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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ) is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

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RESISTANCE AGAINST RAPE AND KIDNAPPING IN NIGERIA: JUSTIFYING LETHAL SELF DEFENCE AGAINST VIOLENT CRIMES

ATERO AKUJOBI, PhD*

Abstract

The spate of violent crimes, defined in this work as kidnap and rape (violent sexual assault) has risen in prevalence in Nigeria within the last one decade, and especially, in the last five years, occurring as often as three out of every ten incidences of crime. Its prevalence has given rise to a self- defense strategy to defend either its occurrence, or a defense of self where it occurs, thus raising pertinent issues of what judicial protection does the law have for victims of violent crimes, who are able to overpower their assailants either causing grievous bodily harm (GBH), or even death. This article using the doctrinal approach analyzes the elements of self-defense, and considers ongoing debate and judicial attitude of the courts as may be deciphered particularly in murder cases. The findings reveal that it is difficult to secure a conviction given the element of self-defence. The paper concludes and makes recommendations as to the best approach to be adopted with respect to victims of crimes of violence and their right to self- defense.

Keywords: Victims of Crime, Self-defence, Violent Crimes, Judicial Protection

Introduction

In recent times, the rise in incidences of kidnap cum violent sexual assault crimes is assuming a threatening dimension. The internet is rife with self-defense skills to prevent attacks and different strategies have been developed to either prevent, or defend against kidnap or sexual assault. Against this backdrop, the courts will soon be faced with situations where victims of crime become accused persons while defending themselves. In evaluating these strategies, it is necessary to revisit the permissible defense that will avail kidnap and sexual assault victims in the event of grievous bodily harm or even death. This, article is anticipatory of the position or the dilemma the law in Nigeria may be faced with, given the continuous rise and prevalence of kidnap and sexual assault within the Nigerian society. According to proponents of the sociological jurisprudence, social engineering and balancing of

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interests are the two major issues in advocating a role for law in the society.¹ Particularly within Roscoe Pound's conception of law, who argued against the rigid compartmentalization of law with very little reference to reality or² practicality; instead, he argues that law must be adapted to changing conditions and social progress. It is in this light that this article evaluates the elements of self-defense and its practicality in kidnapping and rape cases.

This article adopts the terminology of 'crimes of violence for kidnap and rape' for ease of reference; though not a legal or academic terminology. This research posits that these two crimes are committed with utmost violence by either the assailant or who is an aggressor on its victims. Therefore, the term crimes of violence, in this paper refer to kidnap and rape. As the court in *State v Oakes*³ stated, '[R] ape involves serious physical and psychological consequences, perhaps greater than would be suffered as a result of a knife or gunshot wound.... [R] ape alone, without accompanying physical violence, constitutes harm to a kidnap victim.'

This article is novel with its emphasis on these classes of crime victims because it raises unique issues regarding the application of the elements of self-defense in crimes of violence. It adds to the paucity of legal research on the self-defense of victims of kidnap and sexual assaults. It further clarifies principles which justify the use of deadly force or GBH to self-defense.

Scholarship is rife with self- defense and its elements. The justification of the focus on kidnap and rape is that, in most situations, kidnapped victims, especially of the female gender, are usually sexually assaulted while in incarceration and before release, hence the focus on kidnap and rape. Moreover, in the case of crimes of violence, the issue of self- defense is a rarity – more often than not, the assailants have the upper hand. As we see within the Nigerian experience, kidnapping for the female gender assumes a further dimension of rape or sexual assault/abuse and ransom. Female victims of kidnap who live to tell the story tell tales of gang raping as well as other forms of violent sexual assault. The major concern of this paper is to explore the elements of self-defense, and evaluate it against the reality or practicality of a kidnap and rape experience. The question is, would a victim of crime of violence be able to successfully plead self-defense where, in defending herself, he occasions grievous bodily harm or even murder? These questions are critical in evaluating the role of law. It is within this context that this paper focuses on the crimes of kidnap and rape.

¹R. Pound, *Outline of Jurisprudence*, in M.D.A. Freeman (edn) *Lloyd's Introduction to Jurisprudence* (6th ed. Sweet & Maxwell 1943) 900.

