



EXPANDING THE MENTAL ELEMENT REQUIREMENTS IN MURDER IN THE CRIMINAL CODE TO INCLUDE FORESIGHT: A CRITICAL ANALYSIS*

Abstract

As expressed in a long line of judicial authorities, part of the requirements for proof of murder in the Criminal Code is intention to kill or cause grievous bodily harm. However, in cases involving arson and the like which nevertheless involves loss of lives, the courts find it difficult to convict for murder on the ground that death is not foreseeable in the act of arson. This situation leaves much to be desired especially from the point of view of the ordinary reasonable man who goes home wondering whether actually justice has been done in the case. To obviate this type of situation, this article interrogates the propriety of expanding the mental element of murder to include situations where the defendant is expected to foresee the natural consequences of his action. Expanding the mental element in murder in the Criminal Code will bring in all those morally wrong killings which are currently outside the scope of murder. By this expansion, fault element to wit: foresight will be used in arriving at or measuring when a defendant has formed the intention to kill or cause grievous bodily harm. Foreseeability will bring arsonists or suicide bombers within the scope of intentional killers if made an element in determining *mens rea* in murder cases. This work considers the workability of inputting foresight into the mental element in murder in the Criminal Code.

Keywords: Mental Element, Criminal Code, Murder, Foresight, Intention

1. Introduction

The current provisions of the Criminal Code on murder do not cover for the very recent deliberate killings today. Killings that emanated from an arsonist's act of bombing a building where people were killed do not fall under deliberate or intentional killings as provided for under Section 316 of the Criminal Code. A person who knew the occupants of building in which he desired to set ablaze were present in the building at the time and that they could die from the fire and yet sets it ablaze and the occupants died, cannot claim that he did not know that his action will result in the death of the occupants or a suicide bomber who bombed a building with people inside and the people died cannot also claim that he did not desire the outcome (death) which eventuated. The inclusion of foresight of the probability of death occurring or certainty of death occurring in the Criminal Code as mental element in murder and definition of intention in the Criminal Code will bring all these deliberate killings under the umbrella of murder. Intention includes a conscious object or purpose to bring about or cause a particular result. This definition of intention would, by itself, appear to be insufficient as a fault element for murder if intention is expressed in such limited terms. It follows that, no matter how probable a particular result is, a defendant cannot be said to intend it unless it is his conscious object or purpose to achieve the result.¹ The Ontario Court of Appeal, (Canadian Court) held in *Regina v Buzzanga*,² that:

as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve

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¹ Lord Goff, 'The Mental Element of Murder' (1998) 104 LQR 45-46.

² (1980) 25 OR (2d) 705, 720-721.



some other purpose intends that consequence. The actor's foresight of the certainty or moral certainty of the consequences resulting from his conduct compels a conclusion, that if he, nonetheless, acted so as to produce it, then he decided to bring it about (albeit regretfully) in order to achieve his ultimate purpose.

Also, in the Indian case of *Jai Prakash v State*,³ intention was explained or held to include as follows:

Intention requires something more than the mere foresight of consequences, namely, the purposeful doing of a thing to achieve a particular end... 'Intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event.

In explaining what foresight of a probability means, the Court in *Queen v Crabbles*,⁴ held that in respect of this head of murder (by recklessness), there must be foresight of a probability and not a mere probability that death or grievous bodily harm will result. The Court in *Boughey v The Queen*,⁵ further enumerated that the contention 'Likely' (to cause death) in the Tasmanian Criminal Code does not include 'more likely than not'. It accepted that 'Likely' could be equated with 'Probable' which in turn meant substantial - a real and not remote chance.

2. The Mental Element of Murder in the Criminal Code

Section 316 of the Criminal Code⁶ provides for the circumstances that satisfy the requirements for the mental element in murder. It provides thus:

Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances that is to say-

- (1) If the offender intends to cause death of the person killed, or that of some other person;
- (2) If the offender intends to do the person killed or to some other person some grievous harm;

2. 1. Intent to Kill or Cause Grievous Bodily Harm

Sub sections 1 and 2 of Section 316 of the Criminal Code restate the general proposition that for a conviction of murder, proof of an intent to kill or cause grievous bodily harm is sufficient.⁷

In *Odudu State*,⁸ it was held that in ascertaining intention of an accused to commit murder, the following criteria must be examined:

1. The nature of the weapon used, which has to be a lethal weapon, in the sense that it has to be a weapon that can be deadly or cause death.
2. The part of the body brutalised by the lethal weapon and
3. The extent of the proximity of the victim with the lethal weapon used by the accused.

