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Is Unlawful Possession of Indian hemp (*Simpliciter*) an Offence in Nigeria?

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Abstract:
This work examines the reasons why Nigerian Courts treat unlawful possession of Indian hemp, simpliciter, as an offence. In doing so, it focuses on the Charges upon which accused persons are convicted and the interpretation placed by the Courts on the word, "knowingly", in the section creating the offence. The exercise reveals that the omission by the prosecution to state the word "knowingly" in the Charge and the interpretation of it in the section creating the offence to mean knowledge of physical possession and not of the nature (identity) of what is possessed are the main causes of the legal prolapse. The outcome is that innocent citizens are convicted without proof that they had knowledge that what they possessed is prohibited by law. This work, therefore, recommends statutory intervention and a more pragmatic interpretation as the way out of the quagmire.

1. Introduction

The history of planting and smoking of Indian hemp in Nigeria dates back to the early years of the post World War 1 but meaningful regulation began in 1935 with the Dangerous Drugs Act[i] (DDA). As at today, Indian hemp, particularly its possession in Nigeria is regulated by the following enactments:

(a) Dangerous Drugs Act
(b) Indian Hemp Act[ii] (IHA)
(c) Single Convention on Narcotic Drugs[iii] (SCND)
(d) National Drug Law Enforcement Agency Act[iv] (NDLEA Act)

This work examines penal provisions on possession of Indian hemp under the Nigerian Law with recourse to other jurisdictions like Ghana and New York State in order to see whether unlawful possession of Indian hemp *simpliciter* (mere possession) is an offence in Nigeria. To properly do this, a pool of penal provisions (PPP) is put in place to aid readers' understanding of the difference between unlawful possession of Indian hemp *simpliciter* and unlawful possession with knowledge that what is possessed is Indian hemp, a substance prohibited by the law; the former being a strict liability offence and the latter an offence with *men's rea*. Also, the inability of the Nigerian Courts to draw this line of demarcation in cases of drug possession and the resultant implications are to be examined. To do justice to the topic, it is therefore, expedient to segment this paper into:

(a) Inelegant drafting of charges;
(b) The constitutionality of trial for unlawful possession (*simpliciter*) of Indian hemp in Nigeria;
(c) Knowledge of the nature of the substance (Indian hemp) possessed as the *men's rea* of the offence;
(d) Implications of the existing decisions of the apex Court.

Arguments on inelegant drafting of charges in cases of drug possession will enable readers to appreciate why (mere possession) is treated as an offence in Nigeria. The constitutional immunity against illegal trial where a charge is at variance with the Section of the law creating the offence, for example, where the acts alleged do not amount to an offence known to law, the duty of the Court in the circumstance is also to be examined. This paper seeks to demonstrate fully the difference between the accused knowing that he was carrying something (harmless weed or Indian hemp) and that he was carrying Indian hemp, a substance prohibited by the Law.

Finally, the implications of treating mere possession of Indian hemp as an offence in Nigeria will be unveiled. Also, some recommendations will be made to guide both the prosecution and the Court in the trial of possession of drug so that innocent citizens are not rail-roaded into prison.

2. Pool of Penal Provisions as Analytical Tool (PPP)

In order to establish that unlawful possession of Indian hemp is not an offence in Nigeria and, *a fortiori*, that the various convictions as affirmed by the apex Court are unconstitutional, it is necessary to reproduce some penal provisions on possessory offences to aid our analysis of the decisions of the courts. The penal provisions are as follows:

PPP1: No person shall be in possession of or attempt to obtain possession of any of the drugs unless he is licensed (Dangerous Drug Regulations[v] made pursuant to the DDA) which defines dangerous drugs as raw opium, coca leaves, and Indian hemp.

PPP2: On unlawful possession, the Indian hemp Act[vi] provides thus:

> Any person who knowingly has any Indian hemp in his possession shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than four years without the option of a fine.

PPP3: The Single Convention on Narcotic Drugs[vii], the foundation of international drug control system, adopted by the NDLEA Act[viii] in this wise provides thus**:**

> Subject to its constitutional limitations, each party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, *possession*… of drug contrary to the provisions of this convention, and any other action which in the opinion of such party may be contrary to the provisions of this convention, shall be punishable offences when committed *intentionally*, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty**.**

PPP4: Any person who, without lawful authority, knowingly possesses the drugs popularly known as cocaine, LSD, heroin or any other similar drugs shall be guilty of an offence under this Act and liable on conviction to be sentenced to imprisonment for a term not less than fifteen years and not exceeding 25 years[ix].

