

# ACCESSORIES AFTER THE FACT: A CRITICAL ANALYSIS\*

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## Introduction

The criminal law in various jurisdictions makes distinctions among persons who are *participes criminis* in respect of crimes, whether as principals or accessories.<sup>1</sup> This distinction is usually aimed at determining the degree of involvement which will suffice for criminal responsibility commensurate with the level of participation in the commission of crime.<sup>2</sup> The Privy Council observed in *Surujpaul v. R* that:

*A simple but important point is sometimes overlooked, namely that when the law relating to principals and accessories as such is under consideration, there is only one crime, although there may be more than one person... criminally liable in respect of it; if there are more than one person... then the question arises as to the category in which each one is to be placed.*<sup>3</sup>

One of such categories are those referred to generally as accessories after the fact.<sup>4</sup> According to Lord Hale, an accessory after the fact may be where a person knowing a felony to have been committed, receives, relieves, comforts or assists the felon.<sup>5</sup> Therefore, any assistance given to any such person in order to hinder his being apprehended or tried or suffering the punishment to which he is condemned would suffice to make a man an accessory after the fact.<sup>6</sup>

<sup>1</sup> In Criminal Law and Law of Evidence, these persons are generally referred to as accomplices. See *Okereke v The State* (1998) 3 NWLR (pt. 540) p. 75

<sup>2</sup> Okonkwo, C. (1980) *Okonkwo and Naish on Criminal Law in Nigeria*. Second Edition, London, Sweet and Maxwell, p. 156

<sup>3</sup> A. O. Filani, Department of Public Law, Faculty of Law, Ekiti State University, Ado Ekiti (1958) WLR, p. 1050 at 1053

<sup>4</sup> In most Jurisdictions, being an accessory after the fact to a crime is in itself a crime defined in relevant sections of the law and with the punishment duly provided.

<sup>5</sup> *History of the Pleas of the Crown*, p. 618 quoted by Gour, H. S (1983) *Penal Law of India*, 3<sup>rd</sup> Edition, Vol. 2, Allahabad, Law Publishers, p. 1692.

<sup>6</sup> Lord Denning in *Sykes v. DPP* (1962) A. C p. 528 at 561. See also Elliot, D.W (1963) "The Mens Rea of Accessories After the Fact" *Crim. L.R* pp. 160 – 161

The law in Nigeria, Uganda, England, India and Australia with regard to accessories after the fact manifests great variations not only in terminology but also in definition and content. Under the Nigerian Criminal Code, the Penal Code of Uganda and the various criminal law legislations of the States of Australia, the term “accessories after the fact” is used. In England, except perhaps in relation to treason, there are no more accessories after the fact as that part of the Criminal Law Act of 1967 which substituted it with the offence of assisting an offender to escape apprehension or prosecution.<sup>7</sup>

Under the Nigerian Penal Code, there are no accessories after the fact. However, the Code creates offences under the heading of “screening of offenders” which cover the circumstances under which liability as an accessory after the fact will arise.<sup>8</sup> The Indian Penal Code likewise does not create any separate category of accessories after the fact. It does however provide for substantive offences in certain cases where the role played is that of an accessory after the fact. These offences may generally be referred to as offences relating to “screening” or “harbouring” of offenders.<sup>9</sup>

### The Relevant Provisions

Under the Criminal Code, 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 of the offence.<sup>10</sup> Section 167 of the Penal Code provides:

*whoever knowing or having reason to believe than an offence has been committed, causes any evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment, or with a like intention or intending to prevent his arrest gives any information respecting the offence which he knows or believes to be false or harbours or conceals a person whom he knows or has reason to believe to be the offender, shall be punished with*

<sup>7</sup> Section 4. See also Glanville Williams (1975) “Evading Justice” *Crim. L.R.* p. 430, Stephen Mitchell and Richardson, P.J (eds.) (1988) *Archbold Pleading, Evidence and Practice in Criminal Cases*, 43<sup>rd</sup> Edition, London, Sweet and Maxwell, p. 2704.