³ (1991) 2 SCC 32, 42.

⁴ (1985) 156 CLR 464

⁵ (1986) 161 CLR 10

⁶ Criminal Code Cap C38, Laws of the Federation of Nigeria, 2004.

⁷ CO Okonkwo, & Naish, *Criminal Law in Nigeria* (2nd Edn, Ibadan: Spectrum Books Ltd, 2005) 231

⁸ (2017) 17 WRN 128



Another way, the Courts determine the presence of intention in murder is by inference of intent to kill or cause grievous bodily harm from the conduct of an accused person. In *Owhoruke v C.O.P*,⁹ Augustine Eveh (deceased) and PW2, Joel Eriewewere outside the E.T.O bar at Uroto quarters, Oleh in Delta at about 8pm on the 4th of November, 2004. The appellant was inside the Bar having a drink. There was an altercation outside the bar between a man called Uzezi and Joel Eriewe over a girl who goes by name Blessing. The appellant was attracted to the scene and was able to restrain Joel Eriewe and Uzezi from fighting. The appellant thereafter returned to the bar to resume drinking. The deceased came into the bar and snatched the appellant's bottle of drink and broke it. He held on to a piece of the broken bottle and threatened the appellant with it. A struggle ensued. The appellant overpowered the deceased and stabbed him with the broken bottle on his neck. He died before he could get to the hospital. The Medical doctor who performed the post mortem examination on Augustine Eveh said on oath that the stab wounds were on the left side of the neck and that the major blood vessels, carotid arteries, and jugular veins were cut into two. He concluded that the wound was not self-inflicted. The appellant admitted that he stabbed the deceased and that act of his resulted in his death but the death was not intentional. The learned trial judge reviewed evidence led in detail, examined the defences of self defence, provocation and accident and rejected all of them, convicted and sentenced the accused to death. Dissatisfied with the conviction and sentence, the appellant appealed. The Court of Appeal affirmed the judgement of the trial court and dismissed the appeal. Further dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme Court.

The Supreme Court in upholding the judgement of the Courts considered that:
The act of the appellant was intentional with the knowledge that death or grievous harm was its probable consequence. The appellant is deemed to intend the natural consequences of his act. A man who stabs another on the neck region with a bottle is deemed to have intended to kill or cause grievous bodily harm¹⁰.

3. A Comparative Analysis of the Provisions of Murder in the Penal Code¹¹ and Criminal Code.¹²

Section 220 of the Penal Code defines culpable homicide to include:

Whoever causes death-

- (a) by doing an act with the intention of causing death or such bodily injury as is likely to cause death; or
- (b) by doing an act with the knowledge that he is likely by such act to cause death; or
- (c) by doing rash or negligent act, commit the offence of culpable homicide.

Section 221 of the Penal Code went on to provide for a better and clearer provisions on foresight in murder to wit:

Except in the circumstances mentioned in Section 222, culpable homicide shall be punished with death-

⁹ (2015) 39 WRN 24

¹⁰ See also the cases of *Abogede v State* (1996) 6 NWLR (pt. 448) 270 at 238, *Garba v State* (2000) 6 NWLR (pt. 661) 3781.

¹¹ Penal Code Cap 89 Laws of Northern Nigeria 1960

¹² Criminal Code Cap C38 L.F.N 2004.



- (a) If the act by which the death is caused is done with the intention of causing death or
- (b) If the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause.

The Criminal Code and Penal Code both provide for ‘intention’ as the mental element in murder. The difference lies in the criteria at which intention will be determined or arrived at. Intention in the Criminal Code could best be described or defined as provided for by the Court in *Bassey A Iden v State*,¹³ to include:

A design or fixation of the mind on a particular line of act or conduct and until intention is overtly applied or executed in a particular way or direction, it is lost to any human being other than the Almighty God.

But the second emphasis provided by the Penal Code is broader than the intention defined by the Court above. The doer of the act having knowledge or reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause. This is a pure provision on foresight of probability of a consequence occurring which the work canvasses for.