PPP5: Any person who, without authority, proof of which shall be on him has in his possession or under his control, any narcotic drug commits an offence…[x]

PPP6: S. 221.05 Penal Law of New York State which provides thus:

> "A person is guilty of unlawful possession of marihuana when he knowingly and unlawful possesses marijuana".

The essence of pooling together penal provisions on possession of Indian Hemp from different enactments in our clime and other jurisdictions is to enable this work distinguish mere possession from possession with knowledge that what is possessed is prohibited by the law as it takes on the review of a number of cases decided by the apex Court. It is, however, sufficient at this juncture to note that while **PPP1** and **PPP5** prohibit unlawful possession without the use of the word **knowingly** (mere possession), PPP2, PPP4 and PPP6 prohibit it with the word **knowingly**, whereas PPP3 uses *intentionally* in doing it.

3. Inelegant Drafting of Charges

The discernible pattern of drafting charges by the NDLEA is to omit the word **knowingly** from the charge obviously to obviate the necessity of proving that the accused person knew that what he possessed was Indian hemp, a substance prohibited by the law. This is the common thread running through the cases of *Chukwuma v FRN*[xi], *Okewu v FRN*[xii] and *Ugwanyi v FRN*[xiii] decided by the apex Court. It should be noted that the charges in the above cases were all framed from the same section of the NDLEA Act (PPP4), which provides as follows:

> Any person who, without lawful authority, knowingly possesses the drugs popularly known as cocaine, LSD, heroin or any other similar drugs shall be guilty of an offence under this Act and liable on conviction to be sentenced to imprisonment for a term not less than fifteen years and not exceeding 25 years.

However, for prudence and tidiness only a sample of the charges as contained in the case of *Okewu v FRN***,** is hereby reproduced:

> That you Elijah Ameh Okewu on or about the 13th day of March, 1997 at Ibadan unlawfully possessed 58 bags of Indian Hemp otherwise known as cannabis sativa weighing 408 kilogrammes and hereby committed an offence contrary to and punishable under Section 10(h) (now S. 19) of the National Drug Law Enforcement Agency Decree No. 48 of 1989.

As can be seen from the charge the word **knowingly** in the Section creating the offence is omitted. Whether or not the omission is deliberate or due to the fallibility of human beings is not the concern of this work. Rather it is concerned with the consequence of the omission as it invariably leads to the failure to prove that the accused knew that what he possessed was Indian hemp, a substance prohibited by the law. This is what the next segment of this work examines.

4. The Constitutionality of Trial for Unlawful Possession

Where as in the cases under consideration the Charges omitted the word, ***knowingly***, it means the accused persons were tried for unlawful possession *simpliciter* (mere possession) which requires no *men's rea* and therefore a strict liability offence. Just as the NDLEA is determined to prosecute suspects without proving the *men's rea* of the offence, so too is the apex Court in affirming their convictions.

The peremptory question from the juxtaposition of the section creating the offence and the Charge framed therefrom in the preceding segment is whether the acts for which the accused was charged as contained in the statement of offence constitute an offence under the NDLEA Act or any other offence known to our law. The statement of offence in the Charge sheet charged the accused for "being in unlawful possession" of Indian hemp whereas section 19 of the NDLEA Act prohibits "knowingly being in unlawful possession" of Indian hemp. Two questions therefore arise. One, whether the acts of the accused in the statement of offence constitute an offence under section 19. Two, is the word "knowingly" used in Section 19 an embellishment or the mental element of the offence?

It is submitted that the acts of the accused for which he was charged, tried, convicted and sentenced to fifteen years' imprisonment do not constitute an offence under Section 19 of the NDLEA Act or any other offence known to our law. In consequence, the conviction of the accused by the trial Court, its affirmation by the Court of Appeal and subsequent and final affirmation by the apex Court were unconstitutional and therefore null. In reaching this conclusion, this paper relies on the provision of the Constitution[xiv], which states that:

→ No person shall be held to be guilty of a criminal offence *on account of any act or omission that did not, at the time it took place, constitute such an offence,* and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

It is submitted that since the accused was charged with only unlawful possession of Indian hemp, excluding the fact that he knew that what he possessed is Indian hemp, a substance prohibited by the law as represented by the word **"knowingly",** the acts charged do not constitute the offence under Section 19, or any other offence known to law. It is therefore, submitted that the nullity of the trial of the accused in the cases under consideration is rooted in the above constitutional provision.

