

## An Examination of the Scope of Aiding and Abetting in the Process of Crime Commission

Alfred O. Filani<sup>1\*</sup>, Omolade A. Oniyinde<sup>2</sup>

<sup>1</sup>LL.B (Unilag.) LL.M (Unilag.) Ph.D (Ado) B.L Nigeria

<sup>2</sup>LL.B (OAU) LL.M (OAU) Ph.D (Ado) B.L Nigeria

**\*Corresponding Author:** Alfred O. Filani, LL.B (Unilag.) LL.M (Unilag.) Ph.D (Ado) B.L Nigeria,  
Email: [afredfilani@yahoo.com](mailto:afredfilani@yahoo.com)

### ABSTRACT

A number of people may be involved in the commission of an offence either in the planning or actual commission of the offence. Aiding and abetting involve giving assistance, help or facilitating a felon in the process of crime commission. The paper examined the provisions of relevant laws in some selected jurisdictions, elements of the offence and repentance by a secondary party before the crime is committed. The paper concluded that the provisions of the law relating to aiding and abetting in jurisdictions considered are similar and not complex.

**Keywords:** Aiding, Abetting, Assistance, Facilitate, Crime.

### INTRODUCTION

In criminal law, it is not only the person who directly and immediately causes the *actus reus* of a crime that is solely criminally liable for it. It is most likely that a number of persons may be involved in the commission of an offence at particular stages either in planning or commission of the crime. However, the degree of their involvement may vary.<sup>1</sup> The law has to decide what degree of involvement will suffice for criminal liability.<sup>2</sup> The ordinary meaning of “to aid” is to give help, support, assist<sup>3</sup> or facilitate the commission of a crime or to promote its accomplishment.<sup>4</sup>

In criminal law, an individual aids the commission of an offence when, with the necessary *mens rea*, he gives help, support or assistance to the principal offender in carrying

out the crime in question.<sup>5</sup> To abet is to encourage or assist someone, especially, in the commission of a crime.<sup>6</sup>

### DISTINCTION BETWEEN AIDING AND ABETTING

There is judicial and academic disagreement as to whether these terms are to be treated as indistinguishable.<sup>7</sup> In *N.C.B v Gamble*,<sup>8</sup> the court was of the opinion that the two words could be used interchangeably. However, Lord Widgery was of the opinion that these words must be given their ordinary meaning.<sup>9</sup> He stated further:<sup>10</sup>

*We approach S.8 of the 1861 Act on the basis that the words should be given their ordinary meaning, if possible. We approach the section on the basis also that if four words are employed here “aid, abet, counsel or procure”, the probability*

<sup>1</sup>William Wilson (2011) *Criminal Law* Pearson Education Limited, p. 551

<sup>2</sup>Okonkwo, C.O. (1980) *Criminal Law in Nigeria*, 2<sup>nd</sup> Edition. London: Sweet and Maxwell Limited, p. 156

<sup>3</sup>Hornby, A.S (ed.) (2006) *Oxford Advanced Learner’s Dictionary*, 7<sup>th</sup> Edition, Oxford University Press, p. 31. In Law, it means to help somebody to do something illegal or wrong.

<sup>4</sup>Garner, B.A (ed.) (2009) *Black’s Law Dictionary*, 9<sup>th</sup> Edition. (St. Paul Minnesota: West Group) p. 81.

<sup>5</sup> Scanlan, F. and Ryan, C. (1985) *An Introduction to Criminal Law*. London: Financial Training Publications, pp. 100 – 101.

<sup>6</sup>Garner, B.A. (ed.) *Op. at* at p. 5

<sup>7</sup>Clarkson, C.M.V. and Keating, N.M. (1998) *Criminal Law: Text and Materials*, 2<sup>nd</sup> Edition, London; Sweet and Maxwell, p. 503.

<sup>8</sup> (1959) 1 Q. B, p. 11

<sup>9</sup>Attorney General’s Reference (No. 1 of 1975) (1975) 2 All ER, p. 684

<sup>10</sup>*Ibid* at p. 686

is that there is a difference between each of those four words and the other three, because, if there were no such difference, then parliament would be wasting time in using four words where two or three would do.