<sup>8</sup> Richardson, S.S (1987) *Notes on the Penal Code Law of Northern Nigeria*. 4<sup>th</sup> Edition: Zaria, A.B.U Press, p. 65

<sup>9</sup> Syed Shamsul Huda (1982) *The Principles of the Law of Crimes in British India*. Lucknow, Eastern Book Company, p. 90, Nigam, R.C (1965) *Law of Crimes in India*. London, Asia Publishing House, p. 142, The Indian Institute (1962) *Essays on the Indian Penal Code*. Bombay, N. M Tripathi Private Limited, p. 85, Prakash Srivastava (1992) *Principles of Criminal Law*. Lucknow, Eastern Book Company, pp. 64 - 65

<sup>10</sup> Section 10 of the Criminal Code, Cap. C.38, LFN, 2004. This provision is in *pari materia* with the first part of section 10 of the Criminal Code of Queensland as well as the first part of section 376 of the Penal Code of Uganda

*imprisonment which may extend to five years and shall also be liable to a fine.*<sup>11</sup>

Kindred offences are created in sections 169 and 170 of the Code.<sup>12</sup>

In England, by section 1 of the Criminal Law Act, 1976, the distinction between felonies and misdemeanours was abolished and it was provided that henceforth the law applicable to misdemeanours should apply wherever a distinction has previously been drawn between the two classes of offences. A consequence of this was that the disappearance of liability for a felony as an accessory after the fact, since such liability never existed at common law in the case of misdemeanours. Notwithstanding this, the Criminal Law Revision Committee upon whose recommendation the Act of 1967 was based thought that conduct which would have amounted to being accessory after the fact to crime should not cease to be criminal. Consequently, it recommended a provision generally similar to the present offence of being accessory after the fact.<sup>13</sup> Section 4(1) of the Act therefore provides:

*Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence*

### **Elements of Offence**

Under the Criminal Code, the act constituting the offence of being an accessory after the fact is receipt or assistance given to an offender after the commission of a crime. The terms “receipt” and “assistance” must be understood in very general respects. It seems as if mere reception into one’s house for a few moments might be enough.<sup>14</sup> Assistance can be rendered through such acts as hiding the offender, or providing him with food, transport or other such facilities or conveniences.<sup>15</sup> Helping to dispose of a body after the offence of murder would clearly constitute assistance.<sup>16</sup> In *R v. Ukpe*,<sup>17</sup> three men came to the house of the accused and told him that they had killed a man and left a bicycle with him. On the following day, he went with them to where the body was lying, there they dismembered and buried it. It was held that these facts constituted the accused on accessory after the fact.

<sup>11</sup> Cap. P3, LFN, 2004

<sup>12</sup> These offences include taking gratification to screen an offender from punishment (S.168), offering gratification in consideration of screening offenders (S.169) and punishment for screening of persons who have committed the offences of robbery or brigandage (S.170).

<sup>13</sup> Pace, P.J (1978) “Impeding Arrest – A Wife’s Right as a Spouse” *Crim. L.R* p. 82.

<sup>14</sup> C.O Okonkwo, *Op. Cit.* p. 177

<sup>15</sup> Douglas Brown *et al* (1968) *An Introduction to the Law of Uganda*. London, Sweet and Maxwell, p. 70

<sup>16</sup> *R v. Enweonye* (1955) 15 WACA, p.

<sup>17</sup> (1938) 4 WACA p. 141. See also *Mohammed v The State* (1980) N.S.C.C Vol. 12, p. 152.

Accordingly, the acts that constitute the offence of accessory after the fact include:

- i. causing evidence of the commission of an offence to disappear; or
- ii. giving information which the accused knows or believes to be false; or
- iii. harbouring a person who he knows or has reason to believe to be the offender; or
- iv. concealing such person.<sup>18</sup>

In *Okabichi v. The State*,<sup>19</sup> the seven appellants were charged in the High Court, Lokoja for the killing of one Daniel Abutu. The evidence before the court revealed that only the 1<sup>st</sup> Appellant originally knew about the death of the deceased and that it was after the death of the deceased that the 1<sup>st</sup> Appellant sent the other appellants to the place where the corpse of the deceased laid and instructed them to carry the corpse therefrom and hang it on a tree in the bush to give the impression that the deceased had hanged himself. Those Appellants did as they were instructed by the 1<sup>st</sup> Appellant. The learned trial judge convicted them of culpable homicide punishable with death pursuant to section 221 of the Penal Code. On appeal to the Supreme Court, it was held that there was no evidence of complicity in the killing of the deceased against the 3<sup>rd</sup> – 7<sup>th</sup> appellants. However an offence of screening pursuant to section 167 of the Penal Code was disclosed.