The position taken by this paper is in tandem with the Supreme Court's decision in the case of *Ikomi v State*[xv]. In that case, it was decided that an accused should not be made to face trial that from the onset it was clear he should not face. Subsequently, the Supreme Court reiterated this principle in clearer terms in the case of *FRN v Ifegwu*[xvi] thus:

→ That circumstance clearly upheld a fundamental principle of constitutional liberty based on the notion that a person is not to be punished for an act which was not a crime at the time it was done: see *Aoko V Fagbemi* (1961) 1 All NLR 400. See also *Ogbomor v The State* (1985) 1 NWLR [Pt. 2] 223 at 233 where this court said that as a result of the immunity from trial and conviction of a person with respect to an act or omission which at the time of its commission or omission did not constitute any offence under the law, no person can be so tried and convicted on it.

This paper is of the view that since the acts with which the accused was charged did not constitute an offence; he ought not to have been tried at all. To do otherwise, is to pierce the constitutional panoply against illegal trial. The accused was tried for "mere possession" which under the Single Convention on Narcotic Drugs 1961, the foundation of international drug control system, adopted by the NDLEA Act, does not constitute an offence.

In this wise, it is appropriate to turn to the provision of the Convention, which serves as the source of Section 19 of the NDLEA Act that criminalizes possession in our jurisdiction, that is, PPP3 at page 3 of this paper. The essence of the recourse to the Convention is to demonstrate fully that the international drug control system criminalizes unlawful possession of Indian hemp with intention. However, the NDLEA Act used knowingly instead of intentionally as the *men's rea* in prohibiting unlawful possession. Suffice it to say that the international drug control system does not punish mere possession of Indian hemp which is a strict liability offence.

In the light of the above exposition, the holding of the apex court in *Okewu v FRN*[xvii] that the court below was right to hold that the charge was properly framed and unambiguous is very disturbing. Going further, the court held that in the instant case, even if there was any defect in the charge, it could have been cured by the provision of the Criminal Procedure Act[xviii]. The Section provides thus:

→ No error in stating the offence or the particulars required to be stated in a charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission.

Before reacting to the position of the apex court stated above which is the same in the other cases under consideration, let us add the voice of the Court of Appeal in the most recent case of *Oni v FRN*[xix]. In that case, the court, which cited and followed the case of *Ogudo v State*[xx] held that a charge is not invalidated for its failure to disclose all particulars of an offence and that the provision is meant to mitigate the effect of errors arising from the fallibility of human beings. However, it should be noted that the problem in the cases under consideration is not the particulars of the offence but the elements (ingredients) of the offence which must be stated since the offence is to be proved as charged.

The key words in the Section creating the offence are: 'knowingly', 'unlawfully' (without lawful authority) and 'possession', which correspond to the ingredients to be stated in a charge framed there from. Knowingly or knowledge if used in any penal provision represents the *men's rea* of the offence, possession, as used here represents the *actus reus*, whereas "unlawfully" or without lawful authority serves as a qualifier, depicting the type of possession prohibited. It is elementary that in any offence there must be concurrence of *men's rea* and *actus reus*.

So, where as in the instant charge 'knowingly', which is the *men's rea* is omitted, the next question will be whether only the *actus reus* (unlawful possession) constitute an offence to warrant putting the accused on trial. With due respect to their Lordships, this work answers in the negative and submits that the charge was not properly framed. It is equally submitted that Section 166 of the CPA cannot remedy the situation because what we have on hand is putting the accused on trial for acts which did not amount to an offence under the section or any other offence known to law. It is submitted that in such a situation, it is the constitutional safeguard against putting an accused-on trial for acts which do not constitute an offence that applies and not Section 166 of the CPA as held by the Court.

Similarly, to hold that Section 166 of the CPA applies is to open the floodgate to those prosecuting to concoct anything in a Charge in a bid to put a suspect on trial only to canvass that the accused was not misled. It is better for the Court to halt the trial of an accused whose acts do not amount to an offence relying on the constitutional safeguard than the onerous task of determining whether he was misled at the trial after a wrongful conviction. Moreover, the question whether it is a constitutional provision or an Act of the National Assembly that applies to a given situation is frivolous.