It has also been argued that the phrases “aid and abet” and “aider and abettor seem unnecessarily verbose. This is because any aid given with *mens rea* is abetment, hence to add the word “aid” to “abet” is not necessary.<sup>11</sup> According to Torcia,<sup>12</sup>

*In connection with the principal in the second degree or accessory before the fact, the terms “aid” and “abet” are frequently used interchangeably, although, they are not synonymous. To “aid” is to assist or help another. To “abet” means, literally, to bait or excite, as in the case of an animal. In its legal sense, it means to encourage, advise or instigate the commission of a crime*

The conclusion, therefore, is that there is a distinction between aiding and abetting even though there are some overlaps and in some cases, they are used interchangeably. For the purposes of this paper, they will be treated as two distinct words.

### THE RELEVANT PROVISIONS IN RELATION TO AIDING AND ABETTING IN SELECTED JURISDICTIONS

Section 7 of the Criminal Code applicable in the Southern States of Nigeria creates four different classes of principal offenders<sup>13</sup>. Under this section, all those who aid, counsel or procure as well as those that actually commit the offence are principal offenders. Section 7 of the Criminal Code states that:

*When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:*

<sup>11</sup>Perkins, R.M and Boyce, R.N. (1982) *Criminal Law* 3<sup>rd</sup> Edition. Foundation Press, pp. 724 – 725.

<sup>12</sup>Torcia, C.E. (1993) *Wharton’s Criminal Law*, 5<sup>th</sup> Edition, p. 88. See also, Plomp of Business (2014) “Aiding and Abetting: The Responsibility of Business Leaders Under the Statute of the International Criminal Court” *Utrecht Journal of International Criminal Court*; 30 (79): 8.

<sup>13</sup>Cap. C38, Laws of the Federation of Nigeria, 2004. See also, Wigwe, C. C. (2016) *Introduction to Criminal Law in Nigeria*. Accra: Mounterest University Press, p. 120

- “every person who actually does the act or makes the omission which constitutes the offence;
- every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- every person who aids another person in committing the offence;
- every person who counsels or procures any other person to commit the offence”.

However, in the Northern States of Nigeria, the Penal Code prefers to refer to those who assist in the Commission of an offence as abettors.<sup>14</sup> Section 85 of the Penal Code states that;

*Whoever abets an offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Penal Code or by any other law for the time being in force for the punishment of such abetment, be punished with the punishment provided for the offence*

Also, section 8 (a) of the Advance Fee Fraud and other Fraud Related Offences Act, 2004 states that any person who conspires with, aids, abets or counsels any other person to commit an offence under the Act is guilty of the offence and liable on conviction to the same punishment as is prescribed for that offence under the Act.<sup>15</sup>

Under the English law, the applicable law is the Accessories and Abettors Act of 1861. The relevant section 8 as amended by the Criminal Law Act, 1977 provides that whosoever shall aid, abet, counsel or procure the commission of any indictable offence whether the same be an offence at common law or by virtue of any law passed or to be passed, shall be liable to be tried, indicted and punished as the principal offender.<sup>16</sup>

In Australia, section 5 of Crimes Act, 1914 as amended by section 5, Crimes Act, 1926 provides that any person who aids, abets, counsels or procures or by act or omission in any way directly or indirectly, knowingly concerned in, or party to, the commission of any

<sup>14</sup>Section 83, Cap. P3, Laws of the Federation of Nigeria, 2004.

<sup>15</sup>Cap A6, Laws of the Federation of Nigeria, 2004. It is also an offence to conspire with, aids, abets or counsels any other person to commit an offence under section 17 of the Money Laundering Act, 2011.

<sup>16</sup>Williams, G. (1978) *Textbook of Criminal Law*. London: Stevens & Sons, p. 289.

offence against any law of the commonwealth whether passed before or after the commencement of the Act, shall be deemed to have committed that offence and shall be punishable accordingly.<sup>17</sup>

However, there is also another provision for aiding the commission of an offence under the Queensland Criminal Code of 1899. The relevant provision is section 7 which provides that:

*When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it (the offence) that is to say:-*

- Every person who aids another person in committing the offence.<sup>18</sup>

Section 107 of the Indian Penal Code is the applicable provision in India. The section provides that;

*A person abets the doing of a thing when:*

*Firstly: instigates any person to do that thing or;*

*Secondly: engages with one or more other persons in any conspiracy for the doing of that thing. If an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or*

*Thirdly: intentionally aids, by any act or illegal omission the doing of that thing*

The relevant portion here is the third which deals with aiding.<sup>19</sup>

Section 21(c) of the Ugandan Penal Code provides for principal offenders.<sup>20</sup> The section provides that when an offence is committed, every person who aids or abets another person in committing the offence may be charged with actually committing the offence. Having stated all the relevant provisions in the various Codes of some selected jurisdictions, it is clear that the

intendment of all the provisions are similar and they all, *albeit* in different forms create principal offenders who may not necessarily commit the actual offence, but have given aid in the commission of the offence.

