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Second issue

Analysis of the Offence of Non-Sexual Assault (Nigeria, Ghana, Kenya and Uganda as a Case Study)

By

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Abstract

This paper examines the offence of 'Non-sexual Assault'. Using Doctrinal Research methodology whereby case-law, statutes and the authoritative views of legal writers were assembled and analysed, the paper diagnosed non-sexual assault as a common law crime as well as a statutory offence. Amongst the jurisdiction examined are Nigeria, Ghana, Kenya and Uganda. In the final analysis, the paper posited that in jurisdictions, such as Nigeria, where the offence is codified, that opportunity was used by Parliament to enlarge its scope by creating some assault-related offences in a bid to avoid a multiplicity of statutory enactments on the same subject matter and the study appreciated the approach as being better than the common law practice whereby some assault-related offences were imported by judicial activism. Similarly, the situation in Ghana where the Code created two types of "assault" and also distinguished between them may be preferred as opposed to the situation in Kenya and Uganda where the Codes created "common assault" without any efforts at defining the concept or what constitutes "common assault".

Keywords: *Assault, Battery, Consents, Words, Psychic, Physical, Mens Rea, Actus Reus, Hurt, Harm, Aggravated, Trivial, etc.*

Introduction

It is an age-long policy of the law to protect the individual, not only against bodily harm but also against any apprehension of interference with his person which is offensive to a reasonable sense of honour and dignity. It would seem that this policy of the law stands the risk of being violated by assault if not checked by sanctions. Here, the law protects the "individual" or "person of another" against whom the role – actor commits the offence of assault. Accordingly, the person who may be the victim of assault is a 'human being.' This entity excludes Associations, whether corporate or non-corporate as victims, though these bodies may be guilty of committing assault as principal parties. A 'human being' here, who may be a victim of assault, means a person who has been born and has an existence independent of his mother and unless the context otherwise requires, "death" and "personal harm", mean the death of or personal harm to such a "person".^[1]

This seems to be the Common Law position, whereby, a foetus or a child in the process of being born would not be the victim of an assault or any other offence against the person. Such an act may be an offence against the mother where it affected her person, as distinct from the foetus which is not part of her.^[2] The offence of assault covers a wide range of offences, ranging from an unwanted touching on the arm to a life-threatening attack. Of interest to the law is the right to

bodily integrity, which makes it unlawful for a person to be touched against his or her wishes.

This right is protected under the common law[3], and international law. [4] Accordingly, in *St George Healthcare case*[5] a woman in the late stages of labour was advised that she should have a caesarean section operation, without which her life and that of her unborn child were in danger. She refused to consent to the operation, preferring a natural delivery. The hospital authorities having obtained a court order permitting them to do so carried out the operation against her will. The court of Appeal held that the court order should not have been granted. The woman's right to bodily integrity was held to be preciously guarded by the law. Even if her decision might appear to be irrational to others, and even if abiding by her decision might lead to her own death and that of her child, it had to be respected by the doctors, as long as the woman was competent.

The decision in that case reveals that the right to bodily integrity is protected, even if there may be some good reasons for infringing it. Also, in *Thomas case*, [6] it was held that unwanted touching of the bottom of a girl's skirt amounted to an assault. Though the rubbing of someone's clothing might appear to some, to be too trivial a harm to justify the intervention of the criminal law, it reveals the weight attached to the right not to be touched without one's consent.

The Common Law Position

Under the Common Law, concerted efforts and attempts were made, though ostensibly to no avail, to draw a dividing line between "assault and its allied concept, "battery". The efforts and attempts, as well as some related common law foundational principles, shall be considered and reviewed hereunder.

Assault and battery

Assault and battery are two distinct crimes at Common Law, although in ordinary usage and sometimes, in statutes, the word "assault" often indicates both offences. At Common Law, an assault means: (a) an attempt to commit battery (I.e., swinging a fist at another person), or (b) putting another person in apprehension of harm (i.e., shaking a fist under another's nose or pointing a loaded gun or knife at a person). [7] In the same vein most Common Law statutes have defined assault as: (a) an attempted battery in which no actual battery or physical injury or contact resulted and, (b) an intentional frightening in which the state would have to show apprehension or fear on the part of the victim. Thus, assault has been statutory defines as –

An unlawful attempt, coupled with a present immediate ability to commit a violent injury or contact on the person

of another ----- A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.[8].

