

## ISSUES ON EXCLUSIONARY RULES OF EVIDENCE UNDER THE EVIDENCE ACT 2011<sup>1</sup>

### **Abstract**

*The aspects of the law of evidence that is generally associated with exclusionary rules are illegally or improperly obtained evidence. However, there is a wider sense and connotation of the rules of exclusion. It is in this wider sense that this paper proposes to discuss 'issues on exclusionary rules of evidence' under the Evidence Act, 2011. All types of evidence are subject to some form of exclusionary rules, condition for admissibility, or foundation that the proponent of the document must lay before the document is admissible under the Evidence Act, 2011. The rule is that before evidence is admissible it must be relevant but not all relevant evidence is admissible. That, in the opinion of the writer, is the wider sense of the exclusionary rules of evidence. However, this study shall focus and highlight a few areas of the Act that require further debate on their utility as aids to justice.<sup>2</sup>*

**Keywords:** Exclusionary Rules, Evidence, Evidence Act 2011, Nigeria

### **1. Evidence Act 2011**

The Evidence Act 2011 received Presidential assent on the 3<sup>rd</sup> day of June, 2011. 'The Act' consists of 259 sections and sixteen Parts. The length and depth of the provisions of the Act constrains emphasis and attention on only salient provisions that the writer considers novel or likely to generate problems in practice. The scope of certain provisions of the Act, the rules of admissibility or exclusion in the Act presents challenges that call for debate on the need to re-engineer the Act.

### **Part I of the Evidence Act**

Section 3 of the Act states that nothing in the Act 'shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria'. The import of this provision is that the National Assembly can enact any legislation that may render admissible any evidence that may not necessarily be admissible or conclusive under the Evidence Act. It is within the purview of section 3 of the Act that section 29(1) of the Terrorism (Prevention) (Amendment) Act, 2013 authorizes a Judge to make an order for the interception of electronic communication. Any data gathered pursuant to section 29(1) of the TPAA, 2013 'shall be admissible in a proceeding for an offence under this Act, as evidence of the truth of its content'.<sup>3</sup> Section 29(4) TPAA, 2013 creates an irrebuttable presumption that any evidence gathered pursuant to section 29(1) of the Act is true and correct. In a similar vein, certain certificates are admissible under the TPAA, 2013. For example, section 32 of the Act, provides as follows:

Where in any proceeding for an offence under this Act, question arises as to whether anything or substance is a weapon, a hazardous, radioactive or harmful substance, a toxic chemical or microbial or other biological agent or toxin, a

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<sup>2</sup>William Shakespeare said those who would in haste make fie begin them with weak straw. This paper was welded together within a short span of time. The indulgence of the reader is craved to pardon errors which may have been corrected with greater attention.

<sup>3</sup> See section 29(4) of the TPAA, 2013

certificate purporting to be signed by an appropriate authority to the effect that the thing or substance described in the certificate is a weapon, hazardous, radioactive or harmful substance, a toxic chemical or other biological agent, shall be admissible in evidence without proof of the signature of the person appearing to have signed it and shall, **in the absence of evidence to the contrary, be proof of the facts stated therein.**<sup>4</sup>

The words in bold character in the above quotation suggest a rebuttable presumption. From the provisions of sections 29 and 32 of the TPA, 2013, the National Assembly has validly created certain presumptions in terrorism cases that are not contained in the Evidence Act, but are valid under section 3 of the Act. Such presumptions are not subject to exclusionary rules under the Evidence Act.

### **Part II of the Act**

Part II of the Evidence Act deals with relevancy of facts. The substance of this Part encapsulates the principle that relevancy is the litmus test of admissibility. However, exclusionary rules curb the admissibility of evidence which may be relevant but are made inadmissible by the rules of evidence.

### **Part III of the Act- Relevance and Admissibility of Certain Evidence**

Part III deals with improperly obtained evidence, custom, admissions and confessions, statements and other evidence in criminal cases, etc.

