

**THE RULES GOVERNING ADMISSIBILITY  
OF CONFESSION UNDER THE EVIDENCE  
ACT, CAP 112 LFN, 1990: A CRITIQUE**

**BY**

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**LL.M. THESIS, 2000**

## DECLARATION

I hereby declare that this thesis was written by me, and that it is a record of my own research work. It has not been presented in any previous application for higher degree. All quotations are indicated and the sources of information are specifically acknowledged by means of reference.

A handwritten signature in black ink, appearing to read 'Abdul-Azeez Adamu Esq.', enclosed within a large, irregular, hand-drawn oval shape.

ABDUL-AZEEZ ADAMU ESQ.

## **DEDICATION**

I hereby dedicate this thesis to my dear parents – Alhaji Danjuma A. Ahmed, Alhaji Adamu A. Ahmed, Hajija Hadiza Ahmed, Hajiya Aisha A. Ahmed and all members of the Ahmed's family.

CERTIFICATION

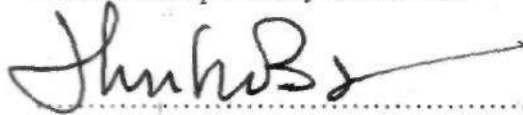
The thesis entitled **THE RULES GOVERNING THE ADMISSIBILITY OF CONFESSION UNDER THE EVIDENCE ACT CAP 112 L.F.N., 1990: A CRITIQUE, BY ABDUL-AZEEZ ADAMU ESQ** meets the regulation governing the award of the degree of Master of laws of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.



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Chairman Supervisory Committee

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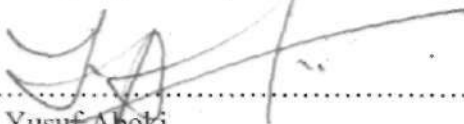
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## ABSTRACT

This thesis deals with the issue of voluntary and involuntary confession. It deals with the nature and meaning of confessional statement. The requirements and scope of voluntary confession was also examined. The requirements, scope and instances of involuntary confession were also discussed. The procedure for obtaining confessions was also critically highlighted.

This topic on confession was chosen by the student because of the controversial and interesting status of confessional statement particularly when it come to admissibility of the said confession

This thesis was also meant to highlight inadequacies of the law in respect of confessions.

In conclusion, various suggestions were given on how these inadequacies can be amended and corrected to serve the interest of justice.

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4. Northern Region Law of Nigerian Cap. 106 of 1960.
5. Judges' Rules, 1964

## ABBREVIATIONS

1. N. W. L. R - Nigerian Weekly Law Report
2. A. L.L. N. L. R - All Nigerian Law Report
3. AL.L.E. R. - All England Report
4. N.M.L.R - Nigerian Monthly Law Report
5. E. A. C. A - East African Court of Appeal
6. S. C - Supreme Court.
7. N. S. C. C - Nigerian Supreme Court Cases
8. W. L. R. - Weekly Law Report
9. W. R. N. L. R - Western Region of Nigerian Law Report
10. W. N. L. R. - Western Nigerian Law Report.
11. F. N. R. - Federation of Nigerian Report
12. P. L. R. - Plateau Law Report.
13. W.A.C.A - West African Court of Appeal.
14. N. R. N. L. R - Northern Region of Nigerian Law Report
15. C. A. R. - Criminal Appeal Report
16. K. B. - Kings Bench
17. U. L. R - Uganda Law Report.
18. Q. B - Queens Bench
19. C.C.C - Cox Criminal Cases
20. F. S. C. - Federal Supreme Court.
21. N, N. L.R. - Northern Nigerian Law Report
22. D.L.R - Dominion Law Report
23. S.C.N.L.R - Supreme Court of Nigerian Law Report
24. E.C.S.L.R - East Central State Law Report.
25. A. C. - Appeal Cases
26. N.C.R - Nigerian Criminal Report
27. A.N.S.L.R. - Anambra State Law Report.
28. C. L. R. - Commonwealth Law Report.

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## Chapter 1

### 1. NATURE AND MEANING OF CONFESSION

#### Introduction

The Nigeria Evidence Act is modelled after Stephen's Digest of the law of Evidence, which in itself is a codification of English Common Law Rules and Principles. Typical Nigerian setting and sociological background was not given due consideration in the enactment of the Act. It is based purely on the English legal system.

Confession is an important aspect of criminal trial and administration of criminal justice in Nigeria and the world in general. The history of revision of laws in Nigeria is still stereotype. That is revision without substantial alteration or amendment of the law it seeks to amend. The Nigeria Evidence Act is not an exception to this practice.

The controversy surrounding the area of confession in the Evidence Act is very much part of the law on the subject. The last revision of the Evidence Act did not cure this defect.

#### 1.1 Meaning of Confession.

The provision defining confession shall now be examined. Section 27 (1) of the Evidence Act Cap 112 L. F. N. 1990 defined a confession as follows<sup>1</sup>:

"A confession is an admission made at any time by a person charged with a crime, stating or suggesting that he committed that crime"

Professor Nokes observed<sup>2</sup> that admission is often used as confession. He also explained that an admission is used as an admission of some relevant fact to a crime, and confession as a complete admission of guilt by an accused.

It is important to note that confession is governed by a separate part of the Evidence Act, relevant to criminal charge and statement made to the police officer or person in authority.

According to Jones<sup>3</sup>, a confession is "a comprehensive admission in express words which acknowledge the declarant's commission of a crime". The learned American author's definition of confession is in line with the American principles of liberalism in the field of law. One important aspect of the above definition is its restrictive nature. The comprehensive, express words must acknowledge the declarant's commission of a crime. Nevertheless, it is restrictive and more realistic definition of confession in the American context.

Wigmore defines confession<sup>4</sup> as follows:

"A confession is an acknowledgement in express words by the accused in a criminal case, of the truth of guilty fact charged or of some essential parts of it"

This definition is full of uncertainties. The definition itself is not certain. The admission of essential part of crime may not be a confession but may be an admission, for example, where an accused admits being in possession of a gun used to commit murder. This definition is restricted in the sense that it is confined to an acknowledgement of guilt by express words.

Cross definition of confession is as follows:<sup>5</sup>

"An expression which includes any inculpatory statement by the accused, as well as full admission of guilt".

Full admission of guilt is confession. Any incrimination statement may not be confession and in the ordinary sense amount to an admission.

The provision of S.27 (1) of the Act, which defines confession, is too wide, inadequate and full of confusions. The privy council could not but observed this clearly in the Indian case of Pakala Narayana Swami V King Emperor,<sup>6</sup> which has similar wordings as S.27 (1) Evidence Act. And Stephen's Digest of the Law of Evidence which has been in application by Nigerian courts shows that Stephen's definition of confession as an admission made at any time by a person charged with a crime stating or suggestion

the inference that he committed that crime, is unreliable, as Lord Atkin stated as follows:

...In their Lordships view, no statement that contains self exculpatory matter can amount to a confession if the exculpatory statement is of some fact which, if true would negative the offence alleged to be confessed. Moreover, a confession must admit in terms either the offence or, at any rate substantially all the facts, which constitute the offence. An admission of gravely incriminating fact even a conclusively incriminating fact, is not of itself a confession. For example, an admission that the accused is the owner of, and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in STEPHEN'S DIGEST OF THE LAW OF EVIDENCE Art 22, which defines a confession as an admission made at any time by a person charge with a crime stating, or suggesting the inference, that he committed that crime if the surrounding articles are examined, it will be apparent that the author, after dealing with admission generally, is applying himself to admission in criminal cases, and for this purpose defines confession so as to cover all such admissions, in order to have a general word use in the three following articles confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872, and in that Act it would not be consistent with the natural use of language to construe confession as statement by an accused 'suggesting the inference that he committed the crime'.

Dr. Aguda in his book,<sup>7</sup> agreed to the fact that the definition of confession according to S.27(1) of the Evidence Act is too wide. It includes incriminating admission, which did not in any way amount to confession.

A critical examination of Lord Atkin's dictum shows that what can be termed confession is either or both admitting the offence or substantially all the facts, which constitute the offence. An admission of gravely incriminating fact can never be a confession.

Nigerian courts have not been inclined to comment on the veracity or otherwise of the term "confession". They mainly restrict themselves to the definition of S.27 (I) of the Act.

Nevertheless, some attempt have been made as was the case in Abasi Vs the State<sup>8</sup> where Karibi – Whyte J.S.C observed that:

"It is settled law that an essential ingredient in the offence charged cannot be cured by a confession"

The above dictum of Karibi – Whyte (J.S.C) can be said to be in line with the dictum of Lord Atkin that gravely incriminating fact is not itself a confession

Karibi-Whyte further observed that<sup>9</sup> :

"Where the confession is that the accused committed the crime charged, it is in the nature of a plea of guilty to such offence".

This goes to show the view that admission of guilt in a charge against the accused is a confession.

The definition of confession in line with S.27 (I) of the act is replete with ambiguities. For example, an admission of guilt in a preliminary hearing in a court and a plea of guilt are in the nature of judicial confession in court. A confession out of court is also known as extra - judicial confession, like the formal judicial confession, in that it acknowledges all the elements of the crime and therefore is an acknowledgement of guilt. An unequivocal plea of guilt by an accused carries conviction. While out of court confession, result to conviction were the court believes it to be the voluntary, positive and establishes guilty of the accused.

## 1.2 Distinction Between Confession and Admission

It is important to note that the Evidence Act attempts a distinction as to what is confession and admission. This is explained by the fact that there are separate sections for confessions and admissions, and therefore cannot be said to be the same thing.

The definition of confession by the Act has been considered together with those of other authors.

Section 19 of the Evidence Act defines an admission as follows:

“An admission is a statement, oral or documentary, which suggest any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, hereinafter mention”.

In comparing the above definition with the definition of confession as contained in S.27 (I) of the Act, it may be said that admission is relevant to civil proceeding. But in strict comparism with criminal trial (in respect of a charge before the court) anything short of confession or full admission of guilt is an admission of some fact relevant to the fact in issue.

For an admission to qualify as confession as observed by Lord Atkin:<sup>10</sup>

“... must admit in terms the offence or at any rate substantially all the fact which constitute the offence. The admission of gravely incriminating fact, even a conclusively incriminating fact is not itself a confession...”

From the above observation it can be said that an admission is admitting some part of the offence, substantial part of the offence or fact in issue while confession denotes full admission of guilt.

The issue of admitting guilt is clear. But the problem is what is admitting substantial part of the offence or some part of the offence. For example where some part of the offence is not admitted in the substantial part of the offence, would the statement be a confession or an admission? Definitely, it would be a mere admission.

On this issue professor Nokes<sup>11</sup> observed that admission is often use as confession. He also explained that an admission is used as an admission of some relevant fact of a crime, and confession as a complete admission of guilt by an accused.

In practical terms there is no strict distinction between confession and admission in criminal cases. Even the courts in Nigeria use these words interchangeably. In the case of Afolabi Vs Commission of Police<sup>12</sup>, Taylor F.J.

(As he then was) remarked as follows:

“The alleged admission or confession states that the appellant admits selling goods and using the proceeds for electioneering campaigns”.

The learned Supreme Court Judge concluded as follows:

“There is no need for us to go into the merit or otherwise of the other grounds of appeal, for without the alleged confession the conviction can not be supported”.

From the above quotations it is apparent that the proper place of confession and admission has not been ascertained. And even where it is assumed to be ascertain the two words have been used interchangeably as confession.

In R Vs Essien,<sup>13</sup> the West African Court of Appeal found thus:

“In our opinion the statement of the appellant can not properly be termed a complete confession”.

This suggests to us that there exist such phrase as “complete” confession and “incomplete” confession This gives the impression that statements, which did not fall within confessions strictly so-call, can also be termed confession. This goes to support the earlier argument that the definition of S.27 (I) of the Evidence Act is wide enough to include statements and admissions which would in the proper sense not amounting to confessions and which gives rise to an inference of guilt. Such statement would, in many jurisdictions be excluded as not amounting to confession.

For example, in the American case of State Vs Guie<sup>14</sup>, Holloway J. Said:

The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon substantive difference of the character of evidence deduced from each. A confession is the acknowledgement of guilt on the part of the accused, and

by the force of the definition, excludes an admission; which, of itself as applied in criminal law, is a statement by the accused, and tending in connection with proof of other facts, to prove his guilt but of itself is insufficient to authorise a conviction.

The above observation of Holloway J. clearly differentiates a confession from an admission.

A confession under the Nigerian Evidence Act is not restricted to acknowledgement of guilt or facts substantially constituting the crime, but it also includes any fact or facts from which inference of guilt might be drawn. Consequently, with regards to this definition, an admission of a gravely incriminating fact, for example the illustration in Swami's case, should be regarded as a confession.

Would the phrase, which goes to show: "Stating or suggesting the inference that he committed that crime", amount to a confession in Nigeria? It is not only a fact to be proof by evidence but also includes evidence to prove a fact<sup>15</sup>. This is so where there is a denial of guilt by the accused, the court shall ascertain the guilt or otherwise of the accused by proof of certain facts would according to Lord Atkin<sup>16</sup> not amount to confession.

Lord Atkin in Swami's case observed that there is the tendency to construe confession as an admission<sup>17</sup>. This observation is contained in Article 22 of Stephen's Digest of the Law of Evidence, which is relevant, and upon which Nigerian Evidence Act is based. The Natural consequence is that a confession in Nigeria includes an admission strictly so-called<sup>18</sup>.

The definitional confusion as emphasize by Lord Atkin is an insight as to the lack of proper demarcation between admission and confession

In considering the nature and elements or otherwise of a confession, even the East African Court of Appeal used the words confession and admission interchangeably.

In the case of Buteba S/O Mubyuzhe and Another VR<sup>19</sup>, the Appeal Court observed as follows:

“A valuable practical guide when weighing the value of an extra-judicial admission or confession or confession made by a co-accused in the presence of an accused person...”

The Nigeria Supreme Court has continued to maintain the practice of not differentiating between confession and admission, as was the case in one of its recent judgement where the word “confession” and admission are used interchangeably.

Thus in the case of Michael Oji Ogbu V the state<sup>20</sup> where Karibi-whyte J.S.C. observed as follows:

“The statement –exhibit “D” is an admission by the appellant that he committed the offence which he was charged. His confession was corroborated by the independent evidence of P W1... outside the confession which clearly indicate that the confession is true.”

### 1.3 Acts Deemed to be Confessions.

A rehash of section 27(1) of the Evidence Act is a necessary step in understanding what statements are tantamount to or the form of confession. The provision of the section shows that a confession must be an admission made by the accused relative to the charge.

An acknowledgement of guilt before the commission of the alleged offence is not a confession. The acknowledgement must be at any time after the commission of the offence. This is in line with the observation of Karibi-whyte J S C. in OgbuV State<sup>21</sup>.

“The statement exhibit “D” was not in violation of S.27(1) of the Evidence Act. He indeed adopted the statement in his oral sworn testimony. It is pertinent to observe that this statement Exhibit”D” was made more than five years after the commission of the offence.”

While it is necessary that, the confession be an acknowledgement of guilt or express admission of guilt, It need not be in writing, but the written confession are accorded greater weight <sup>22</sup>. Problems do arise as to when confessions are orally made

especially where the maker denies making it to the police or whoever is responsible for receiving the confession.

Judicial confession when made pose little or no problem. This is so because whatever happens in the open court is on the record of proceedings of the court. The issue of denial hardly arise in this area.

A confessional statement should relate to the acts of the accused, knowledge and intention.<sup>23</sup>

The confession of an accused must be precise, direct positive and straight forward. This is in line with several Supreme Court decisions particularly in a more recent decision of Onyejekwe Vs the State<sup>24</sup> where Uche Omo J. S. C (as he then was) observed as follows:

“On the purely legal aspect the only issue that is worth considering is whether the statement of the appellant is confessional. I agree with the Court of Appeal that they are direct and positive”

The act of denial by an accused that he did not make the confession does not necessarily render it inadmissible. Thus in Anthony Ejinima Vs State<sup>25</sup>, Nnaemeka Agu J. S. C (as he then was) emphasized that:

But the peculiar situation that has arisen in this case is that the confession was retracted at the trial. I believe the law is that though the court can still admit and convict on such a retracted confession, if satisfied that the accused person made the statement and as to the circumstance which give credibility to the contents of the confession, yet it is desirable that there be some corroborative evidence outside the confession which would make it probable that the confession was true.

But Brett Ag. C.J.F (as he then was) summed up the principle in the case of R Vs John Agagariga Itule<sup>26</sup> as follows:

“A confession does not become inadmissible merely because an accused person denies having made it and in this respect a confession contained in

a statement made to the Police by a person under arrest is not to be treated differently from any other confession”.

But there was the standardization of the requirement upon which conviction can be secured for such retracted confession<sup>27</sup>.

Where confession is made to include other confessions, which has no bearing to the present charge at hand, the other confessions made are not confessions strictly so-called in respect of the pending charge against the accused.

It is a principle of the Common Law in criminal proceedings that an out of court settlement which is adverse to the interest of the maker as a party to the charge now taking place is admissible in evidence against him. The statement is admissible by way of exception to the hearsay rule that is, it is evidence of the fact stated in it. In criminal cases, it was at common law, a condition precedent to the admissibility of confession that it was made “voluntarily”.

In practice, the Police, unfortunately in interrogating suspects, put to them frankly that they committed the alleged offence. And silence in most cases to the Police is an admission of guilt –confession. But in law, silence by a suspect who refuses to answer to Police interrogation does not amount to confession. In R V Hall<sup>29</sup>, the House of Lords in allowing an appeal based on conviction as a result of silence by the prisoner in the course of Police interrogation, Lord Diplock put the issue clearly as follow:

A fortiori he is under no obligation to comment when he is informed that some one else has accused him of an offence. It may be that in very exceptional circumstance an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship’s view silence alone on being informed by a Police Officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation.

#### 1.4 Persons that can Make Confessions

Confessions are receivable and admissible against the maker of it. It can only be made by the person charged with the alleged offence<sup>30</sup>.

This principle of law can be said to have bearing to the fact that criminal liability is personal. To allow otherwise is to open a floodgate for all shades of "confessions" even by a third party against the accused. This is also not in line with fundamental principles for the administration of criminal justice.

Our Law of Evidence has not addressed the area of incapacity of an accused in respect of confession made. It is necessary to point out that our criminal and procedural laws have provisions, which takes care of incapacity of an accused standing criminal trial.

Equally, the legal position where an insane suspect appearing to be sane makes a confession to the Police or person in authority has not been addressed by our Evidence law nor where confessions are made during the lucid period of an insane accused. Lastly, the legislature and the courts do not also address issues such as the capacity in which an accused makes a confession. A probable reason for this omission may result from the fact that the issue of capacity or otherwise of an accused to make valid confessional statements is mostly preliminary matter in criminal trials.

#### 1.5 Confession Made by Another Persons to the Charge.

One of the fundamental principles of evidence particularly in respect of confession is the fact that it must be made by the purported maker, receivable and admissible against him only. That a third party can not make it is also an established principle.

But it is a fact of law that there are exceptions to this general rule. The position of confession made by a co-accused to the charge incriminating the accused in the same

charge would be looked into. The legal position of the confession made by a co-accused to the charge accepting guilt exonerating the accused from criminal liability would also be considered.

1.5.1 Confession Made by Another Person to the Charge (Co-accused) Incriminating the Accused.

It is necessary to ascertain the ambit of S.27 (3) of the Evidence Act which provides as follows:

Where more persons than one are charged jointly with a criminal 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, or a jury where the trial is one with a jury, shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct.

The provision of S.27 (3) of the Evidence Act is clear as to what is required for the admissibility of a confessional statement by a party jointly charged with others. It must be in the presence of those persons jointly charged with the accused. And before its reception in evidence, it has to be accepted by the co-accused or accused as the case may be by words or conduct as their own statement. Therefore a confession of a co-accused is evidence as confessional statement against the co-accused who made it only<sup>31</sup>.

Ordinary statement by the co-accused to the Police cannot be confessional statement and the court must avert its minds to this fact in deciding the case against a party to the charge<sup>32</sup>

Incriminating evidence given by a party to the charge or co-accused is not within the meaning of S.27 (3) of the Evidence Act. The co-accused against whom evidence was given has the right to cross-examine the accused to like any other witness. But evidence of an accused incriminating a co-accused may be received in evidence<sup>33</sup>.

Where evidence is given in respect of the confessional statement by an accused, the co-accused could also cross-examine on it.

For the purpose of authenticity the confession by the co-accused is normally read out to the judge in the open court to determine its position<sup>34</sup>.

Confession of a co-accused may not be the most reliable evidence available. Even if it is the only incriminating evidence against the accused it should be treated with the greatest caution. As Carter C. J. warned in the Ugandan case of R Vs Mikaeri and others as follows<sup>35</sup>.

It has been held in India that the weakness of the guarantee afforded by self-implication and the dangerous and exceptional character of the evidence require that this evidence should be construed very strictly and no weight is to be given to the confession as against any person other than the party making it, unless it is corroborated by independent testimony. A confession made by one accused against a co-accused is not strictly speaking, evidence ... as it is not made by a witness, so that it is not even the evidence of an accomplice on whose uncorroborated testimony alone it is, generally speaking, unsafe to convict. I am clearly of the opinion that a conviction based on the confession of a co-accused alone would be bad. Reliance on confession of a co-accused for the purpose of securing conviction can be said to be a bad or wrong approach. And a confession of such a nature may be used in conjunction with other evidence against the co-accused.

