RELEVANCY AS A BASIS FOR ADMISSIBILITY IN THE NIGERIAN COURTS

BY

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D E C L A R A T I O N

I hereby declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented in any previous applications for a higher degree. All quotations and references are indicated with specific acknowledgments.

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ABSTRACT

RELEVANCY AS A BASIS FOR ADMISSIBILITY OF EVIDENCE IN THE NIGERIA COURTS

The Law of Evidence plays a very vital role in any legal system. It can therefore be said that a lawyer or Judge who is not versed in the law of evidence may be equated with a physician who does not know how to use the stetoscope". Whenever, legal issues arise the law of evidence is usually set in motion. Consequently relevance as a basis for admissibility comes up frequently for consideration.

Even in our daily affairs, evidence is called into play sometimes without our knowing it. Evidence, therefore, finds its way in the practical application of every branch of the law, directly or indirectly. It follows that he who alleges that a crime or a civil wrong has been committed, has the duty to adduce evidence to establish the allegation. Such evidence to be adduced to prove the allegation must be relevant to be admissible. The Court, therefore, determines the relevance and admissibility of evidence in any suit before it. Relevance as a basis for admissibility, constitutes a very important aspect of the law of evidence. It is, because of the importance of this aspect of evidence that the researcher has chosen to examine its operation in the Nigerian Courts. The topic, having been extensively covered under the Nigerian Evidence Law, the researcher has restricted the thesis to some selected areas.

The fair application of "relevance as a basis for admissibility" will depend on the readiness of the Court to freely exercise its role, taking into consideration the Nigerian situation and the facts

of each case.[2] "Relevance as a basis for admissibility", it must be agreed, is a loose concept and, therefore, requires a very careful determination.

ORGANISATIONAL STRUCTURE

The thesis is divided into Six Chapters. Chapter One, the introductory chapter, deals generally with the objectives of this thesis. The main reason, why the researcher has chosen to write on this topic is discussed. Then the scope of the thesis and also the research methodology are outlined. And attempt is made here to limit the scope of the thesis to an academic point of view, making use of the existing literature on the subject.

Sources and application of Nigerian Law of Evidence are also discussed. The discussion on sources is centred around the enactment of the Nigerian Evidence Act, other Statutes and the Common law, the residuary source, with particular reference to Section 5(a) of the Evidence Act. Attempts are made to State the extent of the application of evidence law and its limitation.

Chapter Two deals with relevance and admissibility specifically. An attempt is made to discuss what is relevance and admissibility. Then there is a brief examination of some matters declared relevant under the Evidence Act. Then some facts relevant in special circumstances are also examined.

Furthermore, evidence of similar facts is examined. The adequacy or otherwise of Section 17 of the Evidence Act which deals with relevancy of similar facts is critically examined. An attempt is made here to examine the relevance of character

evidence with particular reference to the provisions of the Evidence Act. Then finally in this chapter, the relevancy of illegally obtained evidence is examined. The position of such evidence in Common law Britain, Scotland, Nigeria and United States of America is examined.

Chapter Three examines the relevancy of statements made in special circumstances. The examination is restricted to the doctrines of res gestae and dying declaration under Section 7 and 33(a) respectively of the Evidence Act in particular.

The adequacy or otherwise of the Common law doctrine of res gestae are examined. Also the adequacy or otherwise of the provision of Section 33(a) of the Evidence Act dealing with dying declaration are examined. Then the similarities between res gestae and dying declaration are also examined.

Chapter Four discusses the relevance of Admissions and Confessions in the Nigerian Courts. The chapter examines admissions generally and then goes on to examine formal and informal admissions. Legal consequences of admissions are discussed.

Efforts are made to discuss Confession generally. Thereafter, the discussion progresses to voluntariness of a Confession and the requirements for such a voluntary confession. The relevant provisions of the Evidence Act are generally referred to. Particular attention is drawn to Section 31 of the Evidence Act which seems to contradict the law stated on the Voluntariness of a Confession and the provision of other Statutes relating to involuntary intoxication. The legal Consequences of Confessions are also examined.

