EXAMINING THE VALIDITY OF STATEMENTS MADE BY SUSPECTS IN THE COURSE OF POLICE INTERROGATION IN NIGERIA

Written By ***Dr Emmanuel Folayan Ijalana* & Miss Gracious Abimbola Ijalana*****

** Lecturer, Dept. of Jurisprudence and Private Law, Obafemi Awolowo University, Ile-Ife, Osun State, Nigeria*

*** Scholar, Dept. of International Business Law, Faculty of Law, Universite libre de Bruxelles, Belgium*

ABSTRACT

The paper examined the evidentiary theory of substantive and procedural criminal law and practice directions in Nigeria relating to validity of statement obtained from suspects in the course of criminal investigation juxtaposed against the exclusionary and admissibility of evidence. These was with a view to undertake a holistic appraisal of the nature and scope of voluntariness of evidence that would avert the miscarriage of justice.

The study relied on primary and secondary sources of information. The primary source included the Constitution of the Federal Republic of Nigeria 19999, as altered, the Administration of Criminal Justice Act, 2015, the Evidence Act, 2011 and other extant Criminal Laws, and practice direction. The secondary source of information included books, journal articles, conference proceedings, newspaper and magazine publications and the internet. Data collated were subjected to content analysis.

The study found that, though there are established principles guiding the taking of statement from suspects, the police in Nigeria rarely follow those rules. It was also found that a cardinal duty of the police during criminal investigation is the recording of statements from the suspects and the presentation of same, in proof of evidence during trial, the courts nonetheless, possess extensive powers to reject involuntary statements obtained in contravention of the law for being inadmissible. The study concluded that, unless the police begin to respect the rule of law, the court would continue to rise to the protection of the defendants by rejecting such statements obtained in contravention of established principles of law.

ISSN 2581 3382

Keywords: Administration of Criminal Justice; Police Interrogation; Statements; Suspects; Voluntariness

INTRODUCTION

The starting point of administration of criminal justice is the making of complaint to the police.[i] Identifying the complaint as a mode of initiating criminal investigations and subsequent prosecution, the West Africa Court of Appeal has rightly, while affirming what great deal of discretions the police wield within the administration of criminal justice system, held in the celebrated case of *Albert Sogbamu v COP*,[ii] that:

> …the expression, 'administration of justice', is not limited to the hearing of cases (whether criminal or civil) in the court. It includes steps taken preliminary to the hearing of cases. However (sic) in a criminal matter with which we are here concerned, it starts with the complaint made by the complainant at the police station to officers whose duty it is, to hear and investigate such complaint with a view to deciding whether the persons against whom the complaints are made should be arrested or summoned and taken to the court.[iii]

The above formed the *locus classicus* of the foundational role of the police in the Nigerian criminal justice system. In performing this role, a critical function of the police is the proof, by evidence, the nexus between the crime and the assailant. This invariably begins with the eliciting of statements from the complaint and his witnesses and the taking of voluntary statements from the defendants, such statements being confessional or otherwise. This work therefore, focusses on the proven principles necessarily imperative for a guide in ensuring the voluntariness of such statements with a view to averting the miscarriage of justice against any of the parties in contention. The paper shall, in addressing this discourse, be divided into four other sections, in addition to the introductory. These are, the ideals for statement takings; the guiding principles arising from the Judges' Rules; the scope and nature of admission and confession in criminal investigation; and conclusions and recommendations.

ISSN 2581 3382

THE FOUNDATIONAL IDEALS FOR STATEMENT TAKING

The interrogation of the suspect is an important aspect of police investigation. Having invited or arrested the suspect, depending on the option favoured by the investigating team. This interrogation stage determines the admissibility or otherwise, of the appropriate statements which is an essential part of the exhibits with which proof of the case would be more ascertained. The major instruments necessary for regulating the making of statements by the suspect are the provision of Judges' Rules and the extant regulatory enactment like the Evidence Act 2011 [EA 2011],[iv] the ACJA 2015[v], the NPA 2020[vi] and the CFRN 1999[vii].

The written statement is one of the weapons that can be used against suspects by the investigator in a case. For a successful prosecution of the case, there is the need to provide enabling environment for statement taking. This should normally be at the police station where a room designated for that purpose is made available. The room should be isolated from bustling activities.[viii] It should be sound-proof, well-lit, secure and protected against interruption as well as equipped with some means of communication and other devices.[ix] There must be adjustable seats, chairs, desks and some writing materials.[x]

A typical issue in the making of statement by the suspect is his absolute right to remain silent. For the avoidance of doubt, section 35 of the Constitution[xi] provides that:

> Any person who is arrested or detained shall have the right to remain silent and avoid answering any question until after consultation with his legal practitioner or any other person of his choice.[xii]

This constitutional provision is reinforced by a similar provision in the Administration of Criminal Justice Act[xiii] which provides, as one of the main rights of the accused person,

> a right to remain silent and avoid answering any question until after consultation with a legal practitioner or any other person of his choice and the right to consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after the arrest.[xiv]

The Act[xv] further emphasised the absolute right of the suspect to make statements. In its section 17, the Act[xvi] provided that "where a suspect is arrested on the allegation of having committed a crime, his statement shall be taken if he so wishes to make a statement".[xvii]

The combined effect of the foregoing is that a suspect is at liberty to exercise his right of election as regards whether or not he should make a statement even after consulting a legal

ISSN 2581 3382

practitioner of his choice. Where a suspect exercises this right, the police's duty of recording the statement concerning the commission of the crime is put in abeyance, and there is, however, a difference between making of a statement concerning the commission of an offence and the making of statement in affirmation, evidencing the exercise of the right. The former connotes an absolute right, without any qualification, except where he so desires. The latter instructively, relates to a certification that the suspect has been accorded a due benevolence of the right.

We need not be reminded after all that the statement of an accused person to the police is evidence of the fact that it was made, but not evidence of the truth of its content[xviii]; so also is the statement of certification. Such certification may be made in this format:

> I, John Lawrence of the above particulars having been informed that the allegation against me is the offence of stealing the sum of fifty thousand Naira on the 1st of December 2016 at No 6 Alex Road, Benin City, property of Miss Elizabeth Janet and having been duly cautioned that I am not obliged to say anything before consulting my solicitor, unless I wish to do so, and that whatsoever I say will be taken down in writing and may be given in evidence against me, wish to state that I do not want to say anything in answer to the allegation.[xix]

The format, as it were, constitutes a complete statement although not of the commission of the crime but as a certificate that the right has been accorded to, and exercised, by the suspect. The fact as to whether or not the court may not comment on the reason for refusing to make the statement remains sacrosanct. It is, however, sufficient to state that, though a suspect declined to make a statement to the police, he is nonetheless entitled to give his testimony before the court. The question that may come to mind under this circumstance is whether the withholding of the fact constituting the suspects' line of defence by the exercise of the suspect's right to keeping silent in accordance with the provision of the CFRN 1999 s35(2), is not unfair to the prosecution?

Having reviewed the position of eminent lawyers[xx] and jurists for, and against, the provision of the CFRN 1999 s35(2) or similar provisions,[xxi] as regards the possibility or otherwise of bias or detriment attached to the presence of legal practitioners during police interrogation which may obstruct the due administration of justice, and bearing in mind the legitimate interest of the society in seeing the guilty convicted as well as the innocent acquitted, Nmerole was of the opinion that:

ISSN 2581 3382

> Whichever side the argument may tilt to, the fundamental question of balancing the interest of effective police investigation of crime on one hand and the protection from abuse on the other hand remains paramount. A strict interpretation of section 35(2) of the Constitution of the Federal Republic of Nigeria 1999, as altered, without qualification appears to favour suspects.[xxii]

Be that as it may, we think the intendment of the drafters of the Constitution[xxiii] is to hold sway as constitutional protection for the accused person, predicated on presumption of innocence.[xxiv] The statutory obligation on the prosecution to prove his case beyond reasonable doubt is absolute. It does not shift but rests on the prosecution.[xxv] The case of the prosecution, as earlier stated, stands or falls on its merit and would not be allowed to rest on the weakness or otherwise of the accused is defence. There is a supposition that every arraignment in criminal cases should be grounded by sufficiency of *prima facie* evidence. Where prosecution evidence is sufficient enough and proved beyond reasonable doubt, surprises sprung by the concealment of the suspects' statement from the police may not be sufficient to controvert the case of the prosecution.

