THE DEFENCE OF MISTAKE IN NIGERIAN LAW

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DECLARATION

I hereby declare that this dissertation has been written by me and that it is a record of my own research work. It has not been presented in any previous application for a higher degree. All quotations and references are indicated with specific acknowledgements.

SUPERVISOR 21/7/87

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DEAN OF POSTGRADUATE SCHOOL

ABSTRACT

The importance of Criminal Law as a vehicle for the advancement of humanity cannot be overemphasised.

> "This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions."[1]

This, then, is the basis for the definition of offences and the stipulation of corresponding punishments. In attendance with this, is the recognition of certain defences to criminal responsibility.

In order to secure a conviction against an accused person, two basic requirements of criminal liability must be established - first the physical conduct (actus reus), and secondly, the state of mind (mens rea) of the accused person must be legally blameworthy. The defence of mistake falls within the category of defences which negative mens rea. If due to some mistaken belief, the accused person is incapable of possessing such a blameworthy state of mind, he should not be held criminally responsible.

It was observed as far back as 1897, that:

> "... the absence of mens rea really consist in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."[2]

1. Wechsler: The challenge of a Model Penal Code.
2. Dank of New South Wales v. Piper [1877] A.C. 383.

The plea of mistake may be raised either alone or with similar defences to criminal responsibility. Particular attention is observed in homicide cases where the life of the accused is at stake. The Supreme Court in Kuvawa Takida v The State,[3] held that, all the defences which are available to an accused person on evidence, should as a matter of course, be considered by the courts, whether or not such defences are raised specifically by the accused or by his counsel.

Organisational Structure

The thesis is divided into seven chapters.

Chapter I is the introductory chapter and it contains an account of the historical background and origin of the Penal and Criminal Codes. The relationship between the two Nigerian codes and their relationship with other Legal systems is also examined.

Chapter 11 examines the early period in English Law when mistake came to be one of the early defences recognised, as not being compatible with the existence of mens rea. Thereafter, the development of the defence viz-a-viz the requirement for mens rea is traced, pointing out the difficulties in the area of mistake of mixed law and fact. The requirements for the plea of mistake are analysed and the critique and public policy behind them stated.

Chapter III is a detailed study of the application of the defence of mistake in the Nigerian Codes. The controvertial issue of "reasonableness of mistake" is treated at length, pointing out the conflicting viewpoints of experts and the practice of the courts in this regard. The chapter seeks to identify inadequacies and shortcomings in the law, and attempts to discover the reasons behind them.

Chapter IV is devoted to an extensive and indepth analysis of the defence of mistake based on the supernatural; in the form of witchcraft, juju, ghosts, voodoo and the like. Particular attention is given to the issue of reasonableness of the belief, or the action following the belief, in an attempt to discover any hidden motive that may be haboured by the accused person. The merit or otherwise of the notion that prevalence of the belief in witchcraft is enough evidence for its acceptability is explored. Judicial authorities from several jurisdictions with varying socio-cultural setting are examined, in an attempt to discover any trend in this mysterious and topical phenomena.

Chapter V is an account, of some related defences to mistake. An attempt is made to highlight the application of common concepts to the defences, and areas of differences are noted. These defences include private defence, insanity, provocation and bona fide claim of right.

Chapter VI is an investigation of the application of the defence of mistake in other jurisdictions, particularly, India and the Sudan. Attention is paid to common grounds with the position in Nigeria, and these are duly specified. Areas of differences are also pointed out.

Chapter VII, the concluding chapter, summarises the thesis and the conclusions drawn therefrom. The researcher's recommendations and proposals for reform are stated here. These are respectfully submitted with a view to rectifying some of the patent defects now existing in the law.

PREFACE

The approach adopted by the researcher is one of examination of the salient features of the defence of mistake, and an analysis of particular concepts related to the defence that are of controvertial nature. In that regard, a critical appraisal of the plea of mistake, as it is entertained by the practice of the courts, is submitted.

Review of Available Literature

The primary source of literature on the subject is decided cases of the Nigerian Courts and other Common Law jurisdictions. The contribution of eminent academic writers also constitute an important source of literature on the subject of the defence of mistake. In that respect, different views are canvassed and various theories advanced.

Upon a review of the available literature, it is discernible that the notion of the "reasonable man" represent one of the causes for conflicting viewpoints on the subject. Pondering on the problem, Professor Okonkwo[1] asked this question - "When the Legislature uses the word "reasonable", does it mean, and are the courts to interprete it to mean, what the ordinary man

1. Okonkwo C.O., Criminal Law in Nigeria 1980 2nd ed. London. p. 106.

would regard as reasonable"? The learned jurist expressed the opinion that, "...the courts should adopt as the standard of "reasonableness", the standard of the general community from which an accused comes, even if this involves their categorising as "reasonable" opinions or beliefs unacceptable to the judges themselves and the educated minority." With due respect, we wonder what kind of standards the courts would set for the society, if the judges started sanctioning opinions and beliefs unacceptable to their judgement.

The Criminal Code in section 25 has codified the requirement of reasonableness of mistake, but the Penal Code is silent on the issue. Professor Amankwah[2] is of the view that reasonableness as a criterion, should be imported into the Penal Code, and should be used to distinguish mistake based on revenge from other cases. Dr. Chukkol vehemently rejects this viewpoint, pointing out that "if the draftsman has envisaged the notion of the reasonableman in the provisions of section 45 of the Penal Code, there appears no reason why this was not clearly provided"[3].

Another area of conflict on the subject is the

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2. Ofori-Amankwah E.H., Criminal Law in the Northern States of Nigeria, (1986) Zaria. p. 164.
3. Chukkol K.S. "The Reasonable Man: Does he 'exist' under the Penal Code" 1984/85 Ahmadu Bello University Law Journal Vol. 2&3, p.47.

issue of supernatural beliefs or witchcraft and the attitude of the courts to these cases. Arguments have been forwarded condenming the courts for rejecting pleas of mistake based on beliefs in the supernatural or witchcraft. On the other hand, the attitude of the courts have been applauded as being pragmatic.

Inspite of all the contributions of the distinguished jurists, we are of the humble opinion that the subject has neither been fully explored by the learned jurists, nor adequately appreciated by the Law courts, especially with regard to reasonableness of mistake, mistakes of mixed law and fact and beliefs in the supernatural or witchcraft, to mention a few.

This thesis is therefore submitted with the hope of filling the vacuum in the body of literature on the subject. The researcher has presented a comprehensive restatement of the law and exposing the lacuna therein, in the modest attempt to advance the frontiers of knowledge.

ACKNOWLEDGEMENTS

This dissertation could not have been completed without the encouragement, guidance and patience of my supervisor, Professor Ofori-Amankwah. I am especially grateful to you and to all the others, who in their own way made it possible.

Any error that may remain in the work is wholly mine.

A. M. POTISKUM

DEDICATION

This dissertation is dedicated to my father - M.B. Potiskum. I owe it all to you.

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Police Act 1964, England - S.51

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Tanganyika Penal Code

S.201

Theft Act 1968 - England

Zambia Penal Code

S.183.

ABBREVIATIONS

A.C.	Appeal Case
A.I.R.(All.)	All Indian Reporter (Allahabad)
A.I.R.(Bom)	All Indian Reporter (Bombay)
A.I.R. (Lah)	All Indian Reporter (Lahore)
A.L.J.	Australian Law Journal.
All. E.R.	All England Law Reports.
All. N.L.R.	All Nigerian Law Report
C.L.J.	Cambridge Law Journal
C.L.R.	Commonwealth Law Report
Ch. D.	Law Reports, Chancery Division (1876-1890)
Cox C.C.	Cox's Criminal Cases
C.A.R.	Criminal Appeal Report.
E. N.L.R.	Eastern Nigeria Law Report
E.R.	English Report.
F.C.A.	Federal Court of Appeal
F.S.C.	Federal Supreme Court
G.L.R.	Ghana Law Reports
I.C.L.Q.	International & Comparative Law Quarterly.
I.L.R.	Indian Law Reports
K.B.	Law Report (Kings Bench)
K.L.R.	Kenya Law Reports
L. & C.	Leigh and Cave's Crown Cases (1861-1865)

L.L.R.	High Court of Lagos Law Report
L.Q.R.	Law Quarterly Review
Leach	Leach's Crown Cases
L.J.K.B.	Law Journal, Kings Bench
L.J.M.C.	Law Journal, Magistrates' Court
L.R.C.C.R.	Law Reports, Crown Cases Reserved
L.T.	Law Times Reports
M.L.R.	Modern Law Review
N.C.R.	Nigerian Criminal Reports
N.L.R.	Nigerian Law Reports
N.M.L.R.	Nigerian Monthly Law Report
N.N.L.R.	Northern Nigeria Law Report
P.L.R.	Punjab Law Reporter
Q.B.	Law Reports, Queens Bench
Qd. R.	Queensland Law Reports
R. & N.L.R.	Rhodesia and Nyasaland Law Reports
S.C.	Judgements of the Supreme Court of Nigeria.
S.C.N.L.R.	Supreme Court of Nigeria Law Report
S.L.J.R.	Sudan Law Journal and Report
T.L.R.	Tanganyika Law Report
T.L.R.	Time Law Report.
U.I.L.R.	University of Ife Law Report
V.L.R.	Victoria Law Reports
W.A.C.A.	West African Court of Appeal
W.L.R.	Weekly Law Reports
W.R.N.L.R.	Western Region of Nigeria Law Reports.

CHAPTER I

INTRODUCTION

This legal treatise is intended to discover the various factors bearing on the topic of the Defence of Mistake in Nigerian Law. As prelude, a brief account of the historical background of the two major enactments, containing the bulk of substantive criminal law in Nigeria is recited. The enactments are the Penal Code[1] and the Criminal Code[2]. The Codes are supplemented by other enactments as well as judicial decisions.

1. Origin of the Penal Code and Criminal Code

The bulk of Penal provisions in Nigeria are to be found in the Penal Code and the Criminal Code. The former applies in the Northern States and the latter in the Southern States. It is pertinent to note that before the advent of the British in the territory now called Nigeria, there existed a system of Customary Criminal Law in the Southern parts of the country, which is largely unwritten and consists of social norms based on the family unit, the village or group of villages. In most of the North, there is a comprehensive body of written Islamic Criminal Law with

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1. Cap. 89. Laws of Northern Nigeria 1963.
2. Cap. 42. Laws of the Federation and Lagos 1958

several Schools of Jurisprudence, the dominant being the Maliki School. The other peoples of the North that are neither Christian nor Muslim, had their own laws based on their cultural practices, though this is sometimes influenced by the more sophisticated Islamic Criminal Law.

In 1863, the British introduced to the colony of Lagos the English Common Law, which included the Common Law of Crime. The Introduction of English notions of justice and morality became imperative, in the British perspective, when they were confronted with the cultural practices of the natives, such as human sacrifices, which was considered "barbarous."[3] The Common Law of Crime was thus aimed at regulating the practices of the natives along the trading posts on the coast, where the main interest of the British lay. This law was, however, restricted to the Lagos Colony, while the rest of the country continued practicing their customary and Islamic Criminal Laws.

The inception of centralised government made the need for a concise and unified set of principles of criminal justice paramount. Thus, in 1904 the Lugard administration introduced by proclamation a criminal code (based on the Queensland Criminal Code), to apply

3. For further detail, see; (a) Ofori-Amankwah, E.H. Criminal Law in Northern States of Nigeria. (1986) Gaskiya Corporation Ltd. pp.52-58.

to the Northern provinces of Nigeria. The Code was made applicable to the entire country in 1916, after the amalgamation of the Northern and Southern protectorates in 1914. The Code of 1904 is the forerunner of the present Criminal Code, which was passed in 1960, and applies in the Southern States of Nigeria.

In the North, there were two or more systems of criminal law co-existing and this led to a lot of conflict. The problems arose when the lawyers, who were English-trained, could not come to terms with most of the rules of Islamic law as interpreted by the Maliki School. For instance, Islamic Law does not recognise provocation as a mitigating factor in murder cases, and the view was held that a murder accused stands a better chance of escaping the gallows if he is tried under English law, than his counterpart being tried under Islamic law, and also, his chances were dependent, in part, on the court which tried him.[4]

Secondly, Islamic Criminal Law does not recognise the right of a person to testify in his defence when charged with robbery.[5] This denial was regarded by the colonialists as constituting a grave violation of

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4. Maizabo V. Sokoto N.A. (1957) N.R.N.L.R. 133. See also: Ofori-Amankwah, E.H. (1979), "Penal Code and Criminal Code - Origin and Differences." Vol.7, Journal of Islamic and Comparative Law p. 49.
5. Mukhtasal Al Khalil and Thufat: "Commentary on the Mukhtasar" 305 (1882).

fundamental human rights, and contrary to the principles of equity and natural justice. Furthermore, the system of Haddi lashing, the aim of which is public disgrace, was considered an embarrassment by the muslim middle-class, due to their rising consciousness.

This situation continued until 1958, the dawn of Independence, when a Panel of Jurists was set up by the Northern Government to draft a Code which could both be applied successfully in a muslim environment and be accepted to the International community. After deliberations, the Panel, which was under the chairmanship of Justice Abu Rannat (then Chief Justice of the Sudan), recommended that Maliki Law should be restricted to issues of personal status and family law of muslim litigants. The main body of criminal law, both in its substantive and procedural aspects was to be codified. The code which eventually emerged in 1959 as the Penal Code Law has the Sudan Penal Code as its prototype.

This prompted Okonkwo and Naish to observe that the Penal Code ". . . has a strong link with English Law because the Sudanese Code was modelled on the 1896 Indian Penal Code, which in turn owed much to a draft prepared almost entirely by Lord Macaulay."[6] Other

6. Okonkwo C. O. and Naish M. E.: Criminal Law in Nigeria (1980) Sweet and Maxwell 2nd ed. p.9.

scholars are of the opinion that the Penal Code is a compromise code.[7] It is neither 100% English nor 100% Islamic, because some aspects of Islamic jurisprudence are preserved. For instance, the Islamic law offence of Zina (i.e. extramarital sexual intercourse) is codified in sections 387 and 388, incest under section 390 and consumption of alcohol by muslims under section 403.

2. Relationship Between the Codes:

The two codes are essentially of territorial application, thus, each code covers offences committed within the territory to which it applies only. Territoriality as a basis of jurisdiction is one of the general principles of Criminal Law. Lord Selbowne, in Singh V. The Rajah of Faridkote[8] made an observation on the principle of territoriality of the Criminal Law. He observed:

> "Territorial jurisdiction attaches upon all persons either permanently or temprarily resident within the territory while they are in it. It does not follow them when they have withdrawn from it and are living in another state"

A Muslim from Northern Nigeria would escape prosecution if he travels to the South to drink alcohol

7. Ofori-Amankwah E. H., Criminal Law in the Northern States of Nigeria, Gaskiya Corporation Ltd., Zaria 1986, p.55.
8. (1894) A. C. 670.

or to commit adultry. An exception, however, arises when an offence comprises of several elements, where the initial, or some, but not all the elements of the offence occur outside the territory. The two codes contain identical provisions for dealing with the exception.[9] If the initial act or omission of the offence occurs within the teritory covered by a Code, and the other elements occur outside, the person commiting the act or the omission is liable as if all the subsequent elements had occurred within the territory.[10] In the following illustration, if A. writes a letter in Maiduguri making false representations to B. in Akure, thereby obtaining delivery of goods by B. to himself in Maiduguri, he will be guilty of cheating under section 320 of the Penal Code. In R. v. Osoba[11], the despatch of a telegram from Lagos to London which induced the conversion of money in England to the use of the accused was sufficient initial element to ground a charge of stealing against the accused under the Criminal Code.