#### 1.5.2 Confessional Statement Made by an Accused to the Charge Exonerating the Co-accused.

This aspect of confession is not common in the Nigerian Courts. Case law authority on it is still lacking. The confession of a person to a charge or the incidence of an accused admitting guilt and exonerating a co-accused poses little problem. Where the confessional statement is properly received in evidence and upon hearing the totality of the case, and from evidence before the court there is no incriminating evidence against

the co-accused the proper procedure is to make an order of acquittal and release the co-accused.

Problem may arise however where a confession is made by a person without reference to the charge admitting that he committed the offence. And where this confession is sought to be receive in evidence in favour of the accused to show his innocence, it may be admitted either as resgestae statement<sup>36</sup> or as declaration against penal interest<sup>37</sup>. The American legal system had introduced a new rule for admitting such a confession under the doctrine of trustworthiness, which shall be explored at the later stage of this thesis.

This concept of trustworthiness has not assumed prominent position under our law of evidence or not been noticed at all.

Another area, which has not yet received the attention of our courts, is where the prosecution enters a kind of arrangement not to prosecute the accused for the purpose of using his confessional statement and other evidence to incriminate the co-accused for the purpose of securing a conviction. This kind of practice is noticeable in the American legal system and is known as plea – bargain.

In conclusion, from the onset, it is obvious that the nature of confessional statement is controversial. From the forgoing, the nature and meaning of confession had been discussed. The distinction between confession and admission was critically evaluated, acts deemed to be confession, person that can make confessions, confession made by another person to the charge exonerating and or incriminating a co-accused were also discussed.

The next Chapter shall examine the issue of voluntariness of a confession in its entirety.

## FOOTNOTES

1. Cap. 112, Laws of the Federation, 1990 shall in this thesis be known as the Evidence Act and also as the Act.
2. Nokes, G.D (1967) An Introduction to Evidence, Sweet and Maxwell, 4th Edition, p. 298
3. Jones, (1972) Law of Evidence (civil and criminal) The lawyers Co-operative Publishing Co. Rochester, New York, Bencroft Whitney Co. Sanfrancisco, California. 6th Edition, Vol. 2. P. 568.
4. Wigmore, J. H. (n.d.) Evidence in Trial and at Common Law, Little Bround and company, 3rd Edition Vol. 4, p. 238.
5. Cross, (n.d) Cross on Evidence, Butlerworth, 5th Edition p. 534.
6. (1939) IALLER 39 at 405.
7. Aguda, T. A. (1972) Law of Evidence in Nigerian, Sweet and Maxwell, 3rd Edition, p. 40.
8. (1992) 8 NWLR pt 259, p.383 at 404
9. *Ibid* at 404
10. Swami V King Emperor (Supra) at 405
11. Nokes OP Cit P.298, Aguda OP Cit P.39
12. (1961) 1 All NLR 654
13. (1939) 5 WACA 70 at 72
14. 58 MONT 485, 189 PAC 329
15. Swami V King Emperor (Supra) at 405
16. *Ibid* at 405
17. *Ibid* at 405
18. *Ibid* at 405, Adesanya, S.A. (1970) The Distinction Between a Confession and Admission in Criminal Proceeding in Nigeria. A Myth or Reality a case for its Abolition. J Journal of contemporary Law. P. 244
19. (1953) 20 E.A.C.A 178
20. (1992) 8 NWLR (pt 259) 255 at 274 to 275

## Chapter 2

### 2.0

### VOLUNTARINESS OF A CONFESSION

This Chapter shall examine the requirements of S.27 (2), which deals with the issue of voluntariness of a confessional statement. The scope of S.27 (2) of the Evidence Act shall also be critically looked into. Case law determination of voluntariness of a confessional statement particularly with regards to the fact whether or not voluntariness is an independent test in the determination of a confession shall also be considered.

### 2.1 The Requirement of Section 27 (2) of the Evidence Act.

Another most important ambit of confession is the fact of its voluntariness. For a confessional statement to be admissible in evidence against the maker, it must be voluntary. The issue of voluntariness of a confessional statement like the Evidence Act, as a whole has been a controversial one.

The issue of voluntariness of a confessional statement has been with the history of the Evidence Act of various countries for centuries.

It is necessary to begin by examining the test upon which admissibility of a confessional statement may be decided. This test is laid down by Cave J. in R V Thompson<sup>1</sup> after considering several authorities before him as follows:

“A simple test... is it proved affirmatively that the confession was free and Voluntary....?”

This is a question, which must be answered before admissibility can be founded upon. This is definitely a question for the prosecution to answer. In the case of R V Warringham<sup>2</sup>, Park B. addressed the prosecution in the following words:

“You are bound to satisfy me that the confession which you seek to prove against the prisoner was not obtained from him by improper means”.

21. Ibid 274 to 275, RV Udo Eka Ebong (1947) 12 WACA 139, Sunday Omungwa V State (1976) 2 S.C. 169
22. Uche & Another VR (1964) 1 All N.L.R. 195
23. Uwabunkeonye Ahamba V State (1992) 5 N.W.L.R pt 242, p. 450
24. (1992) INSCC (pt1) P. 547 at 553, Obidiozo V State (1987) NWLR pt (67) P. 748, Patrick Njovent & other V State (1973) 5 S.C. 17.
25. (1991) 6 NWLR pt 200 P. 627 at 655 Olusegun Olufale and other V State (1968) NWLR 261 at 265.
26. (1961) 1 All N.L.R. 462 at 465, Ojegele V State (1985) INSCC 276
27. Nwaebonyi V State (1992) 5 NWLR 698 at 711 to 712. Ridly J in RV Sykes (1913) 8 CAR 233 at 237
28. RV Erarumoni Otedia (1959) WRNLR 43
29. (1971) 1 All ER 322 at 324, RV Whitehead (1929) IK.B. 99, RV Kelling (1942) 1 All ER 507, RV Afolabi Lagos (1941) 7 WACA 123
30. RV Gunewardene (1951) 2 K.B 600
31. RV Bodom (1935) 2 WACA 390
32. Adisa V Commissioner of Police (1959) WRNLR 81
33. S. 11 Evidence Act.
34. RV Ume and others (1942) 8 WACA 123
35. (1920) 2 U.L.R 359
36. Section 7. Evidence Act.
37. 33 (c) Evidence Act.

Ordinarily, a confession taken in accordance with the provision of the law would be relevant as against the maker but if it is challenged it has become the duty of the prosecution to prove to the satisfaction of the court that the confession was voluntary. Any reasonable doubt in this respect would be resolved in favour of the accused. The issue of presumption as known in other aspects of criminal trial does not carry much weight in respect of confessional statements. The burden is on the prosecution to prove that the confession is voluntary.

The question then is what is voluntariness? When can a confessional statement be said to be voluntary? It is necessary at this juncture to examine the provision of S.27 (2) of the Evidence Act, which provides as follows:

“Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only”.

This provision did not define what is voluntariness, but can be said to have laid down the criteria for relevance and admissibility of a confessional statement as against the maker. S. 27 (2) ties down confessional statements to voluntariness.

The dictionary defines voluntary as follows:<sup>3</sup>

“Implies freedom and spontaneity of choice or action without external compulsion.”

Going by this meaning, for voluntariness to be glaring in a confession, the accused must be ready, willing and without being compelled to make a statement. Therefore, if this is done then the confession would be said to be voluntary. It is important to note that any confession, which is held to be involuntary, is irrelevant as against the maker.

<sup>1</sup>Nwadiro<sup>4</sup>, in his determination of voluntariness or otherwise of a confession has this to say:

“But any confession obtained by any of the manners listed in s. 28 is involuntary and thus inadmissible. Therefore, the section is a guide as to when a confession is not voluntary.”

According to Nwadiolo's submission, S.28 is a guide to s.27 (2) or in determining voluntariness of a confession.

But our courts in trying to determine the meaning of voluntariness had shown and are still showing inclination towards the common law principles and approach. This is by falling back on the common law for guidance.

But Dr. Aguda in his book, who has similar view with Nwadiolo, consider the application and approach to be improper and according to him S.28 of the Evidence Act has taken care of that. He puts his argument as follows:<sup>5</sup>

This would appear to overlook the provision of section 28 which, it is submitted, is meant to enumerate cases of confession which are not voluntary. Although this may be an inelegant way of drafting a piece of legislation, it is nevertheless doubtful if the proper approach to the matter is to hold that the admissibility of a disputed statement under this heading must be determined in the first instance by the Common law rule...

Dr. Aguda and Nwadiolo's approach tend to show that the effect or otherwise of S.27(2) is to be tested with complete reference to S.28. This approach has been said to be wrong and not in line with legal reasoning<sup>6</sup>.

Apart from section 27(2) being tested with the provision of S. 28, Dr. Aguda and Nwadiolo's line of approach implies the fact that both sections 27 (2) and 28 must be read conjunctively.

Secondly, it also implies that S.28 is an explanation of the provisions of S.27 (2) of the Evidence Act.

Thirdly, it creates uncertainty as to which confessional statement could be termed voluntary. This is because the provision of S. 28 is not clear-cut in terms of the

requirements listed thereunder or would it be tested by relying on the provision of S.27 (2) alone?

Lastly, the approach can be said to be too wide as it would entails including other criteria for determining voluntariness.

The Common law approach attempts to give an insight as to what voluntariness is and the requirements a confessional statement must fulfill to be relevant and admissible.

Warickshall's case<sup>7</sup> has been referred to explain the common law approach of the notion of voluntariness of confession. It was observed in this case as follows:

...Confessions are received in evidence or rejected as inadmissible under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. But a confession forced from the mind by the flattering of hope or by the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilt that no credit ought to be given to it is rejected.

The Common law rule was also observed in R V Fennell where Coleridge L. C. J. emphasized as follows:<sup>8</sup>

"A confession in order to be admissible must be free and voluntary; that is must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence".

The West African Court of Appeal also thought in the same direction as was the situation in the case of R Vs Anya Uguwogo<sup>9</sup> where the appellate court held a confessional statement admissible in evidence for being free, voluntary and went ahead to observed in its judgement as follows:

"What is essential in cases of this nature is that the court before admitting the evidence should be satisfied that the statement was really voluntary and was not prompted by any promised or inducement or threat or by actual violence".

Critically, looking at the Common Law approach as was stated in the above cases, the natural conclusion is to assume the fusion of S. 27 (2) and S. 28. This is so because, "voluntariness" in the common law context was never severed from "promise", "inducement" or "threat" and including other criteria. It was regarded as an explanation of involuntariness of a confessional statement.

It is important to note that the common law approach woefully failed to define the term "voluntary".

The Nigeria courts were not left out in trying to find determining factors for a voluntary confession. The approach is still the same with that of the English courts. That is recourse to the common law rule for guidance.

Charles J (as he then was) in Queen Vs Isaac Ajia<sup>10</sup> in delivering the judgement of the court, find it difficult to define voluntariness in respect of a confession and also made it clear that recourse to the common law rule was the answer. He stated as follows:

"The result is that in any judgement the admissibility of the disputed statement must be determined in the first instance by the common law rule".

Charles J. earlier in his judgment did reject the notion that S. 28 is a qualification to S.27 (2) of the Evidence Act and that they are independent of each other. He could not later hide his feelings that S. 28 determine the provision of S. 27 (2) of the Act as he stated as follows:<sup>11</sup>

...that section 28, in effect defines what is an involuntary confession for the purpose of criminal proceedings, and thereby implidly defines what is voluntary confession for the same purpose. In my judgement the section cannot be read that way... section 27 (2) in its term renders a confession admissible in... criminal proceeding subject to two qualifications, that it was made voluntary, which I take it, in used in the common law sense, and that it is only admissible in criminal proceedings A voluntary confession which is shown not to satisfy certain conditions. How it can apply on that basis it is difficult to

see, since a confession proved to be voluntary at common law would of necessity be free from any of the grounds for its exclusion under the section.

Charles J. further tongue lashed the legislature for not being specific in its ill drafting of S. 28. That is to show whether it has bearing to S. 27 (2) or not<sup>12</sup>.

Materials relating to case law as to what voluntariness stand for in early Nigeria Courts decisions are lacking. This clouded the already unclear definition of voluntariness in respect of confessional statement.

The requirement of S.27 (2) of the Act, which lay emphasis on the fact of voluntariness and relevance as against the maker, is a very complex one. From what is deduceable from the common law approach is the fact that S.28 is the determining factor to the provision of section 27 (2). However, this approach had been condemned to be improper<sup>13</sup>.

Secondly, is to give S. 27(2) wider meaning of voluntariness, which is broader and wider than the common law approaches of indirectly, making reference to the provision of S.28 as the determining factor to S.27 (2).

It is worth mentioning here that the provision of S.28 of the Act is covered with a lot of limitations and an examination of the section would have to be in line with those limitations which is more or less in line with the provision of S. 28 of the Act.

The requirement of S.27 (2) of the Evidence Act lies on the fact of the voluntariness of a confessional statement. And according to the common law, voluntariness can be sought by reference to promise, threat, improper purpose, improper questioning, violence and so on.

But the Canadian Court in 1947 in the case of R Vs Washer,<sup>14</sup> Mc Ruer C.J considered the issue of voluntaries and defines it as follows:

- "A voluntary statement means a statement made in a voluntary state of mind, and the requirement of proof of that state of mind are quite varied in different cases".

With due respect to the learned C. J., the definition is proper and in order. But it is arguably submitted that this expostulation fell short of defining all that the term "voluntary" depicts or entail in totality. However, this definition is found to be flattered by the expression, where it refers to it as "statement made in a voluntary state of mind".

However, the bane of the C. J's definition is when can the state of mind of an accused be said to be voluntary? The learned C. J. also went ahead to introduced the concept of "...varied in different cases". Which means that there are different voluntary statements in different cases. Consequently, meaning that there is no hard and fast rule in determining voluntariness or otherwise.

The normal question under S.27 (2) would be "did the accused had the free will and choice of make the statement he made" as in the case of R Vs Richard,<sup>15</sup>.

Voluntariness which is a word without specific meaning and definition for by the courts, can be said to be a term used in a special sense, namely that the statement was not induced by oppression, threat or violence, improper means, unlawful questioning and so on. This is the common law line of approach as cemented by the common law courts.

In the Twenty-first century, where the law is said to be dynamic, our courts have not yet displayed such dynamism and still hold on to the definition of S. 27 (2) without defining voluntariness as Kolawole J. C. A, held and observed in Ekpenyoung Vs State<sup>16</sup>. By referring to the exact provision of S. 27 (2) without saying anything about voluntariness.

The Supreme Court decision in the case of Anthony Ejinima Vs State<sup>17</sup> and in other notable cases on confession did not help the situation. Attempt was not made to

define voluntariness but to hold that a confession if voluntary is relevant against the maker.

It is a settled principle of the law of Evidence that the proof of voluntariness in respect of a confession or statements before a court of law is a strict and heavy burden for the prosecution. He has to satisfy the requirement of S.27 (2) of the Evidence Act. And that it was not obtained by improper means or unlawful and oppressive question or other unacceptable methods.

As to what amount to unlawful and oppressive questioning the Supreme Court in the case of Balogun VA-G,<sup>18</sup> where the accused appealed against his conviction on armed robbery, and while touching on the requirement of voluntariness of the confessional statement made by the accused held that:

“Oppressive questioning in law is questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affect the mind of subject that his will crumbles and he speaks when otherwise he would have stayed silent”.

Critically, looking at the above discussion and the ruling of the Supreme Court, it may be suggested that we are more inclined towards Aguda's argument, which is more of common law approach. This is because, definitely, the Evidence Act has bearing to the common law rules and principles. It is important to note that S.28 which Aguda refers to as stating instances of involuntary confession can be said to be a codification of the common law rules and principles. Its limitations are in the instances stated in the sections.

The issue in determining what to say or keeping mute is very important. The moment the oppression is in such a way as to impede on the free will then the confession is said not to be voluntary. This was the exact position in dealing with a voluntary confessional statement in the case of R Vs Priestly<sup>19</sup>.

However, what amount to free will, scope of a free will, when and how will an accused be said to have exercised his free will would be another problem for the courts to cope with. Definitely, this would imply the use of discretionary remedy by the courts, which ultimately means that each case must be treated based on its peculiarity.

Another requirement of a valid, voluntary confession is the absence of pressure brought to bear on the accused in order to obtain the confession. This is some how similar to oppression. The reason most commonly given for the law's strictness on the proof of voluntariness and absence of pressure when a confession is about to be tendered in evidence by the prosecution is that a confession which was obtained as a result of pressure on the accused to accept admission of guilt is not voluntary and unreliable.

The reception of confession induced by the mildest of all pressure might encourage undesirable Police pressure. It is in most cases difficult for some one charged with a criminal offence to incriminate himself out of his own free will without any sort of pressure<sup>20</sup>.

Nokes<sup>21</sup> in an attempt to explain voluntary confession has this to say:

"A voluntary confession may be made through remorse, or to relieve anxiety or in despair or concealment, or for some other motive which does not militate against the truth".

Nokes in his explanation or attempt to define voluntary confession did make reference to a lot of criteria which may not have bearing to our case law authorities. But nevertheless still exposes and highlighted other requirements in respect of voluntary confession.

According to Nokes' explanation, a confession, which sprouted from remorse or a desire to make reparation for the crime is said to be voluntary and admissible<sup>22</sup>. This explanation can be said to stand the test of free will. Free will has not been curtailed through any form whatsoever.

The ambit of Nokes explanation through which a voluntary confession can be determined can be said to widen the determining factors of confession as to its voluntariness.

Another aspect of Nokes explanation is the fact of the desire to tell the truth and for some reasons which did not affect the truth of the matter. A mere desire to speak the truth by an accused strengthen the voluntariness of a confession made, and the fact that it was made truthfully for no other reasons adds more weight to it.

It is important to emphatically state that voluntary or voluntariness was not defined by the Evidence Act. But in a recent English decision, Lord Lane C. J. states as follows: <sup>23</sup>.

“... Voluntary in ordinary parlance means of one's own free will”

From the previous discussions and this quotation, it still remains obvious that free will is an essential requirement in considering a voluntary confession. The definition by Lord Lane C. J. is much in line with the Twenty-first century legal reasoning and liberalism.

The Evidence Act has not taken care of the requirement of mental pressure on the accused. Our law has not taken care of the fact of some one making a confession while in a disturbed or disturbing mental state. The voluntariness of the accused in this circumstance is in issue. Free will to make such a statement is definitely lacking. The disturbing mental pressure is obvious. The position of the law is not clear-cut.

Application of judicial discretion may not be a ready remedy for such lacuna. It would definitely compound the already incomprehensive state of the Evidence Act.

However, in fulfilling the requirement of S.27 (2) of the Evidence Act, the relevancy of the confessional statement also carries weight. Once the statement are held and determined to be voluntary then they are deemed to be relevant fact as against the

maker of it and admissible in evidence against him. This pose little problem because of the highly probative value of the determined voluntary confessional statement.

The courts rightly conclude that voluntary confessions are admissible in evidence because of this fact as was in the case of Ibrahim Vs R <sup>24</sup>, where it was observed as follows:

“What a person having knowledge about the matter in issue says of it in itself relevant to the issue as evidence against him.”

This case was also given due consideration in the judgement of the Supreme Court in the case of Kim Vs State<sup>25</sup> where it was held and observed by Nnaemeka Agu J. S. C (as he then was) that:

I must pause here to make some observation on the import of this voluntary statement, exhibit I on the whole case. It must be noted that, in law, a voluntary confession of guilt, if fully consistent and probable, and is coupled with a clear proof that a crime has been committed by some persons is usually accepted as satisfactory evidence on which the court can convict.

The courts have not gone into the deep root of voluntariness but only conclude whenever a statement is voluntary or otherwise. And if it is voluntary it is deemed relevant to the fact in issue, admissible in evidence and can be the bases of conviction of an accused.

## 2.2 Scope of Section 27 (2) of the Evidence Act.

This sub-chapter shall consider the scope of voluntariness. Specifically, the ranges of actions of voluntariness or specific instance that constitute voluntary confession under S.27(2) shall be considered. The fact that there is no specific definition of what voluntariness is by the Evidence Act is a draw back as to what

instances constitute voluntary confessional statement which falls under the scope of S.27(2) of the Act.

An adjuration on the accused to speak the truth renders a confessional statement voluntary and admissible in evidence against him. An instance that easily comes to mind in this respect is an adjuration by police officer to a suspect under interrogation.

In the leading and notable case of R V Baldry,<sup>26</sup> a constable told the prisoner that he need not say anything to incriminate himself but what he did say would be taken down and used as evidence against him. The court held that the confessional statement was voluntary and admissible against the accused. There is no way the accused can be said to have said what he did not intend saying.

It is important to note that any confessional statement obtained as a result of an adjuration to speak the truth accompanied with threat cannot come under the scope of S.27(2) of the Act.

But the decision of the House of Lords in Director of Public Prosecution V Ping Lin is some how similar but the fact seems to be different. The decision may not hold in the Nigerian context particularly in relation to voluntariness.

