-Amankwah, op.citp.85
[61] Ibid, see section 254 of NCS bill, 2012.
[62] Smith & Hogan op. cit p.42 Lord Mansfield was quoted to have said that the law could not enquire into a man's mind since not even the devil could know a man's mind
[63] (1798) 7 T. R. 509 at 514

Chief Justice Kenyon stated that: "it is a principle of natural Justice and of our law that *actus non facit reum nisi mens sit rea*".

The rule then became established that to constitute a crime, there must be both the forbidden act (*actus reus*) and a blameworthy state of mind (*mens rea*). The requirement of *mens rea*, no doubt, is in accordance with natural justice and modern trends in penology, for why should a man be guilty of an offence which he did not intend to commit?

mens rea comprises of the mental element attendant to the commission of a crime. It has been variously described as "a guilty mind[64] or malicious mind[65] which an accused person must have to be able to convict him for an offence. This calls for an inquiry into the condition or state of mind of the offender as at the time of the offence.

These phrases may be anomalous in certain circumstances. For instance, guilty mind is not necessarily a feeling of guilt by the accused as he may indeed, be acting with a perfectly clear conscience believing his act to be morally, and even legally right, and yet to be held to have *mens rea*[66]. Similarly, a person may have killed out a compassion, but yet held to have acted maliciously in law.

Essentially, the *mens rea* is reflective of the mental attitudes, which a man may have with respect to the *actus reus* of the offence in question[67]. The mental attitude of an offender may take the form of intention, knowledge, recklessness and negligence. These may operate independently or coincide in a crime.

In this paper, the above shall be used in determining the elements of the crime of smuggling. Glanville Williams with respect to this further asserts:

[64] Smith and Hogan .op.cit. p.53
[65] Chukkol op.cit.p. 24
[66] Smith and Hogan. op.cit, p.54
[67] Chukkol .op. cit p. 25. For instance a father killing his terminally ill child to save him (the child) from the agonies of the pain of an ailment

> *Intention is a state of mind of knowledge of any requisite circumstances plus desire that any requisite result will certainly follow. Recklessness is a state of mind essentially negligent, where there is foresight that a certain result will probably or may possibly follow. Inadvertent negligence does not necessarily contain any element of foresight, and it is not a mental state. but is the condition of one who fails to behave in accordance with a proper standard of care*[68].

It is therefore established that apart from crimes of strict liability, the fundamental requirement for criminal liability is that a guilty mind (*mens rea*) must coincide in point of time with prohibited act (*actus reus*)[69]. *mens rea* implies on intention to do a present act, not a future act. Thus, it has been held that one who walks out of prison in a state of automatism does not commit the offence of escape by deciding when he recovers his senses, to remain at large[70]. It has been had however that where the *actus reus* is a continuing act, then it suffices that the offender has *mens rea* during its continuance[71]. or that where the *actus reus* is part of a large transaction it may be sufficient that the offender has *mens rea* during the transaction, though not at the moment the prohibited act was accomplished[72].

The focus here will be anchored on the mental attitude of the smuggler who engages in the crime of smuggling. this may take the form of intention, knowledge, recklessness and negligence.

These species of mental element may operate independently or coincide in a crime, and may be required to be proved either of each other or conjunctively. The question then is wherein lies the burden of proof? The burden ought to be one the prosecution, which is the general notion of criminal jurisprudence.

[68] Williams .op. cit. 56 p.20
[69] Jakeman (1983). cr. APP. Rep 223 (1983) crim. L. R.104 and commentary thereon *Fowler v. Padget* (1798) 7 T. R. 509
[70] *R. V. Scott* (1967). V.R. p 276
[71] *Fagan .v. Metropolitant police commissioner* (1969) 1 Q.D.P.439
[72] *Thabo Meli .v. Queen* (1954) 1 All E.R. 373

The relevant section here to be considered is section 164 of CEMA which is in parimateria with section 145 of the 1958 Act. The section provides that:

> *without prejudice to any other provision of this Act, if any person.*
>
> *(a) knowingly and with intent to defraud the Federal Government of any duty payable thereon, acquires possession of or is in any way concerned in the carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any goods which have been unlawfully removed from a warehouse or government warehouse, or which are chargeable with a duty which has not been paid, or with respect to importation, exportation or carriage coastwise of which any prohibition is for the time being in force; or*
>
> *(b) Is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any such duty chargeable thereon or of any such prohibition as aforesaid or of any provision of this Act applicable to those goods, he shall be liable to a fine of six times the value of the goods or four hundred naira whichever is the greater or to imprisonment for two years or to both*

There is no doubt, that the section makes knowledge and intention to defraud very vital issues regarding the culpability of the accused person. The question here is on whom is the burden to prove the element of the offence. If going by the general notion under our criminal jurisprudence that before a person is criminally responsible for an act constituting an offence, his guilt must be proved beyond reasonable doubt by the prosecution, then we can say that with regard to the CEMA the prosecution has to prove the elements. This is borne out of the provisions of the constitutions as well as the law of evidence.