#### **Improperly Obtained Evidence**

Section 14 and 15 of the Act exemplifies the core 'exclusionary rules' of evidence in other jurisdictions. Section 14 of the Act render admissible improperly obtained evidence 'unless the court is of the opinion that the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained'. The factors that a court may use to determine whether to admit improperly obtained evidence are provided by section 15 of the Act. The rule codified in section 14 of the Act originated from the decision of the House of Lords in case of *Harris v. DPP*<sup>5</sup> but was made more popular by *Kuruma Son of Kanio v. R*<sup>6</sup> where the Privy Council held thus: 'In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.' The Privy Council further held as follows: 'No doubt in a criminal case the judge always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused... If, for instance, some admission of some piece of paper, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.'<sup>7</sup>

The Supreme Court of the United States laid down the exclusionary rule in *Mapp v. Ohio*<sup>8</sup> where the Court stated that 'the criminal goes free, if he must, but it is the law that sets him free. Nothing

<sup>4</sup> Words in bold character ours for emphasis.

<sup>5</sup> (1952) AC 694

<sup>6</sup> (1955) 2 WLR 233, at pp226-227

<sup>7</sup> *ibid*

<sup>8</sup> 367 U.S. 643, 659 (1961)

can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence'. However, the exclusionary rule established in *Mapp v. Ohio*<sup>9</sup> has been whittled down by *Hudson v. Michigan*<sup>10</sup> and *Herring v. United States*<sup>11</sup> where the Supreme Court of the United States, in majority decisions held that the ratio in *Mapp v. Ohio*<sup>12</sup> represents ideas of bygone days where the police were less sophisticated, and that unless the illegality in obtaining the evidence were reckless, negligent or serious, a court may not exclude evidence obtained in contravention of law. Thus, unlike England<sup>13</sup> and Nigeria where the Judge evaluates the circumstances before determining whether the prejudice of the evidence out-weighs the probative value, in the United State, illegally obtained evidence may sometimes regarded as the fruit of a poisoned tree that is itself tainted and cannot be admissible.<sup>14</sup>

The exclusionary rule relating to illegally obtained evidence in Nigeria is unique and radically different from the rule in other jurisdictions in several senses. Under section 15 (c) of the Evidence Act, 'the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding' is significant, while under section 15(g) 'the difficulty, if any, of obtaining the evidence without impropriety or contravention of law' is an important factor that may blunt the illegality in the method of procurement of the evidence by the prosecution. Another divergence between Nigerian exclusionary rule and the rules in England and the United States relates to confessions.

### **The Fruits of Inadmissible Confessional Statements**

The rules for admissibility of confessional statements are contained in section 28 and 29 of the Evidence Act. While section 28 defines a 'confession', section 29 of the Act stipulates the conditions for the admissibility of a confessional statement. Section 29(1)-(3) and 29(5) of the Evidence Act was lifted from section 76(1)-(3) and 76(8) of the Police and Criminal Evidence Act, 1984 of England and Wales. However, unlike the Police and Criminal Evidence Act that has Codes for regulating the conduct of police investigation, the Evidence Act does not contain any Codes of Practice. Instead, courts in Nigeria are guided by the Constitution, criminal justice legislations, and the Judges Rules in determining the propriety or otherwise of police investigations, particularly interrogations.<sup>15</sup> A confession taken in violation of section 29 of the Evidence Act shall be excluded by the Court. However, the fact that a confession is declared inadmissible and excluded by the court shall not debar e admissibility of physical or other evidence discovered in consequence of such confession.<sup>16</sup>

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<sup>9</sup> *ibid*

<sup>10</sup> 547 U.S. 596( 2006)

<sup>11</sup> 129 S. Ct.695 (2009)

<sup>12</sup> *Supra*

<sup>13</sup> See generally, G. Arthur Martin, "The Exclusionary Rule Under Foreign Law" *Journal of criminal Law and Criminology*, Vol. 52, Fall 1961 pp 271-272

<sup>14</sup> See generally Susan A. Bandes, "The Roberts Court and the Future of the Exclusionary Rule" *American Constitution Society for Law and Justice*, April, 2009; see also Richard M. Re, "The Due Process Eclusionary Rule" *Harv. L Rev.* Vol. 127 (May 2014) pp 1893-1966.

<sup>15</sup> See

<sup>16</sup> See section 30 of the Evidence Act.