In the said case, the appellant with two co-defendants was convicted in contravention of the Drug Act 1971. In an attempt to get the supplier of the drug from the appellant a police superintendent said as follows:<sup>27</sup>

“If you show the judge that you have helped police to trace bigger drug people . I am sure he will bear it in mind when he sentence you”

The appellant there upon gave the name of his supplier. The trial court ruled that the statement was voluntary and admissible and the court of Appeal affirmed this. On further appeal, the House of Lords held that the statement was voluntary and strongly applied the test in RV Ibrahim<sup>28a</sup>.

Lord Morris in his judgment, and while justifying the rationale for such a decision did emphasize that admissibility should be the bases of determination of such statement and not the propriety or otherwise of person or something said or done. He emphatically stated as follows:<sup>28</sup>

The judge will be ruling on admissibility and not (primarily at all events) On any question as to the propriety of the conduct of someone who conducted an interview or asked question or as to the propriety or impropriety of something said or done. The Judge will be ascertaining the facts as to what was said in an interview and not (primarily at all events) inquiring as to the motives or intention of the Person or persons who conducted an interview.

It is when attempts are made or action taken in negation of this sound observation that disputes as to the voluntariness or otherwise of a confession does arise. And at the end of the day, it creates more problems for the entire trial and the accused may be acquitted in certain cases.

In denouncing the procedure adopted in determining voluntariness of a confessional statement with so much complications, Lord salmon has this to say:<sup>29</sup>

“... In deciding whether an alleged confession or statement was free and voluntary and should be admitted in evidence, it is useless, just as it is in an accident case, to search for another case in which the facts seems to be similar and treat it as binding. Facts vary infinitely from case to case”.

The use of precedent in determining scope of voluntariness is not all that helpful and desirable. Each fact must be treated in its peculiar circumstance. The scope of voluntariness is ever increasing. It is not close. Definitely, facts are emerging which have not been dealt with and there is no clear cut legal reasoning or guide for them.

This create more uncertainty in the field of confession as to what to do with these developments: There is no surprise then that Lord Salmon was suggesting that each case should be treated based on its peculiarity and circumstance.

Confessions obtained by fraud, trick and force cannot come under the scope of S.27(2) of the Act.

In the case of Saidu V State,<sup>30</sup> one of the grounds of appeal before the supreme Court was that the confessional statement, that is the signature on the alleged confessional statement was put on it by force, or fraudulently obtained by trick.

The Supreme Court discountenance the action of the lower court for not going into this issue at the trial stage and by not conducting trial within trial to test the voluntariness of the statement. The issue of voluntariness was given prominence in its judgement and the Supreme Court consequently held as follows:

A signature of a confessional statement is an acknowledgement by the owner of the signature and where the accused alleged that his signature was obtained by force or trick or by fraud then the statement cannot be said to be voluntary...But it is otherwise if the statement allegedly made by the accused person is not signed or the signature, where there is one disowned.

From the above judgement of the Supreme Court, statement obtained by force, trick and fraud is not voluntary and cannot come under the scope of S.27(2) of the Act.

A similar instance of this nature was in the case of Ajodha V State,<sup>31</sup> the only reliable evidence of the prosecution was that the accused made a confessional statement which was the bases of his conviction. But the defense appealed on the ground that the signature of the accused which was the acknowledgement and authentication of the confessional statement was obtained by fraudulent misrepresentation that he was signing a document of entirely different character, and that also raise the issue whether the statement was voluntary statement of the accused and therefore goes to the issue of admissibility. The House of Lords in totality rejected the confessional statement as not amounting to a voluntary confession and therefore inadmissible against the accused. The

appeal was not only allowed, the conviction was quashed and verdict of acquittal entered for the accused persons.

This decision is in line with the decision of the Supreme Court in Saidu V State<sup>32</sup>. The scope of S.27(2) of the Act covers retracted confessional statement. Retracted confessional statement is admissible in evidence against the maker once it is declared by the court to be voluntary.

Retraction does not affect admissibility. The fact that a confession was retracted does not affect its voluntariness and is not a determinant of voluntariness of a confession under Nigerian Law.<sup>33</sup>

In the case of Godwin Ikpasa V Bendel State,<sup>34</sup> the appellant who was charged with murder of his wife and later made confessional statement to the police which he later retracted at the trial. The Supreme Court in deciding the admissibility of the retracted and voluntariness of the confessional statement held inter alia:

“A retracted confession is admissible in evidence and the question whether the accused made it or not will be decided by the trial court at the conclusion of the case; the issue of its voluntariness does not arise for consideration and decision.”

Udoma J. S. C (as he then was) in his lead judgement also emphasize as follows:

“... the confession having been completely retracted, all that the trial judge had to do was to consider whether the appellant had made the statement and whether having regard to the surrounding circumstance the statement was true and not whether the confession was voluntary.”

This is an attempt to differentiate retraction and voluntariness into separate compartments. The bases for their admissibility are on different grounds.

The fact that the accused pleads to retract his confession is not a ground that would affect voluntariness of a confession. Consequently, retracted confession can also fall under the scope of S. 27 (2) of the Act.

The scope of S. 27 (2) can be said to be restrictive in one respect. It relates only to voluntary confession. But it did cover the instance of confession made in the course of another proceeding. It is important to note that confession made in the course of another is restrictive and must be adopted by the person who makes it and where it implicates another person, he has to adopt it as his own. It must not be under the compulsion of oath. It is necessary at this stage to examine the provision of S.32 of the Evidence Act, which regulates the voluntariness of a confession made in the course of another proceeding. The section provides that:

Evidence amounting to a confession may be use as such against the person who gives it although it was given upon oath, and although the proceeding in which it was given had reference to the same subject matter as the proceeding in which it is to be proved, and although the witness might have refused to answer any such question the witness is improperly, compelled to answer it, his answer is not a voluntary confession.

The above section envisage and anticipate a situation where an accused person is "improperly compelled" to answer questions put to him under oath amounting to confession. The meaning of "improperly compelled" is not given in the section. The answer in respect to questioning compulsorily made under the oath is not a voluntary confession. That being the case, section 27 (2) cannot cover such a situation as a voluntary confession, and cannot also remedy the situation. It can not also assist the prosecution as a voluntary confession relevant against the maker of it in the course of trial.

This principle is well grounded in the United State legal system. In the United State, the evidence can not be used in the trial of the accused or who it might implicate. This was put clearly by Charles J. in Jackson Vs State<sup>36</sup> while rejecting a confession said to be voluntary as follows:

The principle is that no statement made upon oath in a judicial investigation of a crime can ever be used against the party making it, in a prosecution of himself for the same crime; because the fact that he is under oath of itself operates as compulsion upon him to tell the truth and the whole truth, and his statement therefore, cannot be regarded as free and voluntary.

The provision of S.32 in this respect is faulty in the sense that when an accused is under oath, the proper thing to do is to assume that whatever he says is voluntary and admissible against him. The accused has the necessary free will to decide his faith in a criminal investigation or trial to speak the truth. This section may create an instance where an accused may speak the truth and where the confession is sought to be use against him, he will then invoke the provision of S.32 whose impute may result in an injustice to the prosecution.

The scope of S.27 (2) covers voluntary confession whether duly corroborated or not. Wali. J. S. C<sup>37</sup> after emphasising the issue of voluntariness of a confessional statement as against the maker, went further to the fact that the clear words in S. 27 does not mention corroboration before basing conviction on confession alone. In clear terms, the Supreme Court Judge is saying that voluntariness of confession as stated by S.27(2) do not cover corroboration as either an incidental or mandatory factor.

In the course of Cross – Examination, speculations by the prosecution witness that:<sup>38</sup>

“I think he made the confession in the hope that I would terminate my inquiries into members of his family and perhaps leave the mother out of it, whom I suspect of being involved”.

Was rejected as not vitiating the voluntariness of the confessional statement in question. Instance of this nature is within the range of a voluntary confession and consequently falls within the scope of S. 27 (2) of the Act.

But this kind of answer received from a prosecution witness in Nigeria may be vehemently challenge as rendering the confession not voluntary. Although being a speculation it is doubtful whether our courts would arrive at the same judgement with the English Courts.

Another interesting instance covered by the scope of S.27 (2) of the Evidence Act is in the case of James Igbinovia Vs the State<sup>39</sup>, the appellant was charged with the murder of the deceased who he went out with and never return. In order to obtain the confession of the appellant, a Police prosecution witness was planted in the cell the appellant was detained. The appellant having trusted the prosecution witness who is a Police officer that he is a criminal, confessed to him how he killed the deceased. On appeal, inter alia, as to the regularity of the confession, the Supreme Court in dismissing the appeal held inter alia that the belief by the accused that the Police Officer is a criminal creates a free atmosphere for the accused to exercise his free will and any statement made under such an atmosphere is voluntary and constitute an extra-judicial confession.

The decision of the Supreme Court openly approves the obtaining of confession by deception. The rationale given by the court is that in order to fish and flush out criminal who wear the gap of innocence, detection by deception in combating crime and obtaining confessional statement is accepted and desirable. This approach by the Supreme Court can be said to be in order. It is difficult in normal circumstance for criminals charged with capital offence to openly confess the commission of that offence.

The problem, which this kind of decision may pose in future, is where overzealous police officers may use an illegal manner of deception to obtain confession from a suspect. And the decision of the court which may be either way, may not be in line with previous decisions and contrary to S.27(2) of the Act.

Nevertheless, the situation in James Igbinovia V state falls under the scope of S.27(2) of the Act.

The inconsistency of witness as to what happened in police station does not affect the voluntariness of a confessional statement. It was in Tijani Adigun V the state<sup>40</sup> that the learned trial Judge having earlier found that the confessional statement of the accused was voluntary, he was justified in treating as immaterial the contradictions in the witnesses evidence as to what happened at the police station during the filling of the confessional confirmation form there- after. That is the decision of the Supreme Court. This instance is covered by the provision of S. 27(2) of the Act.

It is necessary at this juncture to consider the scope of S. 27(2) of the Evidence Act in relation to a typical Nigerian setting. In the known case of RV Ebong<sup>41</sup> the charge against the accused was that of murder. The local chief in an attempt to get to the root of the case invoked the fear of "JUJU" that whoever is responsible for the murder would go mad and confess. Eleven months later the accused came forward and confess the killing. The West African Court of Appeal made particular reference to S. 27 (1) and (2) and held that the confession is admissible and gave its rationale as to why it is admissible. The court clearly observed that.<sup>42</sup>

In our opinion the confession in this case Was voluntary from the legal point of view And was properly admitted... To find otherwise would be getting perilously near to the fallacious theory that genuine belief in witch craft might be a possible defence to a charge of murder in so far as it might reduce the charge to manslaughter or even an acquittal by reason of self defence.

The desire of the accused to later take oath to prove his innocence was referred to by the court as <sup>43</sup>:

“A subtle defence (if untrue) to have been thought out by an unsophisticated, backward native”.

Looking at the judgement of the court, one has to look at the composition of the Judges who did not attach any importance to the typical Nigeria cultural setting. The fact that the Evidence Act in operation is purely based on western legal system also pushed their inclination of refusing the fear of “Juju” which was a safety belt for the accused person in the charge before him.

Belief in “Juju” and witchcraft is mostly regarded as repugnant to natural justice, equity and good conscience. Whatever these mean has not been subjected to any plain clear academic definition particularly in respect of legal reasoning and development.

To hold that such a confession is voluntary and admissible is to relegate the belief and way of life of the people to the background, and use Western beliefs and ideas in the determination of issues, which is peculiar to Nigeria and Africa. The result may be the negation of justice which the legal system sought to protect.

The attitude of our courts in this respect has not changed. They still in this twenty-first century refuse to give prominence to traditional values such as belief in witchcraft and “Juju”.

In the same vain in denying an allegation of murder and the confessional statement made to the police on the basis that it was the work of the devil was rejected by the trial court and the confessional statement was held to be admissible against the accused. The Supreme Court<sup>44</sup> upheld the judgement of the trial High Court.

It is necessary to exercise some caution in either accepting and rejecting the confessional statement of an accused based on the belief in “Juju” or any other

metaphysical means otherwise it may become a dangerous pitfall for the persecution and a boomerang to the accused person.

It has been seen earlier that Aguda<sup>45</sup> and Nwadiolo<sup>46</sup> suggested that S. 28 of the Act is the determinant of S.27 (2) and also a guide to S. 27 (2) respectively. If we are to adopt that explanation then any instance not covered by the provision of S. 28 of the Act falls under the scope of S. 27(2) of the Act. This is so because, looking at the foregoing discussion, it can be seen that voluntariness of a confession is the main criteria for a statement to come under the scope of S.27 (2) of the Act. Once a statement is held to be voluntary it then falls under the scope of the S. 27 (2) of the Act.

It is not safe to accept that view in totality. The shortcoming of such adaptation had been highlighted. This means narrowing down the scope of S. 27 (2) of the Act particularly by the limitation in S. 28 of the Act.

The scope of S. 27 (2) of the Evidence Act that has to do with voluntariness of a confessional statement is limitless. It is wide and open. There is no clear-cut demarcation of the scope. It is an everyday happening. Each case depends on its peculiar circumstance and on the merits or demerits of that particular case to determine whether it falls within the scope of S. 27 (2) of the Act or not. This would ultimately require the use of the Judges' discretion. It is obvious that a lot of good cases had been lost as a result of improper use of discretion, which the judges adopt in deciding the scope of voluntariness of a confessional statement. The determination of voluntariness or otherwise of it, would inevitably indicate the scope of voluntariness and which definitely in turn laid down the test of admissibility of the confessional statement.

### 2.3 Is Voluntariness an Independent Test?

The courts in criminal trials in order to secure a conviction do test the admissibility of a confessional statement on the basis of voluntariness test. The normal procedure is to hold any confessional statement admissible if it is voluntarily made.

It had been discussed earlier that voluntariness has not been defined by the Evidence Act. Therefore, its proper legal meaning is not ascertainable. The use of voluntariness to ascertain the admissibility of a confessional statement in criminal trial is what the courts have done in an obnoxious manner.

The issue whether voluntariness of a confessional statement in determining admissibility is an independent test is an objective one. It is important to note that admissibility of a confessional statement is exclusively for the determination of the Judge even where there is a jury trial.

The fact that voluntariness of confessional statement has assumed so much prominence in deciding admissibility is not in reality an independent test. Cross<sup>47</sup> in his proposals for the reform of law of Evidence particularly in respect of confessional statement at the time when there was a general outcry for the reformation of English laws has this to say:

“Subject to special rules governing confessions of crime, in any proceedings, civil or criminal, the oral or written admission of a party may be proved against him in cross-examination or by independent evidence”.

According to the learned law author, determination of confessional statement can be done by cross-examination or by independent evidence. The learned law author did not make reference to voluntariness in this determination. Cross-examination is question by the defense to challenge the reliability or otherwise of an evidence in court. It is

available to both sides. What type of independent evidence is required to determine confession is not ascertainable in line with the observation of the learned law author.

The position of the Nigerian Courts particularly the appellate and Supreme Court have not been consistent. Attempts were made to treat each case on severity of the charge before the court.

In the case of Ogoala Vs State,<sup>48</sup> where the appellant was charged with murder and one of the considerations before the Supreme Court was the issue of voluntariness and admissibility of the confessional statement admitted in the lower court.

In the lead judgement, Olatawura J. S. C particularly observed as follows:

I now come to exhibit B. the confessional Statement made by the appellant. A confessional statement made by an accused and properly admitted in law is the best guide to the truth of the part taken by an accused. Where however it is challenged by the accused, it is the duty of the trial judge to look into the circumstance under which it was made before it is admitted in evidence.

Olatawura J. S. C referred to it as the best guide to the truth of the case at hand, which may not be in dispute. But if it is challenge in the open court then it is the duty of the court to look into the circumstance under which it was made. By this judgement it can be suggested that the courts are given the go ahead to speculate on what test would be used to determine the admissibility of a confessional statement.

This act of speculation may give room for the use of many tests. Some of which may not be ascertainable and may not be known to the law. Consequently, this area may become more uncertain and confused.

The Supreme Court judgement further state the grounds upon which confession may be challenged as follows:

“The grounds for objection vary from tortures, inaccuracies, forged signature and misrepresentation. All these must be investigated and ascertained before the admission can be relied upon”.

From the above quotation where any of the grounds of objections is raised, the court would then assumed an investigatory role to determine any of the objections. This is in fact assigning an unusual role to the courts. Whatever is the rationale for this investigatory role, it is not easily ascertainable.

There is no doubt that a clear voluntary confession is admissible and can be the only basis of conviction of an accused<sup>51</sup>. But our court does and still adds this up with the clear commission of the offence test.

The Supreme Court held this view in the case of Kim Vs State<sup>52</sup> and Nnaemeka Agu J. S. C. observed as follows:

I must pause here to make some observation on the import of this voluntary statement, Exh. B, on the whole case. It must be noted that, in law, a voluntary confession of guilt, if fully consistent and probable, and is coupled with a clear proof that a crime has been committed by some persons is usually accepted as satisfactory evidence on which the court can convict.

From the above case, clear proof that a crime has been committed by the accused is a supplementary test coupled with the admissible voluntary confession of the accused upon which the court can convict. In this case the court did not hide its reasons for upholding the conviction of the accused. According to the Supreme Court since there is clear proof of commission of the offence, it tends to add weight to the fact that the confession is voluntary and the conviction must stand. Consequently, the appeal of the accused was dismissed.

Another test which has been consistent in deciding the voluntariness or otherwise of a confessional statement is the veracity test. The courts place prominence in the case of this test. The purpose, which is not far fetch is to determine the authenticity of confessions.

In the case of State Vs Okolie Eke<sup>53</sup>, where the accused was charge for defilement under S. 218 criminal code, he later made confessional statement, and in the course of trial raised the issue that he made the confirmatory endorsement at the bottom of the statement only after some substance was sprayed into his eyes. The Judge in his judgement held inter alia as follows:

“The court may act on a voluntary confession only after testing the veracity thereof. So long as the court is satisfied of its veracity, the same is sufficient to support a conviction even without corroboration”

According to the trial judge before acting on a confessional statement, its veracity must be tested. Here, looking critically at the decision of the Court, it can be said that veracity is a condition precedent to the admissibility of the confessional statement. In other words, confessional statement must passed through a second test of veracity before it is admissible in evidence. This would no doubt make the work of our Judges very strenuous.

It is also known as the truthfulness test. That is to ascertain the truth of confessional statement for the purpose of admissibility.

The Federal Supreme Court (as it then was) in the case of the Queen Vs Obiasa<sup>54</sup> did specifically asked this question among other questions that: “Is there anything outside it to show it is true...” after answering the question in the affirmative the admission of the confessional statement in evidence was upheld and conviction of the accused reaffirmed.

The issue was put forward very plainly and concisely by the Supreme Court. In the case of Kopa Vs the State<sup>55</sup>, the confessional statement was the only evidence against the accused, no eyewitness and no evidence connecting the accused now appellant with the killing of a woman by stabbing her to death.

The Supreme Court in its judgement, upholding the conviction of the trial court, observed as follows:

That quite apart from the need for a trial court to satisfy itself that a confessional statement upon which it resolves to convict an accused person was free, voluntary and positive and properly proved, there is a further duty on it to test the confession as to its truth; and this test can be satisfied by examining the confession in the light of other evidence.

In this case the fact that the confessional statement satisfy the test of its being truthful was the basis upon which conviction was reaffirmed despite the fact that there was no other evidence before the court.

The fact that a confessional statement was retracted in the course of trial does not mean that the truthfulness test would not come into effect. Once it is established to be true and more importantly where subsequent act goes to strengthen the retracted confessional statement, it shall be admissible in evidence and can be the only basis of conviction against the accused person.

In Njoku Vs the State<sup>56</sup>, the Supreme Court in deciding an appeal against conviction of murder held inter alia:

“A conviction can be based solely on a retracted confessional statement if there is other evidence against the accused to show that the confession was probably true, as for example the discovery of the body of the deceased in the appellant’s room following his statement to the Police”

This is the case where the appellant denies everything about the deceased whom he was alleged to have killed and was later discovered in the appellant’s room. The Supreme Court in its wisdom upheld the reception of the confessional statement as admissible in evidence against the accused and the conviction reaffirmed. To hold otherwise is to destroy the bases of the truth of the matter and the bases of conviction of the accused. This would now result in the discharge and acquittal of the accused.

There is also the genuineness test. The Supreme Court put the test clearly in a charge of murder against the accused in the case of Ejenavwio Vs the State<sup>54</sup>, here the Supreme Court held that when an accused person alleges that his purported confessional statement was not made voluntarily, the trial Judge may admit same in evidence after testing the consistency and genuineness of the confessional statement against the entire background of the case.

In this instance the test is a condition precedent to voluntariness, where voluntariness is challenged and in applying it, the entire background of the case must be taken into consideration. This approach which can be said to be in line with the fundamental principle of the administration of criminal justice and which is to the effect that any doubt should be resolved in the favour of the accused person. Where the court express satisfaction as to the genuineness of the confession it shall be admissible in evidence against the accused person<sup>57</sup>.

Confessional statement may not be received in evidence and admissible despite being voluntary, where its reception would be unfair to the accused. If its reception would in any way be unfairly prejudicial to the accused it would be rejected in evidence.