The accused person will, however, have a defence if it can be proved that he did not intend that his

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9. Criminal Code Section 12A; Penal Code Section 4.
10. Okoro V.A.G. (W.N.) [1965] 1 All N.L.R. 283.
11. (1961) 1 All N.L.R. 1.

initial act should have effect within the territory in which it was consumated. However, if the initial act or omission of the offence occurs outside the territory and other elements occur within, and the accused person subsequently enters the territory, he will be liable as if the initial act had occured within the territory. These provisions do not apply when the only material event is the death of a person whose death is caused by an act committed outside the territory at a time when the person was himself outside the territory.[12]

3. Relationship Between the Codes and Other Jurisdictions

The Criminal Code in Section 2(1) and the Penal Code in Section 2 both say that they are Codes "with respect to the several matters therein dealt with". In the interpretation of the law, therefore, the codes themselves are the starting point.[13] and the words of the codes should be given their plain or literal meaning. This is stated as a general rule of statutory interpretation. But Nigerian courts are free to make use of principles enunciated in other jurisdictions, where our local statutes are deficient in certain definitions.

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12 Section 4(4) Penal Code Law.
13. See Lord Herschell In Bank of England v. Vagliano. [1891] A.C. 107 at 144-145.

In the area of "Mistake", the topic of this dissertation, the English Law approach, as well as Sudanese, Indian and Australian approaches are relevant in the interpretation of our local statutes. English Criminal Law and English cases particularly constitute an important source for interpreting doubtful phrases in both the Penal and Criminal Codes. For instance, one of the matters not dealt with in the Criminal Code is the offence of obtaining credit by fraud which, in England, is covered by Section 13(1) of the Debtors Act 1869.[14] The two distinguished writers - Okonkwo and Naish[15] observed that this is an anomaly in the Criminal Code because it may be argued that in theory a prosection could be brought under section 13(1) of the Debtors Act, by virtue of the reception statutes. They suggested that Section 4 of the Criminal Code should be amended to exclude English Statutes and that the Codes' definition of obtaining by false pretence be altered to cover cases of obtaining credit by fraud.

The Common Law may also be used to fill gaps in the Nigerian Codes or any local statute. This was stated by the Privy Council in Shorunke V. R.[16] when the court held that, in appropriate cases, there

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14. Now abolished by the Theft Act 1968.
15. Okonkwo C.O. and Naish M.E., Criminal Law in Nigeria 1980 (2nd ed.) p.13.
16. [1946] A. C. 316.

existed side by side with the local ordinances and rules, the English Common Law right of subpoeana.

In the practice of utilising foreign rules as a guide to the interpretation of local statutes, the courts sometimes fail to study our local statutes properly, and as a result, prematurely declare them inadequate. This sad trend occasionally results in the courts giving contradictory rulings. For instance, in R. v. Nwajoku,[17] the court held that the English law of provocation is imported into Nigeria by virtue of Section 318 of the Criminal Code. A contrary ruling was reached in Obaji v. The State[18], where the court held that Section 283 of the Criminal Code, defines the defence of provocation for the purposes of Section 318 of the Criminal Code. At other times, the courts completely ignore the provisions of local statutes and go directly to make use of foreign concepts.[19]

It is respectfully suggested that the courts should pay more attention to their judicial duties. Bairamian J., in his dictum in Ogbuagu v Police[20], said:

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17. (1938) 3 W.A.C.A. 208.
18. (1965) N.M.L.R. 417.
19. For instance, the courts continue to use the Common Law doctrine of mens rea without regard to Section 24 of the Criminal Code.
20. (1953) 20 N.L.R. 139.

> "We have in Nigeria a Criminal Code which is meant to be complete and exhaustive."

And the Supreme Court, in Odu v. The State[21], also considered the issue of interpreting the Codes and stated:

> ". . . the most profitable approach to the interpretation of the Criminal Code (Penal Code) is to begin by examining the words of the code itself and that decisions on the Common Law are only of value where the wording of the code is obscure or capable of bearing more than one meaning, when they may be referred to for the purpose of ascertaining the sense in which words are used in the code."

In conclusion, it is hoped that the law courts will endeavour to apply the codes and construe their language according to their natural meaning, and only refer to English or other decisions for interpreting doubtful phrases in the Codes.

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21. [1965] N.M.L.R. 129 at p.131.

CHAPTER II

CONCEPT OF MISTAKE AT COMMON LAW

1. Mistake in Early English Law:

'Mistake' is not mere forgetfulness.[1] It is a slip "made not by design, but by mischance".[2] In Jurisprudence,[3] the term 'Mistake', connotes an erroneous mental condition, conception or conviction induced by ignorance, misapprehension or misunderstanding of the truth, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without the erroneous character being intended or known at the time. It may concern either the law or the facts involved.

In the early period in the development of English Common Law, the idea came to be accepted that a man's conduct does not constitute a crime for which he may be liable to punishment, unless the man knew or was conscious that what he was doing was wrong. An embodiment of this idea was to be found in the Latin maxim "actus non facit reum nisi mens sit rea."[4] At that time, the rule means that the accused person must have had a wicked mind at the time of doing the act, and his action must also be morally objectionable.

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1. Per Lord Esher, M.R. in Barrow v. Issacs & Sons [1891] 1 Q.B. 417 at 420.
2. Per Lord Russel, C.J. in Sandford v. Beal [1894] 65 L.J. Q.B. 73.
3. Ratanlal and Dhirajlal Thakore: The Law of Crimes (19th ed.) p. 135.
4. Contained in the "Leges Henriei Primi V. 28".

Mistake came to be recognised as one of the early factors, the existence or occurrence of which negatives the necessary mens rea, thereby constituting a good defence to the offence charged. In R. V. Banks,[5] the accused person was indicted for being in possesion of naval stores, contrary to a section of the Embezzlement of Public Stores Act, 1698.[6] The prosecution contended that since the Act made possession of naval stores, marked with the King's Mark the complete evidence of guilt, the accused committed the said offence unless he could produce the certificate required under the Act. Lord Kenyon, C.J. rejected this contention and held that an honest mistake that the person from whom the accused person acquired possession of the stores had such a certificate, was a good defence.

Four years later, in Fowler v. Paget,[7] the learned Lord, Chief Justice had occasion to reiterate this stand of the law. He declared:

> "It is a principle of natural justice and of our law that actus non facit reum, nisi mens sit rea - The intent and the act must both concure to constitute the crime."

Aguda[8] comments that this principle continued without interference right through to the third quarter of the 19th Century, the only exception recognised being with regard to the offence of Public Nuisance which, he says;

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5. [1794] 1 Esp. 145; 170 E. R. 307.
6. 9 & 10 Will. 3, C. 41.
7. [1798] 7 T. R. 509 at 514; 101 E. R. 1103.
8. Timothy Akinola Aguda, Principles of Criminal Liability in Nigerian Law, (1964) p.8.

justice in the particular circumstance and Aguda [12] wondered, if in that quest, the court was not carrying the doctrine of mens rea further than was necessary.

Not long after the decision in Hibbert (supra), the court of Crown Appeal Reserved consisting of sixteen judges in the case of R.v. Prince [13] pronounced a decision that would breach the sanctity of the doctrine of mens rea. On similar facts with Hibbert (supra), fifteen of the sixteen judges found the accused liable to the offence as charged, though the accused had believed on reasonable grounds, that the girl was above the age of sixteen (16), and she had in fact told him so much.

Immediately after Prince, the cases indicate that the doctrine of mens rea and, by implication, the defence of mistake (as precluding mens rea), began to be eroded. In Parker v. Alder[14], the defendant was convicted of selling adulterated milk, even though the adulteration was done by others without his knowledge. Curiously, though, the court had held the defence of mistake in R. v. Tolson[15] (which was decided 10 years earlier) to be a good defence. Aguda blamed the courts for this contradiction in the doctrine of mens rea by trying to erode it under the guise of statutory interpretation[16]. He cites Kennedy, L.J.,

12. Ibid. at p.8.
13. (1875) L.R. 2 C.C.R. 154.
14. (1899) 1 Q.B. 20.
15. (1889) 23 Q.B.D. 168.
16. Ibid. at p. 111.

who said:

> ". . . in construing a modern statute this presumption as to mens rea does not exist."[17]

But the learned jurist was of the opinion that the better approach was the one expressed by Lord Goddard, C.J. in Brend v. Wood,[18] when he declared that:

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

In summary, it may be stated that "mistake" was closely allied to the doctrine of mens rea. Whenever mens rea was required to constitute the offence, the mistake of the accused as to the circumstances surrounding the particular situation, which, in effect, is a denial of mens rea, goes to negative the offence. Suffice tp say here that the courts must continue with their primary function of giving effect to the intention of the legislature, and where such intention

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17. In Hobbes v. Winchester Corporation [1910] 2 K. B. 471 at 483.
18. [1946] 175 L. T. at 307. (Lord Goddard's dictum was adopted by the Judicial Committee of the Privy Council in Lim Chin Aik v. R. (1963) A.C. 160.

may be carried out by the proof of mens rea, the courts owe society the duty of insisting on such a proof.

2. Mistake of Mixed Law and Fact:

From the earlier part of this chapter, we have seen that from early times, the Common Law, save in the area of strict liability, has always been willing to exempt a person from criminal responsibility on account of his mistake as to a material circumstance. This mistake must be in relation to the facts and not the law. This requirement has led to several difficulties, one of which is distinguishing between the two types of mistake. A further difficulty arises in situations where there is a mixture of law and fact. In these situations, the trend seems to show that mistakes of mixed law and fact are treated as a mistake of fact simpliciter[19]. This trend is quite noticeable in Bigsay[20] cases, though, as we will see later in the chapter, the matter is not without latent complications.

Hale[21] stated the attitude of the Common Law in regard to mistake of fact as follows:- "in some cases ignorantia facti doth excuse, for such an ignorance many times makes the act itself morally involuntary." We may also recall the words of Cave, J[22]. when he said "honest and reasonable mistake of fact stands in fact

19. R. V. Vega [1938] 4 W.A.C.A. 8.
20. R. V. Tolson [1882] 23 Q.B. 168.
21. Hale, 1 P.C., p.42.
22. R. V. Tolson ibid.

on the same footing as absence of the reasoning faculty(in infants) or the perversion of that faculty (as in lunacy)." On the other hand, mistakes of law have generally not been accepted as a defence in English Law. This stand of the law is embodied in the maxim "ignorantia juris neminem excusat."[23]

Under the Common Law, a string of authorities exist to show that mistakes of law, reasonable or not, have not been accepted as constituting defences. In one of the early decisions, it was held that even a person who was out on the high seas[24] could not claim ignorance of an Act which was passed while he was still on the high seas. And in R. v. Barronet,[25] two French men were convicted of an offence which they believed was not punishable in England because it was not punishable in their country.

We have already expressed the opinion that it is not always easy to distinguish between Mistakes of Law and fact because some propositions of law are invariably based upon the existence of facts. In any event, a few cases exist that may illustrate this viewpoint. For instance, the case of R. v. Wheat & Stocks,[26] may be regarded as an example of a mistake of law though Edwards [27] rejects any such classification.

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23. Blackstone, "Commentaries," Vol.4, p.27.
24. R. v. Bailey [1800] R.&R. 1; 168 E.R. 651.
25. [1863] 1 E.& B. 1; 118 E.R. 337.
26. [1921] 2 K. B. 119.
27. J. LLJ Edwards: Mens Rea in Statutory Offences p. 75.

The facts of Wheat & Stocks are briefly as follows: a man believing himself to be lawfully divorced, went through a second marriage with another woman. He was charged with the offence of Bigamy and convicted.[28] His mistake was described by Dr. Stallybrass [29] as a mistake of law. The case of State Government v. Rangaswami,[30] may be taken to illustrate a mistake of fact; On a rainy day when visibility was poor, the accused and others went out to shoot a hyena. The accused saw an object moving in the bushes and shot at it thinking it was a hyena. But it turned out to be a human being. In the absence of negligence, it was held that the accused could benefit from the defence of mistake. A mistake of mixed law and fact is illustrated by the case R. v. Vega[31]. Here the accused person took possession of some old corrugated sheets believing them to be abandoned goods which, in law, cannot be object of theft. The question whether the corrugated sheets were abandoned or not was a question of fact, while the question whether the accused had a right to appropriate the corrugated sheets is a question of law.

Inspite of all the examples given above, there is hardly any clear-cut formula for seperating the law

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28. Contra R. v. Tolson ibid.
29. 56 L.Q.R. pp. 64-67.
30. A.I.R. 1952 (Nagpur) 268.
31. Ibid.
32. [1937] C.L.R. 286.

from the facts in most given situations. Any attempt at distinction only results in lengthy arguments as was evidenced in the case of R. v. Thomas[32]. The judges in Thomas were of varying views as to what may be fact and law. In his judgment, Latham, C. J., said:

> "I regard the belief relied upon by the prisoner as being a belief not as to a matter of law but as to a matter of fact. The belief was that a decree absolute had not been made by the supreme court of Victoria - whether or not such a decree had been made was a question of fact. . ."[33]

Starke, J. (dissenting) was of the view that the question of a person's marital status was a question of law and not of fact. He declares that:

> "Whether a person is divorced or married is not a mere matter of fact, as is the question whether a person is dead or alive. It involves the status or position in law of a person, which is in truth a conclusion in law and not of fact. . ."[34]

This difficulty was clearly illustrated in the judgment of Jessel M.R. in Eaglesfied V. Marquis of Londonderry,[35] He said:

> "A misrepresentation of Law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, there is still a statement of fact and not a statement of law

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33. Ibid. at p. 286.
34. Ibid. at p. 296.
35. [1876] 4 Ch. D. 693 at pp. 702-703.

> . . . . There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that the man was the first born son . . ."

3. Requirements for the Plea of Mistake:

Under English Common Law, the requirements for a plea of mistake of fact are that the mistake must, firstly, be honest and secondly, that had the real state of things been as the accused believed them to be, his act would not have amounted to an offence. A third requirement is that the mistake must be reasonable. This third requirement has been the subject of great debate, as to whether it is really a requirement or not. Notable academic writers and distinguished judges have all expressed opinions as to the necessity or otherwise of this third requirement. Kenny[36] expressed the view that for a mistake to constitute a defence, it must be reasonable while Turner[37] is of the opinion that reasonableness is only

36. Kenny, Outlines of Criminal Law, 1952, 16th ed. p. 76.
37. Turner, J. W. C., Kenny's Outlines of Criminal Law, 1962, 18th ed. p. 54.

a matter of evidence. And Stallybrass[38] says "reasonableness" is a condition precedent to the defence of mistake. Wi liams [39] explains that the requirement of reasonableness is not a general proposition of law and that the difficulty arises when people confuse reasonableness as a "condition of exculpation from criminal liability with reasonableness as a test of whether the accused was honest in saying that he conceived the mistake."[40] In relation to this, Aguda explains that if the mistake relied on by an accused person is manifestly unreasonable, the jury may be at pain to accept the mistake as honest. Though the learned writer adds that even where the jury accepts the mistake as one that was made honestly, the accused may still be guilty of an offence if the mistake is so unreasonable[41].