Granted, a charge may not be invalidated for its failure to disclose all particulars of an offence but where the particulars and/or elements stated do not disclose an offence known to law, the accused cannot be put on trial since he cannot be convicted for such acts. Even if the failure to disclose arises from the fallibility of the prosecution, the Court is there to make sure that no accused is made to

face trial that from the onset it was clear he should not face as held in the cases of *Ikomi v State,* and *FRN v Ifegwu.* It is submitted that the criminal trial of a citizen, particularly for serious offences as in the instant case cannot be automated based on trial and error.
Finally, it is part of our criminal jurisprudence that the prosecution is to prove an offence as charged. In other words, the prosecution is not expected to go outside the charge to prove the offence for which an accused is tried. The corollary is that an accused is convicted or found guilty as charged. It is for this reason that the apex Court insisted that the prosecution must prove the element of "intent to defraud" in the charge even though it is not an element in the section creating the offence in the case of *Bode George v FRN*[xxi]. The logical obverse of the holding is that any element not stated in the charge is not to be proved. So, where as in the instant charge the prosecution failed to state the *men's rea* of the offence denoted by the word "**knowingly**" in the Section creating the offence, it means the prosecution also did not prove it at the trial, hence the conviction of the accused is a nullity.

5. Proof That the Accused Had Knowledge That He Was in Possession of Indian Hemp
In fact, in almost all the possession of drug cases, the Courts, except in the cases of *Stephenson v Police*[xxii] and *Aloba v FRN*[xxiii]**,** have always maintained that knowledge of the nature of the substance possessed by the accused or that the substance is prohibited by the law is not the *men's rea* of the offence. The apex Court in many cases including the three under consideration treated the word "knowingly" used in creating the offence as the knowledge of the physical existence of the substance (Indian hemp) which is the *actus reus*. This assertion springs from the following holdings of the apex Court.

In the case of *Okewu v FRN*[xxiv], the Court held thus:

→ Knowledge of a thing connotes the acquaintance with fact or truth; it also connotes an act or state of knowing or understanding. Accordingly, a person is said to know that he is in possession of a thing when he becomes acquainted with the fact or truth of the existence of that thing with him.

In the case of *Ugwanyi V FRN*[xxv], the Court stated the 3rd ingredient of the offence to be:

→ That the substance was in the appellant's possession to his knowledge and without lawful authority.

In the case of *Chukwuma v FRN*[xxvi]**,** the Supreme Court accepted the concurrent finding by the trial and the Court of Appeal, which reads thus:

→ Accused person knew that he had the substance in question in his possession.

With due respect to the apex Court, it is submitted that the issue of whether or not the accused knew that he was in possession of the Indian hemp cannot be the men's *rea* of the offence since the prosecution is only required to prove such knowledge if the accused raises the defence of non-conscious possession. As it is, the requirement of proof of the *men's rea* of an offence does not depend on the defence of an accused person but a requirement that must be proved to secure conviction. Therefore, in the cases under consideration where the accused persons did not raise the defence of non-conscious possession, it was a surplus age to have inferred the knowledge that the accused knew that he was in possession of the Indian hemp.
Regrettably, the apex Court with the above findings ignored the earlier flashes of light in the treatment of the word, 'knowingly' as the *men's rea* of the offence in at least two cases. The light shone in the case of *Stephenson v Police*[xxvii] where the Court, in interpreting the word, "knowingly", as used in creating the offence of unlawful possession under the Indian Hemp Act held that:

→ … The word (knowingly) was to protect a person who though may be aware of the physical existence of the article (Indian hemp) *but is innocent* of its actual identity (nature).

Surprisingly, the Supreme Court in the recent cases under consideration is holding on to the awareness of the physical existence of Indian hemp as the *men's rea* of the offence, ignoring the latter part of the above holding that the accused may be innocent of its actual identity (nature), which in fact is the *men's rea* of the offence. Innocence here connotes the lack of a guilty or illicit mind, which 'knowingly' is used to represent in the offence so that only an accused person who knows that the substance he possesses is Indian hemp or that the substance is prohibited by law is guilty of the offence. Rhetorically, if indeed, guilty or illicit mind is the *men's rea* of the offence, what then is the guilty mind if an accused knew that he was in possession of a piece of block?
Similarly, the light flashed again in the case of *Aloba v FRN*[xxviii], when the Court of Appeal rightly stated that one of the ingredients of the offence was knowledge by the accused that what he possessed is cocaine. Making this point clearer the Court went further to state as follows:

→ I shall now deal with the part of that issue which deals with knowingly possessing cocaine. The question here is did the appellant know that what he was in possession of was cocaine? Whether he knew or did not know can be deduced or inferred from his conduct. Circumstantial evidence will be relevant here for it is said that not even the devil knoweth the mind of man.