One major effect of such concealment is that a defence of *alibi* resting thereon may not succeed. This is because the accused has a duty to give the police the opportunity to investigate the *alibi* before it can be relied upon.[xxvi] Such evidence cannot be given for the first time in the court of law and it cannot avail the accused.[xxvii] Thus, in *Ikemsom v the State,* [xxviii]the Supreme Court identified the fatality of such action when it held that:

> The prosecution has a duty to investigate an accused person's *alibi* but only when such *alibi* is set up at the earliest opportunity during the investigation stage preferably in the accused person's statement to the police. An *alibi* raised for the first time from the witness box cannot be considered as a serious defence. At best, it is an after-thought. The positive evidence of the prosecution witnesses will outweigh this weak and belated *alibi*. The two courts below were right in preferring the positive evidence of the prosecution witnesses to the half-hearted and belated *alibi* of the appellants.[xxix]

The authors acknowledge the right of the accused to remain silent, not only during the investigation but throughout the trial, leaving the burden of proving his guilt beyond reasonable doubt, to the prosecution.[xxx] In other words, an accused person is presumed innocent until he is proved guilty. There is, therefore, no question of the suspect proving his innocence. This is

ISSN 2581 3382

because, for the duration of the trial, an accused person may not utter a word. He is not bound to say anything. It is his constitutional right to remain silent.

Besides, the duty for a successful arraignment of the suspect, predicated on *prima facie* evidence, is on the prosecution. The *prima facie* case that would sustain the arraignment of the suspect is fact, or combination of facts at police disposal, that would entitle the police to infer that the suspect needs to make some explanation to the court on why he would not be asked to defend himself. If after the police have gleaned facts from the complainant and his witnesses, the suspect declines to say anything to controvert those facts, there is existence of sufficient evidence to suggest that the suspect should be asked to explain to the court why he would not make his defence or why he would not be convicted. Then, the defendant would, no doubt, have shut himself in the leg and may have himself to blame for such concealment since the police would not speculate on what the accused might not have done to warrant his non-arraignment.

Not making a statement to the police is sometimes like gambling. It is likened to resting one's case on the prosecution. Borrowing the words of Ogbuagu, JSC, in the case of *Adekunle v the State,*[xxxi] relying on Oputa, JSC in *Ali & Ors v the State,*[xxxii] where the Supreme Court stated clearly that:

> It is always a gamble, to rest the defence on the case on the prosecution. It is a risk where issues of facts will have to be decided in favour of an accused person before his defence would succeed. The defence has invariably shot himself out and will have himself to blame. The court will not be expected to speculate on what the accused person would have said.[xxxiii]

In the latter case of *Agugua v The State,*[xxxiv] the consequences of remaining silent in the face of an allegation was emphasised when the Supreme Court held that:

> In effect, his right to remain silent, even when arraigned for a criminal offence, is an inviolable one. But he was taking a huge risk; the law says that he is obliged to make his defence, if his remaining silent will result in being convicted on the case made out against him.[xxxv]

Though exercising the right to remain silent, in the face of a gory allegation, is a constitutional right, which would nonetheless, be akin to not presenting the police with any explanation or an alternative story other than as narrated by the complainant.[xxxvi] It is trite law that facts not

ISSN 2581 3382

disputed are taken as established unless circumstances exist that make the undisputed facts ridiculous.[xxxvii]

A major aspect of police investigation is the interrogation stage. While it is the duty of the police to seek information from all persons from whom they think useful information may be obtained, which include persons reasonably suspected to have committed the offence and witnesses who may avail the police with useful information, the police have no power to compel any person to disclose any fact within his knowledge or give answer to questions put to him.[xxxviii] At the time of making his statement, the ACJA 2015 places an obligation on the police to notify the suspect of his rights to remain silent as well as inform him of the reason for the arrest.[xxxix] The insertion of provisions contained in section 31 into the Evidence Act, 2011 appears to have whittled down the essence of the above caution. Though desirable, it is no longer essential for the admissibility of statement obtained without such caution but the suspect may claim damages for breach of his constitutional rights under the Fundamental Rights Enforcement Procedure Rules. This is supported by judicial precedent.

In an alleged breach of a similar provision that relates to the right to prompt trial or prompt arraignment under the same section,[xl] the Supreme Court in *Mohammed v The State*[xli] approved of this provision when it held that:

> Although section 36 (1) of the Constitution grants the right to fair hearing within a reasonable time to a person standing trial for an offence, where [however,] any delay is occasioned during investigation before he is arraigned for trial, this will not invalidate the trial as it is clearly spelt out in section 12 (6) of the Act. What the Constitution provides under section 35 (4) (a) is to arraign him within two months. The appellant's remedy for the long incarceration without trial is the enforcement of his fundamental right. In the instant case, the appellant was finally tried and convicted and would be entitled to enforce the right (sic) under the Constitution if his appeal succeeds.[xlii]

We need to appreciate that the effects of CFRN 1999, as exemplified in the above case and the scenario in section 35 (2) of the Constitution, are distinguishable. Whereas the breach of section 35 (4) does not ordinarily occasion miscarriage of justice or unfair trial to invalidate the trial, the non-giving of notice to the suspect of his right to remain silent under section 35 (2) has the propensity of misleading the suspect to offer self-incriminating statement. This has the effect of involuntary confession which is inadmissible in evidence due to the fundamental breach.

ISSN 2581 3382

It is, therefore, the writer's considered opinion that, though the suspects under both subsections are entitled to claim reliefs under section 46 of the Constitution,[xliii] in any criminal trial where by reason of the continual incarceration, there is sufficient credible evidence to infer the breach of section 35 (4) of the Constitution which acted as the tool that assisted the police to obtain from the defendant the actual self-incriminating statement, which alone, would have been the reason for the defendant's conviction. By so doing, the court is entitled to expunge, at judgement, from the court record such statement or its offending part which contained such self-incriminating evidence.

The above offers a justification for the introduction of Judges' Rule as a guide against police lawlessness during interrogation. The interrogation stage is an important aspect in the administration of criminal justice. Since the police wield much power which may be detrimental to the defendant while trying hard to discover the author of a crime, they cannot be allowed to handle the interrogation their own way.

GUIDING PRINCIPLES ARISING FROM PRACTICE DIRECTION: JUDGES' RULES

The Judge's Rules[xliv] govern the manner by which a suspect could be interrogated. Nmerole identifies three stages of interrogation or interview contemplated by the Judges' Rule: the information gathering stage, the intermediate stage where a police officer begins to focus a suspicion or evidence against a person, i.e., caution stage and, the final stage, where a police officer has charged a person with an offence or informed him that he may be prosecuted.[xlv]

Judges' Rules No. 1

Though Judges' Rules invest the police with much discretion, it is not a justification for the detention of a person not linked with the crime under investigation The author has had the opportunity of interviewing several police investigators as relates to the extent to which police power of detention could be exercised during criminal investigation and was amazed to note that a higher percentage of the investigators seemed to unduly rely on Judges' Rule No. 1 as the basis for long detention. They argued with all sense of seriousness that, since they were investigating a criminal case, the Judges' Rules empower them to detain any person from whom

ISSN 2581 3382

they think that useful information could be obtained. We beg to differ from this assertion. Meanwhile, Judges' Rule No.1 provides:

> When a Police Officer is trying to discover whether or by whom an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so, whether or not the person in question has been taken into custody. So long as he has not been charged with the offence or informed that he may be prosecuted for it.

Although this is a wide discretionary power conferred on the police in the course of their investigation, no part of the rule bequeaths on police officers the power to arrest a person against whom no link has been established. There is a gulf of difference between putting questions to, and detaining, a person. Depending on police competence style, questions could be put to a person at his residence or in his workplace without inviting him to the station, let alone detaining him. No person must be detained on grounds of mere questioning unless there is evidence linking him with the commission of the crime. It is sufficient to state, at this juncture, that the statement made by any suspect needs not be cautionary until there is evidence for believing reasonably that he has been indicted of the offence. This is the position of the Nigerian Criminal Law. Upholding this sacred position, the Supreme Court in *Gani Fawehinmi v IGP & Ors* re-echoed that:

> I think I can say this that in a proper investigation procedure, it is unlawful to arrest until there is sufficient evidence upon which to charge and caution a suspect. It is completely wrong to arrest, let alone caution a suspect, before the police look for evidence implicating him.[xlvi]

Judges' Rule No. 2

Judges' Rule No. 2 confirms the assertion that, as soon as a police officer has sufficient evidence which would afford reasonable ground for suspecting that a person has committed an offence, he should caution that person or cause him to be cautioned before putting to him any question or further questions relating to that offence.[xlvii] It is at this stage that the police can lawfully detain a suspect as well as caution him. In a suit for unlawful arrest, the main fact that the applicant was cautioned when there was no evidence linking him with the crime under investigation or an allegation which was civil in nature, is a confirmation of the fact that he was treated as a common criminal which depicts illegality of police action.