In one of the recent decisions of the majority of the House of Lords, in R. v. Morgan, [42] the court stated that the mens rea of rape is an intention to have sexual relations with a woman without her consent, or recklessness as to her wishes in that respect. Therefore, an honest but unreasonable mistaken belief that the woman had consented would be a good defence

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38. W.T.S. Stallybrass, op.cit. p.411.
39. Glanville Williams, Criminal Law, 1961, 2nd ed. p. 201.
40. G. Williams, ibid. at p. 201-202.
41. Aguda, Principles of Criminal Law in Nigeria (1965), Ibadan University Press, p. 171.
42. [1975] 2 All E.R. 347.

to a rape charge. The court added that, in that context, there is no express requirement for mistake to be reasonable, but, that does not mean that the reasonableness of the mistaken belief is totally irrelevant, because the reasonableness of the belief is of substantial evidential value - the more reasonable the belief, the more likelihood that the jury will believe that the accused was acting under a mistake. Professor Williams [43] described the decision in Wilson v. Inyang,[44] as "the most important contribution ever made to criminal jurisprudence by an English Divisional Court." He expressed the opinion that the decision repudiates "in general terms the hoary error that a mistake to afford a defence to a criminal charge must be reasonable."[45] The respondent in that case was an African who had lived in England for two years, and had taken a correspondence course in "drugless therapy". He set up in practice and advertised himself as a "naturopath physician", N.D., M.R.D.P. On a prosecution under the Act the Magistrate took the view that Inyang's use of the word "physician" was not allowed under the section, but held that Inyang could not be convicted because on the facts, he honestly believed that he was entitled to use that expression. On appeal, the divisional court affirmed the acquittal

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43. Glanville Williams, [1951] 14 Modern Law Review 485.
44. [1951] 2 K. B. 799.
45. [1951] 14 M. L. R. 485.

and stated that the question was not whether Inyang acted reasonably but whether he acted in good faith.

Having said so much, we may recoup as follows - The case of Morgan (supra) has settled the law that mistake is a defence where it prevents the accused from possessing the mens rea required by law for the particular crime charged. Mens rea in this context may be intention or recklessness and a mistake that precludes both states of mind will be inconsistent with quilt. Where the definition of the offence requires only negligence with respect to some element of the offence, only a reasonable mistake can be a defence, because an "unreasonable mistake, by definition, is one which a reasonable man would not make and is, therefore, negligent."[46] The third proposition is that whenever strict liability is imposed by law, then a mistake, reasonable or not is not a defence.

Lastly, if the real state of things had been as the accused believed them to be, his act should not constitute an offence. This requirement is best illustrated by asking the question, would the accused person escape liability on the facts as he saw or believed them? In this respect, to mistakenly kill a friend for a thief may not relieve a person from

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46. Smith and Hogan: Criminal Law, (1978), 4th ed. p. 182 (The learned authors added that where "gross negligence" is required, an unreasonable but not "grossly unreasonable" mistake is a defence).

liability, because the next question that will be asked is, what is the right thing to do to a thief? The answer to such a question will normally depend on the circumstances of each individual case. And if the answer is in the negative, then under English Common Law, a defence of mistake will not avail.

In R. v. Tolson (supra), the accused contracted a second marriage after her husband had been missing for a considerable length of time. She had given him up for dead. She was charged with the offence of Bigamy when her first husband reappeared. In acquitting her Cave, J., summed up the position of the law under English Common Law when he said:

> "At Common Law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence."[47]

The position of the law in Nigeria is considered in Chapter III.

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47. [1889] 23 Q.B.D. 168.

4. Critique and Public Policy:

Most of the criticism that has been levelled against the defence of mistake has been that the defence, which, essentially raises a subjective matter, has been given an objective interpretation, namely: in the concept of the reasonable man. To that extent, an "honest belief" is not sufficient, it must be reasonable or held on reasonable grounds. The problem lies in reconciling a subjective element (honest belief) with an objective standard (reasonableness).

The critics argue that a lot of injustice is being manifested on account of the objective criteria, and, not only in the area of mistake, but in other defences as well.[48] Professor Turner observed:

> "Unless a man has in his mind the idea of harm to someone it is bad law and morally objectionable to punish him".[49]

The reasons for condemning the objective criteria may have some merit, but, as we will presently see, there are better reasons for retaining the objective criteria in determining guilt.

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48. For instance in D.P.P. v. Bedder, [1954] 2. All E.R. 801; the only question that was asked was whether the provocative behaviour of the prostitute was enough to cause a reasonable man to loose his temper, and no consideration was given to the fact that the accused was impotent. See also R.v.McCarthy, [1954] 2 Q.B. 105.
49. J.W.C. Turner: Oxford Essays in Jurisprudence, 1961, p.29

The major reason behind the concept of reasonableness is one of public policy. The society must be protected even at the risk of sacrificing an individual, and the Criminal Law, as one of the main branches of Public Law, is committed to ensuring the continuity of the society. But before we delve into public policy considerations, we wish to point out that, but for the doctrine of reasonableness, every person would put up a defence of mistake, which, it is submitted, the prosectution would hardly be able to disprove - for it is a common saying that, even the devil does not know the thoughts of man. In view of that, we respectfully contend that, though the objective standard may have its shortcomings, its utility is much more than its potential evil.

There are situations where the reasonableness or otherwise of mistake is irrelevant. These are in the area of strict liability offences. At Common Law, there are three exceptional offences of strict liability - (i) Public Nuisance, (ii) Criminal Contempt and (iii) Criminal Libel. Stephen, describes public nuisance as an act not warranted by law, or the omission to discharge a legal duty which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects[50]. An example of public nuisance is the

50. Stephen, Digest of Criminal Law, 19th ed. p.179.

obstruction of the highway. Criminal (public) libel is the publishing of a statement with a seditious intent, or with the intention of circulating blasphemous or obscene matter. The justification for the imposition of strict liability is similar with that for the doctrine of reasonableness of mistake. It is for the harmful nature of these regulatory offences to the public. Also, it will be difficult to prove that the accused had acted knowingly or negligently.

The society expects its members to come up to an acceptable level in their conduct, and Justice Holmes, clinches the argument for public policy when he said:

> "If for instance a man is born hasty and is always hurting his neighbours no doubt his congenital defects will be allowed in the courts of heaven but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him at his peril to come up to their standard and the courts which they establish decline to take his personal equation into account".[51]

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51. Holmes: General Principles of Criminal Law, 2nd edition, p. 198.

The same learned jurist had occasion to reiterate his position, and he remarked:

> If I were having a philosophical talk with a man I was going to hang I shall say 'I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good; you may regard yourself as a soldier dying for his country if you like but the law must keep its promise:[52].

This is a firm statement of the position of the law, and we respectfully submit that, emotional and academic reasons apart, it is the one practical approach available to us. Thus, it is respectfully suggested that the law courts pay more attention to the doctrine of reasonableness and only depart from it if substantial injustice may result from its strict application.

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52 Holmes: Holmes-Laski Letters (Howe ed. 1953) p. 806.

CHAPTER III

CONCEPT OF MISTAKE IN NIGERIAN LAW

1. Mistake Under the Penal Code:

In the previous chapter we saw that at Common Law, Mistake was one of the early defences recognised as precluding mens rea; where mens rea connotes intention, knowledge, recklessness or some blameworthy state of mind. In that respect, mistake has always been upheld as a valid defence to a criminal charge.

The defence of mistake is also recognised in Nigerian Criminal Law. In the Northern States the defence is codified in section 45 of the Penal Code[1]. The section provides:

> "Nothing is an offence which is done by a person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it."

Professor Amankwah in his most illuminating book gave abrief explanation of section 45 in the following words:

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1. The Penal Code Law, 1959, Northern Region No. 18 of 1959.

> "The plea of mistake implies that the accused person thought (even if wrongly) that he was justified either by law in good faith to do the act subsequently complained of"[2].

And in R. v Tolson,[3] Cave, J. expressed the law as follows:

". . . honest and reasonable mistake of fact stands in fact on the same footing as the absence of the reasoning faculty (as in infants) or the perversion of the faculty (as in lunacy)".

The defence is a denial of one or both of the basic requirements for criminal liability, namely:- actus reus and mens rea. The plea of mistake, where successful, totally exonerates the accused person from all blame, and this, in our humble opinion, is what makes the defence of mistake all important.

The Penal Code requires the mistake to be one of fact and not of law since ignorance of law is no excuse. It is expedient to examine whether there is any significant distinction, save of terminology,

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2. E.H. Ofori-Amankwah: Criminal Law in The Northern States of Nigeria, 1986, p. 159.
3. [1882] 23. Q.B. 168 at 181.

between the phrases "Mistake of Law" and "Ignorance of Law". Several notable academic writers, for instance Keedy[4] and Amankwah[5], subscribe to the view that ignorance of law is not the same as mistake of law, though in practice, the courts rarely draw any distinction between the two. Professor Amankwah went on to say that the maxim - "Ignorantia Legis neminem excusat" - has "operated to the prejudice of our disadvantaged brothers in remote villages who are also deemed to know the law just like the Parliamentary draftmen in the Federal Ministry of Justice". Notwithstanding this hardship, the learned writer continued, "more dire consequences would result from a general rule which gives exemption due to ignorance of law". In addition to this, we respectfully contend that an exemption due to ignorance of law would render the judicial process impracticable because, it would be asking for the impossible to expect the prosecution, in all cases, to prove that the accused person was not ignorant of the law which made his conduct an offence. Aside from these viewpoints, there are a few situations where it may be prudent to recognise exceptions to this rule, and the Penal Code in Section 310 contains one

4. R.R. Keedy: "Ignorance and Mistake in Criminal Law (1908) 22 Harv. Law Rev.75 at 84.
5. Ibid. at p. 160.

of such exceptions. The section provides:

> Whoever commits criminal misappropriation of property knowing that, the property so misappropriated was in the possession of a deceased person at the time of that person's death and has not since been in the possession of any person legally entitled to such possession shall be punished. . ."

This section is aimed at giving special protection to the property of a deceased person in the period before the appointment of an Administrator. Professor Amankwah[6] submits that one of the ingredients to be proved in the charge is "knowledge on the part of the accused that the property in question was in the possession of the deceased person at the time of his death," and he says that where this knowledge is denied, it "goes to the facts and not law"

There are also isolated judicial decisions where ignorance of law was accepted as a good defence. In Ogbu v. R.[7] the charge was of corruptly receiving a bribe, and the contention by the appellant that he did not know that it was an offence to receive a bribe was upheld, thereby accepting ignorance of law as a defence. It is our opinion that this case was wrongly

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6. Ibid. at p. 160
7. (1959) N.R.N.L.R. 22.

decided and may lead to undesirable practice. The Federal Supreme Court was of the same opinion when the case came before them on appeal. The court remarked (obiter):

> ". . . if the matter ever fell to be decided by this court we should require cogent arguments to convince us that on a charge involving doing some act 'corruptly', ignorance of the law is a defence. . ."

It is comforting to note that cases on ignorance of the law are on the decline and at the moment the tendency is to treat mistake of mixed law and fact as a mistake of fact alone, thereby giving the accused the benefit of the doubt.[8] This tendency is noticeable in bigamy cases. For instance in R v. Tolson,[9] the accused believed her husband to be dead after he had gone missing for several years, and she contracted another marriage. He plea of mistake was upheld, as it was upheld in R. v. Gould,[10] where a decree nisi was erroneously treated as decree absolute. In the Indian case of State v. Rangaswami,[11] the plea of mistake was upheld where a company of hunters, on a rainy day when visibility was poor, mistook a man for a hyena and shot

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8. R. v. Vega, 4 W.A.C.A. 8
9. [1882] 23 Q.B. 168 at 181.
10. [1968] 2 Q.B. 68
11. (1952) A.I.R. (Nagpur) 268.

and killed him where he stood. In another case with similar facts in the udan, the Acting Chief Judge held:

> "Accused speared deceased in pitch darkness inside cultivation in the forest, believing in good faith that the object of his assult was not a human being but a wild beast. His act therefore is covered by section 44, and constitutes no offence"[12].

It is noted that though this judgement was given 'per incuriam', it is still preferable to the decision in Ngok Keir[13], where on similar facts the accused was convicted.

A person raising the plea of mistake must have believed in "good faith" that he was justified in doing the act subsequently complained of. This is the second requirement for the plea of mistake under the Penal Code. Good faith is defined in section 37[14] of the Penal Code and the section provides:

> "Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

"Due care and attention" in section 37 will necessarily by negatived by the existence of negligence,

12. Sudan Government V. Meiji Mbele (1961) S.L.J.R. 29
13. (1953) A.C.C.P. 108. 53.
14. Ibid. at p. 21.

carelessness and recklessness, thus making "good faith" synonymous with "due care and attention". Richardson goes on to explain that the "degree of care required to constitute good faith will vary with the circumstances. The greater the danger of injury, the greater the caution required".

Professor Amankwah[15] asserts that when the decision of the English court in Wilson v. Inyang[16] is taken into account, "good faith" and "reasonableness of mistake" turn out to mean different things, though he adds that, cases exist where "the presence of one is a fact from which the other may be inferred," and in support of this proposition, the learned writer cites the case of R. v Vega[17] (where the defence to a charge of stealing currugated sheets was that they were believed to be abandoned goods, which, in law, cannot be object of theft, was upheld).

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15. Ofori-Amankwah, op.cit. p. 162.
16. [1951] 2 K.B. 799.
17. 4 W.A.C.A. 8.

2. Mistake Under the Criminal Code:

The sections that are particularly related to the defence of mitake in the Criminal Code are sections 25, 22, 24 and to some extent section 23. The Criminal Code in section 25 provides:

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

This section seems to be a codification of the English Common Law position discussed in the previous chapter, with the slight difference that section 25, unlike the Common Law position does not exclude the operation of mistake if the act done was unlawful. Section 24 provides, in part that:

> ". . . 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."

According to this section (24) and by the doctrine of mens rea, there is no legal fault in any case in which the accused person is not aware of the facts bringing him within the definition of an offence. An effective way of proving this lack of awareness is provided by the provisions of section 25, to the effect that the accused thought otherwise because he had made a mistake.

The kind of mistake required by section 25 of the Criminal Code must be "a mistaken belief in the existence of any state of things;" This means a mistake as to the facts, as mistakes of law are irrelevant. Section 22 provides:

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

In Ogbu v. R[18], one of the accused persons said at his trial that he did not know that it was contrary to law to pay a bribe in order to induce the other accused to appoint him as village headman (the mental element of the offence charged being that he should have paid the bribe corruptly). The trial judge accepted this story and acquitted him. On appeal by the second accused person, the Federal Supreme Court remarked (obiter):

> ". . . we are not at present satisfied that the learned judge was right in law in acquitting Utachia Okobi on those findings, and that, if the matter ever fell to be decided by this court we should require cogent arguments to convince us that on a charge involving doing some act 'corruptly', ignorance of the law is a defence to a person who had an intent of a kind which the court regards as corrupt."

18. [1959] N.R.N.L.R. 22 at 24-25 (F.S.C.).

Okonkwo and Naish[19] observed that in situations where a mistake is one of law, it should be born in mind that ". . .although mistake or ignorance of the law is per se no defence, it may yet be extremely relevant to the accused's argument," because the ignorance of the law "may constitute strong evidence that he did not in fact have a particular state of mind which the prosecution have to prove against him under the particular crime charged."