### ELEMENTS OF THE OFFENCE OF AIDING AND ABETTING

To be guilty of aiding and abetting, a person must at the critical time either render effective aid to the principal offender or else must be present and in some way lend encouragement to him in what he is doing. Assistance given before the offence is committed will ground liability. It is only as regards the conclusion of the offence that time becomes important. Assistance given after the commission of the offence, that is, to enable someone to escape or dispose of evidence or proceeds, does not come within the definition of aiding. So, the assistance given to a murderer after his victim is dead or to a rapist after the act of intercourse has been concluded cannot ground liability for the crime in question.<sup>21</sup> However, in the case of the offence of rape, the act does not conclude at the instant of penetration but continues, at least, as long as the penetration.<sup>22</sup> The offence only ends with withdrawal.<sup>23</sup> Therefore, any assistance rendered after penetration but before withdrawal makes the aider a party to the offence of rape.

In *R v Johnson*,<sup>24</sup> the court held that the accused person committed the offence of aiding, where X had broken into a shop. A, seeing someone approaching, went to the shop, knocked on the window and signalled to X to leave. X did so, taking with him certain property which he had removed. A was convicted as a party to the offence of breaking, entering and stealing for aiding X. The argument that the offence was complete before aid was given was rejected. The court was of the opinion that, although, section 391(6) of the Queensland Criminal Code provides that the act of stealing is not complete until the person taking or converting the thing actually moves it. It does not say that for all purposes, the act is complete once there is a

<sup>17</sup>Williams, G. (1992) "Innocent Agency and Causation" 3 *Criminal Law Forum*, p. 289. See also, Michael Jefferson (2011) *Criminal Law*, Tenth Edition. Pearson Education Limited, p. 177

<sup>18</sup>Section 7 of the Criminal Code as applicable in the Southern States of Nigeria was modeled closely after the Criminal Code introduced into the State of Queensland, Australia in 1899.

<sup>19</sup>The provision of section 107 of the Indian Penal Code is on all fours with the provision of section 83 (c) of the Penal Code of Northern Nigeria and both Penal Codes use the word "abet" for principal offenders.

<sup>20</sup>Ugandan Penal Code, No. 12 of 1950

<sup>21</sup>Smith, J.C. and Hogan, B. (1988) *Criminal Law* 5<sup>th</sup> Edition. London: Butterworth & Co. Publishers Limited p. 124

<sup>22</sup>*R v Mayberry* (1973) Qd. R 211 at 229

<sup>23</sup>*Kaitamaki v The Queen* (1984) 3 WLR, 137. See also, Bamgbose, O. and Akinbiyi, S. (2015) *Criminal Law in Nigeria*. Ibadan: Evans Brothers (Nigeria Publishers) Limited, p. 178

<sup>24</sup>(1973) Qd. R. 303

moving of the thing or an actual dealing with it and neither does it say that a person who is engaged in removing the goods which he intends to steal and which he has, for example, removed outside a safe is not still in the process of stealing the goods while he is still removing them from the building which contains the safe. In essence, any person who renders aid within this period will be guilty of the offence of aiding.

### PRESENCE AT THE SCENE OF CRIME

The minimum condition for liability for aiding is the presence at the scene of crime. Further conditions must be satisfied before a person can be held for the crime. A person is not guilty merely because he is present at the scene of a crime and has done nothing to prevent it. In *R v Coney*,<sup>25</sup> the court decided that non-accidental presence at the scene of crime is not a conclusive evidence of aiding and abetting. What has to be proved, according to Hawkins J. in the case, is stated thus:

*... In my opinion, to constitute an aider and abettor, some active steps must be taken by word, or action with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting. It may be intentional or unintentional, a man may unwillingly encourage another in fact by his presence, by misinterpreted words or gestures, or by his silence or non-interference, or he may encourage intentionally by expressions, or gestures or actions intended to signify approval. In the latter case, he aids and abets, in the former, he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which jury would be justified in finding that he willfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not.*<sup>26</sup>