ISSN 2581 3382

The essence of Judges' Rule No 2 is to avail the person making the statement a caution that, since there are available substantial pieces of evidence with which to draw an irresistible inference that he has committed an offence, there is no compulsion on him to make further implicating statements in the course of answering the question or further questions to be put to him in relation to the offence. Although this part of the rule is intended to shield the suspect from self-incrimination, there have been allegations of suspects being coerced while extracting self-implicating evidence from them with respect to the offence under police investigation. Hence, the protection contained in the Evidence Act[xlviii] for preservation of voluntariness of statements proceeding from the defendant. In EA 2011 s29, while reinforcing the provisions of the Judges' Rule against self-implicating evidence through coercion, provides that:

> If, in any proceeding where the prosecution proposes to give in evidence a confession made by the defendant, if (it) is represented to the court that the confession was or may have been obtained – by oppression of the person who made it; or in consequence of anything said or done which was likely, in the circumstance existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provision of this section.[xlix]

Proof of the above condition has now become an essential part of the Nigerian Criminal Law, as the court, on its own motion, possesses a great deal of discretionary power for insistence on the proof of voluntariness of the defendant's statement by the prosecution.[l] To protect the suspect further and ensure no oppressive conduct took place at the time of making the statement, the ACJA 2015 allows the presence of a legal practitioner of the suspect's choice, or where he has no legal practitioner of his own choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a civil society organisation or Justice of the Peace or any other person of his choice.[li]

A dynamic interceptive incursion has been made to the Nigerian Criminal Law for the secured protection of the defendant's right to freedom from self-incrimination, by allowing the recording electronically on a retrievable video compact or other audio-visual means, while making such statement.[lii] It is now settled in law that, having been grossly indicted in evidence,

ISSN 2581 3382

every confessional statement or such other statements indicating that the person making the statement is doing so in subsequence of criminal allegation, must be under caution.

The implication of the foregoing is that a suspect is permitted to make as many voluntary statements without administering the words of caution until there is sufficient evidence linking him with the commission of the offence or at the point of his volunteering a confessional statement. Each of the statements, made at intervals since the arrest of the suspect is an independent statement that must be given in evidence and, where disputed, trial within trial into each of those disputed statements must be conducted independently.[liii] It should be noted that, since the purpose of trial within trial is to safeguard the interest of a defendant accused person and further strengthen the constitutional presumption of the accused person's guilt,[liv] the decision of a court at the end of a trial-within-trial is an appealable judgment which can be included in the appeal against the trial court's decision[lv]. The objective of the trial-within-trial procedure is to arm the court with a procedural mechanism for sifting voluntary evidence from involuntary.[lvi]

When tendering the defendant's statement for admissibility in evidence, each of the statements recorded from the suspect during investigation must be made independently.[lvii] The Investigating Police Officer cannot choose which of the statements he will tender in evidence. Where any such statement is concealed, there is a presumption in law that the evidence was so concealed because it was favourable to the accused person. This may be fatal to the prosecution's case.[lviii] Thus, in *Ogudo v the State,*[lix] the Supreme Court maintained that:

> The prosecution is expected to tender all the statements made by the accused person to the police whether at the time of his arrest or subsequently. In this case, the appellant made a statement at Birnin Gwari Police station (the first station he was taken to after he was arrested). The prosecution did not tender the statement at trial to deprive the appellant standing trial for an offence which carried death penalty, the use of the statement made to the police. To my mind, this renders the trial unfair.[lx]

If after being cautioned, the person being questioned makes a statement, or elects to make a statement, a record of the time and place at which any such questioning or statement began and ended, and of the person present, shall be kept. What is the essence of this insertion into Judges' Rule? This is to avert endless interrogation of the suspect by the police. It would be awkward if a one-page statement is claimed to have been made for seven hours; this will connote the

ISSN 2581 3382

presence of oppressive conduct at the time of recording the statement. Besides, the recording of names of persons present is intended to assist the police. Where there is disputation of voluntariness of the statement, the police will be entitled to furnish evidence from such people mentioned as being present when the statement was recorded, during trial-within-trial. Where those mentioned also countersigned as witnesses, as part of the investigating team, any of them may render the statement in the absence of the prime IPO.

At disputation of voluntariness of statement during trial within trial, the burden of proving the voluntariness of the statement is on the prosecution.[lxi] The accused needs not prove the involuntariness of the statement until the prosecution has successfully established the voluntariness of same. Trial-within-trial commences with the proof of evidence from the prosecution first.[lxii] In practice, recording of witness' name is rarely made. The omission could have resulted from preference of short course known with highly-militarised institution coupled with officers' incompetence or dearth of skills.

Judges' Rule No. 3

Judges Rule No. 3 provides that, where a person is charged with or informed that he may be prosecuted for an offence, he shall be charged in the following terms:

> Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say would be taken down in writing and may be given in evidence.

This Rule serves a dual purpose in investigation. First, it avails the constitutional requirement of giving a written notice within 24 hours (and in a language that the suspect understands) of the facts and grounds of his arrest.[lxiii] Second, it reminds the suspect of his constitutional right to remain silent or avoid answering any question until after consultation with a legal practitioner or any person of his choice.[lxiv] The fulfilment of the first purpose, that is notification of the reason of the arrest, appears to be too narrow considering the content of this notification. Ijalana has posited that the notice envisaged by the CFRN 1999 s35(3) is specific and definitive and, in order to give adequate notification, he suggests a more expansive modification of the rule which should include the offence being alleged and for which the statement is required.[lxv] Accordingly, the term should be modified as follows:

> I, James David, of the above particulars, having been informed that the allegation against me is the offence of stealing the sum of fifty thousand naira

ISSN 2581 3382

> (₦50,000.00) belonging to Miss Hannah Elizabeth which said offence was committed on the 18th February, 2016. I have also been informed that I am not obliged to say anything in answer to the charge unless I wish to do so but that whatever I say will be taken down in writing and maybe given in evidence and I therefore wish to voluntarily state as follows:

This modified caution properly fits into the dual purpose explained above and it adequately constitutes enough notices, in writing, in respect of the reason for the arrest. In a suit for a claim of damages for breach of constitutional rights relating to denial of notification of the reason for the arrest, the above modified caution is a reasonable defence while the existing caution as contained in Judges' Rule No. 3 may not constitute a valid written notification. However, it may suffice as a defence to a claim for a breach of duty brought pursuant under the ACJA 2015 s17(1).

The application of Judges' Rule No. 3 prohibits the putting of questions relating to the offence to the defendant, after he had been charged or informed that he may be prosecuted except for the purpose of preventing or minimising harm or loss to some other person or the public, or for clearing of ambiguities, contradictions, mix-up and inconsistencies in previous answers and statements.[lxvi] There is a need, at this instance, to notify the suspect of the intention to put some question about the offence with which he is charged and a caveat, in clear terms, that the suspect is not obliged to answer any of those questions and that, should he do, the answers given to the questions will be taken down in writing and, maybe, given in evidence.[lxvii] The questions put to the accused person relating to the offence and the answer thereto must be contemporaneously recorded in full and the record signed by the person or, if he refuses, by the interrogating officer.[lxviii]

The effect of this is that such record of the caveat, together with the questions and answers thereto, can be made in the statement form at its lower part or may be subjoined in a separate sheet of paper attached thereto. Under the Judges' Rules, refusal or neglect to caution renders a confessional statement inadmissible in evidence.[lxix] Therefore, the issue of caution as relating to administration of cautionary word has always been a thorn in the flesh of many tardy investigators. However, since the coming into force of EA 2011, the effect of non-administration of cautionary word have been whittled down, thereby resulting in admissibility of such confessional statements, even if no caution was administered. For the avoidance of doubt, EA 2011 s31 provides that:

ISSN 2581 3382

> If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the defendant for the purpose of obtaining it, or when he was drunk or because it was made in answer to questions which he needed not have answered, whatever may have been the form of these questions, or because he was not warned that he was not bound to make such statement and that evidence of it might be given (*underlining mine*).