Battery on the other hand, is an intentional touching of another person without the consent of that person and without lawful excuse. It needs not necessarily be hostile, or rude, or aggressive, as some of the cases seem to suggest. It is any act by which the accused, intentionally or recklessly, inflicts unlawful personal violence upon the complainant [9] "Violence" here, includes any unlawful touching of another, however slight for Black-stone had opined that –

The law cannot draw the line between deferent degrees of violence and therefore prohibits the first and lowest stage of it, every man's person being sacred and no other having a right to meddle with it, in any slightest manner. [10].

Analytically, while "assault" is the creation of an atmosphere of fear or apprehension of imminent unwanted, unauthorised and unlawful contact with the person of another, battery is the actual or physical contact with the person of another without that other's consent or authorization. Nonetheless, it should be noted that assault and battery are also torts, and many, though not all of the principles appear to be equally applicable in both branches of the law. In the law of torts which is procedurally and substantively civil in nature, there is a clear destination between assault and battery, but most Penal Statutes,[11] use the words interchangeably to mean one and same thing. According to the English legal writers –

The separateness of assault and battery at common law was not universally recognised. There is a terminological problem in that there is no acceptable verb corresponding to the noun, battery, so that "assaulted" is almost invariably used to mean "committed a battery against". Sometimes the term "assault" is used in statutes to mean "assault or battery" but on other occasions both words are used. There is a deplorable inconsistency in the statutory terminology. Even the criminal Justice Act, 1988, having made it crystal clear in s. 39 that there are two offences goes on in Section 40 (3) (a) to use "common assault" in a context in which it can only sensibly mean and has now been held to mean "common assault or battery". There are, however, grave problems of substance as well as terminology which have long been

ignored but will have to be faced if we are at least to take seriously the proposition that there are two distinct offences.[12].

It would seem from the foregoing that drawing a line between assault and battery would continue to create terminological and construction problems, hence the preference for statutory provisions that merge the two concepts into one in terms of definition and substance. Thus –

It is common ground that the mental element of assault is an intention to cause the victim to apprehend immediate and unlawful violence or recklessness whether such apprehension be caused, but it is incredible that the accused, who takes care to ensure that the complainant apprehends nothing and hits him on the back of the head, is not guilty of an “assault occasioning actual bodily harm”. If the word “assault” in the section embraces two offences, it must have the same meaning when used in an indictment or information alleging an offence under the section. Otherwise, prosecutors would be well advised to draft the particulars of an indictment or information to make it clear that it charges either an assault or a battery, but not both.[13].

This may serve as a practical guide, but where the statute uses one word to mean two things, drafting skills should not be used to distort such clear and distinct provisions. To do otherwise, may even run afoul of established drafting rules.

The truth of the matter is that giving “assault” a double meaning creates an awkward linguistic situation. Assault in the wide sense means (a) a battery or (b) a threatened battery, depending on the context or circumstance. Kissing the “sleeping beauty” is an assault in the sense of a battery, while it is not an assault in the sense of an act causing apprehension. If a threatened battery is an assault, and a battery is an assault, it then follows that a threatened assault is an assault. [14]

The most convenient solution would be to recognise “assault” as the generic expression, consisting in certain kinds of unlawful interferences with the person of another. Thus, interference may be either (a) a physical assault, unlawful bodily contact, which is battery or (b) a psychic assault, also an assault in the sense of a threatened battery. If this logic is accepted, which is ostensibly the case, we can then talk sense instead of paradox, we can therefore say that a psychic assault is a threatened physical assault and since physical assault is by far the commonest form of assault to the consideration legal history as coming before the courts, it is usually referred to as an “assault” and that settles the matter.[15] It is in this sense that Goff LJ’s dictum would be understood. [16]

Assault and words

The controversy as to whether mere words or verbal expressions would in law amount to an assault seems not finally and conclusively resolved. This is in juxtaposition of the trite law that, to constitute an assault, the victim must apprehend immediate or imminent contact with his or her person with neither consent nor authorisation. It has therefore been consistently argued that it is not an assault if the accused shows clearly in words that no immediate or imminent attack is intended, even if he makes a show of aggression. A counter argument may be that a show of aggression may create an atmosphere of fear or apprehension of unwanted and unlawful impact with the person of the complainant before being negative or neutralized by emollient words or expressions.