The Judges Rules in England and their application in Nigeria are discussed. Efforts are made to examine their relevance to the

law of Confession. Also examined, are (Statements to Police Officers) Rules, 1960, made for the then Northern Region. An attempt is made to reconcile the Judges Rules in England applicable in Nigeria and the Northern Rules. Finally, the adequacy or otherwise of these rules is examined.

Chapter Five examines the relevance of opinions of third persons. Efforts are made to examine the general rule as provided in Section 65 of the Evidence Act[3]. The discussion, however, proceeds to state exception to the general rule, that is when opinion evidence can be offered. Opinions of experts are, therefore, examined under this exception. Who is an expert? and the function of evidence of an expert are also examined. Opinions of experts on some selected matters are examined. Some circumstances, when non-experts opinions are also relevant are examined. Then an attempt is made to examine some miscellaneous cases under the Common law when non-expert opinion can be relevant. These miscellaneous Cases are not specifically provided for in the Nigerian Evidence Act but Nigerian Courts largely make use of them.

Chapter Six, the concluding Chapter, is a Summary of the Thesis and the Conclusions drawn therefrom. It also includes the researcher's recommendations based on his findings and observations.

The main purpose of all these is, respectfully, with a view to curing some of the Patent defects existing in the law and also filling in gaps resulting from legislative or judicial Omissions.

FOOT-NOTES TO ABSTRACT

1. See Section 134 Evidence Act.

2. In a variety of Cases discussed in the Thesis, the Courts in Nigerian have not courageously come out to apply the provisions of the Evidence Act or treat the case in accordance with local circumstances. E.g. In Sadau v. The State (supra) the Nigerian Supreme Court fell back to English Common law precedent in admitting illegally obtained evidence. The Court did not even refer to Section 29 of the Evidence Act by virtue of which such evidence can be admitted.

3. See Section 65 Ibid.

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ABBREVIATIONS

A.	A.C.	Appeal Cases.
	A.I.R. (Lah)	All Indian Reporter (Lahore).
	All E.R.	All England Reports.
	All N.L.R.	All Nigeria Law Reports.
C.	Calif. L.R.	California Law Reports.
	C.C.H.C.J.	Certified Copies of the High Court Judgments - Lagos.
	C.C.	Criminal Code.
	C.& P.	Carrington and Payne's Reports.
	CA/K	Judgments of the Court of Appeal Kaduna Division.
	C.P.	Common Pleas.
	Ch.	Chancery.
	Ch. D.	Chancery Division.
	Cox C.C.	Cox's Criminal Cases.
	Cr. App. R. or C.A.R.	Criminal Appeals Reports.
	Crim. L.R.	Criminal Law Review.
	C.P.A.	Criminal Procedure Act.
D.	D.P.P.	Director of Public Prosecutions.
E.	E.A.C.A.	East African Court of Appeals.
	E.C.S.L.R.	East Central State of Nigeria Law Reports.
	E.R.	English Reports.
F.	F.C.A.	Judgments of the Federal Court of Appeal .
	FCA/K	Judgments of the Federal Court of Appeal Kaduna Division.
	F.S.C.	Selected Judgments of the Federal Supreme Court of Nigeria.
H.	How. St. Tr.	See "State Trials".

K.	K.B.	... ...	Law Reports, King's Bench.
	K.L.R.	... ...	Kenya Law Reports.
	L.Q.R.	... ...	Law Quarterly Review.
M.	M.L.R.	... ...	Modern Law Review.
	M.W.S.N.L.R.	...	Mid-Western State of Nigeria Law Reports.
N.	N.C.R.	... ...	Nigerian Criminal Reports.
	N.L.R.	... ...	Nigerian Law Reports.
	N.M.L.R.	...	Nigerian Monthly Law Reports.
	N.N.C.P.C.	...	Northern Nigeria Criminal Procedure Code.
	N.N.L.R.	...	Northern Nigeria Law Reports.
	N.R.N.L.R.	...	Northern Region of Nigeria Law Reports.
	N.W.L.R.	...	Nigerian Weekly Law Reports.
	N.Y.	... ...	New York State Law Reports.
Q.	Q.B. (D)	... ...	Law Reports, Queen's Bench Division.
S.	S.A.S.R.	...	South Australian State Reports.
	S.C.	... ...	Judgments of the Supreme Court of Nigeria.
	S.C.N.L.R.	...	Supreme Court of Nigeria Law Reports (as from 1983).
	Sim. & St.	...	Simon and Stuart.
T.	T.L.R.	... ...	Times Law Reports.
U.	U.I.L.R.	...	University of Ife Law Reports.
	U.S.	... ...	United States of America Law Reports.
W.	W.A.C.A.	...	West African Court of Appeal Report.
	W.L.R.	... ...	Weekly Law Reports.
	W.R.N.L.R.	...	Western Region of Nigeria Law Reports.