The above provision has a far-reaching effect on the admissibility or otherwise of the uncautioned confessional statement. It may result in the treatment of Judges' Rule with disdain as a mere administrative rule of practice without legal implication since, if such a statement is relevant, it becomes admissible whether or not cautionary words were administered. Admissibility is the concept of law of evidence that determines whether or not evidence can be received by the court. For a piece of evidence to be admissible, it must be relevant.[lxx] In *Dondos v The State,*[lxxi] it was the decision of the Supreme Court that:

> It is settled law that for an inducement, threat, or promise to make a confessional statement irrelevant and therefore inadmissible, two conditions must be present (i) it must have reference to the charge against the defendant; and (ii) the defendant should believe that by making the statement, he is would gain advantage and avoid evil even if temporarily. A confessional statement becomes involuntary, if the statement could not normally have been made but for the "inducement, threat, or promise" emanating from a person in authority.

Judges' Rule No. 4

Rule No. 4 provides that where a person volunteers to make a statement, he shall be told to make a written record of what he says: He shall always be asked whether he wishes to write down by himself what he wishes to say; if he says that he cannot write or that he would want someone to write the statement for him, a police officer may offer to write the statement for him.[lxxii] If he accepts this offer, the officer shall, before starting, ask the person making the statement to sign or make his mark on the following:

ISSN 2581 3382

> I, ... wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.[lxxiii]

This presupposes that statements generally must be written down by the maker unless the person making it formally requests in writing, under his hand, for assistance to so do. Any person writing his own statement shall, in addition to the normal words of caution, indicate that he is so making the statement of his free will and he shall be allowed to do so without any coercion except that he may be told to concentrate on matters that are material. Such a person should be allowed to do so without prompting. At the end, he shall be asked to read it over and sign or thumbprint same. Where the writing of the statement is taken by a police officer, at its completion, the person making it shall be asked to read it and make any correction, alteration or addition he may wish.[lxxiv] When he has completed the reading, he shall be asked to sign or make his mark on the following statement:

> I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will. I have nothing to add to it presently.[lxxv]

Or

> My above statement has been taken down and read to my by the police officer. The officer has also invited me to make any correction which I may wish make but I confirmed this statement to be representation of all I have freely, on my own volition, said about the allegation made against me.[lxxvi]

Right Thumb Impression:

Rule 4 of the Judges' Rule further provides that, if a person who has made a statement refuses to read it or to sign it, the senior police officer present shall record what has happened on the statement itself, and in the presence of the person making it. If the person making the statement cannot read or refuses to read it, the officer taking down the statement shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The officer shall then certify in the statement itself what he has done.[lxxvii]

ISSN 2581 3382

Similarly, when a police officer takes down the statement, he should do so, whenever practicable, in the language of the suspect or accused and in the exact words spoken by the person making it without putting any questions other than such as is necessary to make the statement coherent and intelligible. At the end, the officer recording the statement shall read it over and invite the maker to make any corrections, before signing or thumb printing. [lxxviii] Such statement recorded in any language other than English language must essentially be translated to English language which is the official language of the court. What then is the status of a statement taken down by an officer who speaks or understands the language spoken by its maker who does not speak or understand English language if such statement is taken down directly in English language?

It is a fundamental rule that every statement must be taken down directly in the language with which such statement is offered, but must, thereafter, be translated into the official language of the court. To be admissible, both the original statement and its translated version must be tendered by, or through, the translator and the interpreter.[lxxix] A statement containing merely the translated version without its original is hearsay evidence and it offends against the provision of the Evidence Act. If the person taking down the statement understands the native language with which the defendant offered the statement, does that also amount to hearsay? On the authority of *Oseni v The State*,[lxxx] the Court of Appeal answered the above question in negation when it held that:

> Statements should, whenever practicable, be recorded in language with which they are made.... In the instant case, the fact that the appellant's statement was recorded in English Language by the witness who understands Hausa, did not make the statement inadmissible.[lxxxi]

The above underscores the essence of ensuring that proper procedures are maintained in recording statements by the police in the course of a criminal investigation.

Judges' Rule No. 5

Judges' Rule No. 5 provides that where a person has been charged with, or informed that, he may be prosecuted for an offence, a police officer is to bring to the notice of the person any written statement made by another person who, in respect of the same offence, has also been charged or informed that he may be prosecuted. He shall hand over to that person a true copy of such written statement without saying or doing anything to invite any comment. Where,

ISSN 2581 3382

however, the person says that he would like to make a statement or tries to say something in reply, he shall at once be cautioned.[lxxxii] This is in consonance with the provision of EA 2011 s29 (4) of the Evidence Act which provides that:

> Where more persons than one, are charged jointly with an offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, the court shall not take such statement into consideration as against any or such other persons in whose presence it was made unless, he adopted the said statement by words or conduct.[lxxxiii]

A voluntary confession is deemed a relevant fact only against the person who made it.[lxxxiv]

Judges' Rule No. 6

This Rule emphasises the need for all persons charged with the duty of investigating crime, or charging the offender with the commission of a crime, to comply with the provisions of Judges' Rules.

The provisions of Judges' Rule are a guide to all officers of various investigating authorities statutorily charged with the duty of investigating offences or charging offenders with offences. They should, therefore, endeavour to comply with the provisions of the Rules. Except, however, in northern Nigeria where the provisions of the Judges' Rule have been modified, domesticated and enacted as Criminal Procedure (Statement of Police Officers) Rules (1960), its application to this country is not backed by any law. They are rules of administrative practice and not rules of law. Failure to observe any of them in the taking of statement from a person charged with the commission of an offence will not necessarily render the statement inadmissible in evidence.[lxxxv]

The statement recorded through, or by, an interpreter must, as much as possible, be recorded in the language by which it was given and should be translated to the language of the court which is the English language. The interpreter shall endorse the statement as having been interpreted by him and should interpret same to the suspect before causing him to append his signature or thumbprint. Where the suspect is an illiterate, the word of jurat must be administered before it can be admissible in evidence.

The Supreme Court stated in *Olalekan v The State*,[lxxxvi] held that there is a greater burden on the interpreter than the mere tendering of the statement. He must inform the court of when, and how, the suspect made the statement. This will include what question was put through him to

ISSN 2581 3382

the accused person and what answer the accused gave in the language.[lxxxvii] The burden of doing this is on the prosecution.[lxxxviii]

In the case of *Ifaramoye v The State*,[lxxxix] the Supreme Court extended this duty to translator of languages as it held that:

> The interpreter and translator are interchangeable; the same principles apply. To interpret means to translate orally and the interpreter provides oral translation between speakers, who speak different languages the translator is also a person writing messages from one language to another. So, one translates orally and the other one translates in writing. There is no difference between them in the eyes of the law, and the translator falls under the same hammer as the interpreter.[xc]

On what should happen where an accused person gave an extra-judicial confessional statement recorded by a police officer or a third party and translated, the Supreme Court held that:

> Before these documents are admissible in evidence, the police officer who recorded the message and the interpreter (translator) must testify in court. This is vital testimony. It now becomes clear that where a conviction is based solely on the confessional statement and the (police) officer who recorded it and the interpreter or translator who acted as interpreter (translator) when the said statement was obtained did not testify, the confessional statement is hearsay evidence and the accused person is entitled to acquittal.

The crux of the foregoing is that, once a police officer decides to make a charge of complaint against an accused person, he must first of all caution the accused person in the prescribed form. If the accused decides to volunteer a statement, he may write it himself or the police officer may write for him, but such a statement must be free and voluntary.

Where a statement is a product of a question-and-answer session between the accused and the police officer, such a statement cannot be regarded as free and voluntary.[xci] Such a statement would offend the provision of Judges' Rules or of Order 6 of the Criminal Procedure (Statement to Police Officers) Rules 1960 Cap 30 of the Laws of Northern Nigeria 1963 (Judges' Rules).

Where also there is any ambiguity in the statement made by an accused to a police officer, such ambiguity must be raised and explained before the statement is countersigned by a superior police officer.[xcii] If this is not followed, the statement may be rendered inadmissible or discountenanced at judgment. The police officer who is investigating a case is an arbiter of

ISSN 2581 3382

justice; therefore, good faith, justice and fairness must guide his actions. A police officer should not be drawn into a matter before him; as a public officer, he is expected to hold the sword of justice with good conscience. Thus, in *Otufale v the State*[xciii], police officers were admonished, as an integral part of a system engaged in the administration of justice, to always bear in mind that they should at all times see that justice is transparently done.