In R Vs Middleton<sup>58</sup>, the reception of the confessional statement of the accused charged with burglary and handling stolen goods which he made because of a threat by the Police that if he did not do so Mrs. B. would be kept in custody and her children would have to go into care. He happens to be seeing Mrs. B, the decision of the lower court was reversed and the appellate court held that even if it is voluntary it could be rejected as unfair to the accused.

Edmond Davies L. J.<sup>59</sup>. Particularly referred to the quotation of Professor Cross<sup>66</sup> in deciding the admissibility or otherwise of the alleged confessional statement. That is:

“Even though a confession was voluntary... the judge has a discretion to reject it if he considers that it was obtained in

circumstance which would render its receptions unfair to the accused”

The problem with this unfairness test is that the circumstance upon which the court would say reception would be unfair is not definite and is not easily ascertainable. It can be said not to be known and only within the knowledge of the Judge.

Corroboration test also goes to show that voluntariness is not an independent test in the admissibility of a confessional statement. The court tends to use corroboration as a supplementary and incidental test in determining admissibility of a confessional statement.

In the case of Obot Vs Queen<sup>61</sup>, where the appellant killed the deceased under the pretext of using more force than necessary to prevent him from committing a felony the West African Court of Appeal held that the circumstantial corroboration of a statement, coupled with the statement which was accepted by the Judge, provided ample evidence of guilt. The corroboration of the confessional statement provided the necessary grounds for the complete admissibility of the statement in evidence against the accused.

Verity C. J. observed as follows:

“This extremely circumstantial corroboration of a signed statement, ... provides in our view ample evidence upon which the Judge was justified in finding as a fact that the applicant killed the deceased in the circumstance set only in his statement”.

From the observation of Verity C. J. the circumstantial corroboration not only provides additional ground for the admissibility of the confessional statement, but also provides the evidence upon which a conviction must be upheld by West African Court of Appeal.

It is worth mentioning that the corroboration enhances the truth and credibility of a confessional statement<sup>62</sup>.

The Supreme Court rightly agreed with the fact that there is no fault in going further and finding corroboration as an additional test strengthening the admissibility of a voluntary confessional statement.

In Udofia Vs the State<sup>63</sup> the Supreme Court in an appeal against conviction of murder on the appellant has this to say:

“A voluntary confession by itself without any other evidence is sufficient to support a conviction. The learned trial judge could have properly convicted on the appellant’s confession done within case but he went ahead and found corroboration in evidence of PW 2 and what she said the appellant told her”

The judgement of the trial court was accordingly upheld and reaffirmed. According to the Supreme Court the corroboration went further to confirm the voluntariness of the confessional statement before the trial judge. The above various test have been consistently used by our courts despite the fact that they pretend to give much prominence to voluntariness as an independent test. Voluntariness of confession is never an independent test in the admissibility of confessional statement.

The Supreme Court in the case of Ejinima Vs State<sup>64</sup> Nnaemaka Agu J. S. C summed up some of these tests as follows:

In short, all the usual test put forward in R Vs Kanu (1952) 14 WACA 30 in which the principle in R V Sykes (1913) 8 C A.R 233 were adopted would have to be considered. They are: Is there anything outside the confession to show it was true? Is it corroborated? Are the Statement made in it in fact true as far as they can be tested? Was the prisoner who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts, which have been proved. In the instance case, there can be no doubt that all these question will be answered in the affirmative when the confession in the statement, Exh. B is match with other accepted facts given in oral testimonies of the witness for the prosecution...

In conclusion, from the foregoing, it can be seen that the term “voluntary” is not a precise term. The requirement of S. 27 (2) of the Act is as controversial as earlier

discussed with particular reference to opinions of legal experts and case law decisions. The scope of S. 27 (2) was also discussed with particular instances and the issue whether voluntariness is an independent test in determining confession was also critically discussed.

The next Chapter shall critically discuss the issue of involuntariness in all its ramifications.

## FOOTNOTES

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9. 9 WACA 73 AT 74.
10. (1959) WNLR 196 AT 200.
11. *Ibid*
12. *Ibid*
13. Aguda OP cit at 42
14. (1947) 92 C.C.C 18 at 219 (ont).
15. (1967) IALLER 829
16. (1991) 6 NWLR (pt 200) P. 683 at 703
17. *Supra*

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37. Durugu Vs State (1992), 23 N.S.C.C pt. 3. P.22 at 33
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40. (1972) 7 N.S.C.C 100
41. 12 WACA 139
42. Ibid 140
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44. Sunday Onungwa Vs State (1976) S.S.
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49. Ibid at 534
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51. Udo Akpan Vs State (1986) 3 N W L R (pt. 24) p. 258.
52. Supra, Kanu Vs State Supra
53. (1979) A. N. S. L.R 304, State Vs Innocent Uchego (1981) 3 P.L. R 210
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56. (1972) 7 N. S. C. C 166
57. R Vs Omokaro 7 WACA 146
58. (1974) 2 ALLER 1190
59. Ibid at 1195
60. Cross (1967) Cross on Evidence, Butterworths 3rd Edition p. 446.
61. 14 W A C A 352
62. Kopa Vs State (supra)
63. (1984) N.S.C.C 839
64. Supra at 653.

1. Where the confession appears to have been caused by any inducement, threats or promises.
2. Such inducement, threat or promise must have proceeded from a person in authority.
3. Supposition of gaining advantage or avoiding evil.

The above requirements can be regarded as the preliminaries of the provision of S. 28 of the Act. They shall be considered individually and critically.

3.1.1 Where The Confession Appears to have been Caused by Any Inducement, Threat or Promise.

This requirement is the most imprecise of all the requirements of S.28 of the Act. Deciding the faith of admissibility of a confessional statement on the bases of its voluntariness is entirely placed on the court. Although from the on set that has been the role of the court and no one else.

The criteria that would make the confession irrelevant are if the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person.

The phrase "appears to the court" does not require positive proof of the fact that there was any inducement threat or promise. In fact positive proof of such fact is not necessary. The requirement here seems to have been relaxed in favour of the accused. This is obvious and in line with criminal trial concessions which mainly gives much regards to the accused person.

The word "appears" indicate a lesser degree of probability than the word proof<sup>2</sup>.

From the observation of S.28 of the Act, it can be seen that the legislature designed the section in such a way so as to protect the accused person. For example, where the accused has been interrogated in a police station with no one with him, the

## Chapter 3

### 3. INVOLUNTARINESS OF CONFESSION

This Chapter shall consider the issue of an involuntary confession. The requirement of S. 28 of the Act shall be considered. The nature and scope of the vitiating elements shall be critically discussed. Lastly, the rationale for the inadmissibility of involuntary confession shall be highlighted.

#### 3.1 The Requirement of S. 28 of the Evidence Act.

Admissibility of a confessional statement can only stand where the courts accept the fact that it is voluntarily made. Its voluntariness must have been tested and upheld. The effect of such a valid confession had been considered. The courts can safely convict an accused on it<sup>1</sup>.

There is no hiding that the opposite of voluntary confession is the involuntary confession. A confessional statement, which is held to be involuntary by the courts, is inadmissible and accordingly rejected in evidence.

It is necessary in discussing involuntary confession in general terms to start by examining the provisions of S. 28 of the Evidence Act for the purpose of ascertaining the proper requirements of S. 28 of the Act. And which is as follows:

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by an inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making he would gain any advantage or avoid any evil of a temporal nature.

From the above provision of S.28 of the Act, it provides for three fundamental requirements before the provision can effectively take its place, and they are as follows:

accused assertion surrounding the facts and circumstance of the case shall be sufficient to exclude or reject such confession in evidence as an involuntary confession. Even where other people are present who are likely to be police officers they would definitely not be in support of an accused by giving evidence in his favour at the trial of the case.

In the case of State V Stanley Famous and others<sup>3</sup>, the appellant in his evidence stated that the confession was obtained by threat and in the following manner:

The police inserted four office pins under the nails of his middle fingers, four office pins under the nails of his thumb and four office pins under the nails of little finger. That a blow given to him by the police broke the bridge of his nose and that a piece of stick inserted into his penis.

It was as a result of this torture that he was forced to sign the statement. The court on this ground after due consideration reject the confession as inadmissible. It is important to note that the accused took the necessary step to deny the confession in the police station particularly in the presence of one chief superintendent of police who also in the course of the "voredire" gave evidence that the accused denied the confession in his presence even before coming to court.

Furthermore, this issue was again considered by the privy council in the case of Ibrahim Vs R<sup>4</sup> where Lord Summer stated as follows:

If as appears even on the line of authority which the trial judge did not follow the matter is one for the Judges discretion depending largely on his views of the impropriety of the questions conduct and the general circumstance of the case, their lordship think, as will hereafter be seen, that in the circumstances of this case, his discretion is not shown to have been exercise improperly.

From the above dictum of lord summer it can also be seen that, that is strictly the decision of the court whether the confession is voluntary or an involuntary one. It is

necessary to state that it is a fundamental function of the court in that regard. That is, determining admissibility of a confession.

Where the accused person is required to prove inducement, threat or promise. Such proof would not and may not be available to the accused person. That is why the courts do reject in its wisdom a confession improperly obtained and completely excluded from the evidence<sup>5</sup>.

It is important to note that bold assertion by the accused or prisoner as the case may be that he was threatened, tortured or that inducement was offered to him cannot be accepted as true without more sense to that effect. There must be some material on the record to hold that the prisoner was threaten, beaten or the facts relied on and that the alleged deed actually existed at the time of making the confession.

It is necessary to prove that the confession was brought about by improper inducement. It is sufficient if circumstances are place before the court, which would make it appear that the confession is induced. The court would not entertain flimsy excuse as to why the confessional statement was made.

In the case of R Vs Kanu<sup>6</sup>, the allegation by the appellant that he made the confessional statement used against him in evidence when he was "hot" was disregarded by the West African Court of Appeal as not coming under the provision of s. 28 of the Act. This allegation without more is not sufficient to hold otherwise that the confession is involuntary and consequently the confession was held admissible.

The first and normal question the Judge should put to the accused is why did he make the confession? Custody – where the accused was detained or is being detained shall be critically considered. The circumstance in which the question of confession first arose would be considered. How and why did the accused express his willingness before making the confession. Was he able to exercise his free will without any hindrance? It is

only in the circumstance where the facts of the case makes it reasonable and glaring to believe that the accused voluntarily made the confession otherwise the confession ought to be rejected. These are the question the Supreme Court clearly considered in the celebrated case of Ejinima Vs State<sup>7</sup>.

The court is charged with the delicate task of probing the facts which were passing in the mind of the accused at the time the confession was made. This is a speculative job indirectly placed on the courts.

In R Vs Ajege and Kigbo<sup>8</sup>, while trying to ascertain the voluntariness of the confession of the accused person in a charge of murder, Yates, Acting C. J. (as he then was) gave a clear view as to what is to be done by the court in reaching the decision as to whether the confession is involuntary or not and consequently he stated as follows:

“It is necessary therefore to inquire into what was operating in the prisoner’s mind, when he made it...”

The court in this case rejected the confession as inadmissible and involuntary because of the fact that the accused was induced by the offer of food, promise of release from detention, threat especially of being in continued detention and actual detention as what was operating in the mind of the accused at the time the confession was made.

It is important to note that this burden on the court is a speculative one. It would definitely compound the work of the courts if the confession is to appear to the court to have been caused by any of the vitiating elements and having reference to the charge and so on. Definitely, it would mean drawing inference from the circumstance as alleged by the accused.

It is worth mentioning that the devil knows not what is on a man’s mind. The Judge’s work would definitely result to guesswork.

As the proof of the vitiating elements is difficult before the court and from the observation of S. 28 of the Act, it tends to give unlimited discretion to the court in deciding the involuntary nature of a confessional statement. The court has the power and basis within which to form its decision or judgement by taking into consideration the general principle is more of a mandatory procedure.

In the case of Asake Vs The State<sup>9</sup>, the court in deciding the condition for the confession to appear to it to have been caused by inducement, threat or promise and so on stated as follows:

“And being confession it was duty of the learned magistrate to examine the circumstance very closely and make a finding on the voluntariness of the confessional statement”.

And on the fact that the magistrate did not avert his mind to this, the appellate court held the confession to be involuntary and the nature of the case is that there are a lot of reasonable doubt including that of the confession which should be exercised in favour of the accused or the appellant.

The section is worded in such a way that the court can accept suspicion as to what happened as proof of the vitiating element in the section. Critically looking at the section, so much discretion is given to the court to exercise and maneuver in deciding involuntariness under the provision of S.28 of the Act.

The provision of S.28 of the Act would definitely not come to the aid of the accused particularly in respect of judicial confession. The lesser degree of probability than the actual “proof” would not be available to the accused because everything done in the open court and recorded accordingly.

From the discussion of the first arm of the requirement of S.28 of the Act certain issues are obvious and are as follows:

- a. Presumption of regularity in respect of a confessional statement. A confession duly made and proper is relevant against the maker. It is even in line with the provision of S.28 of the Act. That confession can only be irrelevant if it appears to the court to be under any of the vitiating elements under the provision of S.28 of the Act and as was the case in Ejinima Vs State<sup>10</sup>.

It is important to note that this does not affect the burden on the prosecution to prove that the confession is voluntarily made. The courts would take the confession presented to it in the course of giving evidence in a trial as regular. Until it is challenged to be irregular and shown to be under any of the vitiating elements and consequently the court would not give credence to the confession and it shall be rejected in evidence.

- b. Moral adjuration to speak the truth does not exclude or render such a confession involuntary. The best thing to do is to inform the accused clearly and for him to understand that the best thing is to tell the truth. Confession obtained in this regard is admissible. But an adjuration to speak the truth accompanied with threat on the accused to speak, such instance of confession is an involuntary one and falls clearly under the vitiating elements as enumerated under S. 28 of the Act.
- c. Whatever the gravity and nature of inducement, threat or promise offered, either mild or graves, affect the voluntary nature of the confession and render the confession involuntary. This principle was given credence and clearly stated by Lord Parker L.J. in the case of R Vs Smith<sup>12</sup> as follows:

"In deciding whether an admission is voluntary the court has been at pains to hold that even the most gentle. If I may put it that way, threat or slight inducement will taint a confession".

There is no particular standard of threat, inducement or promise required to render a confession inadmissible.

- d. Where a confession is true, it can be excluded and rejected under the provision of S.28 particularly where it appear to the courts to have been obtained as a result of threat, inducement, or promises and so on.

The provision of S.28 would appear and be applicable even if the person who made the confession at the time of making is not an accused, but is sufficient if he become an accused with reference to the charge. This statement must be taken with utmost caution particularly if the provision of S.27 of the Act is critically considered.

Where there is conflicting and unreliable, evidence as to the truth of the confession the trial Judge must focus his mind to the question of admissibility of the confession. And in line with the general criminal law and criminal procedure law requirements. Any doubt should be resolve in favour of the accused person.

Here the issue of relevancy of the confession is a secondary one. What the court must consider is whether the confession is voluntary or it is consequence of threat, inducement or promise as provided for under S.28 of the Act.

The issue of the probative value of the confession, is another important consideration, which the courts have to take into account whether the confession would appear to it to have been cause by inducement, threat or promise. In doing that the following factors have to be taken into consideration.

- i. The character and duration of the accused custody who made the confession
- ii Whether the accused was placed in a position to seek the advice of his relative and his lawyers.
- iii The nature and quantum of proof which was available against the accused or the accused before he confessed.
- iv Whether the confession was consistent with other evidences which the confession was made.

These with the entire facts of the case would help the court in determining the state of the confession made by the accused. Literally speaking, the probative value of a confession may be taken to mean considering the entire circumstance of the case.

In considering the probative value of a confessional statement, the court in the case of Gbolarumi Vs C. O. P<sup>13</sup> held that the probative value of confession must be tested against other admitted facts to see whether or not it can be sustained.

The courts have to make some fundamental decision and consideration in deciding an involuntary confession.

### 3.1.2 Where the Inducement, Threat or Promise have Proceeded from a Person in Authority.

This is another important requirement of the provision of S.28 of the evidence Act. This second requirement is to the effect that the inducement, threat or promise as the case may be, must have proceeded from a person in authority in order for the provision of S.28 of the Act to take effect. This is another controversial requirement of one of the provisions of S.28 of the Act.

The Evidence Act, which did not define some major terms used in the Act as earlier discussed, did not also define the term person in authority. Consequently, since the definition is lacking in the Evidence Act, recourse has to be made to the case laws on this subject. Critical examination of the case laws did not help matter much. But, precisely, clue as to who is a person in authority had been given on like the Evidence Act.

In the case of James Igbinovia Vs State<sup>14</sup>, the manner in which a confession was made to a police officer was in question. The Supreme Court in determining the voluntariness of the confessional statement held that:

“A confession made to a person in authority by a suspect under fear of prejudice or hope of advantage is not voluntary and therefore inadmissible. A person in authority means any one who has authority or control over the accused or over the proceeding or the prosecution against him”.

This ruling by the Supreme Court highlights two issues.

- (1) The condition under which the confession is involuntary under the provision of S.28 particularly when made to a person in authority.
- (2) The definition of person in authority, which the above case restrict to two instances. That is control over the accused person or control over the proceeding or prosecution which the accused is facing.

This definition is restrictive. It restricts the term “person in authority” to a narrow perspective. To fully comprehend the term “person in authority”, it has to be given its liberal meaning or liberal construction from the above ruling of the Supreme Court. The term person in authority can be taken to mean the prosecution in criminal trial and including those on the side of the prosecution. Referring it to the prosecution alone means construing the expression narrowly. That cannot be the intention of the legislature. This is so when the decision of the courts is critically consider as to who are persons in authority with particular reference to confession. This can be ascertained from the following discussion.

Inducement, threat or promise made by a person in authority for the purpose of obtaining confession of the accused, the confession is involuntary and inadmissible in evidence. But the belief that the person or persons to whom the accused made a confession were “persons in authority” is not sufficient to render the confession inadmissible in evidence. The circumstance of the case must indicate that such inducement, threat or promise must have been held out by a person in authority.

Lord Bridge in Ajodha Vs State<sup>15</sup> put it clearly as follows:

“The evidence tendered or proposed to be tendered by the prosecution itself indicate that the circumstance in which the statement was taken could arguably lead to the conclusion that the statement was obtained by fear of prejudice or hope of advantage excited or held out by person in authority”.

The House of Lords after satisfying the requirement of the English Evidence Act which is in line with the provision of S. 28 held in its judgement that the confession is inadmissible.

Precisely, the fact that the confession was made to person in authority does not necessarily mean that the confession is invalid. The person in authority must have held out one form of inducement by either words or conducts.

In the case of Samuel Akinrolabu Vs State<sup>16</sup> where the accused, a Police Officer was standing trial for unlawful demanding and official corruption and one of his grounds for appeal was that his confession was received by a person in authority. The Federal Supreme Court (as it then was) held inter alia that, a confession is not so induced merely because it is made to a person in authority. To be regarded as “induced”, the person in authority must have held out to the accused by word or conduct some inducement, promise or threat which makes the confession not voluntary.

Instances of persons in authority are numerous. A village head is a person in authority for this purpose. But it is necessary to make some explanation to this point.

In Madu Fatumani Vs R.<sup>17</sup> it was held that a village head is a person in authority and in the same position as a Police Officer investigating a crime. But the court remarked that a confession made to a village head as a result of mere adjuration to speak the truth does not render the confession inadmissible. Therefore, this does not amount to threat or promise, as the accused when he was questioned was just a suspect at that time.

But the case of Queen Vs Baba Haske<sup>18</sup> laid down a related but different principle. Where the accused was charged with murder. The village chief summoned his

subject. And said to them "all of you will be in the case and will be gaoled if you do not tell me the truth". And specifically told the accused now the appellant that "I hear that you followed this man with a gun; if you shot him please let me know" later the appellant confessed, and subsequently confessed to the police.

The court held that the Chief was clearly a person in authority and his statement to the villagers that they would be gaoled unless the guilty person confessed was clearly a threat and an inducement. The confession made was involuntary and inadmissible. Consequently, the accused was discharged and acquitted.

The owner of stolen property was also held to be a person in authority particularly where he made his position known to the accused.

In the case of R Vs Wilson and another<sup>18</sup>, where the accuseds were charged with robbery and larceny of the property of the victim, in ruling on the admissibility of the confession, the House of Lords held, allowing the appeal, that the householder, who was and was known to be the owner of the house that has been broken into and of the stolen property and who was therefore the loser and the most interested person in the matter, was person in authority, even though he would probably have been unable to stultify a prosecution that had been brought or to prevent a prosecution from being instituted; and that the oral statement were inadmissible because the prosecution had not proved beyond reasonable doubt that they had not been made as a result of an inducement from a person in authority. The conviction was accordingly quashed.

By this authority, it can be seen that "persons in authority" are numerous depending on the circumstance of each case. It even extends to the owner of a property where robbery and larceny were alleged to have been committed<sup>20</sup>.

Person in authority was extended to include the wife of one of the prosecutors, and concerned in the management of their business<sup>21</sup>.

A Police officer who in the course of his official duty-investigating crime against the accused did not disclose his identity could not be held to be a person in authority.