### **Adverse Comments**

Furthermore, in England and Wales, the Criminal Justice and Public Order Act, 1994 and the Criminal Justice (Terrorism and conspiracies) Act, 1998 have introduced wide reaching provisions to enable courts and prosecutors to make adverse inferences of guilt where the defendant failed to state any fact during investigation that he later relies upon at trial. In Nigeria, adverse inferences can only be made where the defendant fails to testify at trial.<sup>17</sup> This is one area where students, who study abroad, particularly England, raise issues with Nigerian law. They make the point that section 30 is against the Convention Against Torture. However, Nigeria is not alone in her recognition of admissibility of the fruits of an otherwise inadmissible confession. Section 76(4) of PACE, 1984, England and Wales states, inter alia, that the fact that a confession is wholly or partly excluded shall not affect the admissibility in evidence 'of any fact discovered as a result of the confession'. Evidence discovered pursuant to section 30 of the Evidence Act is admissible notwithstanding that the excluded confession which revealed the physical evidence was taken while the suspect was in custody. Thus, a confession procured through torture is not admissible, but physical evidence discovered through torture is admissible in evidence. This is an area where the courts may in future comment on the constitutionality of a provision that seems to justify rough measures by the police to obtain physical evidence. Courts may then determine that the trade-off between solving crimes and inherent violation of basic constitutional norms are too severe to tolerate. Courts may on the other hand take the position that reasonable allowance should be made for collective peace and security. Another device that the legislature may adopt is to separate discovery of information for intelligence purposes, and use of such evidence as evidence. While it is more palatable to allow law enforcement agencies ample room for intelligence gathering, there is a sense that not every fruit of abuse of the rights of a suspect should be countenanced as evidence in court as evidence of guilt.

### **Deception and failure to caution the arrestee are not grounds for exclusion of Confessions**

Section 31 of the Evidence Act is also another interesting provision. The provision of the section is set down for ease of reference as follows:

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 need 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.

Under the provisions of section 31 of the Act, a confession made to an undercover police officer who is planted in the cell is admissible. The Supreme Court of Nigeria considered a similar provision in the repealed evidence Act in *Igbino v, The State*.<sup>18</sup> The Court held, per Obaseki JSC as follows:

In this area of the world where crimes of violence are on the increase and means of investigation are in their rudimentary stage of development coupled with the secrecy with which these crimes are committed and the abiding faith in concealment of facts by what-ever means by the perpetrators of these crimes, the

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<sup>17</sup> See section 181 Evidence Act, 2011.

<sup>18</sup> (191) NSCC 63

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 is 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 pour out stories of what to them are brave deeds of courage but which to civilised human societies are atrocious acts of violence against society and humanity, that information cannot become inadmissible only by reason of the 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. Therein lies, in my opinion the free atmosphere in which to open and close one's mouth and mind. It is this climate of freedom that imparts the voluntary nature to the words spoken at that point of time. If the words are confessional they constitute an extra-judicial confession which, when tested for truth and found proved, went to establish the guilt of the author/suspect of the crime alleged.

Also, the Judges Rules and the Criminal Procedure (Statement to Police Officers) Rules 1970 require the police to caution suspects before taking their statements. However, by virtue of section 31 of the Evidence Act, a statement cannot be excluded by a court simply because the defendant was not warned as to his right to silence before the statement was taken. It remains to be seen if courts will exclude statements where the custodial rights of suspects under the Administration of Criminal Justice Act, 2015,<sup>19</sup> or under the Administration of Criminal Justice (Repeal and Re-Enactment) Law, 2011 of Lagos State,<sup>20</sup> are violated.

### **Admissibility of Oral Confessions**

The Supreme Court of Nigeria held in *Suleiman Olawale Arogundare v The State*<sup>21</sup> that oral confessions are admissible. Section 15(5) of ACJA, 2015 has codified this principle. However, it is worthy of note that the oral confession in *Arogundare's case* was taken at about 2am while he was in detention. The person who heard the confession was a superior police officer. The victim of the case died under horrendous circumstances. However, a clear-eyed consideration of the condition observance of the custodial rights of suspects in an average Nigeria Police dictates caution and requires that oral confessions necessitate a unique sets of rules in Nigeria to prevent abuse.

### **Statements Generally**

This sub-heading is found immediately before sections 33 and 34 of the Evidence Act. There is reference in section 34(1)(b) to 'a statement contained in a document produced by a computer', 'the supply of information to that computer or with the operation of that computer or any equipment by

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<sup>19</sup> See inter alia, sections 6, 8, 15 and 17 of ACJA, 2015

<sup>20</sup> See section 3(2) and 9(3) of the ACJ (R&R) L, 2011

<sup>21</sup> (2009) 6 NWLR (Pt.1136) 165

means of which the document containing the statement was produced by it...’ The reference in section 34(1) (b) of the Act to some form of computer generated evidence and conditions for admissibility is confusing having regard to the provisions of section 84 of the Act that is later discussed in a later part of this presentation. It seems that section 84 of the Act is not the only provision that regulates the admissibility of computer generated evidence in Nigeria.