CHAPTER ONE

INTRODUCTION

1. OBJECTIVES

The topic of this thesis is "Relevancy as a basis for admissibility of Evidence in the Nigerian Courts". It is suggested that those who are most ideally placed to critically and constructively comment on the mechanics or practical implications of the Evidence Act[1] and this topic in particular are those learned individuals and law enforcement officers who are engaged in the day to day application of the law. The same people can be said to be most suited to critically examine and make recommendations on the practical implications of the numerous judicial pronouncements that have been handed down in various provisions of the Evidence Act and residual rules of evidence. The researcher being neither a stranger nor a novice in this regard, has been motivated to research into this topic for many reasons.

This topic is covered extensively by the Nigerian Evidence Act and the researcher has specifically chosen it because of the significance of the topic in the administration of justice. The researcher has observed that some provisions of the Nigerian Evidence Act, and many judicial pronouncements by Nigerian Courts in consonance with decisions of other jurisdictions, covering this topic are inappropriate for the proper administration of justice. Some of these provisions of the Act either give too wide discretionary powers to the court or turn the balance too much infavour of the accused, to mention just a few of the shortcomings. The researcher therefore intends to examine the adequacy or otherwise of the relevant provisions of the Evidence Act in respect of this topic and the position adopted so far by the Nigerian Courts and also the views of legal writers. Furthermore, the researcher will examine the flaws in the application of the test of "Relevancy as

a basis for admissibility" and make necessary recommendations for reforms. This test, is considered by the researcher as the foundation to justice to parties to a suit and there is, therefore need to examine the controversy posed by some provisions of the Nigerian Evidence Act in this regard.

It will be necessary however to briefly mention some of these relevant areas; "Dying Declaration". In dying declaration, it is said, there is need to do justice not only to the accused but also to the victim. But unfortunately the provisions of the Evidence Act[2] in respect of dying declaration make it extremely difficult, if not impossible, for such justice to be done to the victim, that is the deceased. Even when a dying declaration is relevant and admissible, it is most unlikely that a conviction will be based purely on it alone. Invariably, other pieces of evidence, including the fact of death, will be available. The dying declaration therefore, will in most cases only form a piece of the chain of evidence relevant to the given case. Why should conditions surrounding its relevance and admissibility be so stringent as if its relevance and admissibility automatically warrant mandatory finding of guilt either of manslaughter or murder?

There are also cases where even though a piece of evidence may be relevant, nonetheless it may not be admissible for reasons of remoteness,[3] or it may be too prejudicial to the party involved. The yard-stick of such remoteness or otherwise is hardly determined. The court is usually left with wide discretionary power in this regard.

Furthermore, confessional statements even when made in definite circumstances must pass the test of being free and voluntary, that is, without any inducement of promise or threat.[4] This, again, is one area that creates hardship not only to the

victim but also to the accused. Also, the provision[5] and judicial decisions on which illegally obtained evidence, if relevant is admissible is an area that has to be critically examined in this thesis. It will be necessary here to examine the view taken by Courts in the United States in contrast to Nigerian Courts and the Courts in other Common law jurisdictions. It is submitted that, even though a piece of evidence is relevant and admissible in this regard, it is a flagrant violation of a person's fundamental human rights as clearly provided in the 1979 Constitution.[6] There is also the controversy, as to who is an expert and whether expert opinion is binding on the Court.

Finally, there is this controversial issue, everything put together, that a piece of evidence may be relevant and admissible in law but may not be acted upon by the Court when evaluating the evidence before it. What, then, are the basis of relevance and admissibility?

The examples referred to so far together with others and relevant decided cases will be critically examined to ascertain the adequacy or otherwise of the test of "Relevancy as a basis for Admissibility" in the proper administration of justice. The researcher hopes that by the end of the research work, he must have made some provocative but constructive suggestions for reforming the present law on "Relevancy as a basis for Admissibility in the Nigerian Courts".