With respect to the giving of information which is known or believed to be false, this must presumably be to those who are interested in covering the offender.<sup>20</sup> In *Mirza v. The State*,<sup>21</sup> it was held that section 201 of the India Penal Code looks upon a person giving false information with the intention of screening an offender as an accessory after the fact and makes him culpable as an offender committing an offence against public justice.

The word “harbour” as used in section 167 of the Penal Code is defined in section 40 of the Penal Code.<sup>22</sup> The Penal Code defines the “harbour” to include supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or assisting of a person by any means and in any other way to evade arrest or apprehension. The word “conceal”<sup>23</sup> must be taken to refer to its ordinary meaning being to hide, cover, keep from sight or prevent the discovery of the offender. It must be noted however that

<sup>18</sup> The word “evidence” as used here refers not to evidence in its extensive sense as used in the Evidence Act, but to evidence in its primary sense as meaning anything that is likely to make the crime evident.

<sup>19</sup> (1975) N.S.C.C Vol. 9, p. 124

<sup>20</sup> Gour, H.S. *Op. Cit.* p. 1694

<sup>21</sup> (1983) Cut. LT. p. 38

<sup>22</sup> The word “harbour” is equally used in section 212 and defined in section 52A of the Indian Penal Code.

<sup>23</sup> The word conceal is not defined in the Nigerian Penal Code and the Indian Penal Code.

mere knowledge of the whereabouts of the offender does not necessarily amount to harbouring him.<sup>24</sup>

Under section 4(1) of the Criminal Law Act, 1967 of England, the act constituting the offence of assisting an offender is the doing “without lawful authority or reasonable excuse, any act”. In defining the scope of the words “any act” as used in this section, Smith and Hogan noted as follows:

*Once the arrestable offence has been proved, the remaining element in the actus reus – any act – is almost unlimited. There must be act... the common instances of the offence will undoubtedly correspond to the typical ways of becoming an accessory after the fact under the old law – by concealing the offender, providing him with a car, food or money to enable him escape or destroying evidence against him.*<sup>25</sup>

In *R v. Matthew*,<sup>26</sup> it was held that the accused who allowed an offender wanted by the police to stay in his flat for about a month committed an offence under section 4(1) of the Criminal Law Act of 1967.<sup>27</sup>

### The Mental Element

Under the Criminal Code, the mental element required for the offence of being an accessory after the fact is knowledge of the guilt of the person assisted plus an intention to facilitate his escape from punishment. The phrase “to his knowledge guilty of an offence” will presumably have to be given a loose definition, for on a strict interpretation of guilty, there may be the necessity of allowing that the person assisted had already been convicted. This will be contrary to the intention of the draftsman and especially so where a separate offence of “harbouring escaped prisoners” has been provided for in the Criminal Code.<sup>28</sup>

Under the Penal Code, where the act involves causing any evidence of the commission of the offence to disappear, the mental elements are:

- i. knowing or having reason to believe that an offence has been committed;
- ii. intention of screening the offender from legal punishment.

Where the act involves the giving of false information, the mental elements are:

- i. knowing or having reason to believe that an offence has been committed;
- ii. knowing or having reason to believe that the information given in respect of the offence is false;

<sup>24</sup> Gour, H.S. *Op. Cit.* p. 1775

<sup>25</sup> Smith, J.C and Hogan, B (1988) *Criminal Law*, 5<sup>th</sup> Edition. London: Butterworth & Co. Publishers, p. 760

<sup>26</sup> (1982) 4 Cr. App. Report, p. 233

<sup>27</sup> See also *R v. Hunter* (1984) 6 Cr. App. Report, p. 54, *R v. Mosley* (1988) 10 Cr. Appeal Report, p. 55

<sup>28</sup> Section 152 of the Criminal Code

- iii. intention of preventing the arrest of the offender or to screen the offender from legal punishment.