4. Foresight as a Mental Element in Murder in the Criminal Code

There is one meaning of intention provided by the Criminal Code and followed by the Courts and that is where a defendant wants something to happen as a result of his conduct. Intention has always been seen as the most serious form of wrong doing¹⁴, the central or fundamental kind of wrong doing is to ‘direct my actions towards evil - to intend and to try to do what is evil¹⁵’. This is known as direct intent. In addition to this meaning of intention based on purpose or desire, there is also a second meaning of intention, where the actor’s purpose is not to cause a result but he realizes that by his act that result is very likely. This is because a single act can have two quite separate outcomes. In South Africa, it is known as *dolus eventualis* (Indirect intent). In order for indirect intent also known as foresight of a probability of a consequence to exist, two elements must be noticeably present. They are: the cognitive element of knowledge and attitudinal element of reconciliation¹⁶. In South African law, two elements exist in *dolus eventualis* and they are the cognitive element and the conative element¹⁷.

4.1 Cognitive Element of Knowledge

The defendant must have been aware at the time he acted that he might cause the prohibited result or circumstance. The defendant must be aware of the possibility of the unlawful result occurring irrespective of how remote or slight that possibility may have been¹⁸. The essential characteristic of foresight is that the awareness or knowledge of the unlawful possibility must have been present in

¹³ (1994) 8 NWLR (pt 365) 719 at 729

¹⁴ G Williams, *Textbook of Criminal Law* (2nd edn, London: Stevens, 1983) 83.

¹⁵ RA Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990) 113

¹⁶ G Leigh, ‘Murderous Intent - The Attitude of A Murderer’ (2021) *Journal of Criminal Law* 2

¹⁷ Snyman, *Criminal Law* (3rd edn, 1995)

¹⁸ Snyman, *Criminal Law* (3rd edn, 1995)



the mind of the accused even though the foreseen possibility may have been unlikely or improbable¹⁹. If the accused foresaw the result in his own mind, then the accused satisfied the cognitive element of knowledge in foresight.²⁰ In *R v Thibani*,²¹ the South African Court, per Schreiner JA had this to say to wit:

It seems to me to be clear that a man may have the intention to kill even though he does not visualise death as more likely than not to result from his acts. Supposing for instance, that he was expressly warned at the time of the danger of death resulting from his act and while realising that there was such danger, nevertheless did the act, reckless whether death resulted or not. I do not think that it would matter whether he thought that death would very probably result or whether he thought that, though reasonably possible, it would very probably not result ... I shall add that provided the requisite recklessness is present. It may even be correct to say that realization of the possibility of death resulting, even as a remote chance, would suffice.

Furthermore, in foresight, it is also necessary to adduce evidence to support the fact that the defendant foresaw the likelihood of the unlawful result (death) ensuing. Not only must the accused subjectively foresee the unlawful result but the unlawful result must also be probable or likely to occur. In *R v Steenkemp*,²² Milne J, described *dolus eventualis* as follows:

It seems to me, then, that, in so far as it is based on the wounding of the complainant, the conviction can only stand if it was proved that the appellant fired the shot with the specific intention of wounding the complainant or that, when he fired the shot, he knew that there was a substantial risk of his wounding the complainant and was reckless whether he wounded him or not.

4.2 Attitudinal Element of Reconciliation

The first requirement to establish foresight is that the defendant was aware that the defendant was aware that his proposed criminal act will likely result in death or grievous bodily harm of another person even though he did not plan it.²³ Knowledge of the likely result is very crucial in foresight. The second requirement to establish lies in the character of the defendant after being aware of the likely result. To be an intentional action, the act must be wanted²⁴. Where the defendant proceeded with the act after being aware or warned that its eventuation will likely, probably, substantially, really, reasonably,²⁵ result in death or grievous bodily harm and consented, reconciled and took it into bargain,²⁶ and the risk occurred. It would be said that the defendant has reconciled himself with the death or grievous bodily harm.²⁷ However, reluctantly means are chosen, a person is rightly said

¹⁹ Ibid

²⁰ Ibid

²¹ (1949) (4) SA 720 A 729-730.