Also, simply doing nothing, even though present at the scene of crime, is not an act and unless there is a duty to do something. In a case where members of a crowd stood by and watched a

house burning, knowing that an old woman was trapped inside, the court refused to convict the accused but rather stated that “they behaved disgracefully” but that did not bring them within the provision of section 7 of the Criminal Code of Southern Nigeria as to be regarded as participants in murder.<sup>27</sup> In *R v Kennitt, Griffith*, C.J. stated that the mere presence at the commission of an offence would not in itself constitute a person an aider or abettor. There must be something in the nature of assistance or encouragement either by act or word.<sup>28</sup>

### PARTICIPATION BY OMISSION OR INACTION

Although, mere presence at the scene of crime does not ground liability for the offence, however, where a person is under a duty to take positive steps to prevent the commission of an offence and he fails to do so, then, he will be liable. Failure to prevent an offence can amount to participating in it where a person is in a position to prevent it because he is in control of property or for some other reasons. In *Tuck v Robinson, D* was the licensee of a public house and he allowed his customers to drink after hours and thereby committed an offence. His inaction was held to constitute aiding and abetting because he was in a position of authority and control.<sup>29</sup>

In *R v Russel*,<sup>30</sup> a husband stood by and allowed his wife drowned their children. The husband was held guilty of aiding and abetting his wife to commit homicide because his deliberate abstention from action gave encouragement and authority to his wife’s act. Mann J. stated in the case thus:<sup>31</sup>

*Not only was the accused morally bound to take steps to save his children from destruction, but his deliberate abstention from doing so, and by giving the encouragement and authority of his presence and approval to his wife’s act, he became an aider and abettor and liable as a principal offender in the second degree.*

<sup>27</sup> *Akami v R* (1959) W.R.N C.R, p. 153

<sup>28</sup> (1903) St. D. Qd. 17. See also, *Adio v The State* (1986) 2 NWLR, 581 at 591: *Enweanye v Queen* (2007) 5 ACLR, 585 at pp. 590 – 591: *Clark v State* (2007) 5 ACLR, 100 at pp. 124 – 125: *Udedibia v State* (2007) 5 ACLR, 430 at 436 and *Ishola v The State* (2007) 5 ACLR, 437.

<sup>29</sup> (1970) 1 All E. R. 1171

<sup>30</sup> (1933) V. L. R 59

<sup>31</sup> *Ibid*

<sup>25</sup> (1882) Q. B. D. 534

<sup>26</sup> *Ibid*. Per Hawkins J. at p. 557

Furthermore, a Policeman is duty bound to interfere if an offence is being committed. If he remains a silent spectator of an offence incident, he will be in the same position as if he has encouraged doing it.<sup>32</sup> It follows, therefore, that a man who deliberately refrained from using his influence in order to facilitate the commission of an offence might well be guilty of an offence.<sup>33</sup>

### THE MENTAL ELEMENTS IN AIDING

It has been pointed out that a secondary party's *mens rea*, in a sense, requires two elements, namely, knowledge of the principal's *mens rea* and an intent to aid the principal in the commission of his crime.<sup>34</sup>

#### Knowledge and Intent

Secondary participants in the commission of a crime need both *mens rea* as to their own *actus reus* and knowledge or at least willful blindness of the circumstance of the offence. Before a person can be convicted of aiding and abetting the commission of an offence, he must, at least, know the essential matters which constitute the offence. He needs not actually, know that an offence has been committed because he may not know that the facts constitute an offence and ignorance of the law is no defence.<sup>35</sup>

The essential matters which constitute the offence are the circumstances existing at the time when the act of secondary participation is done.<sup>36</sup> The position in England is that knowledge of the criminal purpose coupled with voluntary assistance has been held to be sufficient to incur liability for complicity in a criminal offence.<sup>37</sup> However, the position in

Nigeria is different. Section 7(b) of the Criminal Code imposes liability only when the defendant acts with the purposes of enabling or aiding the commission of an offence while section 83(c) of the Penal Code defines an abettor as one who intentionally aids or facilitates the commission of an offence.<sup>38</sup> The position in England has been criticised to be too wide in its application whilst the interpretation of the provisions under the Nigerian law appears to be that the defendant must actually intend to render assistance by his actions.<sup>39</sup>

There is also the view that the intentional assistance must be given, at least, with knowledge of the crime being committed, otherwise the crime is committed independently of the aider's will.<sup>40</sup>