Where the act consists of harbouring or concealing an offender, the mental elements are:

- i. knowing or having reason to believe that offence has been committed;
- ii. knowing or having reason to believe that the person harboured or concealed is the offender;
- iii. intention of preventing the arrest of the offender or to screen the offender from legal punishment.

The requirement that the accused must have “known or had cause to believe” envisages actual knowledge. Where the question is whether the accused “had cause to believe” presupposes that no one can be said to have reason to believe a thing unless he has sufficient cause to believe that thing. In *Nathu v. State of Uttah Predesh*,<sup>29</sup> it was held by the Supreme Court of India that before a conviction under section 201 of the India Penal Code can be recorded, it must be shown to the satisfaction of the court that the accused knew or had reason to believe that an offence has been committed and having got this knowledge, tried to screen the offender by doing an overt act.

As to the giving of false information regarding an offence, if the accused knew or had cause to believe that an offence had been committed, and yet gave false information regarding that offence, it will be easy to conclude that he knew or had cause to believe that the information he gave in respect of the offence was false.

With regard to knowing or having cause to believe that a person harboured is the offender, it may be said that if such knowledge or belief were not a requirement, then a person may be convicted for merely extending his hospitality to someone in distress. In cases of harbouring, whether an accused can be held to “have cause to believe” must depend on the facts, since the circumstance which will be held sufficient to put a man on enquiry must necessarily vary from case to case.

The underlying intention in all these situations must be to screen the offender from legal punishment. Actual intention must be proved as the mere likelihood of the act of the accused having that effect is not enough. What makes the crime imputable is the hindrance of public justice by assisting the offender to escape the vengeance of the law. Therefore, where the accused for example, harbours a man, not with the intention of screening him from punishment, but rather to prevent his escape, he cannot be guilty of harbouring him. On intent, it is clear that nothing short of positive intention suffices. It is not enough that the accused realises that what he is doing will have the effect of impeding the arrest or prosecution of the principal offender, this must be his motive in doing the act.<sup>30</sup>

<sup>29</sup> (1979) A.I.R (S.C) p. 1245

<sup>30</sup> Peter Seago (1989) *Criminal Law*, 3<sup>rd</sup> Edition. London, Sweet and Maxwell, p. 137

It is however unnecessary that the person assisted should have benefited from the action of the accused. This will not affect the liability of the accused once his intention is established to be impeding the apprehension or prosecution of the principal offender.<sup>31</sup> An intent to impede apprehension or prosecution can readily be referred from such conduct of the accused that as he must have known, tended to that end, where no other reasonable explanation for his conduct can be found.<sup>32</sup> It was held in *R v. Craig*<sup>33</sup> that a person was not guilty as an accessory after the fact merely because he received or handled stolen goods, if his intention was to profit from them and not specifically to help the thief. An accused is not also guilty if by acts done with the object of avoiding his own arrest or prosecution, he knowingly impedes the arrest or prosecution of another.<sup>34</sup> But if the accused has a dual object of saving himself and others from arrest or prosecution, he is guilty.<sup>35</sup>

### Other Relevant Considerations

It must also be confirmed that an offence had actually been committed by a person before the accused can be held liable. The substantive offence committed by the principal offender must be complete at the time of the assistance given to make the accused an accessory after the fact, otherwise, he may well fall into any of the other classifications of parties to crime. For instance, if a person wounds another mortally, and after the wound is inflicted, but before death ensues, a person assists or receives the delinquent, this does not make him accessory after the fact to the homicide, for till death ensues, that offence is not committed.<sup>36</sup>