#### **Part IV-Hearsay, Opinion and Character Evidence: Relevance and Admissibility**

Part IV regulates the relevance and admissibility of hearsay, opinion and character evidence. Section 37 of the Act defines hearsay evidence while section 38 of the Act states that hearsay is not admissible unless under any of the exceptions to the hearsay rule provided by the Act. Section 39 to section 65 of the Act are exceptions to the hearsay rule contained in the repealed Evidence Act 1990 that are restated in the 2011 Act. Section 66 to 76 of the Act make provisions for opinion evidence, while section 78 to 82 of the Act relate to character evidence.

#### **Part V-Documentary Evidence**

Part V of the Act contains some of the most novel but contentious provisions in the Act. For instance, section 84 of the Act lays down the conditions for the admissibility of statements in documents produced by computers. The complexities of computer generated evidence were high-lighted in the English case of *Minors*<sup>22</sup> as follows:

Often the only record of the transaction, which nobody can be expected to remember, will be in the memory of a computer. ... If computer output cannot relatively readily be used as evidence in criminal cases, much crime (and notably offences involving dishonesty) would in practice be immune from prosecution. On the other hand, computers are not infallible. They do occasionally malfunction. Software systems often have ‘bugs’... Realistically, therefore, computers must be regarded as imperfect devices.

Section 84 of the Act is derived from section 5 of the Civil Evidence Act 1968 of the United Kingdom, and not section 69 of the Police and Criminal Evidence Act 1984 in certain quarters. In any case, section 69 of PACE was expressly repealed by section 60 of the Youth Justice and Criminal Evidence Act 1999 UK. However, before the problems of operation section 69 of PACE caused its repeal, the House of Lords commented on the scope of the section in *DPP v. McKeown*<sup>23</sup> as follows:

The purpose of section 69, therefore, is a relatively modest one. It does not require the prosecution to show that the statement is likely to be true. Whether it is likely to be true or not is a question of weight for the justices or jury. All that section 69 requires as a condition of admissibility of a computer-generated statement is positive evidence that the computer has properly processed, stored and reproduced whatever information it received. It is concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered in evidence of a fact which its states.<sup>24</sup>

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<sup>22</sup> (1989) 1 WLR 441 at 443D-E

<sup>23</sup> (1997) NLQOR No.135

<sup>24</sup> *ibid*

There are, however, major differences between section 5 of the Civil Evidence Act and section 84 of the Evidence Act are:

- a. The Civil Evidence Act provided only for civil trials while section 84 of the Evidence Act purports to apply to both civil and criminal cases;
- b. Section 5(1) of the Civil Evidence Act made the Act subject to the rules of court while section 84 of the Evidence Act is intended to be complete;
- c. Section 5(6) of the Civil Evidence Act defined 'computer' while the definition of computer in the Evidence Act 2011 is contained in section 258 of the Act.
- d. Section 6 of the Civil Evidence Act 1968 permitted the admissibility of computer generated evidence by 'production of the document, or material part thereof, authenticated in such manner as the court may approve' but section 84 of the Evidence Act does not countenance production of any document that fail to comply with section 84(2) and (4) of the Evidence Act.<sup>25</sup>
- e. Section 6(2) of the Civil Evidence Act is authority for a court to draw inferences from surrounding circumstances to determine admissibility of any evidence, including computer generated evidence. Unless section 84 of the Evidence Act is read with section 34 of the Act, a court cannot make inferences before determining whether to exclude evidence that otherwise satisfies the provisions of section 84 of the Act.
- f. Section 6(3) and (5) of the Civil Evidence Act enabled a court to determine the weight of computer generated documents. Unless section 34 of the Evidence Act is read with section 84 of the Act, a court may not test weight of evidence like a court in the UK.
- g. Also, under section 8 of the Civil Evidence Act, the proponent of the document must give to the adversary of the intention to adduce computer generated evidence. There is no such requirement under the Evidence act 2011.

Is section 84 of the Evidence Act intended to be complete in itself in relation to computer generated evidence?