The rule that ignorance of the law is no excuse is criticised on the ground that it constitutes an exception to the general principle of "No liability without fault," and, therefore, against the laudable concept of mens rea. The rule is unnecessarily harsh especially where laws are not easily accessible (e.g. hidden in volumes) and where their provisions are so technical that even the trained lawyer is not very sure of their meaning. In defence of the rule, it is submitted that it is everyone's duty to discover what the law is, the alternative being that every scoundrel that broke the law will plead ignorance, and wait for the prosecution to prove that he did in fact know the law. A very difficult task indeed. But Okonkwo and Naish[20] have offered a useful suggestion on this issue

19. C.O. Okonkwo and M.E. Naish (1980) Criminal Law in Nigeria 2nd ed. p. 103
20. Ibid. at 103.

- an ammendment of the criminal code to be substituted by the law as obtains in some Scandinavian countries; where it is a defence if the accused can prove that he was in non-culpable ignorance of the law. They submit that such a provision lays no heavy burden on the prosecution and yet allows for hard cases.

There are a few exceptions to the rule that ignorance of the law is no excuse. The insane person and the immature escape liability because they do not possess the capacity to understand the law. 'Immaturity' is covered by section 30 of the Criminal Code and section 50 of the Penal Code, but this exclusion does not mean that a child cannot be guilty of an offence because Part V of the Children and Young Persons Act[21] provides for the "care and protection" of any child. Consequently, by section 26 of the same law, any Local Authority, Local Government Council, Police Officer or authorised officers, is vested with power to bring any child or young person before a juvenile court, if sufficient reasons exist to show that such a child is in need of care and attention. For obvious reasons, the insane person is not held responsible for his actions. The relevant sections covering this exception in the Criminal and Penal Codes

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21. Cop. 32, 1958 Laws.

are 28 and 51 respectively. Section 258 of the Criminal Code also exempts a person who executes an erroneous sentence, process or warrant if he acted in good faith and in the belief that the sentence, process or warrant was issued with authority.

In section 25 of the Criminal Code, the words "the existence of any state of things" appear to mean that at the time the accused committed the unlawful act, he was making a mistake as to some existing material fact or facts. It is wondered whether this also mean the consequences of an act or is there a difference between "state of things" and "consequences of an act"? In the Queensland case of R. v Gould[22], a mixture of glycerine, Dettol and Surf was introduced into a woman's vagina in an attempt to induce abortion, with fatal consequences. The accused persons contended that they reasonably believed that the insertion of the concoction was a safe procedure, but the court of Criminal Appeal rejected their contention on the grounds that the mistake was not a mistake as to the existence of a state of things, rather it was a mistake as to what consequences would follow. The court explained that it would have been different if the accused persons ordered a harmless solution from a

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22. [1960] Qd. R. 283 (C.C.A.).

chemist, and the chemist supplied a lethal substance unknown to them. If the woman died under such circumstances, the accused persons could be said to be mistaken as to the existence of a certain state of things, that is, that the bottle contained the harmless substance ordered by them. In any event, Okonkwo and Naish point out that the "rejection of a defence under section 25 on the ground that there is no belief in a state of things, is not conclusive of a case, for if the mistake is as to consequences, the rule that a man is not criminally responsible for an event which occurs by accident (section 24, Criminal Code) may apply to negative responsibility"[23].

For the purposes of section 25 of the Criminal Code, the mistake must be both honest and reasonable. This is in recognition that a mistake may be honest but unreasonable or may be unreasonable but honestly made. In neither of the above instances would a defence prevail. We propose to defer this issue to later chapters for discussion in greater detail, because the issue of reasonableness in our humble opinion, is one of the most contentious areas in the defence of mistake.

The Criminal Code in section 25, further provides,

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23. Ibid. at p. 104.

in part, that liability is not to ". . .any greater extent than if the real state of things had been such as he believed to exist". This would mean that even if the mistake is both honest and reasonable, the court would have to ask the question; would the accused escape liability on the facts as he assumed or saw them? This type of question will render many mistakes immaterial. For instance, X. intending to burgle Y.'s house, burgled Z's house by mistake. His mistake here is immaterial because he would still have been guilty of the same offence if he had not mixed up the houses. Similarly, in R. v Aliechem[24]; to mistake a friend for a thief and to kill him would not of itself relieve of liability, because the question would have to be asked: what is the liability for killing a thief? The answer will normally depend on the circumstances of the case. In Aliechem (supra), it was murder, in R. v Aniogo,[25] it was manslaughter; but where a person believes that the thief was attacking him with intent to kill, it may be no crime at all - (section 286 Criminal Code).

Finally, the defence of mistake may be excluded by the definition of an offence. Section 233 of the Criminal Code provides that:

> "Except as otherwise expressly stated, it is immaterial, in the case of any of

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24. (1956) 1. F.S.C. 64.
25. (1943) 9. W.A.C.A. 62.

the two cases would a defence avail. Thus, some say that it is high-handed to condemn a man for a mistake that was honestly made just because it appears unreasonable to a third party (reasonable man), as indeed the current trend in England show that, it is on the way of being established that the reasonableness or not of a belief is to be disregarded so long as the mistake was honestly made.[28]

The question may be asked, who is the reasonable man? Lord Goddard, one of England's most respected judges chose not to venture a definition. He observed:

> ". . .No court has ever given nor do we think can ever give a definition of what constitutes a reasonable man"[29]

Dr. Chukkol however describes the reasonable man as "an average intelligent person in a given community. . . the reasonable man is not a hot tempered man, nor a drunkard. His conduct in any given situation is such that the community to which he belongs would expect its members to conform to"[30]. Taking a cue from the definition, it seems the reasonable man must at all

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28. See DPP. v. Morgan [1975] 2 All E.R. 347 and Wilson v. Inyang [1976] A.C. 182.
29. R. v. McCarthy. (1954) 2 Q.B. 105.
30. The Reasonable Man: Does he 'exist' under the Penal Code?, Ahmadu Bello University Law Journal, 1984 and 1985 p. 45.

times and in any situation be cool and level headed. Where the accused fails to measure up to this standard, he is punished. This may seem like a lot of requirement for a normal person, but in virtually all the decided cases on witchcraft, the courts are unfledging in their stance that belief in witchcraft cannot be regarded as reasonable nor can it be a valid ground for killing a person alledged to possess the power of witchcraft. The attitude of the courts stem from the basic precept that everyone is entitled to be heard. Thus, it is not permissible to kill supposed witches unheard. In Gadam v R[31], the wife of the accused person was suffering from a mortal illness which resulted in a miscarriage. The accused believed that her illness was caused by an old woman through witchcraft. Whereupon he fatally hit the old woman on the head with the handle of a hoe. At his trial, it was found as a fact that his belief was bona fide, and that the belief in witchcraft was prevalent in the accused's community. But the West African Court of Appeal dismissed the appeal against conviction for murder on the grounds that the mistake was unreasonable. In support of its decision, the Appeal

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31. (1954) 14 W.A.C.A. 442.

Court cited an earlier (unreported) case of Ifereonwe v. R., where it was held that the killing of another in the belief that he is bewitching you could not be regarded as a reasonable mistake. They quoted with approval a passage from the trial judge in Ifereonwe:

> I have no doubt that a belief in witchcraft such as the accused obviously has is shared by the ordinary members of his community. It would, however, in my opinion be a dangerous precedent to recognise that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among a community, it is therefore reasonable. The courts must, I think, regard the holding of such beliefs unreasonable.

It is apparent that the courts have taken a long and hard look at the belief in witchcraft and found it wanting. No goodness comes out of it, rather the tendency to throw us back to the days of ritual killings. For this reason, the courts are very stern in discouraging the belief and practice of witchcraft as evidenced by the cases. This attitude of the law courts was criticised by two distinguished writers, who are of the opinion that "the decision in Ifereonwe and Gadam are, in effect, decisions of policy based on the deterrent and educative theories of punishment and a belief in the maintenance of standards which many in

the community cannot reach"[32]. In this regard, one may perceive an undercurrent of undue stress on the deterrent aspect of punishment, without a corresponding consideration for moral guilt. And this, the learned writers observed, is inconsistent with one of the cardinal principles of criminal law - that an act does not make a person legally guilty unless the mind is legally blameworthy.

Mr. Karibi-White J.S.C. observed that it is not the belief in witchcraft which is held to be unreasonable but acting on the belief[33]. This may be the reason why the courts have consistently applied the provisions of section 25 of the Criminal Code to the letter. It may also be in conformity with the rule that the first point in the interpretation of a codified law is the Code itself. It is however our humble opinion that both the belief and acting on it could be unreasonable. This is not withstanding the honesty of the belief[34].

In R v. Aniogo[35], the accused was convicted of

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32. Okonkwo C.O. and Naish M.E.: Criminal Law in Nigeria, 1980 2nd ed. p. 106.
33. A.G. Karibi-White "Cultural Pluralism and the Formulation of Criminal Policy" in A.A. Adeyemi, ed. Nigerian Criminal Process, 1977, University of Lagos Press, p. 9-20.
34. Maawole Konkomba v. The Queen (1952) 14 W.A.C.A. 236.
35. (1944-46) 9 W.A.C.A. 62.

manslaughter. The facts, briefly, was that the accused heard people shouting thief! thief! and he grabbed his gun and came out. He saw someone running and promptly shot and killed him. The court considered this action unreasonable and anyway, section 272 of the Criminal Code prohibits the killing of thieves. Similarly, in R. v. Aliechem[36], the accused was convicted of murder, and in Basoyin v. Att.General Western Nigeria[37], the appellant believed that his wife had committed adultery. He further believes that this wicked act was the cause of his child's sickness. He chased the wife and dealt her matchet blows, and in the course of the struggle, the child slipped from his mothers back and died. The contention for the appelant was that, he mistakenly thought that the child had already died and so he could not be convicted of causing the death of what was already dead. The Supreme Court dismissed the appeal with the words that the mistake "was neither honest nor reasonable". It is our opinion that this is the best attitude that the court can adopt, especially considering the facts of Aniogo and Basoyin alone. The courts must discourage the brazen habit of taking the law into one's hands, because in most cases, vengeance

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36. (1956) 1 F.S.C. 64.
37. (1966) N.M.L.R. 289.

is the motivating factor, and not mistake, or an honest apprehension of harm, as is often pleaded.

The Common Law requirement for "reasonableness of mistake" does not seem to be one of the requirements for the defence of mistake under section 45 of the Penal Code. There are two main viewpoints on this issue - The proponent of one viewpoint, Professor Amankwah[38], an expert on Criminal Law, contends that, though reasonableness may not have been provided for in the Penal Codel, section 45, it should be read into it, and argues that that has infact been the practice of the courts. The other viewpoint is advanced by a no less renowned scholar on the subject, in the person of Dr. Chukkol[39], who is of the view that the concept of reasonableness is alien and has not been specifically provided for in the Penal Code.

The phrase "good faith" in section 45 of the Penal Code relate to the subjective element, which is what the accused believed at the relevant time. Professor Turner says:

> "Since the defence of mistake raises an essentiallysubjective point as to what the prisoner really believed, the objective question of reasonableness is strictly irrelevant"[40]

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38. Ofori-Amankwah E.H. Criminal Law in The Northern States of Nigeria, (1986) Gaskiya Corp. Ltd. Zaria
39. Chukkol K.S. Defences to Criminal Liability in Nigerian Law: A Critical Appraisal, (1980) Zaria.
40. Kenny's Outlines, op.cit. p. 59.

In practice, however, the belief of the accused person is subjected to an objective examination, and this is so, even where the accused, for some personal peculiarity, holds a belief in the phenomenon of the supernatural. This is justified partly by the fact that in the 21st Century, a belief that is not liable to empirical analysis is untenable, and partly in the absurdity of such a belief, which is largely psychological. Looking at the other side of the coin, we find that Nigerians from all walks of life entertain similar beliefs in varying degrees. Some go to the extent of seeking answers to every event from a witchdoctor.

M. Gluckham[41], narrated a story he had heard about a Pondo teacher from South Africa who, in conversation with his white friend, said:

> "It may be true that typhus is carried by lice but who sent the infested louse? Why did it bite one man and not another"

These instances indicate a certain amount of belief in witchcraft, but we must not lose sight of the fact that the terms witchcraft, and witchdoctor, are liable to several interpretations in Africa. A witchdoctor could be a plain traditional healer credited with wisdom and

41. "Customs and Conflicts in Africa," 1965, id at 85.

foresight. This may well be the reason why people go to them in search of cures and answers. Consequently, a witchdoctor is not necessarily an evil person, though some unscrupulous persons like to cash on the gullibility of unwary citizens by laying claims to fantastic feats and mysterious powers. Penal provisions in our statutes like section 210 and 216 of the Criminal and Penal Codes respectively, are purposefully aimed at discouraging such persons. Dr. Chukkol[42], however, argues that these sections of the law constitute an admission of the existence of witchcraft. Our humble opinion is that that argument lacks merit for all the reasons adduced earlier. Further, we wish to repeat that no good comes out of the belief in the supernatural, and the function of the Criminal Law is, among others, to direct man to better his existence on earth, and an assertion like that of Dr. Chukkol is clearly incompatible with the basic ideals of the Criminal Law.

Under section 222(2)[43] of the Penal Code, a person exercising in good faith, the right of private defence will not be liable for murder even if he mistakenly

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42. "Supernatural Beliefs and The Criminal Law in Nigeria", 1983 Journal of the Indian Law Institute at p. 451.
43. State vs. Gwoji Jire, (1965) N.N.L.R. 52.

over-estimates the danger in which he stands and uses more force than is necessary and causes the death of his supposed assailant or any other person. The matter, however, takes new dimension where the anticipated attack is a supernatural one. In such cases, the attitude of the courts is to carefully examine, not so much whether the belief is, unreasonable but whether the subsequent act of the accused smacks of revenge. This can readily be done by an objective examination of the circumstances preceding and succeeding the incident. Questions the court may seek answers to, could be the possibility of recourse to public authority, evidence of injury on the accused as opposed to his claim of fear of imminent harm by words alone, for instance - "I will injure you by juju or witchcraft" - and related questions. In Gadam v. R.[44], the accused had killed the deceased on the belief that the deceased was responsible for his wife's barren condition through witchcraft. At his trial, the question that arose was whether, on the evidence, the accused could be convicted of murder. The contention for the accused was that he did not intend to kill the deceased but only to neutralise the deceased's magical spell. The West African Court of Appeal relied on section 25 of the Criminal Code, which requires a

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44. (1954) 14 W.A.C.A. 442.

mistake of fact to be both honest and reasonable before it exonorates, and rejected the plea of mistake, on account of its unreasonableness.

About fifteen years later the Supreme Court gave a similar ruling in the unreported case of Alu Mamman v. State[45]. Here, the accused person struck the deceased to death in the mistaken belief that the deceased was a witch who was about to harm his (accused's) mother. Commenting on the West African Court of Appeal's decision in Gadam, Okonkwo and Naish[46] are of the opinion that "it is perfectly possible to hold a belief in witchcraft reasonable and yet to punish the killing of witches". But Dr. Chukkol[47] is of the opinion that the matter is not that straightforward. He says: "If one accepts, as the authors appeared to have done, that a belief in witchcraft is quite common, then the accused in Gadam ought to have been exonorated altogether for he did not strike at a harmless witch but one that had harmed (and was still harming) his wife". We still ask the question, what did the accused do following his honest belief? Apparently, he went and sought vengeance.

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45. No. S.C. 312/69 (unreported).
46. Criminal Law in Nigeria, 1980, 2nd ed. p. 106.
47. "Supernatural Beliefs and the Criminal Law in Nigeria," 1983, Journal of the Indian Law Institute, p. 452.