In India, in order to constitute abetment, the abettor must be shown to have intentionally aided the commission of the crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough compliance with the requirements of section 107 of the India Penal Code. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime.<sup>41</sup> Intentional aiding and active complicity is the gist of the offence of abetment under the third paragraph of section 107.<sup>42</sup>

A person cannot be convicted of aiding and abetting an offence unless he knows the essential matters constituting the offence.<sup>43</sup> It has also been held that to make a person a party to an offence, it must be proved that he knew that the type of offence that was, in fact, committed was intended but it is not necessary to prove that he knew that a particular offence on a particular date was intended.<sup>44</sup>

<sup>32</sup>Section 214 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See also, Aguda, O. (2000) *Understating the Nigerian Constitution of 1999*. Lagos: MIJ Professional Publishers Limited, p. 263 and Hamisu Bala Wadume (2019) "Soldiers Corps, freed me, Wadume Confesses" *The Punch*, Wednesday, August 21 at p. 2. This is a case of how some Nigerian soldiers aided the escape of a man who was alleged to have kidnapped many Nigerians by Killing three policemen who arrested him, cut-off his handcuff and released him. .

<sup>33</sup>Okonkwo, C.O. (1980) *Criminal Law in Nigeria, Op cit at p 162*.

<sup>34</sup>Peter Seago (1989) *Criminal Law*, 3<sup>rd</sup> Edition. London: Sweet and Maxwell, 128

<sup>35</sup>Per Lord Goddard in *Johnson v Youden* (1950) 1 K. B 544 at 546

<sup>36</sup>Smith, J.C and Hogan, B (1988) *Criminal Law*, 5<sup>th</sup> Edition. *Op. cit* at p. 129

<sup>37</sup>*National Coal Board v Gamble* (1959) 1 Q. B 11

<sup>38</sup>This provision is similar to section 107 (c) of the Indian Penal Code

<sup>39</sup>Aguda, A. and Okagbue, I. (1990) *Principles of Criminal Liability in Nigeria*. Heinemann p. 136

<sup>40</sup>Okonkwo, C.O. *Criminal Law, Op. cit* at p. 168

<sup>41</sup>Prakash Srivastava (1992) *Principles of Criminal Law*. Lucknow; Eastern Book Company, p. 68

<sup>42</sup>*Sri Ram v State of V.P* (1975) S.C.C, 495

<sup>43</sup>*Wilson v Dobra* (1955) 57 W. A. L. R, 95

<sup>44</sup>*R v Brainbridge* (1959) 43 Cr. App Report, 194. In the instant case, D had purchased some oxygen-cutting equipment on behalf of a third party who he knew was going to use it for an illegal purpose, although he was not sure what the purpose was. The court held that D, to be liable, would need to know more than that the purpose was illegal. Although, he did not need to

In *D. P. P for Northern Ireland v Maxwell*,<sup>45</sup> where D was a member of a terrorist organisation. He was told to take some men to a cinema. He knew that their purpose was illegal but he did not know the details. He found out later that they had planted a bomb and was convicted of abetting an act done with intent to cause an unlawful explosion. The court held that he did not need to know the precise weapon and method to be used by the others. He knew they were terrorists. He knew their purpose would be to endanger life and property and that was enough. In *National Coal Board v Gamble*, Delvin J. held that “a person who supplies the instrument for a crime or anything essential to its commission aids in the commission of it, and if he does so knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting”.<sup>46</sup>

### UNFORSEEN CONSEQUENCES

The secondary party is liable to the same extent as the principal for the consequences which flow from the agreed or authorised acts, whether they are foreseen or not. However, if one party goes beyond what is authorised or agreed upon, he alone will be liable for the unforeseen consequences. The other party may not be liable for the unforeseen consequences of that unauthorised act. In *R v Morris*,<sup>47</sup> D1 and D2 were involved in a fight with the victim. D1 had a knife and used it to kill the victim. D2 denied having the knife. He was convicted for manslaughter. He appealed against the conviction. The court held that if one party goes beyond what has been previously agreed upon and does something completely unexpected, it is outside the common purpose and the other party is not liable. D2's conviction was quashed.

In *Chang Wing – Siu v*,<sup>48</sup> three persons were charged with murder. They had gone armed with knives to the victim's flat supposedly to obtain payment of a debt. They said they had acted in self-defence in killing the victim. The third person denied knowledge of the knife. The court held that the parties were liable if they contemplated the possibility of really serious injury or death. A defendant would not, therefore,

know all the details he would need to know, for example, that it was going to be used for breaking and entering.