So, what is very clear from the passage is that the word 'knowingly' as used in the section creating the offence leads to the question of whether or not the accused knew that what he possessed was Indian hemp, a substance prohibited by the law and not whether he knew that he was in physical possession of the Indian hemp. Knowledge of the physical possession of the Indian hemp is not the *men's rea* but a component of possession, which is the *actus reus* of the offence. This view finds support in the case of *DPP v Brooks*[xxix], where the court held that:

→ In the ordinary use of the word 'possession' one has in one's possession, whatever is to one's own knowledge, physically in one's custody or under one's physical control.

It is this knowledge, which is intrinsic to possession that the Supreme Court is interpreting as the word 'knowingly' used in creating the offence. It is submitted that while the proof of knowledge of the physical possession of the Indian hemp will only arise at the trial if the accused pleads non-conscious possession (affirmative defence of unwitting possession under US law), the knowledge denoted by the word, 'knowingly' in the section must be proved as the *men's rea* of the offence.

In this wise, a charge based on PPP1 and PPP5 need not state knowledge as one of its elements because if during the trial the plea of non-conscious possession is not raised, the prosecution needs not prove that the accused knew that the Indian hemp was in his possession or was acquainted with the fact or truth of its existence which the Supreme Court in the cases under consideration treats as the *men's rea* of the offence. It is however submitted that the prosecution must prove the *men's rea* of an offence in order to secure conviction and that the proof is not contingent upon any defence raised by the accused as the apex Court would want us believe.

As to what is actually the *men's rea* of the offence as created under Section 19 of the NDLEA Act, there appears to be inherent contradiction in the judgment of the Court in the case of *Okewu v FRN*[xxx], where the Court held that:

→ … In the circumstance, the appellant's argument that the evidence proffered by the prosecution only showed that he was in possession of Indian hemp but not that he knew that the materials were narcotic drugs was a total misconception and misleading.

On the other hand, the Court held that:

→ …That accused person need not to know that what he possesses is a narcotic drug but that it is Indian hemp, otherwise known as cannabis sativa, which is a drug in law[xxxi].

With the latter holding, the Court appears to be conceding that the accused ought to have known that what was in his possession is prohibited by the law. Knowing that he possesses a narcotic drug or Indian hemp is one and the same thing. Afterall, the Court defined narcotic drug to include marijuana (Indian hemp) in its judgment[xxxii]. It is submitted however, that medically, Indian hemp is not a narcotic drug but for the purpose of regulation it is categorised as a narcotic drug[xxxiii]. Nonetheless, whether the holding that the accused ought to have known that he possessed Indian hemp is a shift from the existing position or a slip is yet to be seen as we await the next decision of the Court.

The immediate concern of this paper now is the mode of proof of the knowledge that what the accused possessed is narcotic drug or Indian hemp, that is, the substance in his possession is prohibited by the law. On how such knowledge can be proved, we refer to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[xxxiv], which provides thus:

→ Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Aside from this mode of proof being of universal recognition, the above Convention has been domesticated by Nigeria through the NDLEA Act[xxxv].

On this general mode of proof of knowledge, we commend the lead provided by the case of *Aloba v FRN*,[xxxvi] where the Court of Appeal held as follows:

→ I shall now deal with the part of that issue which deals with knowingly possessing cocaine. The question here is, did the appellant know that what he was in possession of was cocaine? Whether he knew or did not know can be deduced or inferred from his conduct. Circumstantial evidence will be relevant here for it is said that not even the devil knoweth the mind of man.

What need to be added to this insightful and far – reaching holding of the Court of Appeal is that the prosecution is the one to place materials from which the Court will infer knowledge from the conduct of the accused.