The English *locus classicus* cases (though now of antiquity) may be of assistance in this area of the law. In *Turberville v. Savage*,^[17] the parties exchanged quarrelsome words. Turberville laid his hand on his sword and said to Savage; "If it was not assize time, I would not take such language from you." These words showed that Turberville's menacing gesture was pure bravado and apart from being a threat, the words were a reassurance. But Savage reacted by thrusting at Turberville and putting out his eye. Turberville sued for damages for assault, in reaction to which Savage pleaded self defence for he feared an attack. It was held that Turberville's conduct was far from being hostile since his words showed no present, immediate or imminent intention to do violence. Accordingly, Savage was denied his defence of self-dense.

A case of conditional threat which would have been absolute but for assize-time also reared its head in the *Light Case*.^[18] Here, accused held a shovel over his wife's head and said: "If it were not for the policeman outside I would split your head" The judges differed on the question as to whether this was a criminal assault and several reports of the case seem not to be completely in accord on what the judges said. Nonetheless, it would seem that a fair inference from the various opinions expressed that the test is as to whether the accused' words so neutralized the menacing character of his acts as to prevent a reasonable woman (in the person of the complainant) from feeling apprehension.

It may be rightly opined that where the act is of a menacing character (as in the *Light Case*) the mere fact that words are spoken indicating that there is no present, immediate or imminent intention to assault, does not necessarily negative an assault in law, the reason being that if a man raises a shovel to a position where he can bring it down on his wife's head, she will naturally, and in all probability feel fear, and her fear may prevent her from listening carefully to what he says and coming to the fact that no assault is intended. Even if the reassuring words are heard and apprehended, they may be wholly outweighed and overwhelmed by the menace of the act. The victim may well fear that the aggressor may suddenly change his mind and attack despite the fact that the condition stated by him is fulfilled.^[19]

A disturbing twist is where the complainant or victim of an assault is terrified by voices which are not accompanied by the physical presence of their speaker, as in telephone calls. Thus, in *R v. Ireland* [20], the court of appeal was confronted, as a matter of general public importance with the question as to whether the making of a series of silent telephone calls can in law amount to an assault. Here, accused harassed three women by making repeated telephone calls to them during which he remained silent. Sometimes, he resorted to heavy breathing and the calls were mostly made at night. The case against him, which was accepted by the court, was that he caused his victims to suffer psychiatric illness. He had a substantial record of making offensive telephone calls to women. He was convicted and sentenced to a total of three years imprisonment. On appeal and in support of its dismissal, Lord Steyn said

The proposition that a gesture may amount to an assault, but that words can never suffice is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence. For instance, a man accosting a woman in a dark alley saying, "come with me or I will stab you", to us, such statement is enough to cause apprehension. Thus, we reject the proposition that an assault can never be committed by words. There is no reason why a telephone caller who says to a woman in a menacing way "I will be at your door in a minute or two" "may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now, the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions and it may be the fear that the callers' arrival at her door may be imminent. She may fear the possibility of immediate personal violence and as a matter of law; the caller is guilty of an assault.[21].

Here the court equated the apprehension of immediate and unlawful violence with the psychiatric injury suffered by the victims.

Assault and Sexual Harassment

A Nigerian legal writer, raised the issue thus –

However, words alone, however vulgar, cannot amount to an assault, so also is the current agitation by some women groups to create an offence called "sexual

harassment". It is humbly submitted that short of actually striking" or otherwise "touching" a woman or at the very least making threatening gestures towards her, mere words of a sexy nature cannot amount to an assault under our law. [22]

The issue of sexual harassment has been a recurring decimal in Nigeria particularly, within the academic communities and between male lecturers and female students. It is more or less a culture than a problem as it is difficult to determine with certainty, which is harassing who, as the scenario is one of allegation and counter – allegation between academically weak female students and sex-greedy lecturers. It would seem that sexual harassment is embodied in "behaviour and body language" and behaviours usually pass undefined as violence, in the criminal law and are usually located in heterosexual cultures and often difficult to distinguish from normal masculine modes of flirtation and courtship – A sociologist has opined that –

Identifying sexual harassment is not always easy. A boy may snap a girl's bra or a girl may tug at a boy's pant under the guise that they were teasing. Even though sexual harassment may not be the motive, if the target finds the behaviour uncomfortable, embarrassing or threatening, it is a case of sexual harassment. So, to define sexual harassment, subjective experience of the person targeted by the behaviour and the degree to which the behaviour is accepted as violating is usually considered.[23].