Returning to the Penal Code, the requirement is that the accused's mistake must be made in "good faith". But when good faith is interpreted in connection with mistakes founded on supernatural beliefs, the courts seem to equate it with the concept of reasonableness under English Law. In the Sudan, where the requirement of good faith in section 44 of the Sudan Penal Code, is similar to what obtains in section 45 of our Penal Code, the courts also adopt the same practice. In Sudan Government v. Lahoyuk[48], a plea of mistake founded on the accused's belief that the deceased was a witch was rejected on account of its unreasonableness. Similarly, in Sudan Government v. El Nebi[4], the killing of a woman whom the accused thought was a baatiya (ghost) was also rejected for the same reasons.

A deviation in the attitude of the courts exist in their treatment of cases where the accused persons knew that their victims were human beings, albiet possessed of supernatural powers capable of harming them, as in Lahoyuk and the cases where the victims were not thought to be human beings at all, as is disclosed by

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48. (1961) S.L.J.R. 122.
49. (1965) S.L.J.R. 140.

the facts of the Canadian case of R. v. Machekequonabe[50]. In this case, the accused had killed the deceased believing it to be a wendigo. A wendigo is an evil spirit that assumes human form and attacks human beings with cannibalistic intent. The rule postulated by Glanville Williams[51] have found acceptance with some judges in these cases. For instance, in Sudan Government v. Nur[52], a belief that the deceased was a ghost was held to be made in good faith and accused's plea of mistake was accepted as a complete defence. The learned writer suggested that in all killings associated with the mistaken belief in the supernatural, two questions should be asked by the court, namely:

(i) Did the accused at the time of striking the fatal blow know that he was striking a human being albiet possessed of some supernatural powers? and,

(ii) Did the accused think that he was not striking a human being at all but a magical creature in human form?

Professor Williams gave the answers as follows:

In number (i) above, the killing is unlawful, save in

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50. (1897) 28 Ont. R. 309.
51. "Homicide and the Supernatural", 65 L.Q.R. 491 at 497 (1949).
52. (1959) S.L.J.R. 1.

exceptional cases like private defence, if the accused knew that he was striking at a human being who is possessed of harmful supernatural powers. This is because the accused will be deemed to possess the necessary mens rea for murder. In number (ii) however, if the accused believed that his victim was not a human being at all, but some creature assuming human form, he would not be liable because he would then lack the mens rea for murder, which is intention to kill a human being.

This careful distinction would have worked quite well but for the difficulty in it, as pointed out by Dr. Chukkol[53]. He observed that in many of the cases of killings of suspected witches, the killer does not just kill for killing's sake but is also "attempting to ward off an apprehended attack". In such a case, "it matters not whether he (killer) knows the deceased to be a human being **or** some magical creature, for the law granting him the right of self defence holds good for even attacks on him by normal persons".

As we stated in the beginning of this chapter, the chief advocate of the "reasonableness concept" is Professor Amankwah. He submits that in the event of a killing in revenge for witchcraft, the plea for defence

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53. "Supernatural Belief and the Criminal Law in Nigeria", 1983, Journal of the Indian Law Institute, p. 454.

is usually rejected not just for the revenge factor, but also for the unreasonableness of the belief. He asserts that though the requirement for reasonableness is not strictly spelt out by the wordings of section 45 of the Penal Code, it should be read into it to fill the "yawning gap in the law"[54]. In support of his contention, he cites the cases of Tunde Garke and Gadam[55]. The learned professor further observes that though the case of Tunde Garke was decided under section 45 of the Penal Code, "the logic and language of the court was in identical terms as in Gadam, decided under the Criminal Code (section 25)"[56]. This means that the court was in effect importing "reasonableness" into the definition of the offence, and the professor asked the question whether "this was a permissible judicial interpretation or should the courts be reminded that Nigerian Criminal Law is codified and the starting point in the interpretation of the Law is the Code"[57]. The learned writer is of the opinion that the trend set by Tunde Garke is salutary[58].

54. Ofori-Amankwah E.H. Criminal Law in the Northern States of Nigeria, 1986, Gaskiya Corporation Ltd., Zaria, p. 166.
55. Tunde Garke v. State, (1978) FCA/K/54/78. Gadam (1954) 14 W.A.C.A. 442.
56. Ibid. at p. 162.
57. Ibid. at p. 162.
58. See also R.v. Konkomba, 14 W.A.C.A. 236; R. v. Acide, 13 W.A.C.A. 48

The distinguished writer offers a suggestion as to when reasonableness should be imported as a criterion. This, he says, should be done only to distinguish mistake resulting in revenge from other cases; and it should apply to all cases of the supernatural in the form of juju, witchcraft and the like. He gives examples of cases of "revenge" and "non-revenge" as follows:-

> (i) A. wakes up at 4.00 a.m. to attend to nature's call in a large compound, and sees a glowing (or grey) figure in the yard. After shouting three times to know who it is and, hearing no response, strikes the figure thinking it is a witch. In the above illustration, the professor contends that A. should incur no liability because it is a non-revenge situation.
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> (ii) A. strikes B. thinking he is magically or through witchcraft responsible for the disappearance of his genitals or the goods from his shop. In this situation, the learned writer advises that the court should discourage private revenge for its attendant consequences.

Whilst recognising and accepting the strength and academic value of the opinion expressed by Dr. Chukkol and other scholars[59] on this subject, it is our respected opinion that the formular recommended by professor Amankwah has the best practical chances of operation, and is, therefore, preferable. When the

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59. M.I. Khalil: "Criminal Law Reform in Nigeria", in Proceedings of the Law Teachers Conference held at Ife in 1974, at p. 127.

evolution of witchcraft, juju, voodoo, and related practices is investigated, a single trend becomes visible, namely, in the more technologically advanced societies of the world, such believes have eventually been found to be retrogressive, without basis and unjustified. It is a result of ignorance and stubborn adherence to the beliefs of our forefathers. It is not unlike the blind beliefs of heathen tribes of old, who refused to accept the religion of God (Christianity and Islam) even when faced with overwhelming proof of it. When this writer interviewed a cross-section of people in Nigeria on their experience, if any, of the phenomenon called the supernatural, we received a myriad of response. The interesting thing about the views collected is that almost all the educated people interviewed were of the opinion that such beliefs, where they exist, were a product of misinformation and a child-like fear of the dark. Even the more humble rural dwellers, tells us that their religion (Christianity and Islam) forbid such beliefs because of its ungodly nature.

Strengthened in our view by these findings, we hasten to repeat our call to the courts to be more resolute in discouraging these beliefs whenever they are sought to be relied on. We further wish to reiterate our association with Professor Amankwah's

stand, that whether or not reasonableness is a requirement under the Penal Code, it should be read into it to give section 45 a fuller meaning. In fact, this has been the practice of the courts, and not in Tunde Garke alone, but also in two more unreported cases on section 45 of the Penal Code; In State v. Shalifu[60], the accused mistook a human being for a monkey and shot him to death. The judge argued that since accused fired his shot at point-blank range, he ought to have ascertained where the shot would fall and, therefore, found accused guilty under section 224 of the Penal Code for causing death by a negligent act. Similarly, in State v. Achema Okolilo[61], the accused had shot and killed a co-hunter under the mistaken belief that the object he was shooting at was a monkey. In his judgement, Adesuyin J. described the accused's conduct as negligent and called him a "careless fellow", and convicted him of manslaughter.

4. Mistake and/or Ignorance of Law:

In accordance with the maxim "Ignorantia Legis Neminen Excusat", section 45 of the Penal Code does not accept mistake of Law as a defence. Similarly, section

60. No. MO/645/65 of 12/2/65 (unreported).
61. Unreported (In the New Nigerian of Sept. 13, 1975)

22 of the Criminal Code provides that ignorance of the law is not a defence.

Our purpose in this chapter is to discover similarities, if any, in the Penal and Criminal Codes use of the two phrases and the extent of their application. Whenever an element of law enter into the mistake of the accused person, his mistake will not avail him as a defence. In this regard, virtually no exception is recognised. We however, respectfully assert that, where a specific criminal intent is a requisite element of the offence, as distinguished from the mere criminal mind, if this intent is negatived by mistake or ignorance, the accused person would not be convicted. The following illustration will explain this point. If for instance, A. thinking that he has a title to the cow of B., takes it into his possession, he has not committed a felony but a trespass because of his belief that he has title. Consequently, in such a case, a different result may be reached where a criminal act is done under a misconception of the law.

Generally, a man may act under a misconception of the law where he does an act in ignorance that the law makes such act criminal. His misconception here is due to ignorance which renders him completely unaware of

the existence of the law that makes his conduct an offence[62]. The misconception here may be termed "ignorance of law", and an example is where a man already married, undergoes another marriage in ignorance that the second marriage is unlawful. Another case in which a man may act under a misconception of the law, is where he does an act under a misconception of the legal effects of certain facts. Here the man has some knowledge of the law, but gets a wrong view of the situation, due to improper application of law to the factual situation. In this case the man is said to have made a "mistake of law". For instance, in R. v. Wheat and Stocks[63], the accused person had some knowledge of the matrimonial law governing his marriage but he mistook their precise effect when he thought his solicitor's remark - "we would soon be sending you papers to sign" - was sufficient to terminate his marriage.

In the African context, and particularly Nigeria where the literacy rate is very low, the problem is not with people knowing the law and misapplying it, but rather with people not knowing the law at all[64]. For this reason, ignorance of law as codified by section 22

62. R. v. Bailey, [1800] R. & R. 1.
63. [1921] 2 K.B. 119.
64. Odangola Ogbu v. Queen, (1959) N.R.N.L.R. 22.

of the Criminal Code is more in line with the African situation when compared with the Penal Code's provision. A man may be ignorant of the law when he does an act without paying any attention to the law, that is, in unconsciousness that the law governs his case[65]. He may also be ignorant of the law if he considers the law and believes that it does not govern the particular case[66].

It is our contention that another distinction, as to legal effect, exist between the two classes of cases designated under the heading "Ignorance of Law and "Mistake of Law". The distinction is based on the footing that ignorance of law does not negative the criminal mind, while mistake of law does. The criminal mind exist when a person, not insane does an act, with the knowledge of its physical character. If the act is criminal, the criminal mind exist even when the person has no way of knowing that the law which makes his act criminal exists - for instance when the act of the defendant was done only a short time after the passage of the statute that the defendant could not have known of it[67]. On the other hand, if a person does an act under the wrong perception of a situation by applying

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65. Rex v. Crawshaw, 1 Bell C.C. 303.
66. Reg. v. Price, 3 P. & D. 421.
67. See Oakland v. Carpentier, 21 Cal. 642, 665. and R. v. Bailey, ibid.

law to facts, if the act done would not be criminal if the situation were as the defendant believed them, then he should have a good defence. The state of mind of the defendant here is as though the situation regarding which he was mistaken were one solely of fact.

The rule that ignorance of law is no defence has been defended by several academic writers on grounds of public policy. In his contribution, Holmes said:

> Public policy sacrifices the individual to the general good of the society. It is no doubt true that there are many instances in which the criminal would not have known he was breaking the law but to admit the excuse to all would be to encourage ignorance where the law maker has determined to make men know and obey and justice to the individual is rightly out-weighed by the larger interest on the other side of the scale.[68]

The judge in People v. O'Brien 69 also justified the rule on public policy grounds. He remarked:

> The rule rests on public necessity. The welfare of society and the safety of the state depend upon its enforcement. If a person accused of a crime would shield himself behind the defence that he was ignorant of the law which he violated immunity from punishment would in most cases result. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration. The plea should be universally made and should lead to intermidable questions incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance excusable? etc.

68. People v. O'Brien [1892] 31 Pac. Cases 45 at 48.
69. Ibid. at 47.

It is our humble opinion that this approach to a defence of ignorance of law is prudent. As we stated earlier, in Nigeria, with a relatively low literacy level, everyone would be breaking the law and the prosecution would be helpless in their attempt to prove that they knew the law. Dr. Chukkol[70], however, is of the opinion that the law should not be strictly applied, but should allow for some limitation. He gives examples of the cases in which an exemption should be granted - (i) where the offence committed is relatively minor, for example, traffic offences and some regulatory offences in factories, (ii) where the act of the accused person violates the provision of a new law, especially in cases where very little time has elapsed between the enactment of the law and the accused's act, and where the meaning of the words used in the statute is hard to determine. The respected scholar has the support of distinguished academic writers on this point. Dr. Fitzgerald commenting on the difficulty of ascertaining the meaning of legal language remarked:

> ". . . Even where the defendant has the good fortune to have the statute or other instrument brought to his notice such is its phraseology that its meaning may well remain a mystery until a court gives an authoritative ruling."[71]

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70. Defences to Criminal Liability in Nigerian Law, (1980) A.B.U. Press, Zaria. p. 25.
71. P.J. Fitzgerald, "Crime, Sin and Negligence" 1963 Vol.79 L.Q.R. 351 at 357.

On new laws, Fitzgerald said:

> ". . . Today we are bombarded by rules and regulations creating new offences only good fortune helps most of us to avoid breaking the law"[72]

In his work, the Morality of Law, Lon Fuller[73] contended that failure to make legal rules comprehensible and failure to publicize statutes are two ways of failure to make law at all. And in a critical commentary, Dr. Chukkol[74] says that in the African context, "publicize", "means little more than putting the laws into gazzettes and stacking some at the various Ministries of Justice in the urban areas...".

In conclusion, Thomas White[75] has described the distinction between fact and law as "more nice than obvious", and it has been objected that a distinction between "Ignorance" and "Mistake" is mere sophistry and therefore should not be approved. Whatever the case may be, we respectfully submit that a different legal effect should be recognised as contended earlier. Thus, where the defendant makes a mistake in applying law to a given factual situation, and thereby reaches a wrong conclusion, and then does an act which would

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72. Ibid. at 358.
73. L. Fuller: The Morality of Law (London) 1969. p.33
74. Ibid. at p. 26.
75. "Reliance on Apparent Authority as a Defence to Criminal Prosecution", 1977 Vol.77 Colum. Law Rev. p. 775 at 748.

otherwise not have been criminal but for the wrong conclusion, he should not be convicted for he lacks the criminal mind. If, however, his mistake does not negetive the criminal mind, for the requirements under mistake of fact, his mistake should be no defence.

CHAPTER IV

MISTAKE AND SUPERNATURAL BELIEF

1. Witchcraft, Juju, Black-magic, etc.

This chapter will be devoted to an examination of the extent to which the belief of the accused that his victim is a witch, beast, ghost or some supernatural creature will exempt him from criminal liability. Before we proceed it should be understood that the terms 'witchcraft, juju, wizardry, blackmagic' and the like are different terminologies for basically the same concept, and will be used interchangeably.