In the most persuasive case of *Narcotics Control Bureau, Judlipher v Murlidhar Soni & Ors*[xxxvii], the Supreme Court of India decided that the prosecution has the onus of placing the materials from which knowledge can be inferred on the part of the accused (respondents). Mr. Kailash – Vasder, learned Senior Counsel for the respondents had contended that according to the prosecution the bag in question was being carried by the respondent's father (deceased) and there was no material (placed by the prosecution) to show that the respondent had any knowledge as to the contents of the said bag. He contended further that in such a situation, the possession of the narcotics by his father could never be construed as conscious possession of narcotics by the respondent. In agreeing with the submissions of the respondent's counsel, the court held as follows:

→ In our opinion, since the prosecution has not placed any material to show the conscious possession of the contraband by the respondent herein and since Murlidhar Soni is dead, we think the contentions advanced on behalf of the respondent as to the possession of the contraband by the respondent has to be accepted. And so, the appeal was dismissed.

The relevant points of the cited authority to the cases under consideration indicate that:

a. knowledge by the accused that the substance (Indian hemp) is within his possession becomes an issue (ingredient to be proved), only if the accused raises the issue of non-conscious possession
b. the prosecution is the one to prove conscious possession, that is, the accused knew that he had the substance in his possession by placing materials from which the court can infer such knowledge.

In the cases under consideration, nobody raised the issue of non-conscious possession or the affirmative defence of unwitting possession; hence it was unnecessary for the prosecution to prove that the accused persons knew that they had possession of the Indian

hemp. Also, the prosecution did not place any material before the trial court to enable it infer the requisite knowledge that the accused persons had possession of the Indian hemp. It is submitted that in the circumstance, the knowledge that they possessed the Indian hemp was not an ingredient of the offence charged hence the finding of the trial court was perverse.

The objective factual circumstances or materials from which the Court may infer such knowledge, which must exist as at the time of arrest, include but are not limited to:

(a) concealment- According to Ediru[xxxviii], "concealment" is the nucleus of such objective factual circumstances;
(b) bluffing a law officer by exhibiting some naïve bravado in permitting a search[xxxix];
(c) attempt to get rid of the suspected substance upon apprehension;
(d) attempt to run away when accosted.

Granted, what objective factual circumstances may amount to guilty knowledge in a trial under the NDLEA Act is still hazy. It must be stated at once that such circumstances depend on each case and cannot be itemized. However, the listed circumstances are not cumulative, as one or a combination of them may be sufficient to infer guilty knowledge.

Still to be examined is how to prove that the accused knew that what he possessed was narcotic drug or Indian hemp or is a substance prohibited by the law where the accused pleads guilty or in a full trial. Where the accused pleads guilty, the question will be whether he admitted the fact that he knew that he was in possession of Indian hemp. Such fact obviously would not have been explained to the accused before his plea since there was nothing in the charge to warrant the explanation of such fact, the word 'knowingly' having been omitted. Now, if after pleading guilty the prosecution is unable to place objective factual circumstances before the Court during the review of the facts of the case to enable it infer the requisite knowledge of the nature of the substance on the part of the accused, the plea of guilty becomes otiose. It is submitted that the Court cannot convict him because to do otherwise is to convict without the proof of the *men's rea* of the offence.

It is to avoid the intricacies outlined above that in some jurisdictions, accusatory instruments are filed with the Report of laboratory analysis of the suspected substance, failing which the prosecution is given time to bring the Report as stipulated by the law. For example, under the New York Penal Law[xl], the procedure is as stated by Murray[xli] as follows:

→ In illegal drug cases, the Government is required to present a laboratory analysis proving that the substance recovered is actually some illegal substance as opposed to ground up aspirin or something legal. When the Government provides this laboratory report to the Court, the accusatory instrument is said to be "corroborated", a fancy way of saying that the accusation has been independently verified in some way. In misdemeanor cases the Government has a set period of time to "corroborate" the accusatory instrument. For a B misdemeanor, the Government has 60 days to get the laboratory report. If the Government fails to get the laboratory report in 60 days on a B misdemeanor, the case must be dismissed because the accusatory instrument was never "corroborated" … the Court does not have jurisdiction to hear an uncorroborated violation. For criminal possession of marijuana that are misdemeanor or even felony offences, depending on the amount involved, the Government is allowed 60 days to 6 months depending on the case to get the laboratory report**.**

If the prosecution does not comply within the time given by the court, the accusatory instrument is struck out. In other words, no person is arraigned without a Report indicating that the substance possessed by the accused is prohibited by the law. If this procedure is adopted and the charge contains the element that the accused knew that he was in possession of a substance prohibited by the law, then the accused will be in a better position to plead guilty, if that is his case.