There are various forms of sexual harassment, and these include, sexual touching, winking of eyes, physical advances, sexual propositions, sexual coercion, sexist remarks, obscene cartoons, comments about man/woman sexuality, extended glares, firm sexual handshakes, lewd comments, vulgarity, stalking, sexual provocation etc. These acts may be going on but unreported for the fear of social stigma. It is the least reported form of gender- based violence, but at the same time, it is the commonest. It is regarded as one of the "victimless" crimes because of the culture of silence that usually surrounds it.

The effects of sexual harassment vary depending on the individual, severity and duration of the harassment. Some common professional, academic, financial and social effects of sexual harassment are; decrease in work or school performance, increased absenteeism from work place, loss of job or career, loss of income and having to drop course, change of academic plan or leaving the school entirely.

From the foregoing, it may not be difficult to identify "sexual harassment" as an act with obvious consequences as highlighted above. The act creates the

apprehension of immediate or imminent unwanted and unauthorized contact with the person of the victim in avoidance of which certain consequences may follow. It therefore qualifies as an assault within the legal definition of the concept.

Mens Rea of Assault

The opinion of the Nigerian legal writers, on what constitute the *actus reus* and *mens rea* of assault is too narrow to embrace all forms of assault, being focused on only one form of assault. According to them -

At common law the actus reus of assault consists in the expectation created in the mind of the victim that unlawful force is about to be applied on him. The mens rea consists in intentionally causing such expectation in the victim's mind and it is immaterial that the offender did not intend to apply such force and could not in fact, have applied it. [24].

With due respect to the learned legal writers, the position taken by them needs much to be desired and accordingly open to some criticisms. The offence of assault is not necessarily committed by the application of force to the person of another and that is why the statute[25] creating the offence uses such words as., strikes, touches, or moves and ended up with the expression "or otherwise applies force of any kind" to the person of another. Again, the statute [26] went further to explain thus "the term "applies force" includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.

Moreover, the *actus reus* is an act and not an expectation. It is therefore an act creating the expectation of fear or apprehension of an unwanted or unauthorised contact with the person of another in the mind of the victim. It is therefore proper to define an assault not just in terms of force but any unwanted or unauthorised contact with the body or person of another, which may be slight, mild or otherwise, and not just forceful.

The *mens rea* is the mental element of an offence and for assault, the accused must intend or be subjectively reckless as to whether the victim apprehends immediate unlawful contact with his/her person for battery, accused must intend or be reckless as to whether he cause unlawful personal contact with the victim.[27] More succinctly put –

The mens rea for an assault is either an intention to cause another to fear immediate unlawful personal violence, or recklessness as to whether such fear is caused. The mens

rea of battery is either an intention to apply unlawful physical force to another, or recklessness as to whether unlawful force is applied. So, intention or recklessness is sufficient for both assault and battery. The test for recklessness is subjective. For an assault, the defendant must realise that there is a risk that his acts/words could cause another to fear unlawful personal violence. For battery, the defendant must realise that there is a risk that his act (or omission) could cause unlawful force to be applied to another. Assault and battery are classed as offences of specific or basic intent and this means that if the defendant is intoxicated when he does the relevant actus reus, he is reckless[28].

In *DPP v. Majewski*, [29] accused consumed large quantities of alcohol and drugs after which he attacked people in a public house and also the police officers who tried to correct him. His Lordship, Elwyn-Jones held that –

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drink and drugs to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crime of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases.

Actus Reus of Assault

This is the physical component of an offence. It is an act or event that causes or brings an offence into existence. The *actus reus* of an assault is therefore an act that causes or creates in the mind of the victim or complainant the fear or apprehension of immediate or imminent unlawful and unwanted contact or application of force or violence to the person or body of the victim or complainant. In the case of battery, it is the causing of unwanted or unauthorized contact, force or violence to the person of the victim or complainant. This requires a technical assault or battery which may occasion or cause actual bodily contact or harm to the body or person of another. It is any hurt or injury calculated to interfere with the health or comfort of the victim.[30]

In *DPP v. Smith (Michael)* [31], accused had an argument with his girlfriend. He cut off her ponytail and some hair from the top of her head without her consent. He was charged with an offence under Section 47 of the Offences against the