Section 36(5) of the 1999 constitution provides:

> *Every person who is charged with a criminal offence shall be presumed innocent until the contrary is proved. Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.*

By section 137 of the Evidence Act[73], if the commission of a crime by a party to any proceeding is directly an issue in any civil or criminal proceeding, it must be proved beyond reasonable doubt. The burden of proof is on the prosecution being the person who normally asserts the guilt of an accused person via a charge.

Under the CEMA, the above general notion of criminal jurisprudence seems not to be the rule. It has now become "you are guilty until you prove your innocence", this is made manifest as seen in section 190 which is in parimeteria with section 168 of the 1958 Act. The section provides:

> *In any prosecution for an offence under the customs and excise laws, it shall not be necessary to prove knowledge or intent, but where the prosecution is in respect of an offence of doing anything knowingly or recklessly or with a specified intent, the onus of disproving that he did such thing knowingly or recklessly or with such intent shall be on the defendant*

The implication here is that apart from general guilty intent which is to be read into all statutory offences, the section again places the onus of proving lack of knowledge, recklessness or specific intent where they are made a requirement of an offence on the defendant or accused.

While commenting on section 190 of CEMA, Olugbesan[74] said apart from general guilty intent, which is to be read into all statutory offences, the section again shift the onus of disproving knowledge, recklessness or specific intent where they are made a requirement of an offence. According to the learned author, contrary to judicial decision to the effect that intention or knowledge or recklessness need not be established by the prosecution, where it is not made a specific requirement of an offence and that the defendant has the burden of disproving same, the section did not relieve the prosecution of proof of such specific intent or

[73] cap. E. 14 L.F.N., 2004
[74] Kofo Olugbesan, smuggling, the law, the crime: (Stevman law publication, Lagos, 1993) p.122

knowledge or recklessness in offences created under sections 47, 63 and 164 of CEMA[75]. The author therefore submitted that what the first part of section 190 did is to curtail the general requirement of criminal law on proof of guilty intend where there is no specific mention of it in an offence[76].

We are not in agreement with her submission in that the courts have expressly interpreted section 190, which is without any ambiguity. Her view as expressed is going against the spirit of the section and the legislature may not have intended that.

The only cure here is an amendment of the section, if not it has to be applied the way it is. We further relay on another provision of CEMA which offers a new dimension in support of our view. Section 188 (1) (g) provides:

> *(i) An averment in any process in proceedings, under the customs and excise laws.*
>
> *(g) That the offence was committed or that any act was done in a specified place in Nigeria shall unless the contrary is proved be sufficient evidence of the matter in question.*

This means that when a charge is adequately framed then an offence is said to have been committed. It therefore follows that going by section 188(i) (g) statements of the particular of the offence in the charge is *Ipso facto* sufficient proof of the commission of the offence. Even when specific intent, or knowledge or recklessness is required, the fact that the charge is drafted with sufficient reflection of the ingredients shall be sufficient evidence that the offence is committed, except there is contrary evidence which must emanate from the accused.

Section 188(i) (g) and 190 relieves the prosecutor of any proof except that he is enjoined to ensure that the charge adequately reflects all the material ingredients of the offence and that

[75] Ibid. at p. 122
[76] Ibid. at p. 124

the charge is free from ambiguity or duplicity. In *Board of Customs and Excise .v. Mustapha*[77], it was held that although the evidential burden of proof in customs cases is shifted on the defendant, it would not arise unless it is shown by the charge that an offence is committed.

From the above analysis it will appear that all the prosecutor needs do is to adequately frame the charge and he is relieved of further obligation. Olugbesan[78] however, stated that some cases do not seen to bear this out. It has been held that in case of unlawful importation of prohibited goods or evasion of duty chargeable on the goods, the prosecution must show that the goods so imported where unlawful because they contravene a particular prohibition or that the goods are chargeable, and the duties there on have not been paid[79].

It is submitted however that, the nature of the burden on the accused, is just for him to give some evidence consistent with his innocence which may be reasonably true, even though the court may not be satisfied that it is true, he should and ought to be acquitted. The burden is less than that required of the prosecution in proving their case beyond reasonable doubt[80]. It has also been held that lack of knowledge of the import prohibition order is no ground or proof of innocence[81].