ADMISSION AND CONFESSION IN CRIMINAL INVESTIGATION

Though admission and confession enjoyed the same ranking in equipollence[xciv] (an accused person's admission of his voluntarily signing a confessional statement is tantamount to confession[xcv]), an irreconcilable error often made by police officers is the inability to distinguish between an admission and a confession. The fact that the suspect admitted to be on the scene of crime where the deceased was murdered does not constitute a confession to the case of the murder of the deceased. The police often take this admission as a confession and, quite often, rely on it as if such admission is without more, enough to ground the conviction of the suspect. Much obligation, however, is imposed on the investigator to unravel what part the suspect played before, during and after the killing. These facts may be furnished from evidence of witnesses or by the suspect confessing to doing such act as may be implicating or adjudged as constituting criminal element for the offence of murder. Mere presence at the crime scene, without more, will not amount to being a participant of a crime.[xcvi] Thus, in *Eme Orji v the State*[xcvii], it was held that:

> The presence at the crime scene does not, as a matter of law, render the person so present guilty of the crime. There must be clear evidence that either prior to or at the time of the commission of the offence, the person did something or omitted to do any act, such as aiding or abetting to facilitate the commission of the offence.[xcviii]

Understanding this distinction is necessary because it will help the IPO to make enough efforts in a criminal investigation towards unravelling the author of the crime through independent evidence, instead of coercing the suspect into offering an admission in the mistaken belief that he has obtained a confession. The confession may be rejected as insufficient for advising that the suspect be charged with the offence by the Director of Public Prosecutions (DPP) or the command's head of legal matters.

ISSN 2581 3382

MEANING AND NATURE OF A CONFESSION

For the avoidance of doubt, confession, which may be either an oral or written acknowledgement of guilt, means an acknowledgement in express words by the accused of the truth of the main fact charged or some essential part of it.[xcix] Since, in any dispute as to the voluntariness or otherwise of any given statement, the onus lies on the prosecution to prove beyond reasonable doubt the voluntariness of the confession.[c]

A confessional statement must be free and voluntary. It should also be directed at the issue upon which it is made. It must be positive or unequivocal, pointing irresistibly to the fact that, it was the suspect who committed the crime.[ci] A confessional statement, that would be admissible to prove the guilt of the suspect in court, should leave no doubt as to what part the suspect played in the commission of the offence (as to the elements constituting the offence). A free and voluntary confession of guilt, whether judicial or extra-judicial, must be direct, positive and properly established with sufficient proof of guilt.[cii]

A confessional statement, where offered, is evidence against the maker only, and not his accomplices.[ciii] Mere mentioning of other persons in an accused person's confessional statement does not mean that the persons, so mentioned, are guilty or that they must be charged to court. [civ] Criminal liability is personal and cannot be transferred. The discretion of the prosecution to prosecute the suspect remains unfettered. A court of law cannot question it. The only jurisdiction of the court is to try the accused person before it. A court cannot go outside prosecution and ask for some other persons to be charged.[cv] The pertinent question is, how would a confession be admissible in evidence during the trial of the case? To be admissible, a confessional statement must be free, voluntary and be relevant.[cvi] To answer this question, the Supreme Court validly laid down a distinguishing factor for its determination in the case of *Ahamba v The State*[cvii], when it held that:

> If it proceeds from remorse, and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, exerted by a person in authority, it is inadmissible. The material question is whether a confession has been obtained by the influence of hope or fear.[cviii]

Evidence of confession obtained by means of police trap is, nonetheless, admissible. In determining whether such confession proceeds from implied promise by person in authority, the Supreme Court in *James Igbinovia v the State*,[cix] held that:

ISSN 2581 3382

> One may also ask whether the fact that 5th P.W., a policeman who disguised as a suspected criminal when he was planted in the cell does affect the admissibility of the confession made by the appellant in a hilarious discussion or chat with 5th P.W. in the cell. In this area of the world where crimes of violence are on the increase and means of investigation are at their rudimentary stage of development coupled with the secrecy with which these crimes are committed, and the abiding faith in concealment of facts by whatever means by the perpetrators of these crimes, the duty of ensuring security for the lives and property of our citizens demands the detection of the perpetrators of these crimes by all means allowed by our law. Detection of crimes is a never-ending task the police are called upon to perform and in the performance of this task, they ought to be able to beat the suspects in their game of hide and seek. If a policeman does not present himself as a policeman but as a wild and vicious criminal and other suspected criminals take him as such and in order to boost their ego and establish better understanding with him open their mouths and paint out stories of what to them, are brave deeds of courage, but which to civilized human societies are atrocious acts of violence against society and humanity, that information cannot become inadmissible only by reason of concealment of the status of the disguised policeman who was fed with such valuable information. Being an undisclosed police officer, he does not fall within the category of persons in authority who can infuse fear of evil into the suspect or inspire hope of advantage in them.[cx]

While obtaining statement from the suspect by a desperate investigator, pressures are usually built along his psyche. These pressures are tensions generated in a bid to link the suspect with the crime at when an indolent investigator failed in his investigation to assemble credible evidence that would sustain the guilt of the suspect. Such indolence may propel an unethical procedure of tortuous attacks on the suspect supposing that, by such intimidation, whether the suspect likes it or not, he must make incriminating statement against himself.

Much as confession may easily ground conviction, the possibility of denial of making the statement and allegation of involuntariness often result in rendering confessions inadmissible. Where the only stake in the investigation is the confession of the suspect, its inadmissibility renders the whole investigation an effort in futility; hence, the need for the investigator to seek

ISSN 2581 3382

any evidence, be it slight or circumstantial, which makes it probable that the confession is true. Such evidence should be obtained from other sources independent of the suspect.

THE TESTS FOR DETERMINING THE TRUTHFULNESS OF A CONFESSIONAL STATEMENT

What sounds confusing about a confession, however, is the determination of its truthfulness, bearing in mind that the suspect, after making a confession and getting out of police custody, is bound to have a rethink on how to countermand the confession which often results in either resilient retraction or absolute denial of its voluntariness, since the statement of an accused person to the police is evidence merely of the fact that it was made but not evidence of the truth of its content.[cxi] To clear this logjam, the Supreme Court, in Idowu *v The State*,[cxii] laid down the test for determining the truthfulness of a confessional statement as follows:

a. whether there is anything outside the confession to show that it is true;
b. whether the statement is corroborated, no matter how slightly;
c. whether the facts contain therein can be tested and are true;
d. whether the accused person had the opportunity of committing the offence;
e. whether the confession of the accused person was possible; and
f. Whether the confession was consistent with other facts which have been ascertained and proved in the matter. [cxiii]

The tests have been accepted and consistently applied by the Supreme Court over a long period in several cases.[cxiv]

Once a court has concluded after the determination of the above test, and it is satisfied of the guilt of an accused person, retraction of such confessional statement is of no effect.[cxv] A law court can rightly convict on the extrajudicial confessional statement which is voluntary and real once it is satisfied with the truth despite retraction of same.[cxvi] In *Afuape v The State*,[cxvii] the Supreme Court, affirming this, held that:

> It is certainly not the law that, once a confessional statement has been retracted, the court ought not to rely on it in convicting the accused person. It is quite the opposite.[cxviii]

ISSN 2581 3382

It must be noted that, in law, a voluntary confessional statement admitting guilt if fully consistent and probable, and is coupled with a clear proof that a crime has been committed by some other person, is usually accepted as satisfactory evidence on which the court can convict.