Person Act, 1861. In delivering the judgement, the Magistrate found that there was no case to answer for the defendant because cutting hair could not amount to actual bodily harm. The Divisional Court allowed the prosecutors appeal by way of case stated, holding that cutting off a substantial amount of hair could amount to actual bodily harm. They remitted the case to the justices for it to continue. Holding that physical pain was not a necessary ingredient of actual bodily harm, His Lordship, Sir Igor Judge said –

In my judgement, whether it is alive beneath the surface of the skin or dead tissue above the surface of the skin, the hair is an attribute and part of the human body. It is intrinsic to each individual and to the identity of each individual. Even if medically and scientifically speaking, the hair above the surface of the scalp is no more than dead tissue, it remains part of the body and is attached to it. While it is so attached, in my judgement it falls within the meaning of "bodily" in the phrase "actual bodily harm."

A battery can be committed without the victim suffering any kind of injury, so, a "touching" can constitute a battery, thus, touching the clothes that someone is wearing amounts to battery. The offence of battery does not necessarily involve a harming of the body; it includes an invasion of "personal space". This is shown by the fact that a battery can take place even if the victim did not feel the touching. [32]

Permissible Assault

Consent is implied and therefore permissible in circumstances where social and public life would be impossible should the law prohibit every unwanted and unauthorised contact with the person of another with Penal sanctions. There are situations in which the courts would imply consent to minor touching. These are the everyday situations in which there is a crowd of people and it is impossible not to have some contacts. In *Wilson v. Pringle*[33], it was held that ordinary "jostling" of everyday life was not battery. Also, in *Collins v. Wilcock* the court observed that

Although we are all entitled to protection from physical molestation, we live in a crowded world in which people must be considered as taking on themselves some risk of injury (where it occurs) from the acts of others which are not in themselves unlawful. Generally speaking, consent is a defence to a battery and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so

expose themselves to the risk of bodily contact. So, nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street, nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is (within reason) slapped.

[34]

This also applies to contact sports. When a person takes part in sports such as football, rugby or judo, he is agreeing to the contact which is part of that sport. However, if the contact goes beyond what is reasonably permitted, then it is possible for an offence to be committed. For example, a rugby player may consent to a tackle within the rules of the game, but he may not consent to an opposition player stamping on his head.[35]

Assault and Consent

Consent by the victim of assault, in most cases would be a valid and complete defence to a battery charge. A bone-jarring tackle in a football or a hard blow to the jaw in boxing is within the rules of those sports and is consented to by persons engaging in those sports. This same conduct would be a battery elsewhere.[36] There are limits to the right of any person to consent to the infliction of physical harm on him because, consent to being killed by any person is ineffective.

It is no defence to a charge of murder for the accused to say that his victim asked to be killed. On the other hand, a victim's consent to the accused taking high degree of risk of killing him is effective where it is justified by law, as it may be in the case of a surgical operation. Where the act has some social purpose, recognised by the law as valid, it is a question of balancing the degree of harm which will be caused against the value of that purpose.[37] Nonetheless, an unlawful act cannot be rendered lawful because the person to whose detriment it is done consented to it. This is so because, no person can license another to commit a crime as the courts are prepared to limit the defence on the basis of public policy grounds.[38]

The Nigerian Position

The Nigerian Criminal Law is governed by two main Penal Statutes[39] and the offence of assault derives its source and substance from them with little implied references to the Common Law principles. The statutes take and define "assault" as a general law concept without balkanising it into "assault" and "battery" which is more or less a Common Law approach. As rightly pointed out by the Nigerian legal writers [40] "It is usual sometimes to use the word "assault" to cover the meanings of both assault and battery and that is the sense in which the word is used in section 252 of the Criminal Code" The section provides that –

A person who strikes, touches or moves or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent, or with his consent, if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, in such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.

The term “applies force” includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever, if applied in such a degree as to cause injury or personal discomfort. [41]

The Criminal Code definition of “assault” is a product of two separate concepts (assault and battery) combined. Nonetheless the product can be dismantled to give the concept separate existence, but the Penal Code definition of “assault” ignores the ‘battery’ component. Thus section 264 of the Code provides-

Whoever makes a gesture or a preparation intending or knowing it to be likely that the gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

It would seem that the relevant Nigerian statutes displayed some peculiarities and features not found in the Common Law and even creates distinct offences under the offence of criminal assault as discussed hereunder.