² Roscoe Pound, 'The Future of Law' (1937) *XLVII Yale Law journal* 1-13.

³ *State v Oakes*, 373 A.2d 210, 215 (Del. 1977).

Given the seriousness and rising prevalence of the crime of rape in Nigeria, and globally, this paper adds a legal perspective to the right to self- defense of victims of violent crimes to repel or prevent the commission of crime using deadly force. The structure of the paper is as follows: following the background, the paper reviews the concept of self- defense and the doctrinal requirements or the legal authorization of self- defense. It also evaluates the conditions necessary to prove self-defense where a victim of kidnap inflicts GBH or murder.

Definition of Terms

This article adopts the common law definition of kidnapper as ‘one who had subjected his victim to ‘unlawful confinement plus ... extreme exportation [moving a person or object] in the form of transportation out of the country.’⁴ A kidnapper removes his victim from jurisdiction and *cuts off all effective aid* from the victim. From the definition, a kidnapper deprives his victim of his right to liberty, unlawful confinement and cuts off all forms of aid, communication and friendly intervention.

The term rape owes its origin to the Latin word ‘*rapere*’⁵, meaning thereby ‘to seize’. In the Oxford English Dictionary ‘rape’ is defined as “spoil along with ‘forceful sex with someone against her will’. The definition of rape differs from jurisdiction to jurisdiction. In Nigeria, sections 357 & 358 of the Criminal Code define rape as ‘having unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by means of threat or intimidation of any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman by personating her husband....’ Section 282 of the Penal Code defines rape as follows: ‘a man is said to commit rape who has sexual intercourse with a woman in any of the following circumstances: against her will; without her consent; with her consent, when the consent is obtained by putting her in fear of death or hurt’.

Kidnap and rape used to be viewed as a personal traumatic experience; particularly for the female gender – rape and kidnap used to be viewed as the result of a wayward lifestyle. Culturally, it is believed that a woman provokes the man into committing rape through, for instance, provocative dressing, etc. Testimonies of rape victims who attempt to report at the police station, are often turned away or discouraged on the basis that the victims are the cause, or that the case lacks any merit. Katharine K. Baker’s writing⁶ sheds light into this aspect when she stated that the question was ‘we felt she ... asked for it the way she was dressed. The way she was dressed with that skirt, you could see everything she had. She was advertising

⁴ Rollin M. Perkins & Ronald N. Boyce, Criminal Law 230 (3d ed. 1982)

⁵ Compact Oxford Reference Dictionary. New Delhi, 2001

⁶ Katharine K. Baker, ‘Once a Rapist: Motivational Evidence and Relevancy in Rape Law’ (1997) 110 harv. L. Rev. 563, 587.

for sex.’ It is also clear that any case of rape almost necessarily brings into focus several questions related to the moral character of the victim.

However, within the last three years, the social construction of kidnap and rape in Nigeria is gradually changing as insecurity and economic instability deepen in the country. These crimes threaten the continued existence of individuals, family and the society at large. As has been argued, rape is one of the ‘most extreme intrusions on freedom of the person warranting self- defense of its own accord due to the fundamental deprivation of liberty and dignity of persons, and places its victim in a position of inability to resist GBH at the rapist’s behest, so one may freely exercise one’s right to lethal self-defense while one can. According to an author,⁷ ‘the harm poses can thus be construed as the imposition of ongoing vulnerability to serious bodily harm whenever one’s kidnapper wishes: It hangs a Sword of Damocles over the victim’.

The Natural, Inalienable Right to Self-Defense

Self- defense itself is a natural right, justifying an action, which would otherwise have satisfied criminal liability and qualified for an offence but which nonetheless is negative under the circumstances. Self-defense is clearly justificatory in nature, being raised when the accused defends himself or herself, or another, from an attack by an unjust aggressor⁸ hence it is also referred to as self-preservation, the purport of which must be to negate the existence of an offence so that when a person kills another in self-defense, the killing does not amount to an offence but leads to a total exoneration of the defendant.⁹

Although our legal system generally discourages the use of force or violence against others, courts have recognized that all individuals have the right to protect themselves from harm and may use reasonable force in order to do so. Under the Nigerian Constitution, there is a guaranteed right granted to an individual to defend his person, family and property against unwarranted oppression. This right to self-defense is provided under section 33 (2) of the Constitution¹⁰ which states thus:

A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law of such force as is reasonably necessary

⁷ See Gregory A. Diamond ‘To Have but Not to Hold: Can Resistance against Kidnapping Justify Lethal Self Defense against Incapacitated Batterers? (2002) 102(3) Columbia Law Review 729-773).