<sup>45</sup>(1978) 3 All E.R, 1140

<sup>46</sup>(1959) 1 Q.B 11 at p. 20

<sup>47</sup>(1966) 2 Q. B. 110

<sup>48</sup>(1984) 3 W. L. R. 677

be liable if he had considered the risk so negligible as not to be worth thinking about, and in that sense, it could be said to be unforeseen. This means that if a secondary party considers the possibility of a consequence or circumstance as so remote as to be negligible, it will not be part of the common purpose if it occurs or exists.

### RECEIVING STOLEN PROPERTY

The offence of receiving stolen property can be committed by a person who is proved to have aided in disposing of the stolen property, although he has not either alone or jointly with another, had it in his possession, provided, he knew it to have been stolen. In *R v Oni*,<sup>49</sup> the 1<sup>st</sup> accused person admitted assisting another person who wished to sell a stolen record player. The assistance he rendered was to introduce him to someone as a possible buyer. He, however, denied knowing that the record player was stolen and that the other person had told him that he bought the article from overseas. Since there was no evidence that he knew that the record player was stolen, he was discharged and acquitted.

### ACCESSORIES AFTER THE FACT

A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.<sup>50</sup> The *actus reus* of the offence is knowing receiving, harbouring or assisting an offender in order to enable him to escape justice.<sup>51</sup> This assistance can be in form of assisting an offender to escape arrest, trial or punishment. The offence can be committed by taking active steps to conceal or destroy evidence through which the offender can be effectively prosecuted.<sup>52</sup> A wife is not an

<sup>49</sup>(1949) 19 N.L.R, p. 61

<sup>50</sup>Section 10 of the Criminal Code

<sup>51</sup>Gour, H.S (1983) *Penal Law of India*, of Southern Nigeria 3<sup>rd</sup> Edition, Allahabad Law Publishers, p. 1692. See also, Lord Denning in *Sykes v DPP* (1962) A.C, p. 528 and Elliot, D.W. (1963) “The *Mens Rea* of Accessories After the Fact” *Crim. L. R.* pp. 160 – 161.

<sup>52</sup>Douglas Brown *et al* (1968) *An Introduction to the Law of Uganda*. London, Sweet and Maxwell, p. 70. In *R v Ukpe* (1938) 4 W.A.C.A, p. 141, the court held that hiding the deceased's bicycle after being killed was an act of assistance. See also, *R v Enwenoye* (1955) 15 W.A.C.A, p. 1 *Okabichi v The State* (1975) 9 N.S.C.C, p. 124, *R v Matthew* (1982) 4 Cr. App. Report, p. 233. See Generally, Filani, A.O.

accessory if she assists her husband to escape punishment and a husband is not an accessory if he assists his wife to escape punishment.<sup>53</sup>

### ACQUITTAL OF PRINCIPAL OFFENDER

The absence of a principal offender does not necessarily mean there is no problem. Provided it can be proved that an offence was committed, a secondary participant can be convicted. However, where the principal offender has been acquitted of the offence, such an acquittal does not necessarily mean that no offence has been committed. It follows therefore that the secondary offender can still be convicted provided that the evidence against him is not identical with the evidence upon which the principal offender was acquitted.<sup>54</sup>

However, if the acquittal of the principal offender means that no offence has been committed, then, there cannot be secondary liability. In *Thorton v Mitchell*,<sup>55</sup> a conductor of a bus was charged as a secondary party to careless driving after helping a driver to reverse. The driver was acquitted on the basis of carelessness. The conductor was acquitted too. If there was no careless driving, then, there was no offence to be aided and abetted.

A principal offender may be acquitted for other reasons even if an offence has been committed. For instance, where there is no *mens rea* or where he has a valid defence. In *R v Bourne*,<sup>56</sup> a husband forced his wife to have sexual intercourse with a dog. The wife could be the principal offender in the crime of buggery. But because of the duress factor, which is a valid defence, she was not charged. There was, however, the *actus reus* of buggery. The court held that the husband could be charged with and convicted of this offence.