In the case of James Igbiovvia Vs State<sup>22</sup>, the police officer concealed himself as one of the criminals in a cell where the appellant was detained. After confiding in the Police the accused confessed the commission of murder.

The objection raised as to the involuntariness of the confession and the Supreme Court in its wisdom rejected that the police officer was a person in authority. According to the Supreme Court the use of deception is necessary and therefore cannot violate the confession.

A confession made to a person in authority after any impression caused by an inducement, threat or promise has in the opinion of the court, been fully removed is admissible.<sup>23</sup>

For the confession made to a person in authority to be held inadmissible and involuntary, Lord Widgery L. J put the answer clearly in the case of R Vs Isequilla<sup>24</sup> as following:

“...that under the existing law the exclusion of a confession as a matter of law because it is not voluntary is always related to some conduct on the part of authority which is improper or unjustified.”

In RY Godinho<sup>25</sup>, Hamilton J Observed that:

“Where a definite hope of pardon has been held out, by a person not in authority, the confession has constantly been held to be receivable.”

In this case, it was held that a confession induced merely by a hope of pardon formed in prisoner's own mind is admissible in evidence against the prisoner.

This instance shows that only unjustifiable conduct on the part of person in authority would warrant the non-reception of the confession in evidence.

Instance of person in authority was extended to include Adjutant of company in the military circle.<sup>26</sup>

It can be said an individual making a threat or offering an inducement is a person in authority from the position he occupies at the time of making the threat or offering the inducement and particularly where it relate to the charge at hand.

From the decision of the courts, the following categories of people can be said to be persons in authority. And are as follows: Police Officers, National Drug Law Enforcement Agency's Officers, Custom's Officers, Immigration officers, those acting in police capacity, Chiefs, Headmen, Manager of a firm, owner of the premises where there is an allegation of crime against the accused and so on. This list is not exhaustive. New situation may emerge which has different circumstance and has to be treated on its own peculiarity.

### 3.13 The Supposition of Gaining Advantage or Avoiding Evil

This is another and last requirement of S.28 of the Act. It completes the circle of an involuntary confession. That is the requirement necessary to make a confession involuntary.

In this instance, the inducement, threat or promise made by person in authority to the accused and who as a result of the inducement, threat or promise confessed to the person in authority, the court would have to determine whether in its opinion it is sufficient to give the accused grounds which would appear to him reasonable supposing that by making it he would gain any advantage or avoid any evil of a temporal nature.

It is important to note from the onset that there is no standard measure or procedure meant to determine the sufficiency or otherwise of the vitiating elements in respect to the accused belief. Consequently, each case must be treated on its own facts and peculiar nature.

The altitude of the Judges in this regard is a discretionary one. West J described this as follows: <sup>27</sup> "It was a discretion." West J further puts it bluntly as follows:

Which was left to the court when the evidence was tendered, and it was only in the exceptional case when the court above had reason to believe that the practice had been obviously abused, and that there had been an entire want of discretion in receiving the confession that they could interfere.

The fact that the nature of the court's power in this regard is discretionary is indirectly highlighted by Earle J in RV Garner <sup>28</sup> as follows:

It does not turn upon what may have been the precise words used, but in each case, whatever the words used may be, it is for the Judge to consider, before he admits or reject the evidence, whether the words were such to convey to the mind of the person addressed, an intimation that it will be better for him to confess that he Committed the crime or worse for him if he does not.

From the observation of Earle J, it could be said that the task of determining the sufficiency or otherwise of the vitiating element is completely in the hands of the court. The accused is at the mercy of the court. Consequently, it is for the court to form its own view on the state of the confession whether it would lead the prisoner or accused to suppose that he would gain or avoid any evil of a temporal nature by confessing.

It is obvious that there is the difficulty in laying down a comprehensive means of regulating this discretionary power of the court. This may lead to arbitrary use of such discretionary powers. And at the end the result could be unfavorable either to the prosecution or the defense.

This is so particularly where the age, experience, maturity of the accused and the circumstance under which the confession was made had to be taken into consideration entirely.

Another problem in deciding this last requirement is the fact that certain language used which may overcome the mind of the accused may not overcome the mind of another accused person. And this may give room for guesswork.

It could be said with reference to the last part of this last requirement, that "Grounds which would appear to him", that the court in this connection has to cloth itself with the mentality of the accused. That is the court placing itself in the position of the accused, form an opinion as to the State of his mind in the particular circumstance of the case. This would ultimately assist the court in determining whether freewill of the accused had been disrupted.

An instance where the above discussion was glaring was in the case of R Vs Ajege and Kigbo<sup>29</sup>, where the court thought it is necessary to enquire into what was operating in the prisoner's mind. After clothing itself with the mentality of the accused and examining the entire circumstance of the case, the court was able to reached the conclusion that:

"It is clear to our mind that in this statement or confession, the prisoner was actuated by the promise of favour he had received from the District Head".

Consequently, the confession was held not to be sufficient to justify conviction in the absence of more direct evidence connecting the appellant with the crime and led to allowing the appeal and quashing the conviction.

The inducement, threat or promise must have reference to the charge and must be such that it is material to the charge at that instance. Consequently, any inducement, threat or promise having reference to a future state of reward or punishment would not affect the admissibility of the confession<sup>30</sup>.

### 3.2 Nature and Scope of the Vitiating Elements.

The vitiating elements are other factors to be taken into consideration in determining the voluntariness of a confession. The vitiating elements affect the root of the confessional statement. It is important to note that an inducement revolves round and involves both a threat and promise. For the purpose of discussing this sub-topic, inducement or promise shall be taken together and discussed under one sub heading while threat shall be discussed under separate heading.

#### 3.2.1 Instances of Inducement or Promise

The term inducement has not been subjected to any particular legal definition as to what is inducement. The Act only made reference to it as vitiating a confession or renders a confession involuntary under the circumstance as stated under the provision of S.28 of the Act.

This development creates a vacuum, which must be filled by recourse to the case law for explanation and answer. It is disappointing to emphasize that no standard definition is also obtainable in this area. Which definitely means that each case must be treated on its own peculiarity.

Inducement can be said to be anything or use of anything by a person in authority to suggest or suggesting to the accused to make a confession coupled with some beneficial result to the prosecution and reward to the accused person if he so confess.

The above explanation as to what is inducement or promise may not be all that exhaustive but may offer some clue as to what inducement or promise is.

The rules for the determination of inducement or promise are not easy to be laid down as a general principle. It all depends on the discretion of the Judge and whatever decision he might reach would definitely depends on the particular circumstance of each case.

Wigmore<sup>31</sup> suggested three test as the criteria for the determination of the confession as involuntary and are as follows:

- i. Was the inducement of a nature calculated under the circumstance to induce a confession, irrespective of its truth or falsity?
- ii. Was there a threat or promise, a fear or a hope?
- iii. Was the confession voluntary? Is practically colorless and unserviceable when the nature of the inducement is in question, and is always translated secondary, before application into terms of one of the other two tests.

According to Sarkar<sup>32</sup>, the question that arise in this connection are as follows:

- i. Was the inducement likely to produce an untrue or involuntary confession? and
- ii. Did the inducement in fact operate upon the mind of the accused? and
- iii. Did the inducement proceed from a person in authority.

From the above criteria of both Wigmore and Sarker, there is no doubt that they are both interwoven and interrelated. There is also no doubt that these factors would definitely assist the court in determining the sufficiency of an inducement or promise and also the main question of whether the confession was voluntarily made or not. The fact of whether these criteria are taken into consideration particularly in the Nigeria context is a different thing entirely.

On the inducement to the accused, it needs not to be one to make the accused speak the truth it is sufficient if it is an inducement to make him make a statement.

The provision of S.28 of the Act impliedly suggests the making of a statement irrespective of the fact that it was true or not.

The confession must have proceeded by an inducement to make a statement no matter how slight it might be.

In R Vs Nimiel Viapbong<sup>33</sup>, in the course of interrogation, a police Sargent said to the accused that:

“You should bear in mind that any statement you make shall be written down by me and taken before the court so that it may be your evidence or so that is it may be evidence for you”.

After hearing this caution the accused made a confession and to the court, it appears to it that the confession proceeded from the caution. In answering the question that the confession was induced by the caution the trial Judge, Harley C. J. (as he then was) put it straight as follows:

The caution was clearly an inducement to speak. An accused person can hardly be expected to keep silence when told that he need not say anything. But that anything he says will be written down and Taken before the court to his evidence or evidence for him: he being given amply sufficient grounds for supposing that by speaking he would avoid evil of being condemned unheard. If an inducement to speak is enough to render the confession irrelevant, this confession is irrelevant.

It is important to note that any promise of an advantage or avoiding any evil will be regarded as an inducement for the purpose of an involuntary confession and a confession made as a result of such promise would be inadmissible<sup>34</sup>.

The position of the accused to that of the person who made the inducement is important. If the inducement is from a person not in authority it would definitely be different, relevant and admissible in evidence. In the case of Deokinann Vs R<sup>35</sup>, Viscount Dilhore made it clear that confession made to a person not in authority is admissible as against the maker.

The allegation of mere existence of an inducement is not enough. It must have operated on the mind of the accused and in the opinion of the court shall be sufficient to

cause a reasonable belief in the accused's mind that by confessing he shall benefit or be penalised.

In the Nigerian case of State Vs Mati Audu<sup>37</sup>, after the accused had been beaten by soldiers at the police station, the police told him that he need not fear any violence if he chose not to say any thing. Thereafter the accused made confession. And the court held that inducement made to the accused was responsible for the confession as the sequence of the first violence had not been completely dissipated and the inducement was sufficient to cause a reasonable belief that by confessing the accused shall avoid further violence. Consequently, the conviction was reverse accordingly.

Therefore, where the confession "proceeded from remorse or a desire to make reparation for the crime, it is admissible, if it flow from hope or fear excited by a person in authority, it is admissible"<sup>38</sup>.

In the same context, moral adjuration to speak the truth is not an inducement. The West African Court of Appeal without any problems in Madu Fatumani Vs R<sup>39</sup>, held that a mere remark by a village head who is definitely a person in authority is a mere adjuration to speak the truth and was therefore not an inducement to the accused person.

Critically, examining the provision of S. 28 of the Act, it can be said that there is presumption of voluntariness of a confession. That being the case, it would be the duty of the accused where he alleges inducement or promise he has to proof that to the satisfaction of the court.

It is worth mentioning here, that for the provision of S.28 of the Act to take full effect, the inducement or promise from a person in authority must relate to the charge. Where the reverse is the case, it is deemed to be voluntary and admissible. Despite the application of this principle in the English courts, it is applied with certain level of caution and criticism<sup>40</sup> it is still relevant in the Nigerian Courts<sup>41</sup>.

The inducement to the accused need not be expressly stated. It could be by conduct and the situation also extends to where it comes to the knowledge of the accused<sup>42</sup>. And to be regarded as induced, the person in authority must have held out to the accused by word or conduct some inducement or promise which make the confession involuntary<sup>43</sup>.

The effect of an inducement no matter how slight or mild it might be very devastating on a confession.

Lord Parker C. J. was very blunt in the case of R Vs Wilson and Another<sup>44</sup> where he puts the issue clearly as follows:

The next question is whether he did make an inducement, because if so, as has been said so often, even a slight inducement by a person in authority is deemed to have such an overwhelming effect as to make it unsafe to allow any statement made as a result of the inducement to be given in evidence.

As have been said earlier, what constitute an inducement depends on the circumstance of each case. The following instances are based on the peculiar nature of their cases and have been considered to be an inducement. "Tell me where the things are and I will be favourable to you"<sup>45</sup>, "If you don't tell me you may get yourself into trouble and it would be worse for you"<sup>46</sup>, "all of you will be in the case and will be goaled if you do not tell me the truth",<sup>47</sup> "the inspector tells me that you make house-breaking tools, if so you had better tell the truth, it will be better for you", "Speak the truth, it will be better for you if you do"<sup>49</sup>.

Other instances where inducements are considered are as follows; the accused, a domestic servant, turned to her mistress and said "If you will forgive me I will tell you the truth" and the mistress replied "and, did you do it"? it was held that the silence of the

mistress to the servant's request could have been in the circumstance an inducement to speak<sup>50</sup>.

Another instance is where the employer, in the case of an alleged embezzlement by an employee, told the brother of the accused that "it will be the right for Marcells (the accused) to make a clean breast of it". And it was accordingly held that this was an inducement as the confession of the accused was only made after he heard of that and so was not voluntary<sup>51</sup>.

In R Vs Patrick Joseph Cleary<sup>52</sup>, a father said to his son as follows: "put your cards on the table. Tell them the lot if you did not hit him, they cannot hang you", this was said in the presence of a police officer making inquiries about murder. The court held that these were capable of being an inducement and the fact that there was Police officer there and benefited from it make the confession inadmissible in evidence. Finnemore J. put the issue as follows<sup>53</sup>.

What is plain is this, that any kind of inducement made by a person in authority will make the statement inadmissible. It has also been decided that, though the inducement be made by a person not in authority, if in fact it is made in the presence of person in authority, the position is the same as if they had made it themselves unless they take steps to dissent from it.

It is worth mentioning at this juncture that where the accused made a confession induced merely by a hope of pardon formed in his own mind the confession is admissible in evidence against him<sup>54</sup>.

Inducement or promise depends on the circumstance of each case. There is no standard requirement for the sufficiency of inducement or promise. All depends on the discretion of the court.

### 3.2.2 Instance of Threat:

Threat is another important vitiating element of confessional statement made by the accused. Confessional statement secured by threat from the person in authority is involuntary and inadmissible in evidence against the accused.<sup>55</sup>

Although S. 28 of the Act did not specify the type of threat, what constitute threat to the accused or the nature of the threat to the accused, which could render a confession inadmissible and involuntary, depends on the circumstance of each case. Consequently, each case must be treated on its special peculiarity.

From the onset, it is necessary to make it clear that the major principles applicable to an inducement or promise are also applicable to threat as a vitiating element under S. 28 of the Act.

On critical examination of S. 28 of the Act one can safely conclude that threat of actual violence, less than actual violence, and potential threat of actual or imminent danger falls and come within the provision of the section.

The question of threat to the accused must relate to the charge in question. And statement made because of threat or use of threat to the person of the accused would be inadmissible or rendered involuntary and inadmissible in evidence against the maker.

In the case of Custom and Excise Commissioner V Harz and Power,<sup>56</sup> in an appeal against conviction as a result of confession made as a result of threat of criminal prosecution, the House of Lords held that the admission would not have been made if H had not been told that he must answer the custom officer's question forthwith and that if he refused to answer them he would be prosecuted, and thus they were made under threat; accordingly, not being voluntarily made, they are not admissible in evidence against the accused.

Lord Reid in his lead judgement put the issue emphatically as follows:<sup>57</sup>

I am of the opinion that it must be held that this threat of prosecution was intended by the custom to apply and was thought by Harz to apply on all these occasions, and that this is a typical case of a suspected person being induced by a threat to make incriminating admission. I think that it is clear that Harz would not have made these admission if he had not been told that he must answer the officers' question there and then and that if he refused he would be prosecuted.

Lord Reid further observed that <sup>58</sup>.

"It is said that if the threat ... which induced the statement related to the charge or contemplated charge against the accused, the statement is not admissible, but that if it related to something else the statement is admissible".

As obtainable in respect of inducement or promise, the slightest level of threat to the person of the accused would be sufficient for the purpose of full application of the provision of S.28 of the Act<sup>59</sup>.

There was no surprise therefore that the Supreme Court in the case of Queen Vs Baba Haske,<sup>60</sup> held the threat of a village head that his subject would be gaol-imprisoned if there is no confession of the crime. The subsequent confession by the accused was held involuntary as it was as a result of a clear threat from the village head and therefore wrongly admitted and consequently, the conviction was reversed.

It is important to note that the use of threat for the purpose of confession is not only restricted to the person of the accused, it also extend to some one close to the accused. Where someone close to him would be threaten if he did not confess, such confession is inadmissible in evidence against the accused.

In the case of R Vs Middleton<sup>61</sup>, the accused was threatened with the fact that if he did not make the confession Mrs. B. whom he is going out with would hence be kept in custody. And her children would hence go into care. He was convicted based on the confession he made. The Court of Appeal reversed the decision and held the confession

inadmissible in evidence and that the fact that the threat was not to the person of the accused was irrelevant and provided that it was to someone close to the accused was sufficient. The reception of the confession by the trial court was also held to be unfair to the accused.

However, the fact that an accused was frightened, sobbing and later became hysterical and made confession because of the justifiable manner of arrest by a Police officer, for example the use of gun did not render the confession involuntary. Such a confession is voluntary and admissible in evidence against the accused. This was the position in the case of R Vs Isegui<sup>62</sup>. But Lord Widgery L. J.<sup>63</sup>, stated the circumstance under which such procedure could render the confession inadmissible and involuntary as follows:

“... that under the existing law the exclusion of a confession as a matter of law because it is not voluntary is always related to some conduct on the part of authority which is improper or unjustified”.

The provision of S. 28 of the Act did not envisage or make provision for threat of harm by metaphysical means. This kind of threat is not sufficient to render a confession involuntary and inadmissible in evidence.

There is no confession therefore when the West African Court of Appeal bluntly refused such a plea of an accused in R Vs Ebong<sup>64</sup> where the fear of “juju” was invoked by the village head and that the person responsible for the murder would go mad if he did not confess. Thereafter, the appellant made the confession upon which he was subsequently convicted. The court refused the plea of the appellant that it was involuntary and the court went further to make it clear that such a belief of metaphysical means has no place in our law.

### 3.2.3 Confession Made After Inducement, Threat or Promise have been Fully Removed

Confession made after inducement, threat or promise made to the accused person had been fully removed would be admissible in evidence against the maker. The confession here is deemed to be voluntary and admissible in evidence under the provision of S.30 of the Evidence Act which provides as follows:

“If such a confession as is referred to in section 28 is made after the impression caused by any such inducement threat or promise has in the opinion of the court been fully removed it is relevant”.

This rule is also discretionary as it is left entirely to the opinion of the court. But the fundamental principle at the root of this provision is the fact that the Judge after due consideration of the circumstances of the case comes to the conclusion that the inducement, threat or promise had dissipated at the time of the second confession. And where the reverse is the case the confession would be held inadmissible in evidence and still comes under the provision of S.28 of the Act. In the case of R V Smith<sup>65</sup> a soldier was stabbed in a fight, immediately after the episode a regimental sergeant major put his men on parade saying that he would keep them there until he learnt who had been involved in the fighting. After the accused confessed to the commission of the offence. The accused later made another confession to a sergeant of the special investigation branch, The court in its judgement held that the appellant, accused first confession to the regimental Sergeant Major was inadmissible as having been induced by a threat, but that his subsequent confession to the Sergeant of the special investigation branch was admissible as at that time the effect of the original threat had been dissipated. In this case, there was sufficient time for the threat to be fully removed.

The Nigerian Supreme Court settled the issue in the case of Queen V Baba Haske<sup>66</sup>,

where an earlier confession was made to a village head after the accused had been threatened with imprisonment by the village head. And thereafter made another confession to the police. The Supreme Court held that both confession were inadmissible and that the second confession could not also be admitted as the threat had not been fully removed and dissipated.

The case of State V Mati Audu present a straight forward and more glaring example. In this case the appellant was taken to an army barrack where he was beaten and was returned later to the police station. While still suffering from his injuries without medical attention, he was cautioned and made the confession to the police. The court held that as at the time the appellant was suffering from the injury sustained as a result of the beating the threat had not been dissipated. Therefore, the confession is involuntary and inadmissible.

The Supreme Court had shown its displeasure to this practice particularly by the police and military personnels. This was made clear in the case of Ishiyaku Mohammed V Kano Native Authority<sup>68</sup>, the Supreme Court after hitting hard on the police and the military personnel for the disregard for due process of law and went further to observe that admitting the confession in that kind of circumstance would amount to an injustice to the accused.

At this juncture, before concluding the discussion on an involuntary confession it is necessary to take a critical look at the entire provision of S.28 of the Act. Various requirements and the vitiating elements had been considered. How are these factors tenable at law and keeping within the dictates of justice of the cases at hand is another question which had been subjected to a lot of controversy.

The requirement that the inducement, threat or promise under the provision of S.28 must bear reference to the charge against the accused is prejudicial to the accused

and unrealistic particularly in the Twenty first century legal system. This is an undue use of legal Jargons, which makes the provision of the law very difficult to comprehend particularly to the layman.

Lord Reid in the case of Custom and Excise Commissioner Vs Harzand and Power<sup>69</sup>. Had no difficulty in showing his disapproval for the complete application of this principle. He said emphatically that there should be distinction of circumstances under which it would operate. And despite its application in the above case he indirectly condemned the principle vehemently.

Therefore, this leads us to the fact where the inducement, threat or promise did not relate to the charge, it would be admissible against the accused.

The provision of S.28 of the Act is subjected to undue technicalities. This undue technical consideration does not mean well for typical Nigeria setting. A good example is the kind of situation in the case of R V Ebong<sup>71</sup> where the societal fear and values were rejected and relegated at the expense of the received English law.