Mens Rea of Assault

Although a literary interpretation of section 252 of the Criminal Code will suggest that intentional conduct is not required, it is submitted that section 24 of the Code[42] can be brought into play to incorporate the doctrine of *mens rea* as a system of statutory construction in the absence of specific *mens rea* being provided by relevant statutes.

The Penal Code provision is therefore preferable for using the words “intending” and “knowing” because –

The epithets used to describe the mental element in any particular offence are unfortunately many in number, for

instance, “intentionally”, “advisedly”, “wilfully”, “knowingly and advisedly”, “falsely”, “fraudulently”, “unlawfully and maliciously”, “negligently”, “in a manner so rash or negligent as to be likely” and many others’.

[43]

When *mens rea* is imputed to section 252 of the Criminal Code, vide section 24 thereof in line with the Penal Code provisions, the *mens rea* of assault as a crime in Nigeria will not be different from what is obtainable under the Common Law. This is so because, the requirement of *mens rea* is so important that it must be prescribed for all offences including assault.[44]

Actus Reas of Assault

The Nigerian legal writers[45] had opined that “At common law, the *actus reus* of assault consists in the expectation created in the mind of the victim that unlawful force is about to be applied on him

As earlier pointed out, the *actus reus* is an act, it is the physical element of an offence. It is not “the expectation created in the mind of the victim”. It is rather the act of the accused that creates expectation of fear or apprehension of unwanted and unauthorised and immediate or imminent contact with the person of the victim or complainant. Accordingly, and with reference to section 252 of the Criminal Code, it is the act of striking, touching, moving or otherwise applying force of any kind to the person of another, either directly or indirectly (batter) or any bodily act or gesture that attempts or threatens to apply force of any kind to the body of another. The Penal Code provisions,[46] is focused on the *actus reus* of assault to the total neglect of its battery component. The Criminal Code provisions may be preferred in this regard.

Consent

Implied in the provisions of the relevant Nigerian Penal Laws is that where the victim of an assault consents to it, the accused cannot be criminally liable for his acts which ordinarily and in the absence of consent constitute an offence. To be unlawful, the assault must be done without the consent of the person assaulted. Nonetheless, the law presumes that persons, who go about in public, consent to that degree of contact which is an inevitable incident of everyday life. Consent freely and expressly given, usually negatives the offence of assault. Nonetheless, consent to an assault is ineffective if the assault is of a nature likely to endanger human life or to amount to a breach of the peace[47]

Clearly, those engaged in playing football, cricket, hockey, etc had consented to run the risk of being assaulted right from the onset. Similarly, in a barbing salon,

somebody submitting himself to a barber must be taken to have consented to suffer some assaults (*i.e.*, *Volonti Non Fit injuria*)[48]

Assault and Provocation

In Nigeria, provocation may constitute a defence to the offence of assault, though the defence is peculiar to the offence of homicide under the Common Law. Accordingly –

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self control and acts upon it on the sudden and before there is time for his passion to cool, provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous harm.[49].

It would seem that the rules and principles applicable to provocation as a legal concept are also applicable to provocation in relation to assault. The objective standard is not compromised. The accused must have acted in the heat of passion guided by the proportionality principle and if death results, he will be prosecuted for manslaughter and accordingly punished.

Aggravated Assault

An assault is said to be aggravated if the accused attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life, or attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.[50] Various Sections of relevant Nigerian Penal Statutes prohibit such acts with penal sanctions. Thus,

Any person who unlawfully does grievous harm to another, or unlawfully wounds another, or unlawfully and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered to, or taken by any person is guilty of felony.[51].

All jurisdictions punish aggravated assault and maiming as felonies as they are more serious than simple assault in which the victim's wound heal after a short time. This could be likened to the common law offence of "mayhem" which is the unlawful and violent depriving of the victim of the full use of any functional member of the body (hand, arms, feet, eyes, legs etc.) which would make the victim less able to defend himself or herself. State statutes have incorporated this concept in the form of maiming or mayhem statutes. "Accordingly –

Whoever shall wilfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose or ear, or put out an eye or in any way deprive a person of any other member of his body, shall be confined in the penitentiary not less than two nor more than years.[52].