The fact that an offence must have been committed by the principal offender before the accused can be held liable was confirmed as a requirement under section 167 of the Nigerian Penal Code in *Idi Garandiya v. Native Authority*.<sup>37</sup> The court held in *Waris v. Uttah Pradesh* that the person who is harboured must be an offender and this character of the person can be proved only when he has judicially been found to be a person guilty of an offence.<sup>38</sup> If he is ultimately acquitted or found innocent or falsely roped in, it cannot be said that the person who was harbouring the said offender was actually harbouring an offender within the meaning of the law.<sup>39</sup>

Under the Nigerian Criminal Code, where a person is charged with being an accessory after the fact, the prosecution must prove the commission of the principal

<sup>31</sup> Peter Murphy (ed.) (1991) *Blackstone's Criminal Practice*. London, Blackstone Press Limited, p. 552, para. B14:14.

<sup>32</sup> Gilanville Williams, *Op. Cit.* p. 439

<sup>33</sup> (1962) 3 All. ER. P. 961

<sup>34</sup> *R v. Jones* (1949) 1 K.B. p. 194

<sup>35</sup> *R v. Kemp* (1968) Crim. L.R p. 33

<sup>36</sup> Turner, J.W.C (ed.) (1964) *Russel on Crimes*, 12<sup>th</sup> Edition. London, Stevens and Sons, p. 166

<sup>37</sup> (1962) NNCN, p. 38

<sup>38</sup> (1983) A. C. p. 134. See also Malik, P.L (1974) *The Criminal Court Handbook*. Lucknow, Eastern Book Company, p. 61

<sup>39</sup> Gour, H.S; *Op. Cit.* p. 1696

offence. However, the Australian Court decided in *R v. Williams*<sup>40</sup> that the fact that subsequent to the conviction of a person as accessory after the fact, the person alleged to have been the principal offender was acquitted of the crime is not a ground for quashing the conviction. But the fact that the principal offender pleaded guilty to the charge against him will not necessarily result in the conviction of an alleged accessory after the fact as such accessory is entitled to challenge the evidence called to prove the commission of the principal offence.<sup>41</sup>

The position under section 4(1) of the Criminal Law Act, 1967 of England, like in other jurisdictions, is that the prosecution must first prove that an arrestable offence has been committed. However, it is not necessary that someone has been convicted of the offence and it would probably be no defence that the principal offender was for some reasons exempted from prosecution.<sup>42</sup> It was held in *R v. Donald* that a prior conviction of the principal offender is not a pre – requisite to a conviction for an offence of assisting an offender contrary to section 4(1).<sup>43</sup> In a similar manner, the conviction of the principal offender is not conclusive proof of the guilt of the assistant even though the prior conviction of the principal offender will raise a presumption that the assistant was guilty. In such a case, it will be for the defence to prove, at the trial of the assistant on a balance of probabilities that the conviction of the principal offender was wrong.<sup>44</sup> Evidence of the acquittal of the principal offender at a previous trial is not admissible at the assistant's trial. However, even where the assistant and the principal offender are tried together, evidence admissible against one might not be admissible against the other. Thus, an admission by the principal offender that he committed the offence will be inadmissible against the assistant on a charge of assisting him.<sup>45</sup>

Another common feature of the offences in all the jurisdictions is that the assistance must be to the offender eluding apprehension or prosecution and not to his effectuating the plan to which the offence was part, or to his reaping the fruits thereof. Erie J. declared in *R v. Hansill* that:

*If one man murders another with the object of marrying the widow, does a third person afterwards become accessory to the murder by advising or assisting the murder to effect his intended marriage?*<sup>46</sup>

The answer is invariably in the negative. A person who, knowing of the principal offence, assisted not the principal offender but an accessory after the fact to the principal offence is himself guilty of being an accessory after the fact of the same

<sup>40</sup> (1932) 32 S.R (N.S.W) 504

<sup>41</sup> Carter, R.F (1974) *Criminal Law of Queensland*, 4<sup>th</sup> Edition. Butterworths, p. 51.