---

(2016) Accessories After the Fact: A Critical Analysis” *International Journal of Education and Research*, p. 211

<sup>53</sup>Section 10 of the Criminal Code. The provision of section 10 protects the wife more than the husband. For example, a husband is an accessory if he assists his wife’s confederates in crime to escape punishment. But the wife is not liable for assisting the husband’s confederates in crime if done in his presence or by his authority. With regard to the offence of conspiracy, section 34 of the Criminal Code states that a husband and wife of Christian marriage are not criminally responsible for a conspiracy between themselves alone.

<sup>54</sup>*Morris v Tolman* (1923) 1 K.B. 166

<sup>55</sup>(1940) 1 All E.R 339

<sup>56</sup>(1952) 36 Cr. App. Rep. 125

The above decision was followed in *R v Cogan and Leak*.<sup>57</sup> The accused had invited a friend to have intercourse with his wife telling him that his wife was a willing partner. During the intercourse, the wife laid passively with her face covered. The jury found that the friend had honestly but unreasonably believed that the woman was consenting and so his conviction for rape was quashed. The husband knew that his wife was not consenting, since he had terrorised her into consenting. But, there is a rule in English law that a husband cannot be convicted as a principal offender in the rape of his wife.

The question then is: can he be convicted as a secondary offender to the rape of his wife by the friend who had now been acquitted on the ground of lack of *mens rea*? The court held that he could. Thus, the overall effect of the decisions in the two cases mentioned above would seem to be that if A gets B to commit an offence with the help of A, ‘A’ can be convicted as a secondary party to that offence even though B, the perpetrator has a defence to the charge. Therefore, where it can be established that an offence has been committed, there can be a conviction of the secondary party even though the principal offender is (i) not known or (ii) acquitted at the same time or subsequently, provided that the evidence against the secondary party is not the same as that against the principal.

The next question is: can the secondary party be convicted of an offence graver than that of the principal? In *R v Richards*,<sup>58</sup> the court held that a party cannot be convicted of a graver offence than the one committed by the principal. However, in *R v Howe*,<sup>59</sup> the court decided that a secondary party can be guilty of a graver offence than the one committed by the principal. Thus, where A and B return to A’s house one night and discover A’s wife in bed with X and B seeing A boiling with rage, hands him a rod and urges him to smash X’s skull. If A were to do this, then, he would be charged with murder and B would be charged as a secondary party. A however, is likely to raise the defence of provocation which will mean that he will be convicted only of manslaughter. B, however, cannot rely on such a defence and he will, therefore, be convicted of murder, while A, the principal, is convicted of manslaughter. This follows the reasoning in Howe’s case. Since

---

<sup>57</sup>(1976) Q. B 218

<sup>58</sup>(1974) Q. B 776

<sup>59</sup>(1987) 1 A. C. 417

both defendants have the same *mens rea*, the difference lies in a mitigating defence of provocation available only to A. It follows, therefore, that the secondary party, B, would be convicted of a graver offence which is murder while A, the principal, is convicted of a lesser offence – manslaughter.

### REPENTANCE BY A SECONDARY PARTY BEFORE THE CRIME IS COMMITTED

If an alleged secondary party repents before the offence is committed, he may escape liability if he repents at a sufficiently early stage and does all he reasonably can to avert the commission of the crime. This is obviously to allow a person avoid criminal liability by withdrawing from a criminal venture before it takes place. However, where the accused has given help to other who then commits a crime, it should not suffice that the accused has simply resolved to have nothing more to do with the venture. What constitutes an effective repentance? This will depend upon the nature of the assistance given, the type of crime involved and the timing of the repentance. Mere repentance without any action leaves the accused still liable of the crime.<sup>60</sup>

To be effective, the notice of withdrawal must be such as will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it, he does so without further aid and assistance of those who withdraw.<sup>61</sup> Where the accused's part in the crime has consisted solely in giving advice and encouragement, he can effectively withdraw simply by telling the other parties that he is withdrawing his encouragement, where the offence is about to be committed, if necessary to prevent the commission of the crime.<sup>62</sup>

An accused person who relies on dissociation from the unlawful aiding must be able to point to any evidence which shows distinctly the dissociation – evidence which shows that he made to the other party an unequivocal timely communication of his intention to withdraw from the common purpose.<sup>63</sup> Therefore, what constitutes effective repentance depends on the facts of each case and it is for the court to decide. As far as the law of conspiracy is concerned, repentance by a secondary party after the conspiracy is formed is irrelevant. But

he will not be liable for crimes committed after the conspiracy in view of his timely repentance.<sup>64</sup>