⁸ J Rogers, ‘Necessity, Private Defence and the Killing of Mary’ (2001) Criminal Law Review 515 at 524.

⁹ *Jeremiah v The State* (2012)14 NWLR (Pt. 1320) 248.

¹⁰ Constitution of the Federal Republic of Nigeria, 1999 (as amended).

(a) For the defense of any person from unlawful violence or for the defense of property;

Also, section 32(3) of the Nigerian Criminal Code states that:

A person is not criminally responsible for an act or omission if he does or omits to do the act...when the act is reasonably necessary in order to resist actual or unlawful violence threatened to him or to another person in his presence

According to section 33 (2) of the 1999 Constitution above, the right to life which is a basic fundamental right of a person can be lawfully violated and such violation of the right to life of another person may be justified. This means that the right is not sacrosanct. This defense is a justification for the protection of self, others and property and which is recognized under the common law¹¹

Section 59 of the Penal Code states that: 'Nothing is an offence of which is done in the lawful exercise of the right of private defence'.

And section 286 of the Criminal Code¹² provides that “

When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make an effective defence against the assault: Provided that the force used is not intended and is not such as is likely to cause death and grievous harm.”

If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm and the person using force by way of defence believes on reasonable grounds that he cannot otherwise prevent the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous harm.

Therefore, the successful plea of self-defense completely absolves the defendant from criminal responsibility.¹³ The defense justifies a person to act in ways that

¹¹ The common law principle of self-defense was established in the case of *R v Palmer* [1971] AC 814. 29 and approved in *R v McInnes* 55 Cr App R 5518 where the court ruled thus: '*It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary*'.

¹² Criminal Code, s 286

¹³ Per J.I. Okoro in *Edoko v The State* LER. 2015. SC 315.2012. See also the cases of *Omoreale v The State* (2008) 18 NWLR (Pt. 1119) 464

would otherwise be unlawful to prevent injury to himself or others or to prevent the commission of a crime.

The scope of the defense extends beyond a person's defense of his own life alone to the defense of rape and other assaults and the defense of other persons to whom one stands in certain defined relations and to the defense of property.¹⁴ Such defined relationship will include the relations of husband and wife, parent and child, master and servant. In these cases, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him who began the affray.

An examination of self-defense theory and its rationale leads us to its conditions, which primarily include the requirements of necessity and proportionality.

In *Kinaghshir & Anor v State*¹⁵, the Nigerian Supreme Court (Per Mohammed JSC) held that

Four cardinal conditions must exist before the taking of the life of a person is justified on the plea of self- defence. Firstly, the accused must be free from fault in bringing about the encounter; Secondly, there must be present and impending peril to life or of great bodily harm, either real or so apparent as to create honest belief of an existing necessity; thirdly there must be no safe place or reasonable mode of escape by retreat; and fourthly, there must have been a necessity for taking risks

These conditions i.e. (threat of impending peril to life and the necessity for the action, the accused person did not bring about the encounter, no safe place to retreat to and necessity for taking risks) on self defence as stipulated above provide that an accused person is not guilty of an offence once they are established. It is necessary to evaluate these elements as they may prove problematic as applied to victims of crime.

A. Reasonableness

A condition for self-defense requires that the defending act be reasonable in the circumstances. For a successful plea of self-defense, the level of force used must be reasonable in the face of the threat as perceived by the defendant. The test applied by the court in determining *reasonableness* is whether a reasonable person would

¹⁴ Because of the extension of the definition of the defense to include other persons, the term 'self-defense' appears misleading and so, it is also referred to as private defense.