### 3.3 Rationales for the Inadmissibility of an Involuntary Confession

Voluntariness of a confession is the basis for its admissibility in evidence against the maker. This is the fundamental principle in admitting confession. The courts are sometimes faced with the problems of involuntary confession and what to do with them. Definitely, after proper examination they are rejected as inadmissible in evidence.

This last sub-topic shall be the consideration of the rationale for the inadmissibility of an involuntary confession.

Firstly, one of the rationales for the inadmissibility of involuntary confession is the desirability to discourage improper police methods. It is a known fact that the police are fully in charge of criminal investigation and in some instances prosecution at the lower courts.

In practice, it is their habit to obtain evidence by whatever means against the accused, including the use of threat, torture, and unlawful detention and without due regard to due process of the law. These unholy methods are used in securing confessional statement from suspects.

In an attempt to discourage this kind of practice by the police, the courts without hesitation normally hold the confession obtained in this kind of situation to be involuntary and inadmissible in evidence<sup>71</sup>.

Niki Tobi in adding weight to the above discussion has this to say:<sup>72</sup>

The successive searching questions, the enticing and seasoned tactics, the open physical confrontations and the like, emanating from some Zealous Police personnel affect the mental orientation of the accused and coupled with the psychology of the interrogation room, as it affect the accused, he is compelled to make a statement which may not be voluntary. To him there is apparently no alternative.

Another rationale for the inadmissibility of involuntary confession is to make sure that justice is done to the accused. The courts even made it clear that it should be for both the accused and the prosecution. It is fundamental that justice should be either way in a criminal trial. An accused, no matter the gravis nature of the charge against him deserves justice to his case. Any unfavourable reversal would amount to an injustice to the accused.

The Supreme Court in the case of Alhaji Isiyaku Mohammed Vs Kano Native Authority<sup>73</sup> put the issue clearly as follows:

“It can not be said that justice was done to an accused person whose statement was admitted in evidence and relied on by Upper Area Court, when that statement was made after he had been taken to an army barrack from the police charge office and there beaten up by soldiers”.

The courts held that the protection of the accused in a criminal trial is important and necessary. Therefore, involuntary confession would be inadmissible in order to

protect an accused. Nnaemeka Agu J.S.C (as he then was) puts the issue bluntly as follows:<sup>74</sup>

After all, our rules about the form and condition for admissibility of extra-judicial statement,... were designed for the protection of accused persons from having such statement which not voluntary, or where necessary not interpreted, or otherwise not of the making of an accused person, or which where otherwise procured by fraud, inducement, threat, promise, intimidation or duress forced on him and used in evidence against him.

An involuntary confession would be rejected in evidence where its reception would operate unfairly against the accused<sup>75</sup>.

Statements induced by improper pressures are likely to be untrue. The courts had displayed on numerous occasions that this issue would not be taken kindly from the prosecution team. This rationale was emphatically stated as follows:

"It is not because the law is afraid of having truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth"<sup>76</sup>

The issue of a confession being entitled to credit is of importance in this discussion. Where a confession is not entitled to credit it would be rejected as inadmissible.<sup>77</sup> It can form the basis of conviction of an accused. The fact that it is not entitled to credit makes it worthless before the court and definitely there would be no basis for its reception in evidence. This rule was stated in one old case as follows:<sup>78</sup>

"Confession are received in evidence or rejected as inadmissible, under a consideration whether they are or are not entitle to credit".

A confession would be excluded on the ground that it is unreliable. This rule is very important in that the court must have considered the entire circumstance of the case. This is so because, it is the circumstance of the case that would determine the unreliability of the confessional statement. There is no need for the repetition of those circumstances.

In the American case of the people Vs Mc Mahon<sup>79</sup> Seldon J, in rejecting a confession observed as follows:

“It is because it is in its nature unreliable, and not on account of any impropriety in the manner of obtaining it, that the evidence is excluded”.

Niki Tobi's likeness for the American jurisprudence was a crucial factors for the advancement of the “untrustworthy theory” as yet another rationale for the exclusion of an involuntary confession<sup>80</sup>. The untrustworthy theory was never scrutinise by the Nigeria courts.

In Conclusion, from the forgoing, the issue of an involuntary confession is as controversial as the voluntary confession. The requirement of S. 28 of the evidence Act has been discussed. The nature and scope of the vitiating elements were discussed. This was done with particular reference to the making of the confession, the vitiating elements, that it must have been from a person in authority, the supposition of gaining advantage or avoiding evil, instances of the vitiating elements and the rationales for the inadmissibility of an involuntary confession was discussed.

The next Chapter shall discuss the procedure of obtaining confessional statements.

## FOOTNOTES

1. Ejinma Vs State (supra)
2. S. 2a of the Evidence Act
3. (1971), ALLNLR 449
4. (1914) A C 599 at 614
5. R Vs Middleton (1974) 2 ALLER 1190
6. (1952) 14 WACA 30
7. Supra
8. 2 WACA 352 at 354
9. (1968) ALL NLR 589 at 593
10. Supra
11. R V Baldry (1852) 2 Den 430 cited from Sarker Law of Evidence (Sarker and Son) 11 Edition p. 218
12. (1959) 2 ALLER 195
13. (1971) INMLR 69
14. (1981) 3 PLR 18
15. (1981) 2 ALLER 193 at 201 at 202
16. (1971) INMLR 25
17. 13 WACA 39
18. (1961) 1 ALLNLR 344
19. (1967) 2 Q.B. 406 at 415
20. Ibid
21. R Vs Warringham 2 Den CC 147 Park B cited from Sarker op. Cit p. 219
22. Supra
23. Queen Vs Baba Haske (Supra)

24. (1975) IWL R 716 at 721.
25. (1911) C. A. R 12 at 14
26. (1959) Cr App Rep. 12. R Vs. Smith (Supra)
27. R Vs Vijjalakshmi Unrep G. C. 163, 164. cited from Sarker op cit 219
28. 2 C & K 920 at 925 cited from Sarker opcit 219
29. Supra
30. Custom and Excise Commissioner Vs Harz and Power (1967) 1 ALLER 177
31. Wigmore, J. H. (n.d) Evidence in Trial and at Common Law. (little Broun and Company), 3rd Edition, Vol. 4, p. 261.
32. Sarker o.p. cit 218
33. (1961) NNL R 47
34. Commissioner of Custom & Excise Vs Harz and others (Supra)
35. (1968) 2 ALLER 346 at 360
36. Spark V R (1964) 1 ALLER 727.
37. (1971) I ALLNLR 511
38. Per Cave, J R V Thompson (1893) 2 Q.B 12 at 15.
39. 13 WACA 39
40. R VS Richard (1967) IWL R 653 at 654 per Winn L. J.
41. State Vs Stanley Famous (Supra) Ejinima Vs State (Supra)
42. R Vs Thompson (Supra).
43. Akinrolabu Vs State (Supra)
44. (1967) 2 Q.B 406 at 415
45. R V Thompson (1783) I Leach 291 cited from Sarker.op cit 218
46. R Vs Coley (1868) 10 Cox C. C 536.
47. Queen Vs Baba Haske (Supra)

48. R Vs Fennel 7 Q.B.D 147
49. R Vs Rose 78 L. F. 119
50. R V Mansfield (1881) 14 Cox CC 639
51. Queen V Thompson (Supra).
52. (1964) 48 C. A. R 116
53. Ibid at 119
54. R Vs Godinho (1911) 7 G. App Rep 12
55. State V Mati Audu (Supra)s
56. (Supra), Ibrahim Vs R (1914 – 15) ALLER Rep 877.
57. Ibid at 180
58. Ibid at 182
59. Per Lord Parker C. J. in R Vs Wilson and another (Supra)
60. Supra.
61. (1974) 2 ALLER 1190
62. (1975) 1 WLR 716
63. Ibid at 721
64. Supra
65. Supra
66. Supra
67. Supra
68. Unreported; S. C. 417/1967; Judgement delivered 31<sup>st</sup> December, 1968.
69. Supra at 182.
70. Aremu L. O. (1977 – 80) “Voluntariness of Confession”, 11 Nigerian Law Journal p. 33.
71. R. Vs Ajege and Kigbo (Supra)

72. Tobi, N., (1980) The Admissibility of Confession: The Dilemma of the accused I  
Maid L. J. 9 at 18.
73. Supra
74. Kim Vs State (1992) 4 NWLR pt 233, p. 17. At 42. Samuel Ojegele Vs the State  
(1988) NWLR pt 71, 414.
75. R V Middleton (Supra) M C Dermott V. R (1948) Common wealth L. R 501.
76. R Vs Mansfield (1881) 14 Cox C. C. 639 at 640.
77. R Vs Thomas (1836) 7 C & p. 345 at 346 cited from Sarker op cit 219.
78. Eyres B. and Nares, J in R Vs Warickshall (Ileach Crime Law 208) cited from  
Sarker, Op cit 219.
79. (1875, 15 NY 386 (AM)
80. Tobi, N. op cit at 19.

## Chapter 4

### 4. PROCEDURE FOR OBTAINING CONFESSION

This Chapter shall deal with the significance of putting cautionary words to a suspect. The purpose and importance of the Police standard form shall be discuss and there will be a critical consideration of the importance of the fundamental pre-trial rights to silence and counsel to a suspect undergoing Police interrogation.

#### 4.1 Caution To Suspect.

The history and practice of cautioning a suspect dates back to the history of the Police force itself which date back to more than a century ago. Steer observed that:<sup>1</sup>

“Although the Police have apparently cautioned of offenders since the creation of organised Police force...”

This goes to show that cautioning of suspects is not a new procedure before obtaining the confession of a suspect. Caution is another relevant factor in the reception and admissibility of a confessional statement made by an accused. It goes to strengthen and or weaken the case of the prosecution particularly where the confessional statement is sought to be “attacked”.

Neither, the Evidence Act, the Judges’ Rules nor the Criminal Procedure (Statements to police officers) Rules 1960 applicable to the Northern States<sup>2</sup> defined what is a caution but only made provision as to how an accused shall be cautioned before his statement is taken down in writing by the investigating police officer.

Before a general discussion of the significance of caution to a suspect it is necessary to state the Judges’ Rules and the Criminal Procedure (Statement to Police officers) Rules, 1960. It is worth mentioning here that these rules are substantially the same except for a few provisions not applicable in the Judges Rules<sup>3</sup> which made it

mandatory that all statement taken against an accused or suspect must comply with the rules before it can be admitted in Evidence<sup>3</sup>.

The Judges Rules of 1964, which replaced that of 1912, are briefly as follows:

- i. 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.
- ii. As soon as a police officer has evidence, which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him, any question, or further question, relating to that offence. The Caution shall be in the following terms:

“You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence”.

When after being cautioned a person is being questioned, or elect to make a statement, a record shall be kept of the time and place at which any such question or statement began and ended and of the person present.

- iii. Where a person is charged with or informed that he may be prosecuted for an offence he shall be caution 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 will be taken down in writing and may be given in evidence”.

It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such question may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement. Before any such question are put to the accused he should be cautioned in these terms.

I wish to put some question to you about the offence with which you have been charged (or about the offence for which you may be prosecuted) you are not obliged to answer any of these questions but if you do the question and answer will be taken down in writing and may be given in evidence.

Any question put and answers given relating to the offence must be contemporaneously record in full and the record signed by that person or if he refuses by the interrogating officer.

When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any question or statement began and ended and of the persons present.

iv. All written statement made after caution shall be taken in the following manner.

- a. If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he said.

He shall always be asked whether he wishes to write down himself what he want to say; if he says that he can not write or that he would like some one to write it for him, a police officer may offer to write the statement for him, if he accepts the offer the police shall, before starting, ask the person making the statement to sign or make his mark to the following:

“I..., I wish to make a statement I want some one 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”.

- b. Whenever a Police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any question other than such as maybe needed to make the statement coherent intelligible and relevant to the material matters. He shall not prompt him.

c. When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or addition he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the 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.

d. If the person who has made a statement refused to read it or to write the above mention certificate at the end of it or to sign it. The senior police officer present shall record on the statement itself and in the presence of the person who make it, what has happened. If the person making the statement can not read, or refuses to read it, the officer who has taken it down shall read it over to him and asked or add anything and to put his signature or make his mark at the end. The Police officer shall then certify on the statement itself what he has done.

v. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence, a police officer may wish to bring to the notice of that person any written offence that has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or start to say something, he shall at once be cautioned or further cautioned as prescribed by Rule III (a).

vi. Persons other than police officers charged with the duty of investigating offences or charging offenders shall so far as may be practicable, comply with these Rules.

There is no need restating the criminal procedure (Statement to Police Officer).

Rules 1960, its provisions are substantially the same with the Judges' Rules.

As to the applicability of the Judges' Rules in Nigeria, the West African Court of Appeal has this to say in the case of R Vs Uguagwu and others<sup>5</sup>:

The so called Judges' rules which lay down inter alia that persons in custody should not be questioned without the usual caution being first administered are rules of caution laid down by the judges in England as the procedure to be followed in that highly civilised country. They should be followed, Mutatis Mutandis, so far as is possible and practicable in this country. But it would in our view be impossible and impracticable to acquire, in the case of primitive and unintelligent accused positive evidence not only that the necessary caution was given but also that it had been understood by them before statement voluntarily made could be admitted in evidence. In England, if a caution is administered the accused is presumed to have understood it until contrary is shown.

In our opinion the same principle applies here. What is essential in a case of this nature is that the court, before admitting the evidence, should be satisfied that the statement was really voluntary and was not prompted by any promise, or inducement or threat or by actual violence. When the court cannot be certain that the words of caution were understood, the onus on the court is all the heavier to be fully satisfied that the statement was really made voluntarily before admitting it.

There is no doubt from the above observation of the court, that the position of the Judges' Rules in Nigeria is directory one and not mandatory. The court further reiterated the importance of voluntariness as the crucial element for the admissibility of a confessional statement and not the strict adherence to the technical requirement of caution to a suspect.

The position of the Judges' Rules was further elaborated by A. T. Lawrence J in R Vs vision<sup>6</sup> as follows

"These rules have not the force of law: They are administrative direction the observance of which the Police should enforce upon their subordinate as tending to the fair administration of justice".

The above observation was further confirmed in the case of R Vs Frimpong<sup>7</sup>

Therefore, the criterion for the admissibility of a confessional statement is not so much the strict adherence to the rules than the voluntariness of the statement.

What then would be the effect of a confessional statement by applying caution to the suspect? The answer to the query was provided in the case of R Vs Vipmong<sup>8</sup> where the court held that since the caution made to the accused person was an inducement to speak, the confessional statement of the accused was inadmissible in evidence against the accused.

The Problem for determination is when would a caution in the above case not be regarded as vitiating the confession.

It is important to note that it is not the duty of the Police to get the accused or suspect to say anything. This was clearly stated in the case of Onobu Vs I. G. P<sup>9</sup> where Hirley J. observed as follows:

When a person is under arrest on a criminal charge, it is not the duty of the police to obtain evidence in the form of a statement from him. It is their duty to record what he says not their duty to get him to say anything. They are to take his statement, that is to record it, but they are not to obtain it, that is to get it out of him. They have no duty to obtain anything from him, because he is not obliged to say anything. To inform him of that, when he has been arrested and charged, he is addressed in the words of the caution prescribed by the Judges' Rules, words well known to the police and the court, he is told that he is not obliged to say anything unless he wishes to do so. The charge and the caution are not put to the arrested person in order to elicit from him something that may be evidence in the case, whether against him or for him, but to give him an opportunity to say for himself whatever he may say while at the same time leaving it upon to him not to say anything. The Judges' Rules were framed for the guidance of the police, and this court will not say that is the duty of a police officer to act in disregard of the rules, or that it is his duty to obtain a statement from an arrested person when the rules are so plainly designed to leave it open to the arrested person to say nothing, and to prevent police officers from trying to get them to say anything..

Any statement made in accordance with the rules should whenever possible be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.<sup>10</sup>

As a matter of law and good practice therefore, the policeman should ask the accused or suspect as the case may be if he could write and if he wishes to write his own statement himself. That is when the accused or suspect volunteers a statement. If the suspect is an illiterate or does not want to write the statement himself, then there would be nothing wrong if the police officer record the statement.<sup>11</sup>

In the case of Ghuna V State<sup>12</sup>, the court held compliance with S.12 (1) of the criminal procedure code as sufficient even if the police did not give evidence in respect of signing the statement in the open court.

In the case of Udo Vs Police<sup>13</sup> where it was held that a statement to the police should, if possible, be written down or recorded in the language in which it was made, but this does not mean it is inadmissible by the mere failure to do so. And in the case of State Vs Adatu<sup>14</sup> where it was held that although it is better that the statement of an accused to the Police should be written down in the language in which it was made, such a statement is not inadmissible merely because it is written down in English and not in the language the suspect spoke.

In practice, after the confessional statement is recorded, both the suspect and the statement are taken before a superior Police officer for an endorsement.

The superior is required to read the confessional statement to the accused. The accused would then confirm that it was a voluntary statement correctly recorded and the endorsement should reflect that.

In respect of this duty on the police, the Supreme Court observed and held in the case of Ejinima Vs State<sup>15</sup> as follows:

The practice of taking an accused person and his statement before a superior police officer for a confirmation that it was his voluntary statement, although not a requirement of any statute has been commended in many decided cases as eminently fair to the accused. It is certainly a matter which can be taken into account when considering what weight is to be attached to such a statement. It strengthens any evidence to show that it was the voluntary statement of the accused. The manner, form and grounds for the administration of caution to a suspect or accused are stated under Rule 2 and rule 3 of the Judges' Rules S. 4 of the criminal procedure (Statement to police officer) Rules of the Northern states also prescribed for the form the caution should take which is similar and in line with Rules 2 and 3 of the Judges' Rules:

The Rules governing caution to a suspect, despite the fact that the courts regarded these Rules as rules of administrative practice and convenience and not rule of law, it is important in the administration of criminal justice not only in Nigeria but also in countries where the adversarial system of criminal justice is practice. The importance of cautioning of a suspect still goes to enhance the importance and level of criminal trial particularly where the voluntariness of a confessional statement of an accused is in question before the courts. It might not be a strong determinant but it may add some weight to the totality of the evidence before the court<sup>16</sup>.

The administration of caution to a suspect is an important element in determining the voluntariness of the confession.

Before attempting a critique of this point it would not be out of place to consider the question: What is a "statement – under – caution" to a police officer or person in authority "statement –under-caution" was defined as follows:<sup>17</sup>

"This is a narrative account by the suspect dealing with the accusation, supposedly composed by him unaided and unprompted and some times written out in his own hand, though more usually presented as having been dictated to a Policeman"

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There is no doubt from this definition, that where the suspect's confession is obtained in the circumstance enumerated above, the confessional statement would be presumed voluntary in the eye of the law and the courts. The definition further indicates that the accused must have exercised his free will in making the confessional statement. The question of voluntariness or involuntariness would not and may not hamstring the trial of the case particularly where recourse has to be made to trial within trial. This would shorten the proceedings for both the prosecution and the defence.

Caution to a suspect puts him on guard as to what to say to the Police or what not to say. No one can strongly object to this. The guilty person may be on his guard already. The person whether innocent or blameworthy would be prepared as to what to say to the interrogating Police officer taking down the confessional statement. In other-words, the accused would be on the alert.

This issue was clearly stated by D. Wolchover as follow:<sup>17a</sup>

“In such a case he is conscious of his guilt and no illusion as to the seriousness of his position when approached and questioned by a police man on the subject of the crime. His mind will be fully on the alert in any case...”

There is no doubt that this would enable the suspect or innocent person to clearly put his own side of the story before the police.

Cautioning of a suspect serves to remind the suspect of the rights he possesses at common law particularly the right to remain silent and to some extent right to counsel. It is worth mentioning here that these rights have been constitutionally quarranteed.<sup>18</sup>

The suspect is reminded that he need not say anything, and he is reminded at an earlier stage than formerly. Hardened, resolute criminals and majority of the citizenry particularly in a country with a high level of literacy know this. But in a developing country like Nigeria with a high level of illiteracy, majority of the citizenry may not know this. Even some members of the police force may not even know this issue.

It is important to note that default in reminding the accused of the rights, may not have any adverse effect on the confession.

Lord Diplock in the case of R Vs Hall<sup>19</sup> puts the issue clearly as follows:

The caution merely serves to remind the accused of a right which he already possesses at common law. The fact that in a particular case he has not been reminded of it is no ground for inferring that his silence was not in exercise of that right but was an acknowledgement of the truth of the accusation.

Cautioning of a suspect puts it to the suspect that he shall or may be prosecuted by the authority concerned with the matter against him. This is so because if a person is arrested, cautioned and told the grounds of his arrest surely he has been told that he may be prosecuted for that offence under enquiry.

Furthermore, cautioning of a suspect not only serves to inform the suspect the nature of the allegation against him. It serves to inform the suspect of the grounds on which he will be prosecuted and on the other hand gives him the opportunity to prepare for his defense since he is conversant with the nature of the allegation against him.

Cautioning of a suspect stimulates the search for independent evidence by the prosecution or by whoever is responsible for the prosecution of the suspect. This is so because the suspect is reminded of his rights of either maintaining silence, that is he is not obliged to say anything at his interrogation and even if he wish to say anything he might do that after consultation with the legal practitioner of his choice and so on. This will in turn prepare the prosecution and put him upon the task of establishing his case well against the suspect.