In a full trial, however, the proof that the accused knew that what he possessed was Indian hemp or substance prohibited by the law takes a slightly different turn. Even with a voluntary confessional statement, the prosecution is still to place before the Court circumstances from which to infer the knowledge. This is because the making of the confessional statement precedes the analysis of the suspected substance so it is impossible for the accused to admit knowledge of the nature of the substance at the time of making it. Furthermore, it should be noted that the result of the preliminary test using the UN Testing kits before sending the suspected substance to the laboratory for analysis is not confirmatory hence no conviction can be based on it. Moreover, the Report of laboratory analysis is the only mode of proof allowed by the law[xlii].

Therefore, it would be wrong to surmise that the accused knew that what he possessed is Indian hemp or a substance prohibited by the law as did the Court in the case of *Okewu v FRN*[xliii] when it held thus:

→ It has been established by the prosecution on the day of arraignment that the accused/appellant according to the statement of offence read to him, was unlawfully in possession of 58 bags of Indian hemp otherwise known as *cannabis sativa* weighing 405 kilogrammes. These, along with other documents/substances, which were admitted in evidence, are strong enough to give support (corroborate) appellant's clear admission of committing the offence with which he was charged, tried, convicted and sentenced. It does not stand to reason for a person who is a *sui juris* to try to avoid liability or responsibility for an offence which he voluntarily confessed having committed by mere denial of having knowledge that he was carrying a narcotic. But, I believe that he knows that the hashish leaves, he was carrying in sacks, in that quantity were not millet, sorghum, maize, groundnut or beans. Neither were they leaves or stalks of such crops. If the appellant had proved by his assertion, that the leaves he was carrying were of the latter classification, he would have gone scot-free as the latter would be ideal and harmless feeds for the animals. Unfortunately for the appellant, his confession and other corroborative evidence proved that he fully and knowingly carried the former, that is *cannabis sativa*, or, more popularly called 'Indian hemp'.

With the greatest respect to their Lordships in that case, the holding has not settled our understanding of the difference between knowingly carrying Indian hemp and knowing that what one is carrying is Indian Hemp, the former being the *actus reus* and the latter, *men's rea* of the offence. It is submitted with the greatest respect that the holding does not accord with the law for at least five reasons.

- → First, there was no way the appellant could have admitted that what was in his possession was Indian hemp since there was no element in the charge to warrant the explanation to him that he had knowledge that what he possessed was Indian hemp when he pleaded to the charge.
- → Secondly, as at the time he pleaded to the offence, the Report of the analysis was yet to be admitted in evidence hence he could not have known that what he possessed was Indian hemp.
- → Thirdly, the inference that the appellant knew that the hashish leaves, he was carrying in sacks, in that quantity were not millet, sorghum, maize, groundnut or beans was not drawn from objective factual circumstances or materials placed before the Court by the prosecution.
- → Fourthly, the issue is not knowledge of possession (conscious possession) but of the nature of what is possessed, Indian hemp.
- → Fifthly, the appellant had no onus of proving that what he possessed was harmless. The offence being one constituted by expert evidence, only laboratory analysis can identify the suspected substance in law.

Properly conflated, the above reasons have shown that the apex Court by its holding did not even recognise that knowledge of the nature of the substance by the appellant is an element of the offence, in fact, the *men's rea*. This is very surprising in the light of the decisions in *Stephenson v Police* and *Aloba v FRN* that recognised such knowledge as the *men's rea* of the offence of knowingly being in unlawful possession of Indian hemp.

One wonders that if the word 'knowingly' in PPP4 means knowledge of the physical possession of the Indian hemp, then under PPP1 and PPP5 without the word 'knowingly', the accused needs not even know of the physical possession of the Indian hemp before he can be convicted. In other words, offenders tried under the regulation made pursuant to the DDA and the Ghanaian Drug Law will be convicted even if they do not have knowledge of the physical possession of the Indian hemp. In other word, the offence becomes a strict liability offence requiring no *men's rea*.