¹⁵ (1995) 3NWLR (Pt. 386) 651

say that the level of force was reasonable in the circumstance, and not whether the defendant thought the level of force used was reasonable.¹⁶

How can one assess the reasonableness of a victim's belief about the necessity of force to escape an ongoing kidnapping? Put in another way, how then, can an unlawfully constrained person know, given an honest and reasonable fear for his physical safety, whether or not he may justifiably defend self with reasonable force? How would one have assessed the reasonableness of each victim's belief about the presence of the threat of kidnapping, as opposed to its status at an early stage in a murder?¹⁷

Should reasonableness be assessed at the point of kidnap, incarceration, sexual abuse, or at the earliest opportunity of escape or murder of the assailant? These questions are necessary because, the usual scenario of a kidnap case is that a victim of violent crime is unlawfully held so as to interfere with his life, liberty and dignity of person.¹⁸ The law must therefore, come to terms with the peculiar position of a kidnap circumstance, the psychological and emotive circumstance of the victims of violent crime in assessing the reasonableness of the action of the victims of crime. Since there are no precise criteria of reasonableness either under the statutes except as may be gleaned from case laws, the court in *Palmer v R*¹⁹, pointed out the following 'A person who is being attacked should not be expected to weight to a nicety the exact measure of his necessary defensive action'. And that 'if the jury thought that in the heat of the moment, the defendant did what he honestly and instinctively thought was necessary then that would be strong evidence that only reasonable defensive action had been taken'.²⁰

Perhaps the Nigerian courts may take a cue from the reasoning of Lord Woolf in *R v Martin (Anthony)*²¹. According to the learned judge, 'in judging whether the defendant had only used reasonable force, the jury has to consider all the circumstances, including the situation as the defendant honestly believes it to be at the time, when he was defending himself. It does not matter if the defendant was mistaken in his belief as long as his belief was genuine'.

Moreover, what constitutes reasonable force is a matter for the jury to decide, balancing the amount of force used against the harm the accused sought to prevent – so that, for example, force considered reasonable for protecting a person might be

¹⁶ This was the position of the court in the English case of *Owino* [1995] Crim LR. 743 (CA); refer also to *DPP v. Armstrong-Braun* [1999] Crim L.R. 416.

¹⁷ *Gregory A. Diamond* (n 7) 729-773.

¹⁸ *Ibid*

¹⁹ [1971] A.C 814.

²⁰ *Ibid*

²¹ *R v Martin (Anthony)* [2001] EWCA Crim 2245 (CA) or [2002] 2 WLR 1.

considered excessive if used to prevent a crime against property. For instance, In *Attorney-General for Northern Ireland's Reference*²² a soldier in Northern Ireland stopped a man, who started to run away. Mistakenly thinking that the man was a member of the IRA, the soldier shot and killed him. He was charged with murder and argued that he had both the statutory and common law defenses. The House of Lords said it was a question for the jury whether the force used by the soldier was reasonable or excessive, and in deciding this they had to consider the limited time for reflection in these types of circumstances. In this case, they would have to balance the high risk of death or serious injury to the man running away, against the harm which could be avoided by preventing the man's escape if he were a terrorist:

The courts also appear to determine reasonableness of force used by the application of the test of proportionality. In applying this test however, the court has warned itself that 'the jury is in the calm analytical atmosphere of the court room'²³. It is submitted that Lord Woolf's reasoning (as stated above), represents the state of the law of self-defense.

Within the context of a sexual assault, the question to ask is: How can one assess the reasonableness of a victim's belief about the necessity of force to escape an ongoing sexual attack? This question is necessary because, an assailant must have conveyed to its victim of the unreasonableness of escape, or the situation is one that is impractical of escape? At what point would a victim, given an honest and reasonable fear for his physical safety, justify a self- defense which occasions GBH or death?

It is suggested that the law should recognize that in the kind of situations such as crimes of violence, where the defence is used, there is rarely much time to consider what should be done. As such in determining the reasonableness of an act, the court/jury should be guided by the circumstances surrounding the accused person.