It will be worthwhile to at this point consider the provision as obtainable in some other jurisdictions.

Under the Hawiian Kingdom civil code, which deals with smuggling, there is the same evidential proof as in the CEMA. Section 657[82] provides that:

[77] (1978) 4 F.H.C.R see also B.O.C & E.V., Okon Eder (1980) F.H.C.R 20; B.O.C.E.V. Ajilore 91980) F.H.C.R. 205
[78] Olugbesan . op.cit p. 125
[79] *B.O.C & E. v. Barigbon and Anor.* case No FRC/P/P4/29C/76 delivered on July 25, 1976
[80] Per Anyaebunam C. J. in Board of customs and Excise .v. Chike Okeke (1980) F.H.C.R 204 at 214. See also *Board of customs and Excise .v. Banye* (1960) 1 A. N.L.R. 178; *Nader. v. Board of Customs and Excise* (1965) 1 All N. L. R. 33; *Egbutu. v. Comptroller of customs* (1960) 4 E.N.L.R.4
[81] *Board of Customs and Excise .v. Christiana Udumezue:* Comfort Ikeamaka (1978) 4 F.H.C.R. 45
[82] Civil code of the Hawaiian Island article xxvi

> *In all cases where any person shall be charged with smuggling, or attempting to smuggle, any goods, wares or merchandise, it shall be incumbent on such person to prove the legal importation, and the payment of duties.*

Under the New Zealand customs and Excise Act[83] there is a presumption of payment of duty unless the contrary is proved. Section 239 (4) specifically provides that:

> *In any proceeding, for an offence against this Act, where it is alleged that the defendant intended to commit the offence, the prosecution has the burden of proving that intent beyond reasonable doubt.*

Section 208(a)(b) of the Kenyan customs and Excise Act[84] provides that it shall not, unless it is expressly so provided, be necessary to prove guilty knowledge and the onus of proof shall be on the person prosecuted or claiming anything seized under the Act.

In Ghana the onus of proof is two ways. Section 309(1) of the Ghanaian customs, Excise preventive service management Act, 1993 provides generally that in proceedings under the Act, the proof shall lie on the person who asserts.

This provision is inline with the general criminal jurisprudence of the presumption of innocence. It therefore means that since it is the prosecution that often alleges, the onus is on him. The other way is provided for in sub-section (3) and (4) of the section to the effect that where in proceedings under the Act it is alleged that prohibited or restricted goods were dealt with for the purpose of importation or exportation contrary to the prohibition or restriction, the burden of proof that they were not dealt with for that purpose shall be on the defendant. It provides further that on the hearing or trial of a cause or matter under the Act, it is not necessary to prove guilty knowledge unless otherwise expressly required but the burden of disproving it shall be on the defendant.

[83] New Zealand customs and Excise Act 1996 (reprinted as at 1st October, 2008) part 15
[84] Cap. 47 laws of Kenya, 1996

The provisions, it is submitted, tend to be contradictory. If sub section (1) is saying that whoever asserts must prove which often is applicable to the prosecution, then sub-section (3) and (4) which place the burden on the defendant is unnecessary.

In India the burden of proof according to the Indian customs Act,[85] is on the person from whose possession the goods were seized or any person claiming ownership. This suggests that the burden is on the defendant who was in possession of the seized goods or who claims ownership of the seized goods.

5. Conclusion

Crime since the dawn of history has been with humanity. It is of diverse dimensions ranging from business crime[86], commercial crime[87], corporate crime[88], crimes of capital[89], crimes of the powerful[90], crimes at the top[91], crimes of the suites[92], economic crimes[93], elite deviance[94],

[85] See section 123 Indian customs Act 1963 chapter xiv
[86] M. Clarke, *Business Crime, Its Nature and Control* (Cambridge Polity, 1990)
[87] L. Snider, *Commercial crime in Deviance Conformity of Control in Canadian Society*, ed. Sacco, V. (Toronto Prentice Hall, 1992)
[88] J. Braithwaite, Corporate Crime in the Pharmaceutical Industry, (London: Routledge and Kegan Paul) 1984; M. B. Clinard and P. Yeager; Corporate Crime, (New York; the Free Press, 1990).
F. Pearce and L. Snider; Corporate Crime in the Phamaceutical Industry, Contemporary Debates, (Toronto; University of Toronto Press, (eds) 1995).
[89] R. Michalowski, *Crime of Capital in Order Law and Crime-an Introduction to Criminology* (New York Random House, 1985)
[90] F. Pearce: *Crimes of the Powerful,* (London: Pluto, 1978)
[91] J. D. Douglas and J. M. Johnson, *Crime at the top. Deviance in business and the professionals* (Philadelhia J.B. Lippincoth 1978).
[92] D. A Timmer and D.S.Eitzen, Crime in the Street and Crime in the Suites (Toronto; Allyn and Bacon 1991).
[93] H. Edelhertz, *Economic Crime in the Nature and Prosecution of White-Collar Crime*, National Institute for Law Enforcement and Criminal Justice, Department of Justice, Washington D.C. 1978
[94] D. R. Simon and D.S. Eitzen*, Elite Deviance*; (Toronto Allyn and Bacon, 1986).