OBJECTION TO ADMISSIBILITY AND RETRACTION OF A CONFESSION

The Supreme Court has repeatedly stated that the appropriate time to object to the admissibility of a statement specified as a confession is when the statement is sought to be tendered.[cxix] Thus, in *Oseni v The State*,[cxx] the Supreme Court subsumed this principle when it held that:

> There was no objection to the admissibility of the appellant's confessional statement. It is rather too late to raise such an issue on appeal.... It [is] regrettable that Appellant's counsel at the trial stage did not object to the admissibility of [his] confessional statement, yet he went on to blame [that] the trial court is not treating Appellant's confessional statement with utmost caution. It will appear to be too late in the day to seek to supply a remedy to a dented or a crucified matter, which can hardly be revived.... It is too late to seek to retract such confessional statement after its admission without objection from the defence. It is always taken as an after-thought, which courts are not ready to accommodate.[cxxi]

To effectively retract a confessional statement, the accused has a duty to impeach the earlier statement by showing any of the following:

(i) that he did not in fact make any such statement as presented; or

(ii) that he was not correctly recorded; or

(iii) that he was unsettled in mind at the time he made the statement; or

(iv) that he was induced to make the statement.[cxxii]

The confessional statement is the best evidence in Nigeria's criminal procedure.[cxxiii] Once it is admitted, the prosecution needs no further evidence to prove the case against the accused person beyond doubt as the confessional statement is an admission of guilt, hence, the need to prove its voluntariness. The law is now clear that, where an accused person makes two

ISSN 2581 3382

statements voluntarily, with full knowledge of what he is doing and without any form of inducement, a trial judge would be right to take the one which is less favourable to the accused, particularly when that one is first in time. The second one will be an afterthought.[cxxiv] The court, before acting on a confessional statement, should have some corroborative evidence, no matter how slight, which makes it probable that the confession is true.[cxxv]

Again, a confession may either be oral or in written. Expunging the written confession will not render the oral version inadmissible.[cxxvi] A statutory dimension has been introduced into oral confession. To this end, section 15 (4) & (5) of the Administration of Criminal Justice Act, allows admissibility of oral evidence even when the written confession is marked *rejected* or *expunged* from the record of proceedings. These subsections provide that:

> (4) Where a suspect who is arrested with or without a warrant volunteer to make confessional statement, the police officer shall ensure that the making and taking of statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audio-visual means.
>
> (5) Notwithstanding the provision of subsection (4) of this section, an oral confession of arrested suspect shall be admissible in evidence.[cxxvii]

Since allegations of coercion while obtaining confessional statements are very rampant among the lower officers in the Nigeria Police, the confirmation or endorsement of such statements by a superior police officer has become a defensive procedure in Nigeria. Though a confessional statement needs not be taken for confirmation before a superior police officer, the accused may deny or admit making the statement. Although there is no statutory provision compelling this practice, the court would, however, treat such a confessional statement without a confirmation of superior police officer with considerable caution. [cxxviii] Thus, in *Odeh v Federal Republic of Nigeria*[cxxix], the Supreme Court held that:

> I note that Exhibit 7 was written by the appellant himself under caution and duly signed by him both after the caution and the end of the statement and PW.4 (a senior police officer) counter signed as the usual practice designed by the police. It is even not required by any rule of law or procedure and it has been highly commended by the court as it ensures fair play and justice.[cxxx]

Endorsement of suspect's statement by a senior police officer becomes essential in cases punishable with death where confessional statements are often retracted by the suspect in court. On the authority of *Ogudu v the* State[cxxxi], no court will sentence an accused person to death

ISSN 2581 3382

based solely on retracted confessional statement without it being endorsed by a superior police officer and signed by the accused. Not only must the cautionary words be well-written and signed, the body of the statement must also give a detailed confession that clearly shows that the person committed the offence for which he is charged.[cxxxii]

In recording the statements of the suspect, the Administration of Criminal Justice Act[cxxxiii] has introduced a new dimension to recording of such statements. Section 17 (1) of the Act[cxxxiv] provides that, where a suspect is arrested on allegation of having committed an offence, his statement shall be taken, if he wishes to make a statement. This indicates that the making or refusal to make a statement by the accused person or a suspect is a discretionary right which the police do not have any power to compel otherwise.

For a greater protection of the above right of the suspect, the Act[cxxxv] further provides that, where the suspect volunteers to make a statement, such statement may be taken in the presence of a legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a civil society organisation or a Justice of the Peace or any other person of his own choice.[cxxxvi] Though the use of the word *may* in section 17 (2) of the Act[cxxxvii] literarily would appear permissive, the import of its insertion as a mean for a greater realisation of the rights of the citizens demands a liberal construction that would make the rights realisable. Of great importance is the extension introduced into the above position by virtue of section 18 (2) of the Administration of Criminal Justice Law of Oyo State, 2016 [ACJL 2016] which made it mandatory that, unless a visual recording is undertaken, and in the presence of legal practitioner of the suspect's choice. This has become necessary and Gouda a guiding principle in criminal investigation. This, therefore, demands that where the cost of visual recording is too expensive to afford its provision, the suspect must, as a matter of law, be appeased to invite the legal practitioner of his choice to take part in the recording of his statement.

The question to ask is what happens where the suspect elects to waive this right? We think it is a matter of balancing of interests. The right to have one's attorney in attendance is not a duty imposed on the defendant but on the police. It is a right which exercise is governed by defendant's personal desire, underscored by personal choice or election. Where the accused person requests the police to record his statement, such a police officer is under an obligation to have such statement recorded accordingly, provided that, before recording the statement, the accused person is informed of the right to have the legal practitioner of his choice present while making such statement, in the absence of a visual recording. The enjoyment of this right cannot

ISSN 2581 3382

be foisted on the defendant. It is sufficient, if its notification is given to and acknowledged by the defendant. This may be contained or incorporated in the defendant's statement.

It is necessary, however, while making such statement that it be made in the presence of some other creditable persons, more preferably, some senior police officer, except the suspect so objected. The presence of such other person thereby becomes imperative to ensure a backup, in event of rejection of the written confessional statement made by the suspect, for whatever reason, by the court.

Earlier, before the enactment of ACJA 2015 introducing the above rights, the Supreme Court of Nigeria, in *Owhoruhe v C.O.P,*[cxxxviii] had acknowledged that most confessional statements are received by some police officers through unwholesome means when it held that:

> It must be noted that most crimes are committed by people with little or no education. Consequently, they are easily led along by the investigating police officer to write incriminating statements which legal minds find almost impossible to unravel and resolve. Confessional statements are often beaten out of suspects, and the courts usually admit such statements as counsel or the accused are unable to prove that the statements were not voluntary. [cxxxix]

In order to advance the cause of Nigerian citizens from the abuse of right to which the police are notoriously known, the Supreme Court has, therefore, advanced a condition which later found expression in ACJA 2015 when it further held that:

> A fair trial presupposes that police investigation of crime for which the accused person stands trial was transparent. In that regard, it is true for safeguards to be put in place to guarantee transparency. It is seriously recommended that confessional statements should only be taken from a suspect if, and only if his counsel is present, or in the presence of a legal practitioner. Where this is not done, such a confessional statement should be rejected by the court (*underlying mine*). [cxl]

Section 17 (2) of the Administration of Criminal Justice Act, 2015 and the Supreme Court's recommendation *Owhoruhe v C.O.P,*[cxli] are complementary to each other. Though the court may not on its own reject a confessional statement on the mere ground that it was taken in the absence of the accused person's legal practitioner, it would be entitled to reject same, if a retraction of the said statement was based on (1) the accused person's being misled to offer self-incriminating evidence, (2) that the mischievous inference drawn by the investigating

ISSN 2581 3382

police officer from vague words used by the accused person did not represent what the accused intended to say, (3) that such incriminating statement was obtained against the accused person's election or (4) on the refusal to allow the accused person's solicitor to be present during the making of such statement, thereby causing extraction of evidence against the accused person's interest. It should be borne in mind that retraction of statement is a matter of fact which must be substantiated by credible evidence. It is also the function of an accused to explain to the court the reason(s) for his inconsistency where he retracts or resiles from his confessional statement.[cxlii] This duty, however, does not absolve the prosecution of fundamental burden of proving the guilt of the accused person. The burden of proving the guilt of the accused remains also on the prosecution even where, as in the instant case, the accused person caught a bad image in the witness box.[cxliii] The suspect, in a bid to offer a defence, may tell a number of stories varying in circumstances and contents, abandoning and adopting some part of the earliest story or substituting the whole with new lies. The fact that a suspect has told lies time and again in the course of making statement has never been accepted as proof of his guilt. At best, it merely expresses that the person listening to him should be wary of relying on his testimony or as a caution that he should glean the truth from the whole lot of his wearing tales. Thus, in the case of *Okpere v The State*,[cxliv] the Supreme Court in Nigeria noted that:

> The burden of proving the guilt of the accused remains also on the prosecution even where, as in the instant case, the accused person caught a bad image in the witness box.[cxlv]

If the voluntariness of a confessional statement is contested at the trial, procedural law requires that the trial court should conduct a trial-within-trial for the purpose of determining the admissibility or otherwise of the statement.[cxlvi]

However, where a confessional statement is retracted, that is, where the making of the confessional statement is denied by the accused person, a trial court is expected to admit it in evidence as an exhibit and in its judgment, it would decide whether or not such denial exonerates the accused. A court can convict, on the retracted confessional statement of the accused, if there is some evidence aside from it, no matter how slight, which will make it probable.[cxlvii]

It is trite that there is no need, however, for trial-within-trial in retraction of confessional statement though it is desirable to have some evidence outside retracted confession before a conviction is recorded based on such retracted evidence.[cxlviii] The Supreme Court has, however,

ISSN 2581 3382

in the case of *Adisa v The State*[cxlix] advised the conduct of trial-within-trial for the just determination of the truthfulness, in situations where an accused person retracted the confessional statement. This helps the court to determine the validity and the voluntariness of the statement before its admissibility in evidence.[cl]

Just before concluding this discourse, another aspect that cannot be glossed over is the attendant radical introduction inserted by ACJA 2015 s17(3) or ACJL 2016 s18(3) which both allow, nevertheless, an oral confession. It needs be noted that those subsections have apparently, as it would appear, to have taken by right hand what ACJA 2015 s17(2) and ACJL 2016 s18(2) offered by the very left hand, in that, where such oral confession is available the statutory provision, as regards visual recording or presence of the legal practitioner of the suspect's choice, appears to be mere salutary.