B. Threat or Imminent Force

It should be stated at the outset, that some legislation has moved from the requirement of imminence to one of immediate necessity,²⁴ for instance, the Model Penal Code justifies the use of force where the actor believes it is immediately necessary to protect himself.²⁵ In Nigeria, the concept of imminent force is still a requirement that assesses the accused's circumstance for an immediate and/or

²²(No 1 of 1975) (1977).

²³ Attorney General for Northern Ireland's Reference (No.1 of 1975) [1977] AC 05; 138 per Lord Diplock.

²⁴ Most states authorize lethal self-defense to prevent or escape rape and kidnapping, even in the absence of other serious bodily harm. See Wayne R. LaFare & Austin W. Scott, Jr., *Criminal Law* 456 & n.15 (2d ed. 198

²⁵ Model Penal Code? 3.04 (1962). "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion

ongoing harm - the word 'ongoing' meaning that where the threat has ended, the use of force is no longer appropriate.

How does the imminence element apply to victims of violent crimes within the context of kidnap and rape? In other words, in a crime of kidnap and rape, at what point can the element of imminence be satisfied? The criteria of imminence are difficult to pin down because, different scenarios play out. A scenario of kidnap is one that a victim is either violently or deceitfully taken from his environment and possibly, incarcerated and continuously raped, such a victim faces a continued vulnerability to serious bodily harm at another's hands, that threat is always imminent, as the victim has no ability to prevent it. Most victims of kidnap and rape are incarcerated for varying periods. Therefore, according to an author, kidnap and violent sexual abuse is one of the forms of no imminence, in which the assailant traps its victim, and assaults his victim. This therefore, justifies self- defense absence of imminence. The learned author states that:

Not surprisingly, men... often intentionally trap them or intentionally give them good reasons to believe that they have no genuine alternative paths of relief. They do this by threatening to find them and beat them if they try to escape (and by carrying through on these threats); they do this by circumventing legal authorities if those authorities are contacted, and then punishing the women more brutally for contacting the authorities, or simply by threatening to wait out any legal obstacles and carrying through on those threats. ... the aggressor (usually, the man), through violence and threats of violence, intentionally cuts off the routes by which the woman may separate from him. He traps her.²⁶

The point is therefore, that, the element regarding imminence of violent crime is hard to justify. For instance, G.... painted the following scenario:

If a woman has been abducted by A and B, who she honestly and reasonably believes intend to murder her, and A falls asleep while B is absent from the room, presumably she may kill the sleeping A as part of a plan of escape if she fears that A may otherwise awaken and prevent her from defending herself against the ambulatory B. This would be so even if A and B had not yet actually begun to move toward committing the murder. Or that: Consider the example of a woman being restrained by an armed rapist who she does not believe intends imminently to cause her serious bodily harm beyond the rape itself. Just after the completion of an act of

²⁶Jane Maslow Cohen, 'Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?' (1996) 57 U. Pitt. L. Rev. 757, 786-90.

rape, she manages to lay hands on a gun, and she believes that she may only have a short time before this is discovered and she is disarmed; hence the necessity of acting quickly. If at that moment the rapist jumps out of the window and flees, she would not be legally justified in shooting him in the back-that would be an act of vigilante retribution. However, if the rapist remained in the room, continuing to hold her as his captive, she would be justified in killing him even though she might have no honest and reasonable belief that she was in imminent danger of an additional rape (or of murder or other serious bodily harm). This is because she retains her status of being harmed by a continuing kidnapping which leaves her vulnerable to a later rape or murder on that present occasion. As such, she has the right to resist and terminate the kidnapper using deadly force if necessary.

Suffice to say that, every moment of escape qualifies as imminent in the face of violent crimes of kidnap and rape; every moment counts as way of escape.

C. The Purpose of Accused Action

The ambit of this condition is that the defense is only available to an accused who was in reasonable apprehension and used force *only* in order to preserve himself from attack. Where there is a possibility of another purpose, such as revenge or retaliation, the defense will not avail the defendant. This position was succinctly stated in *Emeka Oko v The State*²⁷ that for a successful plea of self- defense, the defendant must prove that his life was in so much danger from the act of the deceased and the only means of escape from imminent death or injury was to do the act for which he is charged; and that he used reasonable force in retaliation and that he acted consciously, being aware of the impending danger and took steps to avoid it.