2. SCOPE OF THE THESIS

As stated already at the beginning of this introductory chapter, the topic of this thesis is covered extensively by the Nigerian Evidence Act. This thesis is therefore not intended to

cover every aspect of relevance and admissibility. For reasons of both practical convenience and intellectual modesty, this research will be considerably limited to some selected areas. These selected areas as contained in the table of contents, inter-alia include: Some matters declared relevant under the Evidence Act, similar facts evidence, Evidence of character, Evidence illegally obtained, Res gestae, Dying Declaration. Admissions and Confessions and Opinions of third persons. The limit / to which each of these selected areas will be examined would depend on the gap, perhaps an unintended one that exist in the test of relevancy and admissibility in the Nigerian Courts. Furthermore, some of the areas like, some matters declared relevant under the Evidence Act, Section 33(b)-(c) of the Evidence Act, opinions of laymen, the Judges' Rules etc. may just be discussed ordinarily for purposes of coherence of the thesis.

It is important to note that the limitations so far stated are not conclusive as there could be modifications, if need arises during the course of the research work.

3. RESEARCH METHODOLOGY

The researcher would assume and reflect on the topic as much as possible from an academic or intellectual point of view, marrying the same with practical considerations where possible. The research will centre primarily on the existing literature on the topic. This includes judicial pronouncements of the Nigerian Courts and other jurisdictions. Also contributions of academic writers in Nigeria and other jurisdictions as well.

The researcher will make maximum use of the libraries in the University and beyond. With this mode of research, coupled

with the researcher's relatively brief experience as a legal Practitioner, it is hoped, therefore, that if this thesis succeeds in this direction, it will be some contribution to the subject, no matter how modest.

4. SOURCES AND APPLICATION OF NIGERIAN LAW OF EVIDENCE

(a) SOURCES

It will be unwise and incomplete to research into the topic without stating the position of the Law of Evidence in Nigeria prior to the first day of October 1960, on which date Nigeria became a Sovereign State under a Constitution which provides for the entrenchment of some fundamental human rights. The last leg of this introductory chapter will therefore be devoted in examining the sources and application of Evidence law in Nigeria. The researcher will however concern himself with judicial evidence, Judicial evidence being evidence presented in a Court or tribunal during proceedings.

The primary source of the Nigerian Law of Evidence is the Evidence Act. The Evidence Act was originally passed as an ordinance in 1943. But it did not become law until 1 June, 1945. The Evidence Ordinance by logical deductions was based on Stephen's Digest of the Law of Evidence, 12th edition. Before 1 June, 1945, the law applicable in the Courts established by the British Colonial government was the English Common Law of Evidence, as there was no local legislation dealing with that matter previous to that year. Indeed, the English Common Law of Evidence became applicable from the date that English law generally was declared applicable in Nigeria by the British Colonial government. Section 10 of the Provincial Courts

Ordinance of 1914,[8] beyond which we will not go here, had provided that the Common Law of England should be, as far as applicable, in force in what was then known as the Colony and Protectorate of Nigeria. This provision was repealed but was substantially re-enacted by Section 12 of the Protectorate Courts Ordinance of 1933.[9] Similar Provisions were also contained in Section 14 of the Supreme Court Ordinance,[10] which replaced the Protectorate Courts Ordinance, and in Section 30 of the Magistrates' Courts Ordinance,[11] both of 1943.

Before the coming of the British to Nigeria and the imposition of English law upon the people of Nigeria, there were two bodies of laws namely - (a) The African Law or Customary Law, (b) Islamic Law. It is therefore necessary to note that before the coming of the British to Nigeria, we had a sound, efficient legal system that served the needs of our Society. Even today after the imposition of English law and English rules of Practice and Procedure, Customary Law and Islamic law are still retained in our legal system. The Nigerian legal system, therefore, it is submitted, is pluralistic and this has been recognised by the 1979 Constitution.[12] The Constitution: provides for the establishment of Sharia Court of Appeal,[13] and Customary Court of Appeal.[14]

Reference to "Nigerian Law of Evidence" in this thesis is to be interpreted to include regional Evidence Laws, for example Northern Nigeria[15] and Eastern Nigeria.[16] A detailed scruting of the regional Evidence Laws will reveal that they are essentially replicas of the Evidence Act of the Federation, that is Cap. 62. The textual modifications which they may contain are neither fundamental nor substantive enough to warrant their separate and independent treatment in a research of a general nature like the present one.