Supernatural beliefs or witchcraft presupposes a belief that certain individuals posses the power to do the fantastically impossible by the manipulation of objects, as in voodoo, or by the performance of certain rights, as in witchcraft. These believes are held by a great number of people the world over, but it cannot be described as universally held. Chief (Dr.) Ozekhome, owns and runs the Ozeks Tradomedical Clinic in Lagos, subscribes to the notion that witches exist and are capable of harming a person living in far away places without going there.[1] This, he says, is done through poison which is telepathically inflicted. Another advocate of this theory is Professor Godspower Oyewole,

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1. Lagos Weekend, March 20, 1987, p.9.

a doctor of homeopathy, who tells us that only people with psychic powers can identify witches[2]. This group represent the "believing" school of thought, while one Suleiman Ashiegbu, another practicing doctor of homeopathic medicine regard the belief in witchcraft as largely superstitious.[3] He represents the "denying" school of thought. Consequently, there is no concensus as to the existence or otherwise of witches, and it would be a futile academic exercise to venture into a search for proof in this thesis. Suffice to say that the belief in witchcraft is held in our society by all classes of people. We however, make haste to say that because the belief in witchcraft is prevalent in certain communities, and has been so held since time immemorial, does not make it an irrefutable truth or that the attitude will not change with time. For instance, Joan of Arc was burnt at the stake in 1432 as a sorcerer, but was eventually canonized in 1920[4]. Inspite of this ancient account, the belief in witchcraft still exist even in technologically advanced societies. In an article by Dr. C. S. Momoh titled 'Superstition, Tradition, Modernisation', the author gave an account of the belief in witchcraft in America

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2. The Guardian, August 11, 1983. p.5.
3. Ibid.
4. Bailey, N. "It Pays to Enrich Your Word Power" Reader's Digest, May 1982, 9 at p.10

in the following words:

> "Mr. John Snell, Clinical Instructor in Psychiatry at the Harvard Medical School contends that millions of sane intelligent Americans believe in various kinds of witchcraft. In a two year period of research, Dr. Snell claimed he treated 50 patients who complained of ailments brought on by witchcraft."[5]

Notwithstanding the prevalence of this belief in America, we have not been able to find a single judicial authority where the belief has been upheld as a valid reason for exemption from criminal responsibility. In effect, we must conclude that there is very little substance in such beliefs. They are largely ficticious, and where death has been alledged to be caused by or through witchcraft, we have not come across one medically proven case of death caused by witchcraft. In addition, Mr Oredola contends that "there has never been an acclaimed witch or wizard, who is willing and able to openly demonstrate his powers to convince doubting Thomasses."[6] Again, we must stress that no reasonable basis has been established for beliefs in witchcraft. In fact, whenever the belief in witchcraft is entertained, revenge, has been found to be the attendant motive, as is very evident from the cases examined further in this chapter. Consequently,

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5. The Daily Times November 12, 1983 at pages 16-17.
6. M.A.R. Oredola: The Right of Private Defence in Nigerian Law; unpublished LL.M. Dissertation, Aug. 1984.

whenever revenge is found to be the motive behind the accused's conduct, his defence of mistake should fail, as Professor Amankwah aptly puts it - revenge repairs no injury.[7]

The plea of mistake based on the belief in witchcraft also presents difficulty because it cannot be physically examined, as it is largely psychological, even in instances where there has been a genuine belief. This is coupled with the fact that the victim is no longer around to defend himself. And this goes against the principle of natural justice that no man shall be condemned unheard. Even where a person has an honest belief, he must not put it to such a drastic test because he would be constituting himself a judge and executioner in his own cause. This was the opinion of the court in R. vs Akope s/o Karoun and Another,[8] where the appelants killed the deceased on the belief that the deceased had killed their close relative by witchcraft. The court observed that the appelants killed the deceased in revenge and were "merely constituting themselves executioners."[9] The court further stated that:

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7. Ofori-Amankwah, E.H. Criminal Law in The Northern States, p. 216.
8. 14 E.A.C.A. 105 (Kenya, 1947).
9. Ibid. at p. 107.

> "A mere belief that witchcraft has been or is being exercised may be an honest belief . . . but the suspicions of the person cannot be said to be both honest and reasonable. To hold otherwise would be to supply a secure refuge for every scoundrel with homicidal tendencies"[10].

A few years ago, there was a widespread scare in the North, about certain people credited with the power to render a man impotent by witchcraft, or to make the male genital organs disappear, just by a touch of the body or handshake. There was mass panic and hysteria resulting in lynching and other forms of mob justice. The point of interest here is that throughout the period of this scare, no case arose out of the incident. Not even a single proven case of actual genital disappearance. All reported claims ended up as false alarms with the sad consequence of loss of life through mob justice. The question here is: would honest belief avail an accused person who participated in the mob slaughter of a person suspected of having such alleged supernatural power? In our humble opinion, honest belief is insufficient to serve as a valid defence for an accused person charged with the homicide of the victim. Aside from being unreasonable, it cannot be described as a case of mistake of fact as envisaged by section 45 and 24 of the Penal and

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10. Ibid.

Criminal Codes respectively, but a case of intentional, deliberate and wicked act of jungle justice. This opinion is statutorily backed by penal provisions enacted to curb the excesses of such antisocial behaviours. One of such penal provisions is the Offences against the Person (Special Provisions) Act 1974. (Act No.20). Section 2 of the Act provides that:

> 2 - (1) Any person who in company with one or more other persons -
>
> (a) in the belief that any person has used or exercised or is capable of using or exercising any kind of witchcraft, juju, sorcery, enchantment or conjuration; and
>
> (b) with intent to kill, maim, disfigure or disable that person or to do some grievous bodily harm to him, unlawfully wounds or does grievous bodily harm to him by any means whatsoever shall be guilty of an offence under this section and shall on conviction thereof be sentenced to imprisonment for life.

The stiff sentence prescribed by this provision discloses the displeasure and contempt the law reserves for persons making such claims.

2. Analysis of the Cases:

Professor Kenny is of the opinion that "no belief which has now come to be currently regarded as obsolete superstition can be treated as a mistake sufficiently reasonable to excuse a crime"[11]. Moreso, it has been

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11. Kenny: Outlines of Criminal Law; 18th ed.

argued that allowing a defence based on a belief in witchcraft will be tantamount to legitimazing pre-emtive killing. In this spirit, the West African Court of Appeal in Mohammed Gadam[12] rejected the belief of witchcraft as unreasonable. Further, a post-mortem revealed that the death of the wife of the accused in Gadam (supra), was a result of an infection caused by a miscarriage. Therefore, the belief of the appellant that the illness of his wife, was caused by the seemingly inexplicable powers attributed to the alledged witch, was explained away by medical science as a purely natural cause. The strongest of the criticisms levelled against the decision in Gadam, is that, since the belief in witchcraft is common in the accused community, he should have been exonerated "for he did not strike at a harmless witch but one that had harmed (and was still harming) his wife".[13] With all respect, common belief is not a synonym for gospel fact. It was also pointed out earlier that the prevalence of a belief could, and in fact, does change with time.[14] In any case, there are people, at any given point in time, that do not believe in the

12. (1954) 14 W.A.C.A. 442; see also the case of Alu Mamman vs. State, (unreported) S.C. 312/1969.
13. See "Supernatural Beliefs and the Criminal Law in Nigeria" A Critical Appraisal; by K.S. Chukkol (1981) M.I.S. Press Zaria at p.12.
14. Reference to Joan of Arc; Reader's Digest, May 1982, p.9.

phenomena of the supernatural, and there rights, under the law, is co-extensive with that of the "faithful". Therefore, the application of the doctrine of reasonableness in that case, was not absurd but proper.

In the case of Tunde Garke vs. State[15], the court was also of the view that the belief in witchcraft was unreasonable, though the case was decided under section 45 of the Penal Code. This stresses the point that the application of the doctrine of reasonableness is in fact salutary, because it enables the court to distinguish and identify the cases of killing in revenge for an alledged witchcraft practiced on a relative. In Garke (supra), the court enunciated the principle that:

> While we concede that a defence of witchcraft as grave provocation would be available where the accused himself is put in fear of immediate danger, the point is still open whether such defence would be available to him if it was a member of his family or near relation that was the party affected . . . Belief in witchcraft, even though it might be prevalent in the locality from where the appellant comes is unreasonable.[16]

What is being reiterated is that no one is justified in taking the law into his hands, whatever his belief is. In Ngene Arum vs The State,[17] the

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15. FCA/K/54/78 (unreported).
16. Ibid. 1 at p.4.
17. (1979) 11 S.C. 109 at p.124.

learned justice of the Supreme Court concluded that:

> The power to punish for all or any of the above acts resides only in the law courts of the land after due process of trial and in no other authority and every citizen is entitled to the same full protection of the law for his life and property as if he had done no wrong to that other party.[18]

And in the recent case of Mosalen Okotoga vs The State[19]; Uwais, J.S.C. stated, "It is settled law that belief in witchcraft is not a defence to murder". Similarly, in Nse Obong Jonah vs. The State[20], the appellant claimed that the deceased had tormented him through witchcraft. He (appellant) then went on to cut the deceased to death with a matchet, while the deceased was taking a bath. On appeal against conviction for murder, the Supreme Court dismissed the appeal and upheld the decision of the learned trial judge who stated in his judgement that; "However, even if the accused held the belief that Wilson (deceased) had used witchcraft on him, such belief would be unreasonable and the court will not countenance it as provocation"[21].

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18. Ibid. per Obaseki, J.S.C. at p. 124.
19. (1984) 4 S.C. 69 at p. 74.
20. (1977) 1 S.C. 27.
21. Ibid. at p.30 and see the Principle enunciated by the Court of Appeal in Tunde Garke v. The State FCA/K/54/78 (unreported).

Another issue of interest that concerns both provocation and self-defence is the pre-emptive attack by a person claiming provocation by witchcraft. Dr. Chukkol submitted that where a person believed that he is about to be attacked by a witch or where he is provoked by "its" behaviour, he may raise the defence of provocation or private defence in the event of a pre-emptive attack[22]. It is our humble submission that this is a negation of a chain of authorities on the issue. For instance, the Supreme Court in James Anyim v. The State[23], stated:

> The position . . . was that the appellant had conceived the notion that some people including the deceased, were planning to kill him and he therefore decided to strike before they would actually kill him. He decided to pre-empt their supposed action - to do them to death before they would catch up with him. The question of law to be resolved here and which ought to have been dealt with by the Trial Judge was whether such a pre-emptive strike, by the appellant against a supposed intending assailant, is recognised by our law as a valid defence under the second segment of S.26 of the law aforementioned when in fact the appellant had not been attacked by anybody and no step had been taken, or act done, by anybody, to re-enforce the appellant's delusion that he was imminently, about to be killed.[24]

The appeal against conviction was dismissed by the

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22. Chukkol K.S., Defences to Criminal Liability in Nigerian Law: A Critical Appraisal, Oct.1980,p.52
23. [1983] 1 S.C.N.L.R. 370; (1983) 6 S.C. 350.
24 Ibid. at p. 376 per Aniagolu, J.S.C.; pp.361-362.

court, on the grounds that the appellant could not claim to be acting in self-defence, by virtue of his pre-emptive attack against a victim, who had neither assaulted him nor done anything to him, to put him in reasonable apprehension of imminent danger. Similarly, a person will not be allowed to raise the plea of mistake in defence to the pre-emptive killing of a supposed witch. The belief itself has been shown to be unreasonable and supposed witches, like everyone else, do have a right to live, and should not be hounded or killed unless they are caught, and proved to be in the actual practice of their act. Even then, the power to punish resides only in the law courts after the prescribed trial has been conducted, and not in the hands of any wicked, vengeful or deluded person.

We have stated earlier in this chapter that Penal provisions exist discouraging the belief in witchcraft, and cited the Offences Against the Person (Special Provisions) Act 1974. In addition to that, the Penal and Criminal Codes also contain provisions aimed at discouraging the belief and practice of witchcraft. Section 216 and 210 of the Penal and Criminal Codes respectively, are aimed at discouraging and punishing the belief and practice of witchcraft - Section 216 which is the same as Section 210 in all material particular provides:

Whoever -

(a) by his statements or actions represents himself to be a witch or to have the power of witchcraft; or

(b) accuses or threatens to accuse any person with being a witch or with having power of witchcraft; or

(c) makes or sells or uses; or has in his possession or represents himself to be in possession of any juju, drug or charm which is intended to be used or reported to possess the power to prevent or delay any person from doing any act which such person has a legal right to do, or to compel any person to do an act which is alledged or reported to possess the power of causing any natural phenomenon or any disease or epidemic; or

(d) presides at or is present at or takes part in the worship or invocation of any juju which has been declared unlawful under the provisions of section 215; or

(e) is in possession of or has control over any human remains which are used or are intended to be used in connection with the worship or invocation of any juju; or

(f) makes or uses or assists in making or using, or has in his possession anything whatsoever the making, use or possession of which has been declared unlawful under the provisions of section 215, shall be punished with imprisonment which may extend to two years or with fine or with both.

It becomes apparent upon an examination of section 216, that the object of the provision is the emphatic proscription of meddling in witchcraft and related activities. It is therefore surprising to read the

argument that section 216 is an admission of the existence of witchcraft - "for if there is no such thing as juju or witchcraft there would not have been the necessity of forbidding its practice..."[25] With respect, this argument only confuses issues. It is humbly submitted that the true object of the Penal statute, is to discourage mischievous persons, who may otherwise lay claims to such fantastic and preposterous feats. It is also aimed at discouraging tricksters who may take advantage of gullible persons, who may believe that their problems could be solved through juju or witchcraft. Finally, the provision conveniently forestalls any accused person from escaping justice, by claiming that there is no Penal statute outlawing his claims.

The appellant in Agbode v. C.O.P[26] was convicted of violation of a statute creating a misdemeanour, when she accused the complainant of causing the illness of her husband by witchcraft. The statute makes it an offence to accuse a person with being a witch or with possessing the power of witchcraft. It therefore stands to reason and sound logic, that if the law makes

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26. K.S. Chukkol; "Supernatural Beliefs and Criminal Law," Journal of the Indian Law Institute Vol.25: 4 p. 451, 1983
26. [1960] W.R.N.L.R. 81.

it an offence to even claim the power of witchcraft, then the law will not allow a defence of mistake based on a belief in witchcraft. The belief is fraught with so much uncertainties that Dr. T. O. Elias lamented that "the offence of witchcraft is one of the most difficult to define."[27] He went on to observe that:

> . . . the constituents of the offence of witchcraft have been described in such a wide manner so as to discourage all forms of the conduct commonly called witchcraft. No exact definition has been attempted, because none is possible in the present state of our knowledge of the matter. What the code seeks to achieve is to make it not worthwhile for the various forms of deception often practiced in the name of witchcraft as well as for the various acts of wickedness or disruption that are usually committed in its name by unscruplous persons.[28]

The learned jurist left no one in doubt as to what he thinks about witchcraft. Consequently, we will be spelling doom for ourselves if we ever allow a defence of mistake or private defence, to be based on a deceptive allegation of witchcraft. It would not be an exaggeration to say that we would be unleashing a reign of terror throughout the land. The consequences would be too gruesome to even think about. One thing would be certain though - the total breakdown of law and order.

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27. Dr. T.O. Elias. Nigeria The Development of its Law and Constitution. London Stevens and Sons, 1967, p. 367.
28. Ibid. at p. 368

CHAPTER V

MISTAKE AND RELATED DEFENCES

1. Mistake and Insanity

The defence of mistake and the issue of insanity relate to each other in that, the rationale behind the insanity plea is that a person who is not a responsible agent should not be the object of punishment[1]. Similarly, by reason of mistake of fact, a person is not strictly responsible for the outcome of his conduct; He lacks culpability. The point of difference between the two defences is that the insanity plea, unlike that of mistake, is not a denial of mens rea but a "consideration that the law does not want to punish the particular mens rea for reasons of mental disorder"[2]. The question we have to consider at this point is whether or not an insane or deluded person conceives factual situations as they are or differently? For instance, if A. due to some mental infirmity kills B., thinking that B. was about to shoot him and so had to act in self-defence, though the need to so act never arose, could it not be argued that A., though insane or for insanity had believed in the

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1. Fingarette, H. (1972): The Meaning of Criminal Insanity, California Press. p. 131.
2. Omotesho, O. A.: "The Plea of Insanity in Nigerian Law;" Unpublished LL.M. Dissertation, Oct. 1986. p. 15.

existence of a fact material to the transaction, which does not exist. In other words, A. has made a bona fide mistake of fact.