occupational crime[95], organizational deviance[96], white-collar crime[97], and our focus in this paper the crime of smuggling[98].

Smuggling therefore is an old phenomenon and it involves the taking of goods illegally across the frontiers. It behooves therefore the need for countries to put in place legislation, that will put in check the activities of the smugglers.

In Nigeria the CEMA is the principal enactment that seeks to enforce the crime of smuggling. It infact regulate the management and collection of duties of customs and excise and for purposes anxillary thereto.

In the management and collection of duties, several breaches of the enactment are likely to occur, and this was the crux in this paper wherein smuggling which is one of the serious areas that may lead to the breaches was considered.

To this end, the mental attitude of the smugglers was analysed, in determining the general mental element of smuggling. The paper found that under the CEMA, the *actus reus* of an offence is all the external manifestations of the human conduct resulting in the forbidden act, hence there is liability under section 50 for failing to deliver to the proper officers an entry outward in the prescribed form.

Also the reversal of the general burden of proof in criminal law by CEMA, was brought to the fore in this paper. It found that often the *mens rea* is subsumed in the *actus reus*, thereby

---

[95] G.S. Green, *Occupational Crime* (Chicago, Nelson hall, 1990).

[96] M.D. Emman and R. J. Lundman, *Corporate and Governmental Deviance: Problems of Organizatioanl Behaviour in Contemporary Society, (New York: Oxford, 1982). M. Punch, Dirty Business Explaining Corporate Misconduct (London: Stevens, 1996); D. Vanghan, controlling Unlawful Oganizational Behaviour, Social Structure and Corporate Misconduct*, (Chicago, University of Chicago Press 1983).

[97] H. Croall: White-Collar Crimes, (Buckingham: Open University Press, 1992); G. Geis and E. Scotland, White collar Crime Theory and Research (eds) Beverly Hil sage, 1980)
D. Nelken, *White-Collar Crime* in Maquire, M. Morgan, R. & Rainer, R. (eds), the Oxford Handbook of Criminology (Oxford Clarendon Press), 1994; and D. Nlekem, White Collar Crime (Aldershort Dart Mouth) (ed.) 1994

[98] Kofo Olugbesan, *Smuggling, The law, The Crime:* (Stevman Law Publications, Lagos 1993).

for instance, if any one imports anything whose importation has been prohibited, he becomes guilty unless he can prove his innocense. The case of *Board of customs and excise .v. Alhaji Ibrahm Barau*[99] which is the *locus classicus* on this issue was considered. Even though the supreme court found that ignorance of a prohibition order is no defence, our submission is agreement with the decenting view of Bello J.S.C which is to the effect that since knowledge is the most essential element of the offence in question, it is therefore a defence to plead lack of it. The reversal of the burden of proof was contended by Ezike[100] as being in line with decree No 5 of 1966 to the effect that the onus of proving unjust enrichment lies on the public officer. This was further amplified by Ige[101] to be innovations introduced by corrupt practices and other related offences Act 2000. We however submit that it is contrary to the principle of law that an accused is innocent until proven guilty, and the onus has always been on the prosecution. We therefore found that to the extent of that inconsistency there should be a rethink leading to an amendment.

The paper considered the law regarding forfeiture of goods, which is absolute meaning that any vehicle used in conveying any smuggled goods is smeared and therefore liable to forfeiture. Even though "Judicial activism" in some instance as exhibited by Ayinde J. in *B.O.C. v. Aro Olajide*[102] by condemning the absolute rule of forfeiture, we found that this will only involve a game of hazard and therefore advocated a more authoritative legislative action as postulated by Ofori Amankwah[103].

In all, the paper is not in support of the reversal of burden of proof, the strict rule of forfeiture and recommends that all the relevant sections on the issue namely 190, 169 and perhaps 164 be amended in line with the general notion of criminal jurisprudence.

[99] op.cit
[100] Op.cit p. 149
[101] Op.cit p. 149
[102] (1984) FHCLR I
[103] Ofori Amankwah, op.cit p.85