The draftsman of the Evidence Act, 2011 curiously scattered several provisions on computer generated evidence in different provisions of the Act. Section 34 of the Act, 51, 52, 93(2) & (3) of the Act all deal with different types of electronic evidence. Section 84 is likely to cause a lot of problems. The ration in *P.D. Hallmark Contractors Ltd & Anor v. Gomwalk* <sup>26</sup>suggests some of the problems that may be caused by section 84 of the Act. The Court of Appeal held in that case that the foundation or procedure for admissibility of computer generated evidence laid down in S. 84(4) &(5) of the Act and that any party that desires to prove computer generated evidence shall plead and prove how the document was generated or processed. Is a bank customer who relies on a statement of account printed from the computer system of his banker expected to plead and prove how the computer operates and processed documents? Is a prosecutor who relies on computer printouts evidencing a crime that was recovered in the course of investigation expected to lead evidence concerning the production of the document before a court can admit the document as proof of its

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<sup>25</sup> See *Kubor v. Dickson* (2012) LPELR-9817(SC); (2013) 4 NWLR (Pt.1345) 534; see also *Dickson v. Silva & Ors* (2016) LPELR-41257(SC)

<sup>26</sup> (2015) LPELR-24462(CA)

contents? These and other problems are issues not contemplated by the draftsman of section 84 of the Evidence Act.

It is urged that courts should not interpret section 84 of the Act in such a manner as to exclude evidence deemed relevant and admissible by section 34, 51, 53 and 93(2)&(3) of the Act, otherwise, it might cause injustice. Decisions of courts from other jurisdictions are not necessarily of assistance in the construction of the provisions of section 84 of the Evidence Act. Such decisions may, however, assist in the comprehension of the complexity and nature of computer generated evidence. The decision of the House of Lords in *R v. Shepherd*<sup>27</sup> for instance, is a signpost for the danger of misapplication of electronically generated evidence. The decisions of the Supreme Court of India on section 65B of the India Evidence Act are particularly illustrative of the caution that is required in determining whether to exclude or admit computer generated evidence. The wording of section 65B of the India Evidence Act, which deals with admissibility of electronic record, is different from section 84 of the Evidence Act. The Information Technology Act 2000 of India also contains provisions on electronic evidence. By contrast, Nigeria does not have an information technology legislation. The Cybercrimes (Prohibition, Prevention, etc) Act, 2015 does not contain any provisions on admissibility of electronic evidence. In *Anvar P.V. v. P.K. Basheer & Ors*<sup>28</sup> the Supreme Court of India held, overruling the court's earlier decision in another case, as follows:

The evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Section 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Section 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu* case, does not lay down the correct legal position. It requires to be overruled and we do so.

The decision in the above-cited case now represents the correct position of law in India. But the fact that the Court felt the need to overrule its decision in *State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru*<sup>29</sup> shows the dynamic nature and emerging understanding concerning the nature of computer generated and electronic evidence. It is interesting to note that in the recent case of *Jagjit Singh v. State of Haryana*<sup>30</sup> the same court held that an original CD is admissible in evidence. Similarly, in *Shamsher Singh Verma v. State of Haryana*<sup>31</sup> the same court held that: 'In view of the definition of 'document' in Evidence Act, and the law laid down by this Court, as discussed above, we hold that the compact disc is also a document'. Courts in Nigeria should observe the nuanced provisions in sections 34, 51, 52, 93(2)&(3), and the definition of 'document' in section 258 of the Evidence Act in order not to shut out parties from presenting their cases by excluding evidence that

<sup>27</sup> (1993) 1 All ER 225, at 231

<sup>28</sup> (2014) 10 SCC 473

<sup>29</sup> (2005) 11 SCC 600; AIR 2005 SC3820 (this case dealt with admissibility of intercepted communication)

<sup>30</sup> (2006) 11 SCC 1

<sup>31</sup> Criminal Appeal No.1525 of 2015



are relevant and admissible under the sections mentioned above, but fail to satisfy the foundation required by section 84 of the Act when the computer or garget is within the control of the adversary, or a person or entity that is unwilling to cooperate, or, for instance, an entity that is the subject of criminal enquiry or prosecution. In *FRN vs. Femi Fani – Kayode*<sup>32</sup> the Court of Appeal demonstrated the wisdom required in the construction of the disparate provisions of the Evidence Act that are connected to electronic evidence. The Court held, *inter alia*, in relation to banker’s evidence that:

[N]owhere in Section 97 is the means of making the copy referred to, nor made relevant. How the copy is made; that is the device used to make the copy whether by longhand writing, by a duplicating machine or via a computer printout is not relevant. Not from the ordinary wordings of the provisions of Section 97(2) (e) (h) of the Evidence Act.

This case suggests that there are other tracks for the admissibility of electronic evidence in the Act than section 84 of the Act.