Aggravated assault is ordinarily defined in terms of the harm which has occurred and particularly as “an attempt to cause or causing serious bodily injury” though it does not require that the victim actually be seriously injured. Aggravated assault laws often attempt to protect certain classes of public employees by forbidding assaults against them. Assault against law enforcement officers performing their duties are commonly made aggravated assaults. Conditions which may be made part of the laws to elevate simple assaults to aggravated assaults may include; use of deadly weapons, accused wearing hood mask to conceal identity, or occurrence of the offence on or about a public way, on property or in a public place.[53]

Assault and Hurt

The Penal Code Law of Nigerian uses the term “Hurt” to denote “aggravated assault” and other forms of “grievous bodily harm”[54] Section 240 defines “Hurt” as “any bodily pain, disease or infirmity to any person “This definition can be compared with the Criminal Code’s definition of “harm” which is “any bodily hurt, disease or disorder whether permanent or temporary”[55] . According to the Criminal Code, “Grievous harm” means “any harm which amounts to a maim or dangerous harm, or which seriously or permanently injures health or which is likely to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, member or sense[56]. The code outlined the component of “grievous Hurt” to include –

(i) Emasculation – which means castration, (ii) permanent deprivation of the sight of an eye or the hearing of an ear or the power of speech, (iii) deprivation of any member or joint, (iv) destruction or permanent impairing of the power of any member or joint, (v) permanent disfiguration of the head or face, fracture or distortion of a bone or tooth or (vi) any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe pain or unable to follow his ordinarily pursuits.[57].

Comparatively, while under Section 284 of the Criminal Code, a person who causes simple hurt or being provoked is exonerated, no such exemption exists under the Penal Code, as provocation can only reduce punishment.

Contemporary Codes Provisions

Other African jurisdictions outside Nigeria have made various provisions on the offence of assault. The Codes in Kenya and Uganda provided for “common assault” without any efforts at defining the concept or what constitutes “common assault”. The Kenya Code, which is *impari materia* with the Ugandan Code, provides that –

Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year. [58].

But the Ghana Code provisions are more helpful, explicit and comprehensive. The law in Ghana created two types of “assault” namely, “assault and battery” and “assault without actual battery”. [59]

Assault and Battery

Here, the law in Ghana provides that –

A person makes an assault and battery upon another person, if without the other person's consent, and with the intention of causing harm, pain, or fear; or annoyance to the other person or of exciting him to anger, he forcibly touches the other person or causes any person, animal, or matter to forcibly touch him. [60].

Here, assault and battery, which may constitute different offences in other jurisdictions, are merged together as one and may be committed by forcibly touching or causing any person, animal or matter to touch another with the intention of causing harm, pain or fear, or annoyance to that other without his consent. Consent obtained by deceit on the part of the accused shall not suffice with respect to intention that the touch is intended to cause harm, pain, annoyance or to excite anger. [61] Consent obtained in circumstances where the victim of assault is incapacitated to give or refused same shall be construed with respect to intention to mean that the touch is designed to cause harm, pain, fear or annoyance to him, [62] or that the touch is intended to likely cause harm, pain, fear, annoyance or to excite his anger. Such circumstances may include infancy, unconsciousness, insanity, insane delusion or insensibility. Once the intention as required by law is proved, any slightest touch suffices for assault and battery and a person is said to be “touched” within the meaning of the code, if his body, clothes or any other thing in contact is actually touched and it is immaterial whether the intention is to cause harm, pain, fear, or annoyance. [63]

Assault Without Actual Battery

The Law in Ghana provides that –

A person makes an assault without actual battery on another person, if by any act apparently done in commencement of an assault and battery he intentionally puts the other person in fear of an instant assault and battery. [64]

Here, it may not be necessary that an actual assault and battery be intended or that the instruments or means by which this assault and battery is apparently intended to be made should be or should by the person using them be believed to be, of such a kind or in such a condition as that an assault and battery could be made by means of them.[65] A person can commit an assault within the meaning of the law by moving or causing any person, animal or matter to move towards another person, although he or such person, animal or matter, is not yet within such a distance from the other person as that assault and battery can be made, and an assault can be committed on a person, although he can avoid actual battery by retreating or by consenting to do, or to abstain from doing, any act.[66]

Conclusion

Under the Common Law, two legal concepts constitute assault. There is “assault” properly so called which is an act that creates a state of fear or apprehension of imminent or immediate contact with the body or person of another without consent or authorization. There is also “battery” which is actual contact with the body or person of another without his consent or authorization.