For the avoidance of doubt, the subsection provides that:

> (3) Notwithstanding subsection (2) of this section an oral confession of arrested person shall be admissible in evidence.[cli]

It is also worth noting that the procedural requirement on objections to admissibility of a confessional statement on grounds of involuntariness demands that such objections must be raised at the point of tendering same.[clii] Objections must be raised timeously to enable the trial judge order trial a -within-trial in determining whether or not the statement was made freely or voluntarily so as to be admissible in evidence.[cliii]

CONCLUSION AND RECOMMENDATION

The constitutional presumption of innocence, as one of the fundamental rights of the accused person, places perpetually on the police and other investigation institutions, the duty of proving the guilt of the accused person to the satisfaction of the court. This is done by presenting, before the court, credible evidence linking the accused person with the crime. Such evidence includes statements obtained in the course of police investigation. The admissibility or otherwise of these statements depends on the individual outcome, having exposed them to the validity test relating to the guiding principles as contained in the constitution, extant statutes and other practice directions which have been discussed in the main body of this discourse. It is, however, sufficient to conclude that, unless the police begin to respect the rule of law, the court would continue to rise to the protection of the defendants by rejecting such statements obtained in contravention of established principles of law.

ISSN 2581 3382

It is against the foregoing conclusion, that the following recommendations are hereunder proffered:

a. Expanding police training syllabus to incorporate modern trend in policing such as community policing; intelligence-led policing; procedural due process in law enforcement such as would advance breakthrough in criminal investigation and prosecution;
b. Constant training and retraining of officers and men of law enforcement agencies, from time to time, more especially on criminal investigation has become necessary;
c. For the judiciary to accomplish the role of being the last hope of the common man in Nigeria, the appointment of judges and other judicial staff must be made from people who possess high standard of moral integrity, proficient professional skills, undaunting courage and resolve to do justice.
d. Staff motivation in terms of better remuneration and better conditions of service should be put in place to attract the right personnel to the police and the judiciary;
e. Adequate funding of the judiciary, the police and other security agencies for logistic and operational requirements is necessary; and
f. Ensuring that judicial criteria are put in place to guide admissibility of confessional statements are strictly followed.

It is hoped that the foregoing will, in no little way, ensure fairness and justice in criminal investigation and prosecution of cases in Nigeria.

ENDNOTES

[i] Administration of Criminal Justice Act 2015 [ACJA 2015].
[ii] *Albert Sogbamu v COP* (1948) 12 WACA 356.
[iii] Ibid at 357.
[iv] Evidence Act 2011 [EA 2011].
[v] ACJA 2015 [n 1].
[vi] Nigeria Police Act 2020 [NPA 2020].
[vii] Constitution of the Federal Republic of Nigeria 1999 (as altered) [CFRN 1999].
[viii] Basil Momodu, *Laws, Rules and Procedure of Criminal Investigation in Nigeria* (Evergreen Overseas Publications Limited 2013). at p. 1.
[ix] Ibid. Note that these communication devices include audio or video recording electronics.
[x] Ibid.
[xi] The CFRN 1999 [n 7].
[xii] Ibid s35 (2); see also NPA 2020 [n 6] s35 (2).

ISSN 2581 3382

[xiii] ACJA 2015 [n 5]; see also Administration of Criminal Justice Law of Oyo State 2016[ACJL 2016].
[xiv] Ibid at section 6 (2); see also ACJL 2016 [n 13] s8(2).
[xv] The ACJA 2015 [n 1]; see also ACJL 2016 [n 13] s18.
[xvi] Ibid.
[xvii] See ibid at s17(1); see also ACJL 2016 [n 13] s18 (1).
[xviii] *Suberu v The State* vol. 5 CAC 350 at 363.
[xix] This is a Constitutional right of the suspect and the police have no power to pressurise him on making further statements against his will.
[xx] Quoting the positions of Justice Clark in *Crooker v California* 357 US 433 (1958); Bolaji Owasanoye in Owasanoye. B., "Laws and Practice Relating to Police Interrogation in Nigeria*" LASU LR* vol. 1 No. 1; Ehindero.S.G., as contained in, *The Nigeria Police and Human Rights*, (Ehindero Press, 1998) p. 67; Justice Jackson in *Watts v Indiana*,338 US (1949); G. Williams in Williams, G., *The Proof of Guilt: A Study of English Criminal Trial*, (3rd Edn, 1979), who all thought that "the rule is unethical indefensible and a clog in the wheel of police efficiency and effective interrogation". Referring to this horde of authorities, Nmerole was unmindful also of a contrary argument advanced by Justice Clark in Richard Uviller, in his treatise, 'Evidence from the Mind of the Criminal Suspect: A Recommendation of the Current Rules on Access or Restraints' [1987] Vol. 87, No. 6 (Oct. 1987), *Columbia Law Review* pp. 1137-1212 https://www.jstor.org/stable/1122587, accessed on February 7, 2022..
[xxi] The CFRN 1999 [n 7].
[xxii] Nmerole C. I: *Police Interrogation in Criminal Investigation* (Halygraph Nig. Ltd. 2008) p. 272.
[xxiii] CFRN 1999 [n 7].
[xxiv] Ibid at s36(5).
[xxv] See *Igbikis v The State* (2017) 5 SCM 140 at 149.
[xxvi] See *Agu v The State* (2017) 25 SCM 15 at 32-33.
[xxvii] See the case of *Gachi v the State* (1985) NMLR 333. See also *Odidika. v The State* (1977) 2 SC 21; and *Njovens v The State* (1973) 5 SC 17.
[xxviii] *Ikemson v the State* NSCQR (1989) 153 also reported in (1989) NWLR (pt. 110) 455.
[xxix] Ibid at 469.
[xxx] *Utteh v The State* (1992) 3 NWLR (pt. 138) 301 at 311.
[xxxi] *Adekunle v The State* (Supra) at 31.
[xxxii] *Ali & Ors v The State* (1988) 1 NWLR (pt. 68) 1 at 18.
[xxxiii] *Adekunle v The State* (supra) at 32.
[xxxiv] *Agugua v The State* (2017) 6 SCM 1; see also *Okoro v The State* (1988) 5 NWLR (pt. 94) 255 at 266.
[xxxv] Ibid at 28.
[xxxvi] Ibid.
[xxxvii] Ibid at p. 31.
[xxxviii] Nmerole, Celestine I., *Police Interrogation in Criminal Investigation* [n 22].
[xxxix] See ACJA 2015 [n 1] s6(2); see also CFRN 1999 [n 7] s35; the NPA 2020 [n 6] s35(1).
[xl] See the CFRN 1999 [n 7] s35 (4).
[xli] *Mohammed v The State* (2015) 4 SCM 214.
[xlii] Ibid at 223.
[xliii] CFRN 1999 [n 7].
[xliv] The Judges Rules were then formulated in 1912 by the judges of the King's Bench of England for the guidance of police officers in interrogating suspects. Originally nine in number, the old Rules have been superseded by six new Judges' Rules promulgated by the British Home Office in 1964. The Rules are of general application in Nigerian Courts but in the Northern States, they have been modified in the Criminal Procedure (Statement to Police Officers) Rules of 1960.
[xlv] Nmerole, C. I. *Police Interrogation in Criminal Investigation* [n 22] p. 157.
[xlvi] *Gani Fawehinmi v IGP & Ors.*, (2002) 23 WRN 1 at. 34.
[xlvii] Judges' Rule No. 2.
[xlviii] EA 2011 [n 4].
[xlix] Ibid at s29(2).
[l] Ibid 29(4).
[li] See ACJA 2015 [n 1] s17 (2); see also ACJL 2016 [n 13] s18 (1).
[lii] Ibid at s15(4), *ibid*; see ACJL 2016 s18 (2).
[liii] *Gbadamosi v The State* (1992) 9NWLR (pt. 266) *465.*
[liv] *Alo v The State* (2015) 2 SCM1 at 18.
[lv] *Asimi v The State* (2016) 9 SCM 18 at 33.