<sup>42</sup> Peter Seago, *Op. Cit.* p. 137

<sup>43</sup> (1986) Cr. App. p. 49

<sup>44</sup> Peter Murphy, *Op. Cit.* p. 551

<sup>45</sup> *R v. Spinks* (1982) 1 All. ER. p. 587

<sup>46</sup> (1849) 3 Cox, p. 597 at p. 600



principal offence.<sup>47</sup> The offence of accessory after the fact can be committed by an act done through an agent. The mere authorisation of an agent in itself would be a sufficient act, when done with intent to impede apprehension or prosecution, though the agent may never have acted on it.<sup>48</sup>

The strict common law position is that assistance must be personal to the person assisted.<sup>49</sup> Maule J. had in *R v. Butterfield*<sup>50</sup> questioned the classification of assistance offered to a principal offender as personal or non personal. As far as he was concerned, anything done for the purpose of effecting the escape from punishment of the principal offender is personal assistance.

It may also be relevant to examine the exact ambit of the reference to “any offence” said to have been committed by the principal offender under the various sections. The term “any offence” will include felonies, misdemeanours and simple offences. Where the principal offender has committed any of these class of offences, therefore, any accessory after the fact thereto will be liable to punishment as provided for each of the categories of offences. In considering the ambit of the term “any offence”, there is also a noteworthy provision under the Penal Code of Nigeria and India which does not obtain in other jurisdiction. The explanation to section 167 of the Nigerian Penal Code provides:

*In this section, the word “offence” includes any act done outside Northern Nigerian would be an offence and the punishment for the offence shall be deemed to be the same as the punishment would be if the act were done in Northern Nigeria.*

Richardson, in commenting on this Explanation observed that the effect thereof is that it is an offence for a person in Northern Nigeria to screen from lawful punishment another who has committed an offence outside the region.<sup>51</sup> The screening is a distinct offence and prosecution in the Northern States is not prevented by the provision of section 4 of the code relating to territorial jurisdiction in criminal cases.

Another relevant question is whether a person can be an accessory after the fact to an offence committed by him. In England, the person who committed the arrestable offence cannot himself be convicted under section 4(1) of the Criminal Act of 1967. Glanville Williams asserted that this is an interesting indication of legislative policy against penalising a person who, acting alone, attempts to impede his own prosecution.<sup>52</sup> In India, though, there appears to be conflict of authority on whether a

<sup>47</sup> Okonkwo, C.O. *Op. Cit.* at p. 180

<sup>48</sup> Smith, J.C and Hogan, B. *Op. Cit.* p. 760

<sup>49</sup> *R v. Chapple* (1840) 9 Cox, p. 355

<sup>50</sup> (1843)1 Cox p. 39

<sup>51</sup> *Op. Cit.* p. 131

<sup>52</sup> *Op. Cit.* at p. 435

principal offender can also be convicted for screening the offence under section 201 of the Indian Penal Code.

The predominant view is that such a charge can hold. The Supreme Court of India in *Kalavati v. Hinachal Pradesh* laid down the rule thus:

*Section 201 is not restricted to the case of a person who serves the actual offender. It can be applied even to a person guilty of the main offence, though as a matter of practice, a court will not convict a person both of the main offence and under section 201 of the I.P.C.*<sup>53</sup>

This view of the Supreme Court appears to be supported by the language of the section which is perfectly general and hence there is really no justification for holding that the offender cannot be punished for the offence of concealing evidence or causing disappearance of evidence of the commission of an offence by himself.<sup>54</sup> It seems that the above analysis of the Indian position will also obtain under the Nigerian Penal Code, at least with respect to aspects of the offence under section 167 dealing with causing of disappearance of evidence and giving of false information in respect of respecting the offence. It will be elementary to say that under the Nigerian Penal Code, the aspect of the offence dealing with harbouring cannot be committed by the principal offender since one cannot harbor himself. But it may be argued with some conviction that one can conceal himself to evade apprehension.

The wording of the Criminal Code of Nigeria excludes any argument as to whether a principal offender can also be guilty of being an accessory after the fact to an offence committed by him. such permutation will be highly illogical, since a person cannot “receive” or “assist” himself. However, such a person may possibly be committing other offences if he does any act in relation to the offence committed by him in respect of which liability as an accessory after the fact would ordinarily arise.