The second part of section 28 of the Criminal Code deals with insane delusion and cases under this category bear a remarkable similarity to those of mistake of fact under section 25 of the Criminal Code. In R. vs. Grumah, the West African Court of Appeal defined delusion as;

> "a sympton of mental disturbance and a false belief which is unshakable by facts."[3]

The following cases reveal the similar nature of cases under the two pleas. In Richard Willie vs. State[4]; the court rejected a plea of insanity because it was not founded on natural causes. The accused person had murdered his mother while labouring under the mistaken belief that she had poisoned him through witchcraft. The court was of the opinion that belief in witchcraft was incapable of bringing about the state of mind envisaged by section 28 of the Criminal Code. Also, as when raising the plea of mistake, his belief would have had to be subjected to the test of reasonableness. In

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3. (1957) 2 W.A.L.R. 225.
4. (1968) N.M.L.R. 213 and R. vs. Eriyemremu (1959) W.R.N.L.R. 270.

the same vein, the court in State vs. Clement Iwuanyanwu rejected the defence of insanity when it was based on a belief in witchcraft. Onyeama J.S.C. said, inter alia:

> ". . . At the time the appellant killed the deceased, the deceased was not attacking him, and the whole purpose of the murderous attack on the deceased was to prevent his own death in the future to be caused by juju. . ."[5]

The attitude of our courts in rejecting insanity pleas founded on the belief in the supernatural has been the cause for great controversy and has attracted some heavy criticism from academic writers[6]. Professor Turner has suggested that supernatural beliefs should be treated as cases of delusions. He declared:

> "It would be more satisfactory if the instances of fantastic superstitious beliefs should be approached as insane delusions and treated in accordance with the rules applicable thereto."[7]

The respected writers suggestion has found favour with a contemporary contributor on the subject, who is of the opinion "that this is a better approach"[8] to the current attitude of the Nigerian courts of rejecting

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5. (1964) 1 All N.L.R.; and see James Anyim vs. State [1983] 1 S.C.N.L.R. 370; where the Supreme Court rejected the defence of insanity under section 28 of the Criminal Code.
6. Aremu, L.O.: "Criminal responsibility for homicide and supernatural beliefs" (1980) International and Comparative Quarterly. p. 131. and Chukkol, K.S. ((1981) Supernatural Beliefs and the Criminal Law in Nigeria. A.B.U. Press, Zaria.
7. Kenny's Outlines on Criminal Law, p. 54.

altogether the defence of insanity when founded on a belief in the supernatural, witchcraft, juju, etc.

We have stated elsewhere in this work, several reasons for the courts rejection of defences based on a belief in the supernatural and related phenomena. Now we wish to emphasize that in determining criminal responsibility in situations where there has been a belief in these phenomena, one all-important question should be examined by the court; namely, what did the accused person do following his belief? If he went to execute sentence on his victim, the court should not hesitate in condemning his action, because he would have taken the law into his hands, and the possibility of his being motivated by REVENGE would be glaringly obvious. And the defence of insanity, like that of mistake, would not avail a person who acted in revenge. In Akhidenor v. State, the accused, convinced that his brother and mother were responsible for his impotence through witchcraft, shot at and killed the brother in revenge. The accused pleaded insanity which was rejected by the trial court. The case was dismissed on appeal and the Supreme Court

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8. Omotesho, O.A.: The Plea of Insanity in Nigerian Law; unpublished LL.M. Dissertation, Oct. 1986. p. 55.
9. (1966) N.M.L.R. 136. See also, Anyim v State (supra) and Willie v State (supra).

observed that it was clear that the accused was obsessed by his impotence and this may have affected his mind. But there was no evidence on which the trial judge could have found that the appellant was insane within the meaning of section 28 of the Criminal Code. If, on the other hand, the accused person made recourse to public authority or took measures to protect himself eg. by barricading his home, a strong presumption that he was not driven by revenge will be extended in his favour. That, coupled with other surrounding circumstances, like a consuming belief in witchcraft shared by other members of the accused's community should be sufficient to tip the scale in his favour.

2. Private Defence:

Private defence entails a defence against persons when they attack you or another, or when they commit a wrong to property. This right exists when there is no time to have recourse to the protection of public authority, and it does not extend to causing more harm than necessary. The issue of mistake of fact and the right of self defence comes up when things turn up to be different from what they seem initially. Sometimes the act of defence is alledged to be wrongful, and in such a case, the person exercising the right of defence

may be charged with assault, murder or manslaughter. In the event of such an occurrence, would a mistaken belief be a defence at all, and if so, would there be any restriction as to reasonableness or must the belief be based on reasonable grounds? Normally the defence of mistake can be invoked to a charge of assault or even murder, where it can be shown that mistake negatives intent; that is that the accused did not intend the consequences that followed his act. For instance a person who mistakenly kills another believing him to be an armed thief, may be acquitted of homicide.[10] Also where Z. points an unloaded gun at X. and threatens to shoot him, X. in the honest belief that he is about to be shot at and killed, will be justified to defend himself, even to the extent of killing Z. And it will not be heard that Z's gun was unloaded. Similarly, a guard who forcibly ejects an invited guest from a private property, under the mistaken belief that the guest was trespassing, may raise his mistake as defence to a charge of assault. Further, section 61 of the Penal Code provides for the right of self defence against a person who otherwise may not be liable for his unlawful act by reason of mistake of fact or unsoundness of mind. Glanville

10. R. vs. Levett [1639] Cro. Car 538; 79 E.R. 1064.

Williams puts it as follows: "A man is allowed to kill in self-defence against a wrongdoer, and even to kill a lunatic who attacks him, though the lunatic may be, because of his insanity, under no criminal responsibility for the attack."[11] The above may be stated as a general proposition, but curiously, the courts (especially American Courts) have sometimes denied the relevance of mistake in similar situations. They have held that "one who goes to the aid of a relative or third person acts at his own peril. . ."[12] And this is notwithstanding the intentions of the other. With respect, this does not represent the correct legal position, because actions are judged according to intentions and the intentions of one man should not be imputed to another. This opinion is in conformity with the reasoning of the English Court in R. v. Ross[13]; where a son shot at and killed his father, while labouring under the mistaken belief that the father was about to kill his wife (boy's mother). The boy was acquitted of the homicide charge on the strength of his mistake. It is interesting to note that private defence (in this case the defence of another) was also available. The judge in Ross (supra)

11. Williams, G. Criminal Law - The General Part, 2nd Edition. London, 1961, p. 737.
12. Wood v. State [1900] 128 Ala. 27.
13. [1884] 15 Cox 540.

also directed the jury that if they found that the accused's mistake that he was defending his mother was not based on reasonable grounds, the defence will not avail him. The direction on "reasonableness of belief" is proper[14] and this is borne out by the decision in Att. Gen of Nyasaland v. Frank[15]. In that case, it was held that the belief of the accused person, that the woman he shot was about to cast a fatal spell on him was unreasonable.

An answer to the question whether belief, regarding private defence and mistaken belief, must be based on reasonable grounds, was supplied by the recent case of Albert v. Lavin,[16] where the defendant shunted the queue at a bus stop, unaware that a plain-clothes policeman was on the queue. When the people on the queue objected at the defendants behaviour, the officer prevented him from boarding the bus. A scuffle ensued and the officer disclosed his identity and warned the defendant that he would arrest him if he did not stop struggling. The defendant did not believe the officer and hit him in the abdomen. The officer arrested him and charged him for assaulting a constable in the execution of his duty, contrary to section 51 of the

14. Williams, G. (submits that it is a misdirection) Note 6 p. 208 - Criminal Law, The General Part (2nd ed).
15. [1957] R & N. 443.
16. [1981] Crim. L.R. 238.

Police Act 1964. The justices decided that the reaction of the people on the queue was sufficient to convince the officer that a breach of the peace was about to take place, and that though the defendant genuinely did not believe the officer's identity, there was no reasonable grounds for the disbelief. The defendant was convicted and he appealed. On appeal, it was held that it is not a defence to a charge of assault, if the defendant honestly and mistakenly disbelieved the officer's identity and thought that his conduct was justified in self defence, unless there was reasonable grounds for that belief.

We may deduce from the commentary above that in certain situations a plea of private defence may be entwined with that of mistake of fact. The case of David Ikpe v. The State[17] is an authority for that proposition. In that case the appellant honestly but mistakenly believed that the deceased was holding a matchet while it was only a stick, and it was dark. Pushed by that belief, the appellant defended himself with a matchet and only became aware of the true facts after the incident. On appeal, the defendant was discharged and acquitted. The point to be noted here

17. (1977) 4 F.C.A. 145.

is that our law is very specific on the requirement that the mistaken belief must not only be honest but must also be reasonable. consequently, the issue of reasonableness as it affects cases of "mistake of fact and apprehension of imminent threat of death or grievous hurt in self defence is a concept of law, determinable on the facts and circumstances of the given case."[18]

3. Provocation:

A mistake of fact may lead to provocation, for instance, where the accused person loses his self-control as a result of provocation which may have been offered to the accused, not by the victim, but by some other person.

The approach at Common Law is inconsistent, though the authorities seem to suggest that where a person is provoked as a result of a mistake of fact, he will be treated as if the facts were as he mistook them to be. In Brown,[19] the accused person caused the death of an innocent passerby while under the mistaken belief that his victim was part of a group that was provoking him. The killing was held to be manslaughter only. But in R v. Simpson[20] Lord Reading said:

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18. M.A.R. Oredola: The Right of Private Defence in Nigerian Law; Unpublished LL.M. Dissertation, August, 1984. p. 168
19. (1776) 1 Leach 148.
20. (1913) 84 LJKB 1893.

> "No authority has been cited to support the proposition that provocation by one person, followed by the homicide by the person provoked of another person, is sufficient to reduce such homicide to manslaughter. There is no such authority".

It was noted that Brown (supra) was not cited to the court, but curiously, the same court (Court of Appeal) in the subsequent case of R. v Hall[21], substituted a conviction for murder with one of manslaughter where the accused person, while under provocation, had killed another person other than the person offering the provocation.

In Manchuk,[22] the court allowed a mistaken belief, which seemed wholly unreasonable as good enough to create a case of provocation. And it also appears that the English courts have in the past been sympathetic to the drunkard, as to allow him a defence of mistaken provocation, without looking too closely at the issue of reasonableness[23]. Glanville Williams,[24] however, observe that this attitude will most likely change because of the decision in Majewski[25]. The House of Lords in that case established the doctrine that, evidence of intoxication can only negative a specific intent but not a basic intent.

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21. [1928] 21 Cr. App. R. 48.
22. [1938] S.C.R. 18 (Can.)
23. Wardrope 1960 Crim. L.R. 770.
24. Williams G., Textbook of Criminal Law, p. 496.
25 [1977] A.C 443.

By section 38 of the Penal Code and section 283 of the Criminal Code, a plea of provocation cannot mitigate the punishment of the accused if such provocation is as a result of a lawful act done to the accused. For instance where the police are exercising their powers of arrest. A problem may however arise where the policeman mistakenly arrests X. instead of Z. In such a situation, Dr. Chukkol[26] is of the opinion that if the policeman was acting under an honest mistake, X. cannot plead provocation because the policeman's action, "though erroneous is lawful in the wider sense. . ." The learned writer goes on to say that, if however, the policeman was acting maliciously and X. was aware of the illegality of the action, he may be able to plead provocation if he had killed the policeman in an attempt to resist arrest. Sound as the opinion of the learned writer may be, we wish to point out that if the act of the policeman is illegal, then the defence to any assault on him is self or private defence and not merely provocation.

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26. K. S. Chukkol - Defences to Criminal Liability in Nigerian Law; A Critical Appraisal.(1980) p. 88.

4. Bona Fide Claim of Rights:

Akin to the defence of mistake is that of claim of right. This defence essentially relates to a charge of an offence relating to property. The accused person hoping to benefit from this defence must show that he was acting with respect to the property in issue in the exercise of an honest claim of right, and without intent to defraud. In this respect, the defence is very much like the defence of mistake under section 45 of the Penal Code. As was stated earlier, this defence is mainly concerned with offences relating to property, but under English Law, in R. v. Tinkler[27], the defence was applied to the taking of a child out of custody under an honest belief of the right to do so. The Criminal Code in section 371 also makes the defence of claim of right available to a charge of child stealing.

When considering this defence, the question that must be asked is whether the defence is only applicable to the situation where the accused has in fact a right to the disputed property, or whether the defence also covers situations where the accused thought that he has a right, while in fact, he has none. From the decision in I.G.P. v. Emeozo[28], it would appear that Nigerian

27. (1859) 1 F. & F. 513.
28. [1957] W.R.N.L.R. 213 (H.C.).

law favours the wider interpretation. In that case, the accused person had demanded money from another man, as a kind of compensation, by alledging that the man had committed adultery with his wife. Under native law and custom, a husband is entitled to be paid compensation by an adulterer. The trial magistrate did not believe that adultery had been committed, and so, convicted the accused under section 406 of the Criminal Code (demanding property with threats). The case came before Thomas J. on appeal, who allowed it, though no actual adultery had been committed. He cited the English case of R. v. Bernhard[29] in support; "a person has a claim of right if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or fact." From the foregoing, the defence of claim of right seem to be closely related to that of mistake of fact with the exception that the defence of claim of right need not be reasonable as a matter of law, but only required to be honest. Okonkwo and Naish, however, point out that "if it is shown to be unreasonable, there is quite a strong inference that it is also dishonest."[30]

By the nature of the defence of claim of right, it is usually raised in two situations. The first is in

29. [1938] 2 K.B. 264.
30. Okonkwo and Naish: Criminal Law in Nigeria 2nd ed. 1980. p. 109.

respect of malicious damage to property, and the second in regard to theft offences - stealing, robbery and demanding property with threats.

CHAPTER VI

TREATMENT OF MISTAKE IN OTHER JURISDICTIONS

1 Sudanese Approach:

In the Sudan, the defence of mistake is covered by section 44 of the Sudan Penal Code; which section reveals a subjective test. The section provides:

> "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be justified by law in doing it."[1]

The above section is couched in similar language with section 45 of the Northern Nigerian Penal Code[2] and the treatment of the section by the courts is substantially the same. The exemption offered by the section does not extend to mistakes of law but covers situations where the act of the defendant is justified by law, simpliciter, and where the defendant, by reason of a mistake of fact, in good faith, believes himself justified by law in his action.

A preliminary question may be asked here, namely, when can an act be described as "justified" by law? Vasdev tells us that the Sudanese courts have relied on section 44 to describe "justified" by law.[3] And this

1. Alan Gledhill: The Penal Codes of Northern Nigeria and the Sudan. (1963), London.
2. S.S. Richardson: Notes on the Penal Code Law, 1959 (Northern Region, No. 18 of 1959).
3. Vasdev K.: The Law of Homicide in the Sudan, 1978, London, p. 128.

is in cases where the defendant kills a human being under the mistaken belief that his victim was a ghost. The reasoning here being that since there is no law prohibiting the killing of ghosts, the defendant's action may be described as "justified" by law.

Mistake of law on the other hand envisages a mistake as to the contents or existence of a particular statute. Neither of this kind of mistake is recognised in the Sudan as constitution good grounds for defence. The reasons for the rejection are the same for Nigeria and for most of the common law countries; namely the proliferation of pleas and the difficulty in proving that the defendant was not really in ignorance of the law.

Alan Gledhill[4] is, however, of the opinion that ignorance of law may sometimes indirectly constitute a defence to the particular offence charged. He says, this would be where "ignorance negetives the intention or knowledge which is an essential ingredient of an offence."