**Parts VI, VII, and VIII** provide for proof, oral evidence and the inspection of real evidence, and exclusion of oral evidence by documentary evidence. These areas are traditional areas which, in our view, are less contentious and controversial than other parts discussed previously in this presentation.

#### **Part IX-Production and Effect of Evidence**

There are provisions in Part IX of the Act for burden and standard of proof, both in civil and criminal cases. We speculate that the time might be right to reduce the burden of proof of allegations of criminality in election cases to the standard of proof on the balance of probabilities.

**Part X** of the Act makes provisions for presumptions and estoppel, while Part IX deals with witnesses. The provisions on competence and compellability of witnesses are straight forward. However, section 177 of the Act may be put to mischief if read together with section 84 of the Act in relation to documents produced by bank computers. Section 84 of the Act needs recalibration to avoid unintended consequences particularly in criminal cases, and cases in which a bank’s interest might conflict with that of the interest of its customers.

#### **Adverse Comments Consequent upon Failure of Defendant to Testify**

Section 181 of the Act allows the court and the prosecutor to make certain comments where a defendant invoke’s his right to silence at trial. It is suggested that this section be amended to allow courts to draw adverse inferences where a defendant raises a fact for the first time on trial when such fact was available but was not mentioned during investigation. This principle already applies in relation to the plea of alibi. It should be extended to exculpatory facts not drawn to the attention of the police at the earliest opportunity.

#### **Issues Relating to Compellability of Witness During an Inquiry Under Part 49 of the CPA**

Section 183(c) of the Act provides that a witness may be compelled to answer any question during an inquiry pursuant to Part 49 of the Criminal Procedure Act at the instance of the Attorney-General of the

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<sup>32</sup> (2010) 14 NWLR (Pt.1214) 481

Federation or Attorney-General of the State, as the case may be. However, section 493 of the Administration of Criminal Justice Act, 2015 repealed the CPA. Consequently, the section 183(c) of the Evidence Act needs to be amended to align it with the ACJA and relevant criminal procedure legislations in the various States of the federation.

### **Compellability as to Production of Documents**

Section 185 of the Act provides that no person shall be compelled to produce documents which another person may not be compelled to produce. It is difficult to fathom the applicability of this section to section 84 of the Evidence Act read with section 89 of the Act. It is thus necessary to amend section 84, 89, 185, 244, and 245 of the Act to allow secondary evidence where a computer is in the control and power of the person against whom secondary evidence of the existence, condition or content of computer generated evidence is sought to be adduced. The rules relating to notice to produce under sections 89, 244, and 245 of the Act are insufficient to address the peculiar nature and character of computer generated evidence and the conditions for the admissibility of computer generated evidence under section 84 of the Act.

### **The Taking of Oral Evidence and Examination of Witnesses**

**Part XII** deals with the taking of oral evidence and examination of witnesses. The caution for witnesses summoned to give evidence under section 206 of the Act serves to re-emphasize the consequences of perjury. All persons are competent witnesses unless they cannot understand questions put to them or give rational answers.<sup>33</sup> This rule applies to every person above 14 years.<sup>34</sup> A child below 14 years may give evidence other than upon oath if he scales through the tests prescribed by section 208 and 209 of the Act.

Other provisions of Part XII of the Evidence Act provide for examination in chief, cross examination, and re-examination. It is often said by advocates that in cross-examination, the sky is the limit. However, in *Olomosola v. Oloriawo*<sup>35</sup> Niki Tobi JCA (as he then was) stated, inter alia, as follows:

One cliché or aphorism has always worried me in the profession, and it is that in cross examination the sky is the limit. Counsel love it. It is almost a song in the judicial process. Apart from the fact that the judicial process has nothing to do with the sky, which is not within the reach of the ordinary man, the statement is not correct in law. In law it is not cross examination which is said not to have any inhibition or limitation, but relevancy as a principle of the law of evidence, has to be considered. The point I am struggling to make is that evidence procured from cross examination can only be admitted if it is relevant to the live issues before the court. Counsel may decide to ask irrelevant questions (and some do) but the trial judge cannot make use of evidence procured from such questions because they are outside the live issues in the matter.