### VICTIMS AS PARTIES TO AN OFFENCE

It is trite that a statute that creates a crime does not generally provide that it shall be an offence to aid, counsel or procure it. Such a provision would be superfluous as it follows by implication of law.<sup>65</sup> There is an exception to this rule. Where the statute is designed for the protection of a certain class of persons, it may be construed as excluding by implication the liability of any member of that class who is the victim of the offence, even though, that member does, in fact, abet, counsel or procure the offence.<sup>66</sup> This is the rule in Tyrell's case. The rule is to the effect that where a statute is designed to protect a certain class of individuals, such individuals cannot be held to be a party to the crime however willing they were for the crime to be committed against them.<sup>67</sup> In the said case, a girl between the ages of 13 and 16 abetted the accused to have unlawful sexual intercourse with her. Being an offence committed by the accused under section 5 of the Criminal Law Amendment Act, 1885, it was held that the girl could not be convicted of abetting because the Act was passed for the purpose of protecting women and girls against themselves. Another aspect of aiding the commission of an offence with regard to the victim of the said offence is the taking and giving of bribes. Bribery can be defined as the corrupt payment, receipt or solicitation of a private favour for official action.<sup>68</sup> Bribery involves both the giver and the taker.<sup>69</sup> The victim who has aided the taking of

<sup>60</sup>*R v Becerra and Cooper* (1976) 62 Cr. App. Rep 212

<sup>61</sup>*R v Whitehouse* (1941) 1 WWR 112

<sup>62</sup>*R v Whitefield* (1984) 79 Cr. App Rep. 36

<sup>63</sup>*R v Saylor* (1963) Q. W. N. 14

<sup>64</sup>In *Mulcaphy v R*, (1968) L. R., 3 H.L 308 at 318, Willes, J declared that the gist of the offence of conspiracy lies, not in doing the act or effecting the purpose for which the conspiracy is formed but in the forming of the agreement between the parties. This dictum has been adopted and followed in *Dattatraya v State of Maharashtra* 1982 Cr. L.J p. 1025; *R v Rogerson* (1992) 66 A.L.J.R 500 at 503 and *Oladejo v State* (1994) 6 NWLR (pt. 348) 101 at 127

<sup>65</sup>Smith, J.C and Hogan, B. *Criminal Law Op. cit* at p. 158

<sup>66</sup>*Ibid* at pp. 158 – 159

<sup>67</sup>(1894) 1 Q. B. 710

<sup>68</sup>Bryan, G.A (ed.) *Black's Law Dictionary, Op. cit* at p. 217

<sup>69</sup>United Nations Office on Drugs and Crime (2004) *The Global Programme Against Corruption: UN Anti-corruption Toolkit*, 3<sup>rd</sup> Edition, p. 2. See also, 6<sup>th</sup> and 7<sup>th</sup> Pre-ambular paragraphs of the "African Union Convention on Preventing and Combating Corruptions"



## An Examination of the Scope of Aiding and Abetting in the Process of Crime Commission

bribes is also guilty of aiding the offence of taking bribes.<sup>70</sup>

### CONCLUSION

Having analysed the penal provisions of the various jurisdictions under study, it is clear that the provisions relating to the offence of aiding

and abetting are relatively similar. In fact, cases from one jurisdiction are often used to emphasise the various elements of the offence in another jurisdiction. For instance, English cases, are often cited in India, Nigeria and Australia. This goes to show that the ingredients of the offence are similar in all these jurisdictions.

**Citation:** Alfred O. Filani, Omolade A. Oniyinde, "Regulating An Examination of the Scope of Aiding and Abetting in the Process of Crime Commission", *Journal of Law and Judicial System*, 2(4), 2019, pp. 17-25.

**Copyright:** © 2019 Alfred O. Filani. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

---

adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union in Maputo on 11<sup>th</sup> of July, 2003 and section 21, Corrupt Practices and other Related Offences Act, Cap C31, LFN, 2004.

<sup>70</sup> Section 98A(1(a) and (b) of the Criminal Code, Cap. C38, LFN, 2004 states that any person who corruptly gives, confers or procures any property or benefit of any kind to on or for a public official or corruptly promises or offers to give or confer or to procure or attempt to procure any property or benefit of any kind to; on or for a public official or to, on or for any other person on account of any such act, omission, favour or disfavor is guilty of an offence and is liable to imprisonment for seven years.