The application of the element of reasonableness of the action of victims of violent crimes such as kidnap and rape may be hard to justify; such as was the case in *Thomas v The State*²⁸. In *Thomas' case*²⁹ the Court of Criminal Appeal of Texas upheld the murder conviction of a woman who claimed to have been kidnapped and sexually assaulted by a group of four men in a motel room. Prosecutors asserted that she was a prostitute who, after a failed attempt to coerce them to pay for her services, ambushed and shot the men as she emerged from the bathroom, killing one. Counsel to the accused argued that “the court's charge was erroneous because it indicated that appellant was justified in using deadly force *only to prevent an imminent rape or kidnapping, but not in order to escape during or after the commission of such a crime.*” [emphasis mine]. The position of the court was that

²⁷ Suit Number SC.242/2013.

²⁸ *Thomas v The State* 578 S.W.2d at 694.

²⁹ *Ibid.*

“Thomas "had the right to defend herself if she were the victim of such a crime or was about to become such a victim," and that it could not "reasonably be read as allowing the use of force to escape before, but not after the crime.”. With respect, it is submitted that the reasoning of the court was erroneous in holding that reasonableness did not extend to after the commission of the crime. As has been asserted, violent crimes of kidnap and sexual assault are ongoing, and given the extent of violations of rights, liberty, dignity of person, it is submitted that reasonableness extends to as long as a victim is within the detention of its assailants.

D. Proportionality

Proportionate self-defense requires that the threat fended off/interest protected pass a threshold of comparable seriousness. The test used is in relation to the harm inflicted on the attacker. Just where the threshold of comparable seriousness lies in a given case is a mean task that can be disputed. Nwabueze³⁰, a constitutional rights lawyer and scholar said that ‘*self-defense, to be effective and meaningful... must be by means proportioned to the means employed by the attackers*’

Thence, the amount of force used in the defendant’s subsequent reaction is not viewed objectively at all, but purely subjectively. Thus, in the Palmer case³¹ Lord Morris held that ‘what is reasonable force is a matter of fact to be determined from evidence and the circumstances of each case’. The Nigerian courts have followed a similar line of reasoning in determining proportionality or otherwise of an action. For instance, the court in Emeka Oko’s³² case stated that the proportionality test is an objective one, and the factors the court will consider in reaching a verdict are the circumstances in which the force was used, the part of the body hit in self-preservation among others. It is a substantive question whether, for instance, it is proportionate to use lethal force against a threat of bodily injury or abduction.

Also, that "Where a killing has resulted from the excessive use of force in self-defense the accused loses the justification"³³

From the perspective of the victim of violent crime, this may be a hard criterion to fulfill, the reason being that, a normal kidnap/rape scenario usually has more than one assailant, who are clearly armed and overpower the victim. So clearly, any and every force is necessary in order to succeed in an escape. As held by Oredola JCA in *Maigari v The State*³⁴, ‘a plea of private or self- defense is predicated on the

³⁰ Self-defense guaranteed by the Constitution – Nwabueze in <https://www.thecable.ng/nwabueze-danjuma-is> accessed 10, April 2020.

³¹ Supra

³² Ibid

³³ K v Faid [1983] 1 SCR 265 at 271

³⁴ [2010] LPELR- 4457 (CA)

natural principle of kill or be killed. Thus, the accused person must have reasonable grounds to believe that his own life is at stake and in utmost anger, with no other viable option...'.³⁵

So, in order to save his life, a victim of violent crime who carries out a lethal attack in an attempt to kill his assailant, the one uppermost thought of the victim, is to overpower his assailant, such that any weapon, even lethal, defensive force is justified. And even when the attacked person is not in danger of being killed or seriously injured, but rather of being raped, the use of lethal defensive force is justified if this is what is necessary to fend off the rapist.

Defensive force that is out of all proportion to the danger posed harms the social-legal order and is therefore unjustified.