Another important point is whether a person who is charged with a substantive offence of which he is found not guilty can be convicted of being an accessory after the fact if the evidence discloses such offence. In *Okabichi v. The State*,<sup>55</sup> the Supreme Court, while holding that the 3<sup>rd</sup> – 7<sup>th</sup> appellants could not be held guilty of the offence of culpable homicide punishable with death as charged, substituted a conviction for the offence of screening under section 167 of the Penal Code, which offence was disclosed by the evidence.

It is also possible in all the jurisdictions for a victim of an offence to be an accessory after the fact to that offence. For example, a man may make himself an accessory after the fact to robbery on himself by harbouring or concealing the thief or assisting in his escape.<sup>56</sup>

<sup>53</sup> (1958) S.C, p. 131 at 135

<sup>54</sup> Gour, H.S. *Op. Cit.* p. 1697

<sup>55</sup> Supra

<sup>56</sup> Turner, J.W.C *Op. Cit.* p. 165

### **Limits To Liability As An Accessory**

The point to consider here is whether a mere omission as distinct from an overt act could constitute assistance under section 10 of the Nigerian Criminal Code. It is quite an uphill task to establish the relevant mental element in the case of an omission, especially where no legal duty is imposed. The Australian Courts have held that only a positive act done to assist the principal offender will suffice.<sup>57</sup> The Penal Code of Nigeria does not give room for argument on this issue as it is clearly evident that omissions are not contemplated.

The second part of section 10 of the Nigerian Criminal Code provides that a wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving him or assisting him in order to enable him escape punishment, nor by receiving or assisting in her husband's presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment nor does a husband become accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment.

The Nigerian Criminal Code continues in the same section by providing that the terms "wife" and "husband" mean respectively the wife and husband of a Christian Marriage. This protection should not have been limited to Christian marriage.<sup>58</sup> This provision is discriminatory and fails to take into account the realities of the Nigerian societies where a substantial number of marriages are polygamous or potentially polygamous. It should be pointed out that the provisions do grant more protection to the wife. For instance, a husband is an accessory if he receives or assists his wife's confederates in crime, while she is not liable for receiving or assisting the husband's confederates if done in his presence or by his authority.

### **Punishment for the Offence**

Under the Nigerian Criminal Code, any person who becomes an accessory after the fact to a felony is guilty of a felony, and is liable if no other punishment for two years.<sup>59</sup> Any person who becomes an accessory after the fact to misdemeanor or simple offence is liable to a punishment equal to one half of the greatest punishment to which the principal offender is liable upon conviction.<sup>60</sup> The provision of section 167 of the Nigerian Penal Code is clear in providing for a term of imprisonment which may extend to five years together with a fine whenever an offence is committed.

The Criminal Code of Nigeria and Queensland as well as the Penal Code of Uganda specially and specifically create and treat the offences of being "accessory

<sup>57</sup> *R v. Ready and Manning* (1942) A.I.R p. 117

<sup>58</sup> Okonkwo C.O *Op. Cit.* p. 180

<sup>59</sup> Section 519 of the C. C

<sup>60</sup> Sections 520 and 521 of the C. C

after the fact to treason” and “accessory after the fact to murder”. They both attract a sentence of life imprisonment.<sup>61</sup> The Nigerian Penal Code makes no special provision for accessories after the fact to treason or murder. It may be argued that they will fall under the general provisions of section 167.

### **Conclusion**

The offence of being an accessory after the fact is, by its very definition, related to the offence of interfering with the course of justice which is variously provided for in all the jurisdictions.<sup>62</sup> The forgoing analysis has shown that the offence as contained in the individual provisions is not complex. Suffice it to say that its goal remains consistent with the general essence of criminal law which is that crime and criminal activity of whatever degree must be appropriately punished. The law relating to complicity in crime whether as principal or accessory is designed to cope with that fact.

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<sup>61</sup> Section 40(1) and 322 of the Criminal Code.

<sup>62</sup> Stephen Mitchell and Richardson, P.J (eds.) *Op. Cit.* pp. 2464 - 2465