²² (1960) 3 SA 680 (N) 684

²³ Snyman, *Criminal Law* (3rd edn, 1995)

²⁴ Kenny, A, '*Intention and Purpose in Law*', *Essays in Legal Philosophy*, ed. Summers, RS, (Oxford: Basil Blackwell, 1968)

²⁵ *R v Suleman* (1960) 4 SA 645 (N) 646 H.

²⁶ *S v Humphreys* (2013) 2 SACR 1

²⁷ G Leigh, '*Murderous Intent- The Attitude of A Murderer*' (2021) *Journal of Criminal Law*



to have wanted them.²⁸ In *S v Humphreys*,²⁹ the Court explained the conative element of *dolus eventualis* to include:

A man may foresee the possibility of harm and yet be negligent in respect of that harm causing e.g. by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility ... The concept of conscious (advertent) negligence (*Luxuria*) is well known on the continent and has in recent times often been discussed by our writers... conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) 'consents' to the consequence foreseen as a possibility, he 'reconciles himself' to it, he 'takes it into bargain'... Our cases often speak of the agent being 'reckless' of that consequence, but in this context, it means consenting, reconciling or taking into the bargain... and not the 'recklessness' of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in, regard to the foreseen possibility which characterizes *dolus eventualis* and which is absent in *Luxuria*.

The inclusion of foresight of either probability of death or grievous bodily harm occurring or virtual certainty of death or grievous bodily harm occurring in the Criminal Code will expand the law on murder and bring in many killings of which are currently outside the scope of murder under the umbrella of murder. One of the elements of foresight is knowledge. It is often required in the definition of a particular crime that the accused must have knowledge of a particular existing circumstance. As regards proof of knowledge, the same considerations apply as for proof of intention. In *R v Udo*,³⁰ it was held that:

The fact of guilty knowledge can seldom be proved by direct evidence. Nearly always, it has to be inferred from the circumstances of the case, and the question of whether guilty knowledge on the part of an accused is the proper inference to be drawn from the evidence is for the trial judge.³¹

If the intention to cause a particular result is not expressly declared to be an element of the offence, then the result intended to be caused by the accused is immaterial³². But the definition of an offence prescribes the specific conduct which the prosecution must prove that the accused intended. In murder, the specific intent must be intent to kill or intent to cause grievous bodily harm.³³ The state of a man's mind is as much a fact as the state of his digestion.³⁴ A man who embarked on a mission to bomb a building filled with people inside it, could confess that his sole intention is to bomb the building. Oh yes, he bombed the building but he foresaw and knew that the death of the people inside the building will be an end result of his act. An awareness that the building will be bombed on a certain date before the actual date intended for the bombing to take place would have prevented the death, but the defendant knew that such awareness will rebut his mission, and that he would frown

²⁸ A Kenny, (n) 25.

²⁹ (2013) (2) SACR 1.

³⁰ (1942) 8 WACA III at II3.

³¹ See also *R v Agu* (1949) 12 WACA 486

³² Criminal Code Cap C38 L.F.N 2004 section 24

³³ Ibid at Section 316

³⁴ Per Bowen L.J in *Edgington v Fitzmaurice* (1885) 29 Ch.D 459 at 483.



at it and will not be happy that his mission was rebutted, carrying out the act without such an awareness brought the mission to accomplishment of which the accused is happy about. No one is capable of seeing into another's mind and of being able to state with absolute certainty what his intention is³⁵. Only when a man himself confesses what it was, he intended or foresaw do we come close to being sure of what it was, although, even though, when, we may not always be certain, because we may misunderstand him, or he may consciously deceive us or unconsciously deceive himself as to what his real state of mind was.³⁶ But everyday decisions, legal or otherwise, have to be made on the basis that another's intention is a fact capable of being ascertained with a reasonable degree of certainty.³⁷ We must infer intention from the facts of any particular situation.³⁸