E. Necessity

Necessity within the context of self-defense has been subjected to different meanings; some academic literature use the term to refer to a defense that the defendant did the lesser of two evils; this means that, the defendant was in a dilemma that would result in harm being done; the second meaning refers to duress of the defendant. This work adopts the first meaning – the lesser of two evils.

‘The condition of necessity means that it must have been reasonable for the defendant to use force, rather than retreat or escape from the threat in some way’. Thus, the question that necessity seeks to ask to ground a defense of necessity is this – was it reasonable for the defendant to use force, rather than escape? In the leading Australia case of *R v Loughnan*³⁶, Young CJ and King J described a three-part test for the defence:

- 1) “[T]he criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others he [or she] was bound to protect.”
- 2) [T]he accused must honestly believe on reasonable grounds that he [or she] was placed in a situation of imminent peril such that he had to take a pre-emptive strike;
- 3) [T]he acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.³⁷

Even though this point has not been elaborated upon in most Nigerian cases on self-defense, other jurisdictions have emphasized these three points in order to uphold the condition of necessity. This means that, under the circumstances the defendant found himself, was it reasonable either to try to retreat or stay and ward off the

³⁵ At page 47 paras D-E

³⁶ *R v Loughnan* [1981] VR 443

³⁷³⁷ *ibid* 448

attack. Therefore, if the defendant tried unsuccessfully to retreat from the threat and then used force to repel the attack, then the defendant was acting reasonably.

Securing an acquittal on the basis of the three- tier test stated above may prove to be an onerous one in a plethora of cases. The Court in *Benson Ukwunnenyi v The State*³⁸, held thus ‘there was no evidence that the deceased attacked 1st appellant with dangerous weapons or indeed fists. It is more probable, as suggested by the trial judge, that the 1st appellant challenged the deceased to a fight’. Oputa JSC further stated in his judgment that: ‘he was not being attacked by the deceased. His life was never in danger.... the defense of self-defense cannot be extended thus far.’ However, the court founded on provocation of the appellant which, in the words of the court ‘all these ordinarily will provoke the ordinary person to action. It is the nature of the action that is governed by our law’.

What level of certainty regarding necessity is required to justify the killing of one's kidnapper in order to effectuate one's escape? The victim of an ongoing kidnapping may kill if it is necessary to extricate her from the threat of harm. She still cannot kill gratuitously; she must have had an honest and reasonable belief that she could only escape harm by killing. If she can flee in absolute safety without killing, she must do so. Moreover, it is argued that the factor of a recapture is adequate to fulfill the requirement of necessity as an element of self- defense.

Conclusion

This paper examines trouble spots where victims of violent crimes over power their assailants and are charged with either murder or grievous bodily harm with intent. Law, it is said, is a means to an end, and not an end in itself. Thus, where the societal realities reveal the impracticability of the law, it is suggested that, in terms with Pound's view, such a law be reviewed to come to terms by laying aside technicalities and be flexible enough to render justice. It is necessary that the law on self-defence be reviewed and be flexible to accommodate victims of such violent crimes as analyzed above to protect them against their assailants.

-There is a need to redefine the law, the elements of self- defense because of the peculiarity of the circumstances associated with the crimes. A victim of violent crime who carries out a lethal attack in an attempt to kill his assailant, the one uppermost thought of the victim, is to overpower his assailant, such that any weapon, even lethal, defensive force is justified

As has been asserted, violent crimes of kidnap and sexual assault are ongoing, and given the extent of violations of rights, liberty, dignity of person, it is submitted that

³⁸ Supra

reasonableness extends to as long as a victim is within the detention of its assailants. The vices of kidnap and rape are an everyday occurrence in our society today. Therefore, there is a need to redefine the elements of self- defense because of the peculiarity of the circumstances associated with the crimes. Kidnap and rape situations are straightforward – it is an unlawful situation; substantiality of the period; the purpose of incarceration is to inflict bodily harm and occasioning sexual abuse on, especially female victims, confinement in place of isolation, and removal of any form of aid or intervention. A victim of kidnap has one goal in mind, regaining liberty; so, the rationality of proportionality, imminence and reasonableness of action becomes suspended. It is recommended that the elements of self- defense should be reviewed within the context of violent crimes.

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