The importance of producing independent evidence against the accused cannot be over emphasized. The more cogent the evidence available against the accused the better the chances of securing a conviction against him.

This practice can be said to strengthen the constitutional provision of presumption of innocence against or in favour of the suspect and that whoever is alleging the commission of a crime against any body should prove his case beyond reasonable doubt. That is the intention and spirit of s.138 and 141 of the Evidence Act.

The cautioning of a suspect also discourages shoddy police practice and methods. This is so because since they are aware of the fact that the suspect has to be cautioned and can not be forced to say anything against his wish, hence, adequate investigation of the case will be conducted by the Police according to due process. In practice, whether this is obtainable is another issue entirely. Where the Police has made up its mind that the suspect committed the crime alleged they may not follow laid down procedure but obtain the evidence through extra-legal means.

Cautioning of a suspect can also be said to compensate for the greater use of facilities and resource at the disposal of the prosecution. This is so where the facilities are used for massive independent evidence. This statement can only be realistic where there are facilities and resources at the disposal of the police or the prosecution. This is unrealistic in the present Nigerian situation where there is acute shortage of manpower and necessary facilities for the search of independent evidence against the suspect, particularly in respect of forensic and other scientific evidence.

Failure to administer caution to a suspect and non-notification that he has right to remain silent and that he need not say anything would be a breach of due process and would constitute a violation of a fundamental right of the suspect in a free society.

In summing up this discussion, it is necessary to highlight the pitfalls of the rules governing caution to a suspect and the cautionary process itself.

In the exercise of the court's discretion to exclude a statement taken down without caution, two points require consideration. In the first place, the statement may be

excluded where there is no custody in the strict sense and secondly, the court may exercise its discretion with due regard to the general circumstance of the case<sup>20</sup>. This argument however logical does not lay down any rules or grounds upon which a statement without caution may be excluded.

The Judges Rules and the existing judicial authorities leave no doubt that any person whether he be a "suspect or not" may be questioned without a caution being administered, with a view to obtaining useful information, when an officer is endeavouring to discover the perpetrator of a crime under investigation.

What this means is that anybody at anytime can be questioned without the usual caution. Then what is the importance of caution to the suspect?

#### 4.2 Police Standard Form

The Police Standard form has some relevance to confessional statement made by an accused person. It can be said to be more of a directional procedure prescribed for police officers in taking down confessional statements. It is not a mandatory procedure for the police to comply with.

In the Supreme Court case of David Obue V The State<sup>21</sup> the court, in endorsing the practice or procedure adopted by the police in respect of confessional statements has this to say.

We wish to observe that where the court is expected to attach some weight to a confessional statement purported to have been confirmed should be followed. The reason for this is obvious because the question set out in the standard form were deliberately intended to test whether the accused made the confession alleged or not to the recording officer.

It is important to note at this juncture that the standard form is a form with questions to be filled and answered by the accused person. The standard form is recommend to enable proper regulation of the process of obtaining confessional

statement and to ensure that confessional statements are not obtained by over-zealous police officers through unfair means and methods.

The provision of the Evidence Act or that of any other Act does not make the use of this form mandatory nor provide for penalty or sanction for non-compliance with the standard form.

The purpose of the standard form may be deduced to be as follows:

- a) It is meant to determine whether or not the accused person was cautioned by the person or whoever arrested and charged him to court.
- b) It is also meant to determine whether after the caution, the accused made a statement.
- c) It is also meant to determine whether the accused signed or thumbprint on the statement.
- d) It would also determine whether the statement was voluntarily made.
- e) Thereafter, the statement would be read to the suspect and he is asked whether it represents what he said to the police officer.
- f) It would also determine whether the accused has any other thing to say or to alter what he had said in the statement.
- g) Where the accused is an illiterate, an interpreter who attests to it interprets the questions to him.

It is important to further emphasised that in the case of Samuel Ogegele V the State,<sup>22</sup> the fact that the standard form was not used was held by the Supreme Court not to be fatal to the case. It was further held that whether the form was filled or not it is irrelevant to the proceedings provided that the confessional statement was voluntarily made to the receiving police officer. And that it was relevant only to the issue of the weight to be attached to the statement.

This principle was reaffirmed in the case of Adamu V A. G. Bendel State<sup>23</sup>. In this case the appellant retracted his confessional statement claiming that he did not make the statement. The court of Appeal held that since the standard form was not used by the superior police officer the benefit of that error or omission must be accorded to the accused. This can be said to be in line with the fundamental principle of criminal law and procedure. That is resolving any lapse, ambiguity or doubt in favour of the accused person! The importance and purpose of the standard form was enumerated in the Supreme Court case of David Obue V the State<sup>24</sup> as follows:

It is not disputed that there is a standard form which a superior police officer has to fill when an accused person is brought before him with a confessional statement for the purpose of confirmation or otherwise. Certain questions are inserted in the form, which are to be put to an accused person, and his answers recorded, but this was not done in the case of exhibit 'H'. The D.S.P. only wrote out in red ink on the side of the remarks of the 3rd prosecution witness that the accused had confirmed the statement as correct. This is not satisfactory. The question in the form and the answers when obtained might have lent weight to such confirmation. We wish to observed that where the court is expected to attach some weight to a confessional statement purported to have been confirmed before a superior police officer the laid down procedure for such confirmation should be followed.

The reason for this is obvious because the questions set out in the standard form were deliberately intended to test whether the accused made the confession alleged or not to the superior police officer. It is also essential that the superior police officer should be satisfied that the accused person understands the language used by him. It is because of the weight that will be attached to a confessional statement confirmed by an accused person before an independent and responsible person, namely a superior police officer that care should be taken that the laid down procedure is strictly followed. The weight to be attached to the evidence on confirmation of such confessional statement will depend to some extent on whether there had been compliance with the provision of the standard form. It is peculiarly necessary where the confessional statement is the main proof of the prosecution's case.

#### 4.3 Pretrial Right To Silence And Counsel To A Suspect

There is no doubt that in the area of reception of confessional statement of a suspect, the role and importance of pretrial rights to silence and counsel can not be over-emphasized. At this stage, when investigation is in process though almost completed, the first thing to do is to inform the suspect of these rights and avail him the opportunity of benefiting and utilizing these rights.

These benefits entail that the suspect or accused as the case may be has the right to remain silent and refuse to answer police questions. He also has the right to consult his counsel before questioning and throughout the period of questioning by the police or whoever is responsible for the prosecution of the suspect. These rights shall be discussed separately.

##### 4.3.1 Right To Silence

From the onset, in discussing a suspect's pre-trial right of silence it is necessary to make some observations concerning this right.

Right to silence is a common feature of the constitution of various countries of the world. It is in line with well-known principle of law that any person suspected of committing a crime shall be presumed to be innocent until the contrary is proved. Right to silence and privilege against self-incriminating statements can be said to be one and the same. Thus it has been argued that statutory interference with the privilege against self-incrimination is almost as old as the right to silence.<sup>25</sup>

In practice, it would appear that suspects hardly enjoy these right to silence in the course of police investigation particularly where they are bent on securing information that may be used adversely against the accused.

The nature, scope and position of the right to silence is an issue which for centuries has presented enormous legal problems both to lawyers and jurist. As to what

constitutes right to silence, Lord Mustill in Smith V Director of Serious Fraud,<sup>26</sup> explained that the right to silence did not denote or refer to any single right but referred to it as a *desperate group of immunities which differs in origin and dimension*. He identified them as follows:

(1) A general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer questions posed by other persons and bodies; (2) a general immunity, possessed by all persons and bodies from being compelled on pain of punishment to answer question the answer to which may incriminate them; (3) a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officer or others in similar position of authority, from being compelled on punishment to answer question of any kind;...

Here, it is necessary to examine the constitutional provisions regarding a suspect's right to remain silent while undergoing interrogation and investigation.

S.35(2) of the 1999 Constitution provides as follows:

"Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice".

It is important to emphasize that this constitutional provision applies to a suspect who is arrested or detained. This constitutional guarantee illustrates the importance of the right to silence to a suspect. A suspect under interrogation has the right to silence and cannot be subjected to any form of compulsion for the purpose of obtaining information or evidence, which might be used against him in the subsequent trial.

It should be stressed, though that the constitutional and other statutory support for competence and compellibility of witness are provided by our law.<sup>27</sup> The problem and issues associated with a legal system which seeks to compel an accused or suspect to give evidence thus diminishes the right to silence has been considered by Wigmore who has this to say:<sup>28</sup>

Any system of administration, which permits the prosecution to trust habitually to compulsory disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly, upon such evidence, and to be satisfied with an incomplete investigation of other sources. The exercise of the former to extract answer begets a forgetfulness of the just limitation of that former. Thus the legitimate use grows into unjust abuse; ultimately the innocent are jeopardized by the encroachment of a bad system.

From the foregoing observation of the learned author, it would not be in line with common sense and the dictates of justice even without constitutional provision to subject a suspect to an unjust method simply because the prosecution wants to obtain some evidence against him and for the purpose of him incriminating himself.

S. 35(3) of the constitution further provides that a person arrested or detained shall be informed in writing within 24 hours of the fact and grounds for his arrest or detention. The Judges rules can be said to fit in with this provision of the constitution which further strengthens the submission that the suspect would come to know of the reasons he is or was detained and this would definitely put him on his guard.

The constitutional provision and the importance of right to silence, goes further to strengthen the requirement that the prosecution must prove its case beyond reasonable doubt. And not the duty of the suspect to furnish the prosecution with evidence, which he will use in the conviction of the suspect.

The right to silence is the statutory assertion of the fundamental principle that the prosecution must prove their case and that no obligation lies upon the accused to prove his innocence.

The right to silence provided in favour of the suspect or accused is another way of protecting the dignity of human person and his right to personal liberty under the law. This is so because a man can not be force to say what he does not mean to say. It is

intend that the exercise of this right will discourage police use of unorthodox method to make a suspect "talk". Degrading and inhuman torture cannot be used to make him talk when he would have otherwise kept silent. The privilege can be said to protect the "conscience and dignity of man"<sup>29</sup>.

In spite of the salutary objective of this constitutional safeguard, it is doubtful whether in reality it has imparted positively to the benefit of suspects undergoing interrogation for criminal charges. There are numerous recorded and unrecorded allegations particularly against the police force for using degrading and inhuman methods for the purpose of securing confessional statements against suspects particularly where there are a lot of interest in the case and where there is an "order from above".

It has frequently been pointed out that the right to silence and the privilege against self-incrimination is rooted in history and is the rationale underlying the rejection of improperly obtained confession<sup>30</sup>. On the other hand, the courts have also expressed reservations about the restrictive rule preventing Judges from commenting on the failure of suspect to answer police question before trial<sup>31</sup>.

The basic important issue here for consideration is the conflict between the exercise of the right to silence and the need to secure information in order to convict those responsible for criminal offence.

It is worth mentioning that there is no general duty to act as a witness of truth towards any official or private individual by a suspect. This is a well-known principle both at the common law and by the constitution.

The right to silence has also been described as one of the great landmarks in man's struggle to make himself civilized. Frankfurter J.<sup>32</sup> puts the issue as follow:

"... An expression of one of the fundamental decencies in this relation we have developed between government and man"

The right to silence of a suspect removes one obstacle that prevents witnesses from coming forward to give information or testify during trials. The benefit of this safeguard has however been seriously doubted<sup>33</sup>.

One reason for this is that, because of peoples' fear of police station, suspects and even witnesses may be nervous and where they are compelled to give evidence may be incoherent and give false evidence. Therefore, any factor that removes their fear is likely to make their evidence more valuable and reliable.

Similarly, the right to silence can be said to reduce the risk of perjury. This is so because whenever and wherever the claim to the right is strictly upheld, the urge towards telling lies is greatly reduced if not completely eradicated.

#### 4.3.2. Pre-Trial Right to Counsel

The pre-trial right to counsel is another important safeguard to fair trial and fair hearing it can be said to begin from when a suspect is taken into custody on an allegation of the commission of a crime or an offence. From that moment, a suspect should be given every reasonable opportunity to exercise this right.

It is an important constitutional provision, in fact, it is a fundamental right to the suspect or accused as the case may be who is alleged to have committed a crime. The suspect has every right to be represented by counsel in the course of police interrogation or interrogation by a person in authority. The right to counsel involves fair hearing and a wider right to fair trial as a whole. It is important to note that a man cannot be condemned unheard, the consequence of such an action can be very grievous and harmful to the case of the prosecution. Every suspect must be afforded an opportunity to be heard. That is, to state his side of the story or exercise his right to silence and right to his counsel.

This would afford the investigating authorities, the police or person in authority the opportunity to decide in the course of their investigation and applying the "reasonableness test" whether a prime facie case has been made against a suspect to warrant his prosecution in a court of law.

The fact that the Judges' Rules of 1964 was declared to be an administrative guideline is not in doubt but the preamble to the Rules make provision for and state that they do not affect the principle of right to counsel. The preamble was emphatic about it as follows<sup>34</sup>.

Every person at any state of an investigation (by police) should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so.

The proviso to the Rules should be accepted with mixed feelings and can be seen as an attempt by the legislature to satisfy the requirement of right to counsel and at the same time satisfy the need for quick and effective dispensation of justice.

The provision of the 1979 constitution and that of 1999 constitution in respect of the right to counsel is one and the same. It is a mere reproduction of the section.

S. 36 (6) (c) of the 1999 constitution provides as follows:

"Every person who is charged with a criminal offence shall be entitled to defend himself in person or by legal practitioner of his own choice".

Without doubt this constitutional provision gives every person charged with a criminal offence the right to counsel. It is important to note that these provisions have not been subjected to proper interpretation as to whether the right avails a suspect in the course of police interrogation. Nevertheless, it can be said that every person charged with a crime possesses such a right.

S. 35 (2) of the 1999 constitution comes in handy to strengthen the position that the right is intended for "every person" particularly suspects undergoing interrogation by the police or by other persons in authority.

This appears to be the case since any person who is detained or arrested, shall have the right to remain silent until after consultation with a legal practitioner or any other person of his choice. The provision of S. 35 (2) of the 1999 constitution is obviously more elaborate and having taken care of the pre-trial right to counsel of the suspect.

The importance of right to counsel has different dimensions. Its importance can be equated with the entire liberty and survival of mankind. In fact, it is an indispensable safeguard for freedom and justice under the law.

A man, no matter how learned he might be, has a crucial need for a counsel to represent him and adequately brief him on what to say in the course of police interrogation or by person in authority, especially, in this present age where all sort of tricks and deceptions are used for the purpose of obtaining evidence for the purpose of convicting the suspect when he eventually goes to trial. The suspect may not be in a position to take care of this situation. Therefore, the presence of counsel is of great importance.

In a largely illiterate society, such as ours there is compelling need for counsel to represent a suspect. In fact it is a necessity. Even in developed societies where the rate of literacy can be said to be high, the intelligent lay man may not be conversant with the rules of procedure, science of law and particularly the provision of the Evidence Act as applicable to the interrogation which he is undergoing.

The maxim that ignorance of the law is not a defense does not improve the lot of a suspect. Therefore, there is every reason for a counsel to represent a suspect for a

proper and effective representation in the course of interrogation and any subsequent proceeding that may be initiated against him.

A professional should be allowed to take charge of the situation. He would be in a better position to adopt and use all legal techniques at his disposal for proper and effective representation of a suspect. Idoko J. (as he then was) in Uzodima V C OP,<sup>35</sup> summarised the above discussion as follows:

The need to have counsel to defend one stems from a number of factors: the accused may be incapable of adequately making his own defense because of ignorance, illiteracy, feeble-mindedness, anxiety or fear or just for the simple logic that the doctor who has a sickness may not be the best healer of himself.

Every interrogation of a suspect by the police or person in authority carries the potential for confrontation between the suspect and the interviewing officers. This may arise where the interrogators who are desperate to obtain incriminating or harmful evidence against the suspect threaten him. The position and role of the solicitor here is to reconcile the function and duties of the interrogating officers and the maintenance of the rights of the suspect in the course of interrogation. Therefore, the solicitor must be alert to the need to intervene firmly and effectively if and when the situation demands.

“Inefficiency” of counsel in the discharge of these duties may pose a problem to the optimal enjoyment of this right by a suspect. A solicitor must ensure that the suspect satisfactorily states his case to his interrogator. The solicitor is there to ensure protection of the interest of his client, which is paramount to any other interest.

Voluntariness of a confessional statement is as important as the admissibility of the statement. Where the confessional statement is not voluntary, it would definitely be inadmissible in evidence. The availability of a counsel when a statement is to be taken down goes to solve a lot of problems for both the prosecution and the defense.

Controversies and disputes as to the content and voluntariness of the statement are minimised if not eradicated altogether. On this issue, Kelly J. A. in R Vs Loque,<sup>36</sup> has this to say :

“The availability of the advice of counsel to an accused before giving statement could be cogent evidence as to the voluntary nature of the statement”.

In R Vs Emele,<sup>37</sup> the accused was charged with having murdered her husband. The evidence showed that on the second day of her detention she had asked to see her solicitor but this was refused at the time. She was held for one more night, and on the next morning she made a number of declarations, including one to a neighbour. The trial judge refused to admit them. The Canadian Court of Appeal in upholding the trial Judge's judgement further observed as follows:

After all the question he had to determine was not what would have happened if the respondent had been permitted to see her solicitor but whether the statement alleged to have been made by her were voluntary. The fact that her request was ignored was, in our opinion but one of a number of circumstance requiring consideration in determining that question.

The presence of counsel in the course of police interrogation and the right to counsel allow the observance of due process of law. There is no doubt that where a solicitor is present he would insist on compliance with the due process of law and procedure.

In R Vs Ballegeer<sup>38</sup>, the accused was charged with unlawful breaking, entering and theft. This was made known to him when he was to be arrested. His request to consult and seek legal advice from his counsel was turned down because the constable “had driven 130 miles to get a statement”. The accused pleaded guilty (he was not represented at the time) but later appealed against the conviction and sentence. In the Court of Appeal Freedman J. A. observed as follows:

"A spectacle of a police officer willfully, and alas successfully frustrating the due process of law. What the constable did was wrong and unjustifiable, and his conduct cannot receive the sanction of the court".

The appeal was consequently allowed and retrial ordered.

In concluding the discussion on this right, a situation where a suspect is deliberately refused access to his counsel is a clear violation of the suspects fundamental and constitutional right to be represented by legal practitioner of his own choice.

From the forgoing, the status of cautioning of a suspect was discussed. The relevance and legal implication of strict adherence or otherwise of the Judges' Rules was also highlighted. The purpose and importance of the police standard form was also discussed and finally the importance of the pre-trial rights to counsel and silence was abundantly enumerated.

The last Chapter shall summarise, observed inadequacies earlier, discussed and suggest ways of amending and correcting these inadequacies.

## FOOTNOTES

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8. (1961) N.R.N.L.R 47
9. (1957) N.R.N.L.R 25
10. Rule 4 of the Judges' Rules 1964
11. S.126(1) Criminal Procedure Code applicable to the Northern States.
12. (1965) N.M.L.R 165.
13. (1954) N.M.L.R 21.
14. (1980) 2 N C R 33 Per Idoko J. Ogbuewu Vs R (1949) 12 WACA 483.
15. Supra, RVs Awip (1957) SCNLR 307 R Vs Nwigboke (1959) SCNLR 248.
16. Ejinima Vs State (Supra).
17. Wolchover, D. (1984) Validating the accused's Confession Vol. 47 M.L.R 535.
- 17a Ibid
18. Chapter 4, S.35(2) of the 1999 constitution
19. (Supra) at 324.
20. Per Lord Sumner in R V Ibrahim (Supra) at 614
21. (1976) 2 S.C 141

22. (1988) INWLR 415
23. (1986) INWLR 286.
24. Supra at 153
25. Smith Vs Director of Serious Fraud Office (1992) 3 AUER 45 at 472 Per Lord Mustill.
26. Supra at 463 to 464.
27. S.36 (11) of the 1999 constitution and S. 175 and 159 of the evidence Act.
28. Wigmore, J. H. (n.d) Evidence in Trial and at Common Law (little Brown and Co.) 3<sup>rd</sup> edition Vol. 4 at 304.
29. Per Blackand Douglas J. J. in Ullman V US 350 US 422, 446 (1950).
30. R Vs Sang (1979) 2 ALLER 1222 AT 1230, Law Chi-Ming Vs R (1991) 3 ALLER 172 at 178.
31. R Vs Gilbert (1977) 66 Cr App Rep 237, R Vs Alladice (1988) 87 Cr App Rep.380.
32. Ullman Vs US 350 U.S.A 422, 426 (1955).
33. Wigmore O.P cit P. 307.
34. Practice Note (1964) IALLER 237 No. 2
35. (1982) I.N.C.R 27 at 29.
36. (1962) 2 C.C.C 34 at 350 (ont).
37. (1940) 74 C.C.C 353,
38. (1969) 3 C.C.C 353, I.D.L.R (3d) 74.

## Chapter 5

5.

### CONCLUSION

#### 5.1 Summary

The meaning of confession as defined by the Act and other legal commentators were critically considered. The controversy surrounding the purpose and extent of the definition of confession was also considered. Whether the distinction between confession and admission has any practical effect in the administration of criminal justice was also considered. It is submitted that if any such distinction exist is more of an intellectual exercise than having a practical value in criminal trials. The specific nature a confession should take had been discussed. The position of persons that can make confession had been seen. The legal consequence of a confession made by another person to the charge had been critically discussed.