The right to fair hearing is, in our view, not a license for dilatory cross examination to paralyze the business of a court or tribunal. The Administration of Criminal Justice Act 2015, the Practice Direction of the Federal High Court relating to corruption and other trials, and similar practice direction at the High Court of the Federal Capital Territory empower judges to control their court rooms. So long as one party is not allowed more time than the other, there cannot be any cry of the wolf of denial of fair hearing where there are none. Apart from parties to litigation, several sections of the Act empower courts questions that

<sup>33</sup> See section 175 of the Act

<sup>34</sup> See section 209 of the Act.

<sup>35</sup> (2002) 2 NWLR Pt 750) 113

are asked without reasonable grounds<sup>36</sup> Sections 230 and 231 of the Act pertain to evidence of hostile witness. Also in this Part of the Act, provisions are made for impeaching credit of witnesses,<sup>37</sup> cross-examination as to previous inconsistent statement,<sup>38</sup> refreshing memory, production of documents by witness summoned to give evidence<sup>39</sup>, indecent and scandalous questions,<sup>40</sup> questions intended to insult or annoy<sup>41</sup>. Also, section 229 of the Act provides, *inter alia*, as follows: ‘When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character no evidence shall be given to contradict him, but if he answers falsely he may afterwards be charged with an offence under section 191 of the Criminal Code and on conviction shall be dealt with accordingly’:

Section 258(2) of the Act purports to make a cross reference to the Criminal Procedure Code and the Penal Code as the case may be. However, section 229 of the Act and other provisions of the Act that refer to the Criminal Code are inapplicable to states that have introduced new legislations on substantive and procedural criminal laws. Aside from the reasonable restriction imposed upon a cross-examiner or the party adverse to the party that called the witness under the purview of section 229 of the Act, there is the quite unexpected restriction of the coverage of this provision of the Act to section 191 of the Criminal Code. Are we to suppose that a witness who give false evidence under section 229 of the Act cannot be prosecuted under, for instance, the Criminal Law, 2011 of Lagos State? Greater attention to detail is required in future efforts to amend the Evidence Act.

#### **Exclusion of Evidence on Grounds of Public Interest**

Evidence may be excluded on grounds of public interest under section 243 of the Act if a Minister, or in respect of matters to which the executive authority of a state extends, the Governor or his nominee objects to the production of the document, or requests the exclusion of oral evidence of the document when after consideration he is satisfied that the production of such document or the giving of such oral evidence is against the public interest. Such objection, if taken before trial, shall be by affidavit, or, if taken at the hearing, by certificate produced by a public officer.<sup>42</sup> The court has discretion whether or not to accede to such objection, and in determining whether to uphold the objection or not, the court may inspect the document or be informed as to the nature of the oral document. Section 243 is designed to preserve the security of the State, and prevent the disclosure of intelligence and confidential sources and technique. The purpose of section 243 is not to protect public officials from disclosure of compromising information or to preserve the personal aggrandizement of public officials. It is intriguing that section 243 does not restrict the use of such documents or oral accounts in criminal cases. The provision also does not state that in criminal cases such documents or information shall be availed defence counsel even if it contains exculpatory material.

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<sup>36</sup> Section 225 and 226 of the Act

<sup>37</sup> See sections 233, 235, 237, and 238 of the Act

<sup>38</sup> See section 232 of the Act

<sup>39</sup> See section 249 of the Act

<sup>40</sup> Section 227 of the Act

<sup>41</sup> Section 228 of the Act

<sup>42</sup> See section 243(2) of the Act.

**Power of Court to Put Questions**

A judge or any person empowered by law to give evidence may put questions to witnesses to clear ambiguities or clarify points which are obscure.<sup>43</sup> However, the provision is not a license for the court to take over the case of parties, or conduct cross-examination to extract evidence to convict a defendant.<sup>44</sup>

**Part XIII of the Act** makes provisions for evidence of previous conviction,<sup>45</sup> while **Part XIX** pertain to wrongful admission and exclusion of evidence. Wrongful admission or exclusion of evidence shall not be ground for reversal of the decision of the court unless that decision could not reasonably have been the same.<sup>46</sup>

**2. Conclusion and Recommendations**

The Evidence Act 2011 introduced several new vistas into the law of evidence in Nigeria. Some of the innovations are positive, but others are potential flash-points in litigation that may cause injustice in civil cases, while others may make it more difficult for the prosecution in criminal cases. Consequently, the following proposals or recommendations for amendment of the Act are urged to ameliorate the problems that are emerging in the operation of the Act.

**Rules of Inclusion of Admissibility of Evidence under Other Legislations**

Section 3 of the Act should be retained. However, having regard to the provisions of Item 23 in the Exclusive Legislative List, it is doubtful if section 256 of the Act can save any rule of evidence that does not emanate from the National Assembly.