In the Sudan, a mistake of fact is recognised as a defence if the mistake is reasonable or is one which a reasonable man would make in the circumstances and if

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4. Ibid. at p. 108
5. Vasdev, K.: ibid. at p. 129

no liability would have attached to the defendant, had the supposed circumstances been real. Section 44 requires the mistake to have been made in good faith. Reasonableness is not an express requirement under section 44 of the Sudanese Code and Vasdev asks the question; "where does the concept of reasonableness of mistake spring from."[5] The section does not envisage any such concept, which is objective, rather the question is asked whether or not the defendant was acting in "good faith" and "good faith" is defined by section 37 of the Sudan Penal Code as follows:

> "Nothing is said to be done or believed in good faith which is done or believed without due care and attention."

This would mean that even if the defendant acted in "good faith", he will not escape liability if he had not taken "due care and attention."

From the Sudanese authorities, it would seem that the concept of reasonableness has been imported as criteria for determining the tenability of certain beliefs for example, witchcraft or the supernatural, where such beliefs were sought to be relied on as defences. In England, no belief that is regarded as obsolete superstitution will be accepted as a mistake

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6. Cited by J.W.C. Turner, ed.; Kennys Outlines on Criminal Law, (1966) p. 59.

of fact of the kind that will excuse a crime. Thus; in 1880, at Clonmel, a woman labouring under the mistaken belief that her child was a deformed fairy, and the real child would be restored if she placed the child on a hot stove was convicted and sentenced.[6] The trend of authorities from the Sudan indicate that where there has been a belief in ghosts, the courts sometimes regard it as obsolete superstitution, thereby denying the defence, and at other times sympathise with the defendants belief when it appears that he was honestly mistaken. In Sudan Government v. Abdullah,[7] the accused had gone out in search of a missing cow in the early hours of the morning. On his way back, he met the deceased who was dressed in black and carrying a stick. There was a current belief in the accused's village that a ghost was about. The accused spoke to the deceased who did not reply and he became thoroughly frightened and, believing the deceased to be the ghost, repeatedly struck her until she fell senseless. The accused returned to his village where he gave an account of what had happened. The court held that the accused had honestly believed that he was attacking a ghost and had acted in good faith. He therefore lacked the intention to kill a human being and was entitled to

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7. [1959] S.L.J.R. 1.

the defence of mistake of fact under section 44 Sudan Penal Code.

In Sudan Government v. Ali Abdel Nebi and another,[8] Abdel Mageed Hassan P.J. said:

> "We must always bear in mind that an honest and reasonable error as to a question of fact, e.g., that the spouse is dead, may afford a defence."

Consequently, in Sudan Government v. Mirghani El Tahir,[9] the defendant (Mirghani) and his friend (Adam) were herding sheep by night in a valley which is believed to be haunted. The defendant was aroused from sleep by a figure which was falling over him and, thinking it was the ghost, stabbled at it three times before running to his father to tell his tale. On a charge of homicide, the evidence was before the court that there was no enmity between the two friends and that the defendant had, genuinely believed on reasonable grounds that he was stabbing at a ghost and not his friend. He was accordingly not found guilty of the offence. In his judgement, Rao J. stated that "... The version of Mirghani (defendant) is straightforward, and one only has to hear his simple tale and it impresses as an honest statement of what had happened.... We believe that Mirghani had stabbed an imaginary ghost..."

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8. [1965] S.L.J.R. 50.
9. (1955) ACCP 271, 55.

In the cases discussed above it would seem that the defendants honestly and reasonably believed that they were not dealing with human being but with ghosts and, therefore, lacked the **mens** rea of homicide as ghosts are not regarded as human beings. It would appear that the Sudanese courts sometimes take the view that ghosts or witches are human beings with supernatural powers. In these cases the courts do not permit the killing of such ghosts or witches. Thus, in Sudan Government v. Lohoyuk,[10] the court rejected the accused's story that he believed his victim was **a witch** and he was convicted and sentenced.

In a seperate class of Sudanese authorities, the belief in the supernatural was induced by alcoholic drinks, and in all such cases known to the writer, the accused persons were convicted as charged.

In Sudan Government v. Ebeidalla Kurdi,[11] the president of the Major Court in his judgement said "... There is no suspicion of evil motive but the court holds that a spasm of insensate fear induced by a state of drunkenness into which Ebeidalla (defendant) had knowingly got himself cannot be taken as a legal excuse

10. [1961] S.L.J.R. 122.
11. [1944] ACCP 293 44; KDN Maj. Ct. 68 44 (unrep.).

for a savage and murderous act". And in Sudan Government v.Abdullah Gar-el-Nebi Ismail,[12] the defendant while in a state of drunkenness killed the deceased with an araki bottle when she refused to consent to have sexual intercouse with him. Writing a note of confirmation, Abu Rannat C.J. stated:

> "In such circumstances, he cannot be heard to say that she was a ghost even if he saw that her hair became disorderly as a result of drink or the quarrel. . ."

2. The Indian Position.

In India, the defence of mistake is covered by section 79 of the Indian Penal Code and the wordings of the section is similar with those of section 44 and 45 of the Sudanese and Nigerian Penal Codes respectively. In that respect the relevant phrases of the section are (i) justified by law, (ii) Mistake of fact and (iii) Mistake of Law.

Section 76 of the Indian Penal Code is however very similar to section 79 of that Code, with the distinction that under section 76, a person is assumed to be bound by law while under section 79, a person is assumed to be justified by law. Consequently section 76

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12. [1965] S.L.J.R. 140.

excuses a person who has done what by law is an offence, while under the misconception of facts, which led him to believe in good faith that he was commanded to act the way he did. This exception emanates from the maxim "ignorantia facti excusat".

The protection provided by section 79 is only available in respect of offences punishable by the Indian Penal Code and does not extend to offences punishable under any local or special law, for instance, the Forest Act.[13]

Justified by law - This phrase is employed in the Indian Penal Code in its strict usage, to defend something as being in conformity with the law. In this respect, there is no justification by law for an advocate to ask a magistrate to return the money he had received by way of bribe.[14]

Mistake of fact - This type of mistake envisages a slip or ignorance of a fact, past or present, material to the transaction. It could also be a bona fide belief in the present existence of a fact material to the transaction, which does not exist. Under section 76 and 79 of the Indian Penal Code, this mistake must be one of fact and not of law. consequently, the

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13. See K.R. Lewis, [1913] 15 Cr. L.J. 171.
14. U San Win v. Uttla, [1931] AIR (R) 83.

Common Law rules regarding the defence of mistake of fact is applicable.[15] This makes the position similar to what obtains in Nigeria.

From the foregoing, it is apparent that the defence of mistake of fact may either be a good or bad defence depending on individual circumstances. In Bhawoo Jivaja v. Mulji Dayal,[16] the accused person, a police constable saw the complainant in the early hours of the morning carrying a number of clothing items under his arm. Suspecting the goods to be stolen property, the constable challenged the complainant who gave unsatisfactory answers, and declined to let the constable inspect the goods. A scuffle ensued between the two whereupon the constable promptly arrested the complainant. The complainant was later released at the station by the Inspector of Police after his identity has been verified and his ownership of the goods established. The complainant however went on to prosecute the constable for wrongful arrest and confinement. The trial magistrate convicted the constable as charged. On appeal, the High Court held that the conviction was wrong as the constable had acted under a bona fide belief that he was legally

15. See dictum of Cave, J., in Tolson, [1889] 23 Q.B.D 168 at 181; Stephen, J., in Tolson ibid. at p. 188 and Levett, [1839] Cro. Car. 538.
16. [1888] 12 Bom. 377.

justified in detaining what he suspected to be stolen property. His questions to the complainant to verify his suspicions was an indication of good faith so, he was, therefore, protected by section 79.

In another case,[17] certain persons who went to execute a warrant of arrest against a judgement debtor, violated a Palanquin carrying a pardanishin lady of rank, under the mistaken belief that the judgement debtor was concealed in it. At their trial, it was held that they were entitled to the protection of section 79. And where the Madras Act,[18] made the conveying of liquor a penal offence and laid the burden of proving that their act was not an offence on the accused persons, it was held that they had discharged the burden by proving that they believed in good faith that they were not transporting liquor.[19]

In the area of beliefs in the supernatural, the Indian approach has not been altogether consistent, depending on which section of the Penal Code is invoked. For instance, where a person believing in good faith that the object of his assault was not a human being but a ghost, and went on to inflict fatal injuries on it, which resulted in the death of another,

17. Kanai Lal Govala, (1897) 4 Cal. 885.
18. Madras Act 1 of 1886, S. 4.
19. C. Kandan, (1894) 1 Weir 40.

it was held that, by virtue of the provisions of section 79, the accused was not guilty of murder or culpable homicide.[20] In a similar situation in another case, the accused thought that a stooping child, whom he saw in the gloom of early morning in a spot locally believed to be haunted, was a spirit or demon, went on to cause the death of the child by blows before realising his mistake. It was held that the accused was not entitled to the exception in section 79 and was found guilty under section 304A of the Penal Code. The section punishes the causing of death by any rash or negligent act.[21]

In another instance, the accused in a moment of delusion mistook his only son for a Tiger and killed him with an axe. His contention was that by reason of mistake of fact, he believed that he was justified in destroying what he thought to be a dangerous animal. The court held that the accused was not guilty as his act was due to the mistake of fact.[22]

Justification under section 79 was held to be a bad defence where a police officer shot at an escaping suspected thief, but accidentally hit another person and killed him.

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20. Waryam Singh, (1926) 28 Cr. L. J. 39.
21. Hayat, [1887] P.R. No.11 of 1888.
22. Chirangi, [1952] Nag. 348.

Mistake of Law - The treatment of mistake of law in India is similar to what obtains in other Common Law countries and Nigeria; Mistake in point of law in criminal cases is no defence. Mistake of law entails a mistake as to the existence or otherwise of any law on a relevant subject, and also a mistake as to what the law is[23]. Consequently, any person of the age of discretion and Compos Mentis will be liable for a breach of the criminal law of India. The distinction between Ignorance and Mistake of Law, that ignorance implies passiveness while mistake implies action, has been rejected by the Indian Courts as a refinement too subtle to be applicable to practical situations.[24]

3. Other Common Law Cases.

The approach of other Common Law jurisdictions to the defence of mistake is not unlike what obtains in Nigeria, especially with regard to the concept of reasonableness and issues of witchcraft. In this regard, mistakes founded on witchcraft are normally rejected as unreasonable.

In the Kenyan case of Akope s/o Karonon[25], the

23. Tustipada Mandal, [1950] Cutt. 75.
24. See dictum of Muttusami Ayyar, J., in Fischer, (1891) in Mad. 342 at 354
25. (1947) 14 E.A.C.A. 105; see R.V. Magata s/o Kachehakana (1957) E.A. 330.

East African Court of Appeal made a profound observation when it said:

> "A mere belief that witchcraft has been or is about to be exercised may be an honest belief. . . but the suspicions of a person cannot be said to be honest and reasonable. To hold otherwise would be to supply a secure refuge for every scoundrel with homicidal tendencies...."

Similarly, in R. v. Wagstaffe,[26] the plea of mistake of a parent who had denied his very sick child medical attention on religious grounds was rejected.

In the Canadian case of R. v. Machekequonabe,[27] the accused killed the deceased under the mistaken belief that the deceased was an evil spirit in human form, which would cannibalize a human being. The accused belongs to a tribe of Indians, and such beliefs was prevalent among his tribesmen. The belief was held by the court to be unreasonable and the accused convicted of manslaughter.

One of the requirements for the defence of mistake is that the mistake relied on must be such that, assuming the facts and circumstances as believed by the accused were true, his act would not have constituted an offence. In Darcey v. Pre-Term Foundation Clinic & Anor[28], the supreme court of New South Wales

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26. (1861) 10 Cox CC. 530; see Reynolds v. 4.S. (1978) 98 4.S. 145, for the position in American jurisprudence.
27. (1894) 28 Ont 309.
28. (1983) 2 N.S.W.L.R. 497

CHAPTER VII

CONCLUSION AND RECOMMENDATIONS

1. Conclusion:

In the preceding chapters, we have examined the defence of mistake in Nigerian Law. We have seen that the plea of mistake, where it succeeds, provides the accused with a total defence. This fact makes the defence important, because in criminal proceedings, a conviction is followed by punishment.

The provisions of the Penal Code (section 45) is silent on the notion of "reasonableness". We have however seen that the courts in practice take cognisance of the notion; and this approach is salutary. The courts should,however, be reminded that though it is permissible to look to foreign legal systems for guidance in the interpretation of our Codes, wholesome importation of foreign precepts and notions is not desirable. More so, when the provisions of our local Codes can properly cover the situations, if fully appreciated. For instance, the provisions of section 24 of the Criminal Cose use the expressions - "voluntary act" and "intention", thereby replacing the concept of "actus reus" and "mens rea" as the basic ingredients constituting an offence.

In the cases of supernatural beliefs, we have seen that the prevalence of the belief has not been accepted

as constituting good grounds for its acceptance. This is a comforting trend, though, we have heard strong arguments from learned jurists that this approach may lead to injustice in particular cases. The rejection of beliefs in the supernatural is largely for the unreasonableness of those beliefs. However, Professor Amankwah[1] has pointed out that it is not so much the belief that is held to be unreasonable but the subsequent action. Also, the doctrine of reasonableness can be used to verify the motive of the accused. This can be done by asking the question; what did the accused do following his belief? Did he make resort to public authority or did he choose to seek personal vengeance. If the accused took the law into his hands, his action is clearly unreasonable and smacks of revenge.

It has been suggested that in cases of profound beliefs in the supernatural, which are regarded as superstitious, the treatment should be as a case of delusion.[2] The courts have however consistently refused to treat cases of superstitious beliefs as cases of delusion, because the belief has always been held to be unreasonable and difficult to prove. It is

1. Ofori-Amankwah, E. H. Criminal Law in the Northern States of Nigeria (1986) Gaskiya Corp. Zaria p.163
2. Kenny's Outlines on Criminal Law (1966), 19th ed. London. p. 54.

contended that the attitude of the courts is sound because it is not merely a question of proof but, "more importantly, a meticulous demarcation between cases of revenge on one hand, and non-revenge on the other"[3]

The provisions regarding witchcraft in the Criminal and Penal Codes are explicit enough. It has been argued that they are an admission of the existence of witchcraft. A careful study of these provisions however reveals a contrary intention. They are clearly a warning to all that certain behavious are punishable. This removes all uncertainties regarding such beliefs, and one of the functions of the criminal law is to set standards to be attained.

2. Recommendations:

In the context of the foregoing, the following recommendations and proposals for reform are respectfully being made in addition to those already made in the preceding chapters:

(a) An ammendment to section 45 of the Penal Code to specifically include the requirement for reasonableness of mistake is desired. This will do away with the controversy surrounding the importation of the notion, as evidenced by the practice of the courts.

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3. Ofori-Amankwah, E.H., ibid. at p. 163.

(b) The Nigerian Law Reform Commission[4] can perform its functions more effectively if it can accept the participation of the public. At the moment, the public is hardly engaged in the functions of the commission. Its members are essentially professionals who rarely come into contact with the less priviledged members of the society.

(c) The dual penal statutes in Nigeria give the impression that Nigeria is two countries instead of one. In that regard, a uniform Criminal Law for the country is recommended. Apart from checking the present proliferation of standards, a unification of our penal statutes will enhance the understanding of the law by students and the public. It will also make the teaching of the law easier and improve the performance of the lawyer in court. Finally, it will give better meaning to the doctrine of stare decisis in our courts.

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4. Set up by Decree No.7 of 1979.

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