The requirement of Section 27 (2) of the Act, which deals with voluntariness as the basis of admissibility of confession had been critically discussed. The basis of and reliance on free will, free state of mind of a suspect and the voluntary nature of a confessional statement had also been discussed.

The scope of section 27 (2) of the Evidence Act was critically discussed and various instance covered by section 27 (2) were eloquently highlighted. Judicial determination of voluntariness of confessional statement particularly with regards to the fact that whether or not voluntariness is an independent tests in determination of a confession had been critically discussed .

Chapter three deals with the main body of this thesis in the form of legal exposition of the requirement of Section 28 of the Evidence Act. Particular reference to the nature and scope of the vitiating elements was also abundantly enumerated with special exposition as to the instances of inducement or promise and threat. The effect of

confession made after the inducement, threat or promise has been fully removed was also plainly discussed. Various factors and judicial pronouncements which are the basis for the rationale for the inadmissibility of involuntary confession were also enumerated with particular instances.

Caution to a suspect is another important aspect and procedure adopted in obtaining confession from a suspect. Importance of caution was highlighted including the Judges' Rules and its significance were also discussed. The legal consequence of none application of the Judges' Rules was discussed with a particular reference to case law authorities. The purpose, requirement and importance of the police standard form was also discussed. In discussing the purpose of and importance of police standard form, the importance of pre-trial rights to silence and counsel in the course of police or person in authority's interrogation was an aspect which was also highlighted.

Right to counsel and silence was discussed as to how it stands in the course of police interrogation and interviews.

The forgoing is a general summary of what was dealt with in the preceding Chapters. Various observations shall be the area of consideration in the following paragraph.

## 5.2 Observations:

Firstly, the definition of confession as critically discussed in Chapter one particularly with reference to the Evidence Act and case law expositions is too wide and unrestrictive. A definition that reads admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime means admitting anything and inference to any statement or act that relate to the crime committed as a confession.

In fact it is an inelegant way of legislative drafting. It does not give a concise and clear definition of what confession stand out to be.

There is no doubt that the Stephen's Digest of the law of Evidence was the source of Nigeria Evidence Act. This could also be another factor which makes it difficult to comprehend the present Evidence Act.

The present Evidence Act does not take into consideration our peculiar local circumstances and set up.

The distinction between confession and admission appears to have been fully settled by the Evidence Act particularly with respect to confession in criminal cases and admission in civil cases. The confusion and problem arose in the course of usage by the courts. The courts used the word confession and admission interchangeable without due regard to its implication. The Supreme Court in one of its judgement used the term interchangeable. This was the circumstance in the case of Ogbu Vs State.<sup>1</sup>

The Police and other persons in authority for example, National Drug Law Enforcement Agency's Agents, Nigerian Customs Officer, Nigerian Immigration Officers and so on, normally deemed silence to interview of the allegation of the commission of offence against a suspect to be a confession. This is a very dangerous trend.

It is important to note that the area of incapacity of an accused or suspect with respect to confession he made or which he may make has not been taken care of by our law of Evidence.

The area of confession made by another person to the charge is a very delicate one particularly where the co-accused was not charged jointly and where there is an arrangement with him not to be prosecuted.

In considering voluntariness of confession, it is important to observe that the determinants of voluntariness were not enumerated by the Evidence Act as is the case with respect to section 28 of the Act which deals with involuntary confession. There are no clear cut factors which could be used to determine when a statement would be said to be voluntary.

Nwadiolo,<sup>2</sup> Dr Aguda<sup>3</sup> and Dr Aremu<sup>4</sup> all gave divergent opinions as to what should determine voluntariness of confession with much weight and reliance on section 28 of the Evidence Act and the common law principles. This goes to show the uncertainties as to what could determine voluntariness and thus widen the scope of the factors that could determine voluntariness of confession.

It could also been seen that the general and accepted opinion is that once a confession is held and determined to be voluntary then it is held to be admissible against the maker.

In rejecting involuntary confession, the requirements that the inducement, threat or promise under the provision of S.28 of the Evidence Act must bear reference to the charge against the accused is a very bad law, unfairly prejudicial to the accused and unrealistic in the present twenty first century legal system.

The fact that vitiating elements must bear no reference to the mind of the accused worsened the position of things particularly with respect to the defense of the accused and provide a channel for the reception of involuntary confession.

The third requirement that the confession must proceed from a person in authority is not a good development for our law of Evidence, criminal and procedural law in general.

It is also important to note that the requirements contained in section 28 of the Evidence Act lacks precise definition which further compound the real understanding as to what constitute those requirements.

This further compound the problems with other form of duress. For example the application of physical violence, torture, dumping of a suspect in an under ground cell, threat of humiliation of a suspect in the public and so on. How can they be accommodated by the provision of section 28 of the Evidence Act?

Another issue is the fact that the cumulative elements in section 28 of the Evidence Act must be present before a confession could be termed involuntary. That is all these elements must be present in order to vitiate a confession<sup>5</sup>.

It has been highlighted earlier on in this thesis that the Judges Rule as applicable to our legal system is salutary and merely directory. It has no adverse effect and force of law for its application or to a confession. It could go to add more weight to the final determination of confession of an accused person.

An important aspect of the Judges' Rules is the aspect of cautioning of a suspect before taking down his statement. Cautioning a suspect when there is reasonable belief that the suspect committed the crime, and when the suspect is to be charged to court is an unnecessary waste of resources and time. There is no need for such a cumbersome practice.

The form of the caution is not straight forward as it does not give the accused the benefit of giving his evidence or stating his own side of the case, with holding any evidence and the implication of withholding such an evidence in court.

The practice of cautioning persons not in custody is also irrelevant and not in line with the Judges' Rules. It is also worth mentioning here that Rules 2 and 3 appear to be a duplication of functions.

There is no doubt that the issue of caution tends to put an accused or suspect on guard as to what to say to the interrogating police officer or person in authority as the case may be. Although the accused or suspect has the option, so to say, remain silent in the interrogation room, or refuse to make an incriminating confession. One is not quite sure whether he can really stick to his gun on the face of the most torturing and formidable police interrogation after administering the caution to him.

From the above instance it is virtually difficult for an accused to remain silent. At the end of it all, he would end up making a confessional statement to the police or person in authority.

In practice, the police hardly use the police standard form to complement the confession or taking of statement of a suspect. It is hardly presented in court. The standard form is not normally included in the proof of evidence, which would ultimately be handed over to the prosecution.

It is only the National Drug Law Enforcement Agency, which had a standard procedure for taking statement from a suspect. The Agency has an "Incident Report Form" which is similar to the police standard form containing questionnaires of the incident that happened and which is compiled and completed by the investigating narcotic officer before the suspect makes his statement.

It is worth mentioning here that suspect and witness statements sheet of the National Drug Law Enforcement Agency is elegant and comprehensive in nature. This is so because taking of statement at the Agency is been supervised by the Agency's legal practitioners.

It is also important to note that both the police and other persons in authority (for example National Drug Law Enforcement Agency, National Agency for Food Drug Administration and Control, Nigeria Customs and Nigerian Immigration Service and so

on) in most instance do deny suspects access to their counsels in the course of interrogation and taking down his statement. There are incidences that the police and other persons in authority do send counsels away from such event claiming that their stations are not court for the counsels to appear. Sometimes counsels are arbitrary detained with their clients.

It is a fact that in some extreme cases suspects have died in the course of police interrogation and continued detention in police custody. This is so particularly where they are subjected to all forms of torture for the purpose of making them confess the allegation of crime against them.

If suspects are detained while investigation goes on into allegation of robbery, murder or dealing in hard drugs made against them, it is unlikely that policemen and persons in authority who are their custodians, would go out of their way to remind them (the suspects) that they have some fundamental and elementary rights particularly rights to counsel and silence under Nigerian Law. In some instances, suspects are outrightly denied access to their counsels under the pretext that it is not time for the suspect to see his lawyer.

Legal remedies against the police, law enforcement officers and other persons in authority who are responsible for this kind of disturbing conducts are difficult to implement. The police are known for their co-operation whenever there is an allegation of crime or wrong doing against any of their colleagues. By-standers and police officers present are normally reluctant to come forward and testify in favour of a suspect whose rights have been infringed.

In some instances it is even difficult for the suspect or accused to produce independent witness in court. This is so because this interrogation, torturing and so on

normally take place at the police station or stations of persons in authority with no neutral or third party present.

The use of modern technological equipment to record confessional statement has not yet assumed prominence in our legal system. The use of sound recording equipment and video-taped confessions are yet to be given their proper judicial pronouncement.

In reality, the technical nature and the provision of S.27 and S.28 of the Evidence Act is not what is easily comprehended by the layman. Laymen hardly appreciate the benefits of these provisions except where they have been briefed by their lawyers. The people hardly appreciate trial within trial and submissions of counsel there to in course of deciding admissibility of confessional statement in court. To them this is another cumbersome procedure and use of legal jargons in court.

It is not surprising therefore, that the provisions of the Evidence Act was not mandatory made applicable to the Area Courts which exercise criminal jurisdiction unlike the Customary Court.

The layman or ordinary man as the case may be, may find the application of these provisions in relation to confession very difficult to comprehend particularly where he is the nominal complainant in the criminal case or matter. He would find it difficult to believe that where a crime has been committed and he is directly involved but the court will now bother itself with the issue of voluntariness of the confessional statement and admissibility of the said statement.

Whether this area of confession, deciding voluntariness and admissibility of the confession is acceptable to the ordinary man is an objective one which can only be ascertained after the conclusion of trial.

### 5.3 Suggestions.

The area of this thesis shall contain suggestions or recommendations as to how the above problems highlighted could be resolve and if properly implemented and adhere would lead to effective administration of criminal justice.

It is important to note that justice is three-way traffic. That is justice from the court, justice to the prosecution and justice to the accused. And the main aim of trial in general is the administration of justice.

#### 5.3.1 Amendment of Section 27 (1) of the Evidence Act.

The definition of confession as contained in Nigerian Evidence Act which is too wide and unrestrictive should be amended to read as follows<sup>6</sup>:

“A confession comprise words or conduct, or a combination of words and conduct, from which whether taken alone or conjunction with other facts proved an inference that may reasonably be drawn that the person making it has committed an offence”

It is important to note that following this dictum expressed in Swami's case as to the problem of the definition of confession and other decision of the East African Courts which exposed the practical and realistic nature of the problems faced in the application of the former section (S.27) on confession which is based on the Stephen Digest of the law of Evidence, the Kenyans amended their Evidence Act to read as suggested above.

As originally drafted, and as its appeared in the Bill, the section reiterated almost verbatim the wording in the judgement in Swami's case This is as follows:

“A confession is a statement which admit in term either an offence or substantially all the facts which constitute an offence”.

The present recommended section as contained in S.25 of the Kenyan Evidence Act is wider in scope, concise, precise and elegant as to what would constitute confession.

This definition of confession shows admission of the commission of an offence, either by taken a fact alone or substantially all the facts that constitute the offence. This definition do away with a situation were an implicative fact, conduct or conclusively incriminating facts would be regarded as confession. The concise nature of this definition would admit only the fact or facts that bother on full commission of the offence.

Adopting this section would reassert the principle of fair hearing in criminal trial and justice to both the prosecution and the defense. An accused would not be convicted base on the statement he made “ suggesting the inference that he committed the crime” as was the case under S.27 of the evidence Act.

Since there is a clear distinction by the Act, it is hereby suggested that the court should restrict the term confession to its strict sense of the term as confession. That is full admission of guilt by a suspect or accused. Anything short of that should not be regarded as a confession and that would not be an admission. Anything short of a confession, that is not admission of guilt in respect of the alleged offence for which the accused is standing trial or to be prosecuted for should be regarded as admitting facts relevant to the fact in issue and not strictly as an ‘admission’.

This is to avoid the obnoxious use of the term without due regard to their practical applicability. The courts should also resolve this issue in a case law pronouncement so that the issue would have the force of law.

The fact that a suspect kept quite in the face of police interrogation or interview by persons in authority should not be deemed to be confessional. Silence alone is not

sufficient. There must have been other cogent acts or conducts which could be properly termed confessional as contained in the recommended section.

The courts should aid in rejecting evidence of this nature out rightly and the prosecution should be rebuked for such presentation of that kind of evidence in court.

Judicial pronouncement in making this principle worth while is highly desirable. The law should be explicitly stated and should go beyond the observation of Lord Diplock in R Vs Hall<sup>8</sup> where it is the only basis of the prosecution's case the accused should be discharged and acquitted without further delay.

Positive and direct confessional statement of the accused should be regarded as the only reliable confessional statement that can be relied on in our courts.

In respect of confession made by an insane suspect or an accused, the Evidence Act should be revised and amended to make provision for a general testimonial capacity section to take care of confession made during the period of various forms of incapacities.

Conviction based on the confession of a co-accused should be handled with care. Although section 27 (3) of the Evidence Act is very clear on the issue. What the prosecution should do is to find out other independent evidences to strengthen up confession of the co-accused.

The courts on its own part should not base its conviction purely on the confession of a co-accused except where it sees good reasons to the contrary and it should encourage the search of independent evidence by the prosecution. This can be done by notable judicial pronouncement.

### 5.3.2 Amendment of Section 27 (2) of the Evidence Act

It is important to mention here that section 27 (2) only provided that once a confession is voluntary it is relevant and thereafter admissible against the maker leaving no bases for the determination of voluntariness.

It is hereby suggested that the provision of section 27 (2) of the Evidence Act should be amended to make room for determination of voluntariness with reference to the state of mind of the suspect or accused. And where free will and decisiveness of the accused would be the determining and considering factor by the court.

In the interest of justice, the entire circumstance of the case should be taken into consideration by the courts in deciding voluntariness.

### 5.3.3 Amendment of Section 28 of the Evidence Act

In view of the peculiar problems of the provisions of section 28, there is an urgent need to over haul and amend the provision of section 28 of the Evidence Act doing away with all these unnecessary requirements.

The requirement that the threat, inducement or promise must bear reference to the charge should be disallowed by the court and the provision amended and dilated from the provision of S. 28. It is a channel for admitting all forms of involuntary confession. Instances where these requirements did not relate to the charge should be held to have vitiated a confession once threat, inducement, or promise and other forms of violence and human degradation are meted out on a suspect or accused.

These requirements should be precise, defined and classified. This is to enable the court be decisive and certain of the nature of the vitiating elements that was applied on the accused.

The requirement that the confession must proceed from a person in authority should be disallowed and made inapplicable. This requirement does not give regard to

the fact that it proceeded from a policeman or an “efficacious bystander who point a gun at his head”<sup>9</sup>.

Admitting this kind of confession is a grave injustice to the accused person. This requirement can be said to be an obnoxious one.

S.28 should be amended to include that the listed requirement must bear reference to the state of mind of the accused or suspect. This is the most determining factor. The state of mind of the accused would determine whether a confession is voluntary or involuntary.

Provision should be provided for rejecting confession if it is unreliable, untrustworthy and unfairly prejudicial against the accused as in the case of other similar jurisdiction<sup>10</sup>. The rejection of confession as a result of being untrustworthy and unreliable should be based on the Nigerian peculiar setting taking into consideration the high rate of ignorance and illiteracy

The requirement that the vitiating element must be present before a confession would be vitiated should also be disallowed. Section 28 should be amended to include and given the effect that once any of the vitiating elements is present such a confession should be held to be involuntary.

These listed and discussed suggestions tends to do a way with unnecessary technicalities which has no relevance and importance to our law and lastly provide a very sound and simple reasoning for the reception of confession in our courts.

#### 5.3.4 Amendment of the Procedure of Obtaining Confession.

The purpose of cautioning suspect is to enable the suspect tell the truth of the matter in question. And for this to happen there is the need to have straightforward and elegant drafting of all the cautioning words which is to be used.

Consequently, it is hereby recommended that cautioning of a suspect should be made mandatory before whatever interview is to be taken in respect of the offence of which he is to be charged to court.

It is hereby further recommended that such cautioning words should take the following form:

You have been charged with (informed that you may be prosecuted) ... if there is any fact on which you intend to rely in your defense in court, you are advised to mention it now. If you hold it back till you go to court, your evidence may be likely not to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this would be done<sup>11</sup>.

The above cautioning words can be seen and said to have contained all the necessary facts and circumstances which would enable an accused or suspect to give his true testimony to the interrogating officer.

This caution should be made available to an accused at the later stage of investigation and where a final decision had been taken to prosecute a suspect in a court of law. It must also be made known to the suspect that he is under arrest.

This cautioning should be translated to the language of the suspect where the suspect does not understand English.

The cautioning words should be written clearly on the upper most part of the document which the statement is to be taken down. And thereafter both the attesting officer and the suspect made to sign the document before the suspect would now write down his statement.

Where the suspect is an illiterate, the provision for illiterate jurat should be made mandatory and non-compliance of it should be held to have vitiated the confession.

There is no clear distinction between Rule 2 and 3 of the Judges' Rules. It is hereby recommended that either of the Rules should be retained and one abolished. This is to avoid duplication of the Rules.

Police standard form should be made mandatory. The police should be in charge of filling in the standard form as is the practice with the "Incident Report Form" of the National Drug Law Enforcement Agency. It should be made to go simultaneously with the statement of the suspect. This is to make it easier for the court to detect whether or not such a statement is voluntary particularly where there is conflict between the two documents. Non-compliance with this procedure should be held to have vitiated a confession.

The importance of pretrial right of an accused to silence and counsel in the course of police or persons in authority interrogation had been critically discussed.

It is therefore important that our courts in determining voluntariness, relevance and admissibility of a confession should have special and particular reference to the fact whether or not these rights have been infringed or not.

Where it is glaring that there is an outright infringement of these rights such a confession should be refused and rejected by our court.

It is hereby recommended that the suspect should be given free access to his counsel and his counsel should be allowed to witness his statement being taken.

Due exercise of the right to counsel give room for free flow of police interrogation and avoidance of obstacle at the trial.

Interview run well if the solicitor is present and the suspect has access to his solicitor. Interviews run better if the solicitor is able to establish a working relationship with the interviewer based on mutual respect, which has to be earned, of the two

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professionals trying to do a proper job and co-operating to do it. If for any reason that does not work the solicitor must intervene as strongly as possible but politely.

It is important to emphasize that the solicitor should try and minimise the possibility of open confrontation with the interviewing authorities particularly the police. In practice, considering the composition of the police force particularly the lower cadre in Nigeria, members of the police force hardly appreciate and understand the right of a suspect undergoing police interrogation.

In the course of police interrogation of a suspect, particularly after the administration of caution and he elect to keep silent, refuse to write and snub police interviews, such conduct of a suspect should be respected and accepted. The suspect should not in anyway be compelled to say anything.

Where there are signs of the suspect been compelled to write anything against his wish such confession should be rejected. This suggestion is aimed at safe guarding the suspect's constitutional rights to silence and non-incrimination.

It is humbly suggested that the taking and witnessing of statement of suspects which might later turn to be confessional should no longer be left to the junior police officer or persons in authority. This is so because the senior police officers are better taken care of, educated and are not as crude as the "rank and file" – junior officers who are not in a position to appreciate the rights and liberties of its citizens.

Categorically, taking of statements should be left to the senior police officers to handle. After a suspect's statement had been taken by a senior police officer it should be taken forward to a superior officer other than the one who took it for the usual endorsement and countersigning.

At this juncture, it would be necessary to comment on the attitude of our Court in deciding the admissibility of confessional statement. Although it has been the attitude of

our Court to stick to what has been decided in previous judicial decisions, it would be in the interest of justice and fairness that they should shift their position and adopt a more liberal and humane approach toward deciding admissibility of confession.

It is humbly suggested that section 1(3) of the Evidence Act (as amended) as to the application of the Evidence Act should be amended to ensure the compulsory application of the provisions of S.27 and S. 28 Evidence Act in or before the Area Courts and Customary Court. The provision that makes it of a guiding nature in accordance with the provision of the criminal procedure code is not in touch with reality. This is so if we are to consider the wide jurisdiction of the Area Court in adjudicating criminal causes and matters. Compulsory application of this provision will take care of obnoxious and cruel practice in the Area Courts and Customary Courts.

In conclusion, from the forgoing summary observations and suggestion, it can be seen that the entire aspect of this thesis had been highlighted. From the observations made, inadequacies of the law in respect of confessional statement were enumerated. Convincing and proper suggestions were given to take care of these inadequacies and problems.

It is submitted that these suggestions would go along way in removing bottlenecks at the taking of confessional statements, assist lawyers in the course of their practice and Judges in adjudicating on the admissibility or otherwise of a confessional statement.

## FOOTNOTES

1. Supra
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5. R Vs Ebong (Supra)
6. S.25 Kenyan Evidence Act.
7. Supra.
8. Supra.
9. Ladan, M. T. (1991 - 1992) Some Aspect of Reform in Nigerian Law of Evidence, A.B.U. Law Journal Vol. 9 - 10, p. 31 at 33.
10. R V Washer (Supra), Law Reform Commission of Canada's Report on Evidence, (1975) p. 15 - 16.
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