**Quo vadis illegally obtained evidence**

Section 14 and 15 of the Act have restated and refined the case law on illegally obtained evidence in Nigeria. The rich pedigree of these provisions commends their use and retention in the Act.

**Need to introduce provisions for admissibility of computer generated evidence in civil and criminal cases**

Section 84 of the Evidence Act purports to be a one stop shop for the admissibility of computer generated evidence in Nigeria. However, a look at sections 34, 51, 53, 93(3) of the Act, and the rules relating to notice to produce documents in several sections of the Act reveals that the pretensions of section 84 of the Act cannot be and should not be if courts are to serve the core function of discovery truth. The tests for the admissibility of computer generated evidence under section 84 of the Act are not the only tests for determining the authenticity and reliability of evidence. It is recommended that the rules on computer generated evidence should be harmonized. The Act should focus on authenticity and reliability and not on custody or management of the operation of the garget or device that generated the output. New sets of rules for admissibility of computer generated evidence in criminal trials should be evolved to assist the state particularly in view of the provisions of the Cybercrimes (Prevention, etc) Act. The present provisions on admissibility of computer generated evidence are obstacles to the discovery of truth and will impede justice.

**Any necessity to reconsider the rules for the admissibility of oral confessions in Nigeria**

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<sup>43</sup> See section 246 of the Act

<sup>44</sup> See *Grace Akinfe v. The State* (1988) 7 SCNJ 226

<sup>45</sup> See sections 248 to 250 of the Act

<sup>46</sup> See section 251 of the Act

The law must strike a balance between the needs of law enforcement agencies and the custodial rights of arrestees. Oral confessions should remain admissible. However, the current carte blanche to the admissibility of oral confession seems unsafe considered in the light of the current in camera tactics and procedures of securities agencies in Nigeria. It is reasonable to introduce a requirement that **the prosecution shall disclose the intention to adduce evidence of oral confession to the defendant before such evidence can be adduced.** Such disclosure is a part of adequate facilities for defence eloquently affirmed by the Supreme Court of Nigeria in the recent case of *Okoye v. COP, Anambra State*<sup>47</sup> to the effect that the defendant is entitled to all materials available to the prosecution to enable him prepare for his defence.

**Are the fruits of rejected confessions fundamentally tainted like the fruits of a poisoned tree?**

The fruits of rejected confessions remain invaluable in the discovery of truth and the resolution of crimes. It is expected that judges will evaluate such fruits in the context of section 14 and 15 of the Act. The United Nations Convention Against Torture should be studied to determine the extent to which signatory countries can rely on local circumstances to structure legislations.

**Deception and failure to caution the arrestee are not grounds for exclusion of Confessions**

Section 31 of the Act should be retained until such a time that Nigerians are able to readily report crimes and aid law enforcement agencies with greater patriotism.

**Scope of Comments by Courts**

A new rule should be specifically introduced in the Evidence Act to allow judges to comment on reliance by accused/defendants on facts or defences not raised at the point of earliest contact with investigators. This rule is not entirely new as that is the current practice in relation to the plea of alibi.

**Issues Relating to Compellability of Witness During an Inquiry Under Part 49 of the CPA**

Section 183(c) of the Act should be amended to reflect the reality of the ACJA, 2015 and new criminal procedure legislations in states.

**Compellability as to Production of Documents**

It is thus necessary to amend section 84, 89, 185, 244, and 245 of the Act to allow secondary evidence where a computer is in the control and power of the person against whom secondary evidence of the existence, condition or content of computer generated evidence is sought to be adduced. The rules relating to notice to produce under sections 89, 244, and 245 of the Act are insufficient to address the peculiar nature and character of computer generated evidence and the conditions for the admissibility of computer generated evidence under section 84 of the Act.

**The Taking of Oral Evidence and Examination of Witnesses**

Relevant provisions of the ACJA, 2015, the Federal High Court Practice Direction 2013, and the High Court of the Federal Capital Territory Practice Direction, 2014, generally empower judges to adopt case management techniques and strategies to prevent delay. Dilatory cross examination must not be allowed to tie the hands of judges. Judges are understandably cautious not to give room to the wolf of allegation of denial of fair hearing. A new Evidence Act should empower courts to regulate length of cross examination.

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<sup>47</sup> (2015) All FWLR (Pt. 799) 1101