The former is psychic assault while the latter is physical assault, and both require the proof of intention or recklessness as *mens rea* on the part of the role actor. A psychic assault is a threat creating the apprehension of immediate force by way of physical assault. The threat may be by contact or by words; though reassuring words can negate an assault. A physical assault requires the application of some degree of unlawful force to the body of another, which may be slight, though ordinary social contact is not an assault.

In Nigeria, the offence of assault is a creation of statute and there is no dividing line between “assault” and “battery” as separate legal concepts. The relevant statutes use the word “assault” to denote both assault and battery and in addition created other assault related offences and defences such as “aggravated assault” “hurt” and provocation while adopting relevant Common Law principles such as *mens rea*, *actus reus*, consent, as components of assault.

Historically, the object of the law in providing a remedy for assault is to offer the victim some means of vindicating his own dignity and security without recourse to acts capable of causing a breach of the peace. But, unfortunately, the police and other law enforcement agencies rarely prosecute, if no great harm is done. They take assault as being of everyday occurrence which is of no legal consequence. In Nigeria –

Nothing is an offence by reason that it causes or that it is intended to cause or that it is likely to cause any injury if that injury is so slight that no person of ordinary sense and temper would complain of the injury[67].

Recommendation

The common law practice whereby the offence of ‘assault’ is divided into ‘assault’ and ‘battery’ should be discouraged and restricted to civil actions. It should not be allowed to operate as a common law crime, because being a crime, one of its major attributes is codification to make room for certainty and when codified, what is regarded as “assault” under the common law shall metamorphose into “attempted assault” and what stands today as “battery” should be renamed “assault”. The Nigerian practice where the two concepts are merged into one by statute as “assault” is preferred. Still, the Ghanaian position where distinction is clearly drawn between “assault and battery” and “assault without actual battery” may be recommended. Similarly, the general view that acts amounting to assault as so trivial to warrant prosecution, except in cases where grievous bodily harm results should be reconsidered, this is because, an offence is an offence, no matter how slight its effect on its victim, more so as the statutes creating the offence of “assault” equally created appropriate punishments for same. It is nothing but acts of negligence on the part of law enforcement agencies who refuses to prosecute and accordingly punish persons who commit the offence of assault and the law should not condone such negligence of duty.

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[3] *St. George's Healthcare NHS Trust v. S.* (1999) 1 All ER 513

[4] Art. 8, European Convention On Human Rights

[5] (*supra*)

[6] (1985) 81 Cr. App. R. 331.

[7] Gardner & Manian, n.1

[8] Section 240. California Penal Code, See also, Chapter 38, Section 12-1 of the Illinois Statutes.

[9] Smith & Hogan, *op. cit.*(n.1), p. 411 See also, Rolfe (1952) 36 Cr. App R. 4

[10] Commentaries, 3 All ER 120, See also Goff L. J in *Collins v. Wilcock* (1984) 3 All ER. 374 at 328.

[11] The Nigerian Penal Statutes (Section 252, Criminal Code, Section 264 Penal Code) used the word "assault" to mean assault and battery.

[12] Smith & Hogan, *op. cit.* (n.1), p. 413

[13] Per Lord Ackner in *Savage case* (1991) 4 All Er. 698 at 711.

[14] William, G. *Text Book of Criminal Law* (2nd Edn India Universal Law Publishing Co. 2009), p. 172

[15] *Ibid*, p. 173

[16] Goff L J had in *Collins v. Wilcock* (1984) 3 All ER 374, opined that – "The law draws a distinction between an assault and battery. An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person; a battery is the actual infliction of unlawful force on another person".

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[36] Gardner & Manian, *op. cit* (n.1),p. 341

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[38] See *Denovan* (19340) 2KB, 498, *Brown* (1993) 2 All ER. 75 etc.

[39] The Criminal Code which holds sway in the South and the Penal Code which regulates Criminal conducts in the North. There are nonetheless, other Penal Statutes, most of which are of recent historical importance and application, such as the Economic and Financial Crime Commission Act, 2004, Criminal Procedure Code Act, 2002 etc.

[40] Okonkwo and Naish, *op.cit* (n.24)

[41] Second Paragraph of Section 252, Criminal Code

[42] Section 24 of the Criminal Code says that "subject to the express provisions of this code relating to negligent acts 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.

[43] Okonkwo and Naish, *op.cit.* (n.24),p. 50

[44] Chukkol, *op.cit.* (n.22), p.315

[45] Section 264

[46] Section 253, Criminal Code

[47] *R v. Donowon* (19340 2KB. 498

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