Clearly, a man is not reckless who foresees a criminal consequence as only a remote possibility.³⁹ Equally clear, if he foresees it as certain to happen, that is tantamount to a finding that he desired it and therefore intended it.⁴⁰ Between these two extremes, is a whole range of degrees of possibilities: Consequences may be described, for instance, as possible, reasonably likely, likely, probable or very probable.⁴¹ In *R v Okon*,⁴² it seems in Section 316 (3) of the Criminal Code to have been taken to mean 'reasonably probable'. While the second element in foresight is reconciliation. Intention is not capable of positive proof, it can only be implied from overt acts.⁴³ It is often said that the notion of actus reus includes a certain mental element- namely, that the accused cannot be considered to be 'acting' if his physical movement is 'unconscious' or 'involuntary' and that he must be aware of his physical movement and willing it if it is to be considered an *actus reus*.⁴⁴ This is the same principle in foresight. For that foreseen result to be brought about. There must be a marriage between the cognitive element of knowledge and attitudinal element of reconciliation. According to Gavin Leigh,⁴⁵ in the context of the means to an end, it can be said that defendants foresee the use of death or grievous bodily harm in accomplishing their purpose and therefore, are in pursuit of it. Similarly, when it comes to knowledge that the likelihood of death or grievous bodily harm, if it occurs, might logically contribute to their purpose, can be said that defendants knew death or grievous bodily harm might be useful in bringing about their purpose. They are reconciled with its eventuation and are not simply accepting the side effects as a foreseen risk, however likely or certain. These defendants must have been made to accept its occurrence might play a part in bringing about their purpose. Suppose these defendants' purpose is conditional on not bringing about death or grievous bodily harm but they knew there is a likelihood of death or grievous bodily harm and that, logically, the eventuation of the risk might contribute to bringing about their purpose. In acting they have reconciled themselves to death or grievous bodily harm.

4.3 The Test to be Applied in Determining Foresight in Murder

The test of foresight in murder, ought to be subjective as in intention, that is, did the accused foresee death or grievous bodily harm as likely? – With the reasonable man test used only as a guide to

³⁵ Okonkwo & Naish, *Criminal Law in Nigeria* (2nd edn, Ibadan: Print marks ventures, 2005) 53

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

³⁹ Glanville Williams, *Textbook of Criminal Law* (2nd edn, New Delhi: Universal, 2009) 38-42

⁴⁰ Ibid

⁴¹ Okonkwo & Naish, *Criminal Law in Nigeria* (2nd edn, Ibadan: Print marks Ventures, 2005) 57

⁴² (1938) 4 WACA 19

⁴³ *Sefrena v R* (1951) 13 WACA 132

⁴⁴ Okonkwo & Naish, n (42) 61.

⁴⁵ G Leigh, 'Murderous Intent-The Attitude of A murderer' (2021) *Journal of Criminal Law* 7



discovering foresight. This reasonable man test is often expressed in the form that there is a presumption that a man intends the natural (or reasonable) consequences of his acts.

The Court in *S v Humphreys*,⁴⁶ took the subjective test into consideration and rejected the lower Courts decisions wherein he considered whether the appellant took the consequences that he foresaw into the bargain, whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. The Court on the aforementioned reasoning held that the appellant did not reconcile himself to the possibility of causing the death of the passengers for the two reasons presented below:

1. Common sense dictates that for the accused to foresee the death of the passengers, he would have also had to foresee his own death as a possibility of the collision. It was held by the Court that the appellant had not contemplated his own death into the bargain nor was there any indication that the accused had been indifferent towards his possible death.
2. The appellant was under a false confidence that he would have successfully avoided the collision with the train. The Court arrived at this conclusion because the appellant had successfully performed this dangerous manouvre on two previous occasions.

5. Conclusion

Foresight as an element in determining culpability for an offence, is not alien in criminal law. It is an element in determining manslaughter cases. The only difference for foresight in murder and manslaughter is that in murder, it is subjective in nature while in manslaughter it is objective in nature. Expanding the mental element in murder in the Criminal Code will go a long way in developing the Law of murder in Nigeria. Some cases which are currently treated as manslaughter may begin to fall under murder if foresight is made an element in murder in the Criminal Code. As crimes evolve the law should also evolve to meet up with the trending issues associated with intentional killings today. For example, the laws of terrorism, banditry and kidnapping in Nigeria were amended and reproduced when the crimes took new shapes in the Nigerian society. The laws were made stricter and in conformity with the trending issues associated with them. Many intentional and deliberate killings emanating from these crimes would be covered by the provisions of murder in the Criminal Code when foresight is made a mental element in murder.

⁴⁶ (2013) (2) SACR 1 Paras 18-19.