ISSN 2581 3382

lvi *FRN v Borishade* (2015) 1 SCM 103 at 116.
lvii *Peter Durogo v The State (1992)* 7WLR (pt. 255) *525.*
lviii EA 2011 [n 4] s167.
lix *Ogudo v The State* vol. 7 CAC 257.
lx Ibid at 275.
lxi *Gbadamosi v The State (1992)* NWLR (pt. 266) 465.
lxii Ibid.
lxiii See CFRN 1999 [n 7] s35(3).
lxiv Ibid at s35(2).
lxv Ijalana E. F. *The Exercise of Police Discretion under the Nigeria Law*, (2012) (unpublished), an M.Phil. thesis submitted to the Faculty of Law, Obafemi Awolowo University, Ile-Ife, P.206.
lxvi Ibid*;* see also ACJI 2016 [n 13] s18 (1).
lxvii Ibid.
lxviii Nmerole, [n 23] p. 228.
lxix See EA 2011 s 31; see also Samaila v The State (2020) 8 SCM 174 at 184-185.
lxx *Ifaramoye v The State* (2017) 4 SCM 1 at 27.
lxxi *Dondos v The State* (2021) 5 SCM 1 at 25.
lxxii Momodu [n 8] at p.106; see also Nmerole [n 23] at p. 228.
lxxiii Ijalana [n 65].
lxxiv Ibid.
lxxv Ibid pp. 106 and 107.
lxxvi Ibid.
lxxvii Momodu [n 8], p. 107.
lxxviii Ibid.
lxxix Ibid.
lxxx *Oseni v The State* (2011) 6 NWLR (Pt. 1242) 138.
lxxxi Ibid at 165; see also *Oloye v The State* (2018) 14 NWLR (Pt. 1640) 509 at 530.
lxxxii Judges Rule No. 5.
lxxxiii See EA 2011 [n 4] s29 (4).; see also *Ifaramoye v The State* [n 70] at 36; *Jimoh v The State* (2014) 216 at 241- 242
lxxxiv *Alo v The State* (2015) 2 SCM 1 at 17.
lxxxv Aguda, T. A., *The Law of Evidence* (4th edn, Spectrum Books Limited 1980).
lxxxvi *Olalekan v The State* (2004) 1 CAC 203.
lxxxvii Ibid, p. 214.
lxxxviii Ibid, p. 215.
lxxxix *Ifaramoye v The State* [n 70].
xc Ibid at 24.
xci *Namsoh v The State* (1993) 5 NWLR (Pt. 292) 129 at p. 144 (paras. C-E).
xcii Ibid, p.145 paragraph G; See also *Bakin v State* (1981)5 SC 75.
xciii *Otufale v The State* (1968) NMLR 261.
xciv See *FRN v Borishade* [n 56] at 117.
xcv See *FRN v Dairo & Ors* (2015)1 SCM 125 at pp. 151-153.
xcvi *Posu & Anor v The State, vol. 5* CAC 329 at 339.
xcvii *Eme Orji v The State* (2008) 7 SCM 116.
xcviii Ibid, at p. 132.
xcix *Okanlawon v The State* (2015) 9 SCM 159 at 183.
c *The State v Gwangwan* (250) 9 SCM 253 at 276.
ci *Dondos v The State* (2021) 5 SCM 1 at 23.
cii *Ladan v The State* (2016) 6 SCM 113 at 124-125; see also *Okeke v The State* (2016) 1 SCM 71 at 86-87; *Dibia v The State* (2017) 5 SCM 25 at 43; *Asimi v The State* (2016) 9 SCM 18 at 28-29; and *Musa v The State* (2018) 7 SCM 92 at 160.
ciii *Suberu v The State, vol. 5* CAC 250 at 363.
civ See *Akpa v The State* (2008) 8 SCM 67 at 81; see also *Solola. v the State,* vol. 2 CAC 233 at. 246; *Durogo. v the State* (1992) 7 NWLR (pt. 225) 525 at 541.
cv Ibid, p. 81.
cvi *Dondos v The State* [n 72].
cvii *Ahamba v The State* (1992) 5 NWLR (pt. 242) 450.
cviii Ibid.
cix *James Igbinovia v The State* (1981) 2 SC 1 at 15 (per Obaseki).

ISSN 2581 3382

cx Ibid. at p. 28.
cxi *Suberu v The State* [n 103] at 363.
cxii *Idowu v The State* (2000) 7 SC 114 at 125-126; see also *Alarape & Ors v the state* (2001) 5 NWLR (pt.705) 79.
cxiii *Alarape & Ors v The state, ibid.*
cxiv *Musa v the State* [n 102] at 103-104; see also *Afolabi v The State* (2016) 10 SCM 20 at 42; *Ubieho v The State* (2005) 2 SCNJ 1 at 8, (2005) 2 SCM, 193; *Idowu v The State* (2000) 7 SC 114 at 125-126.
cxv *Ladan v The State* [n 102] at 121-122; see also *Okanlawon v The State* (2015) 9 SCM 159 at 184-185.
cxvi *Adisa v The state* (2014) 12 SCM 42 at 56-57.
cxvii *Afuape v The State* (2020) 9 SCM 56.
cxviii Ibid at 75-77
cxix *Muhammad v The State* (2017) 12 (Pt. 2) SCM 588 at 609.
cxx *Oseni v The State* (2012) 4 SCM 150.
cxxi Ibid.
cxxii *Okanlawon v The State* (2015) 9 SCM 159 at 184.
cxxiii See *Samaila v The States* (2020) 8 SCM, 174 at 184; see also *Adamu v The State* (2017) 12 (Pt. 2) SCM 67 at 89-90.
cxxiv *Edoko v The State* (2015) 2 SCM 78 at 90.
cxxv Ibid, 125; see also *Fabiyi v The State* (2015) 9 SCM 51 at 66.
cxxvi Arogundare v *The State* vol. 5 CAC 25 at 34. In *FRN v Iweka* vol. 6 CAC 130 at 153, the Supreme Court affirmed that an extrajudicial admission of truth made orally carries no less weight than the one made in writing. See also *Otufale v The State* (1968) NMLR 261; and Uche & Anor v *R (1964)* 1 ALL NLR 195.
cxxvii See ACJA 2015 [n 1] s15 (4) & (5)
cxxviii See *Solola & Ors v The State* [n 104] at p. 246, see also *R v Omeriwure Sapele* (1957) 2 FSC 24.
cxxix *Odeh. v Federal Republic of Nigeria*, vol. 4 CAC 202.
cxxx Ibid at pp. 335-336.
cxxxi *Ogudu v The State*, vol. 7 CAC 257.
cxxxii Ibid at pp. 274-275.
cxxxiii ACJA 2015 [n 1].
cxxxiv Ibid.
cxxxv Ibid s17 (2).
cxxxvi Ibid.
cxxxvii Ibid.
cxxxviii *Owhoruhe v C.O.P* (2015) 7 SCM 242 at 255.
cxxxix Ibid.
cxl Ibid.
cxli Ibid.
cxlii *Musa v The State* [n 102] at 101.
cxliii *Okpere v The State* (1971) 1 All NLR 1, supra at p. 5.
cxliv Ibid at 1; see also *Haruna v State* (1967) NMLR 145.
cxlv Ibid at p. 5.
cxlvi *Madgenu v The State* (2001) 6 SCM 135.
cxlvii See *Busari v The State* (2015) 1 SCM 74 at 90.
cxlviii See *Ubierho v The State vol.2* CAC 262 at 278, see also *Nwagbonu v The State* (1994) 2 NWLR (pt. 327) 380; and *Egbogonoine v The State* (1993) NWLR (pt. 306) 383.
cxlix *Adisa v The State* (2014) 12 SCM 42.
cl Ibid at 59.
cli See ACJL 2016 1 (3).
clii *Ifaramoye v The State* [n 70] at 30.
cliii *Dibia v The State* (2017) 5 SCM 25 at 44.

ISSN 2581 3382