6. Implications of the Existing Judicial Decisions

To properly understand the implications of the existing judicial decisions, a scenario capturing the situations in all the cases under consideration is hereby painted:

> Illustration: 'A', who is dissatisfied with the performance of Orthodox medical practitioners decided to seek alternative treatment from 'B', a herbal medical practitioner. As part of the treatment, 'B' gave 'A' a concoction containing Indian hemp as one of its ingredient but never disclosed this fact to 'A'. Meanwhile, unknown to 'A', NDLEA officials have placed 'B' on surveillance based on the information they received that 'B' uses Indian hemp as an ingredient of his herbal preparations. Shortly after 'A' left 'B's house on his way home NDLEA officials apprehended him with the herbal preparation in his hand which upon analysis tested positive to Indian hemp.

Quickly, 'A' was charged under the NDLEA Act[xliv] under the Section that provides thus:

> Any person who, without lawful authority 'knowingly' possess the drugs popularly known as cocaine, LSD, heroin or any other similar drugs shall be guilty of an offence under this Act and liable on conviction to be sentenced to imprisonment for a term not less than fifteen years and not exceeding 25 years.

In all the cases under consideration the apex Court is saying that so long as 'A' knew that the herbal preparation containing the Indian hemp was in his possession (of course in his hand, in his dress or bag) and without lawful authority, he is guilty of the offence and liable to imprisonment for a minimum of 15 years. However, this work is of the view that unless 'A' knew as at the time he was arrested that the herbal preparation contained Indian hemp in it, which the law says no person should possess without lawful authority and yet he possessed it, 'A' cannot be guilty of the offence. This work is also saying that the knowledge by 'A' that what he possessed is Indian hemp is denoted by the word 'knowingly' in the section creating the offence which is the *men's rea*. Therefore, the reference to the offence created by the section as unlawful possession of drug is not correct rather it should be 'knowingly' being in unlawful possession of drugs. This is where the case of *Okewu v FRN* got it wrong.

7. Conclusions

This work, in order to ascertain the current position of the law on possession of Indian hemp examined the most recent decisions of the apex Court using a pool of penal provisions from various jurisdictions as analytical tool and the outcome is that unlawful possession of Indian hemp is not an offence in Nigeria. Rather, this work has established that:

1. The treatment of unlawful possession of Indian hemp as an offence in Nigeria is a creation of the courts and not the law.
2. The practice of deliberately omitting the word 'knowingly' contained in the section creating the offence from the charge by the prosecution to lessen the onus of proof at the trial is partially responsible for the legal prolapse.
3. If the elements contained in a charge do not constitute the offence charged or any offence known to law, the constitutional safeguards will apply to halt the trial rather than proceeding with the trial only to ascertain whether or not the accused was misled at the trial.

4. The failure of the courts to recognise that 'knowingly' as used in the law creating the offence denotes the *men's rea* of the offence which is not knowledge of physical possession but knowledge of the nature (identity) of what the accused possessed is the main cause of the problem.
5. In all the cases examined the prosecution never placed any materials before the Court to enable it infer the requisite knowledge before convicting the accused for unlawful possession (mere possession) which is not an offence in Nigeria.
6. Procedurally, it is not possible to plead guilty to possession of drug offences which are constituted by expert evidence.
7. The existing judicial authorities do not reflect the correct position of the law on possession of Indian hemp.
8. Unless the apex Court revisits its current decisions on the issue, innocent citizens stand the risk of being convicted for unlawful possession of Indian hemp which is not an offence in Nigeria.

8. Recommendations

From the conclusions reached in this work it is obvious that the Nigerian Courts are having serious problems of adjudication in drug cases especially in the area of isolating the *men's rea* in the possession of drug offences, hence there is the need for statutory intervention as follows:

(a) The Nigerian Legislature should adopt the phrase, "knowingly and unlawfully possesses" as used in the Penal Law of New York State instead of the "without lawful authority, knowingly possesses" used in Section 19 of the NDLEA Act in criminalizing possession of illicit drugs. "Knowingly" as used under the NDLEA Act appears to be an adjective suggesting the type of possession that is prohibited, whereas "knowingly" under the Penal Law of the New York State is independent of the word "possesses" hence it can only mean the guilty or illicit mind of the possessor and not the type of possession.

(b) Again, there should be a statutory provision in our drug laws prohibiting the arraignment of suspects without a positive laboratory result showing that a suspected substance is indeed a substance prohibited by the law. In other words, charges must be corroborated before arraignment as it is under the Penal Law of the New York State.

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