Under the Constitution of the Federal Republic of Nigeria[17] Evidence is included in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution. Thus only the Federal Legislature may Legislate on Evidence to the exclusion of State Legislatures.[18] The Constitution being the Supreme law of the land, any Statutory Provisions relating to the law of Evidence that are inconsistent with the Constitutional Provisions are null and void to the extent of their inconsistency.[19] However, Section 1(3) and Section 4 of the 1979 Constitution of the Federal Republic of Nigeria so far referred to in this thesis are among those Sections suspended by Decree number one of 1984.[20] The suspension may however not alter the position of Evidence as the exclusive preserve of the Federal Government of Nigeria. This researcher has not had the benefit of laying hands on matters of conflict between the Federal Government and State Governments in respect of Evidence. If the researcher should be wrong in his speculation, it is hoped that the error will still be within the realm of Common Sense and rational deduction.

When it is said that the primary source of the Nigerian Law of Evidence is the Evidence Act, certain points are readily noted:

(a) Court decisions based on the Evidence Act are included in the Act.

(b) Section 5(a) provides:

> "Nothing in this Ordinance shall prejudice the admissibility of any evidence which would apart from the provisions of this Ordinance be admissible";[21]

That provision may be broadly interpreted to mean evidence may be admitted under the provisions of other Statutes beside the Evidence Act itself.

Secondly, evidence may also be admitted under any law that was enforced before 1 June, 1945 when the Evidence Act came into ope-

ration. The law at that time was the English Common Law.

In R. v. JOHN AGAKAGARIGA ITULE[22], in considering whether a Confession which goes in favour of the accused person is admissible as evidence in favour of the accused, Brett Ag. C.J.F. said that:

> "the matter is not dealt with expressly in Sections 27 to 32 of the Evidence Ordinance and the Common Law rule therefore applies by virtue of Section 5(a)".

However, no evidence can now be excluded under the Common law. This section is not meant to allow the exclusion of evidence otherwise than under the Act, and the rules of the Common law governing the exclusion of evidence are no longer applicable here, except those which have been incorporated into the Act. Nigerian Courts can look up to English decisions only as guides to the correct interpretation of the provisions of the Act where there are provisions similar to these under the Common law or under an English statute[23]. As Mbanefor F.J. pointed out in JIMO AMOO AND OTHERS v. R,[24] where there is a conflict between the provisions of the Act and a decision of a Court in England, the Courts in this country would be bound to follow the Act. However, it is submitted that Nigerian Courts should not only refer to English precedents but also decisions and precedents of other countries.

The Second Source of the Nigerian Law of Evidence is what may be called supplementary sources. This comprises other local Statutes like the 1979 Constitution, Penal Code, Criminal Code, Matrimonial Causes Act, to name just a few[25]. Some of the provisions are procedural in nature.

It is, therefore, submitted that where a particular Statute enacted after the Evidence Act, Contains specific matter or matters of evidence, then the provision of that Statute would be applied to the exclusion of the Evidence Act. Furthermore, when there is

any inconsistency between the provisions of the Evidence Act and the provisions of that other Statute, then the provisions of that other Statute would prevail. HAMEED APAIPA AND ANOTHER vs. YESUFU ANI & B.LOGUN[26], the Court was called upon in this case to examine the provision of Section 219 of the Evidence Act as against Section 22 of the 1963 Nigerian Constitution similar to Section 33 of the 1979 Nigerian Constitution. Section 219 of the Evidence Act empowers the Minister to withhold evidence that is considered to be against public interest. Meanwhile the relevant provisions of the Constitutions guarantee fair hearing to all parties in a Suit. The Court therefore held in this case that, a party or a litigant could not be said to have a fair trial if the Minister has an absolute discretion to withhold evidence. The provision of the Constitution as to the extend of the inconsistency prevailed over that of the Evidence Act. On this principle, even if it was another Statute not the Constitution, it would have prevailed over the Evidence Act.

The reason is that, one has to presume the intention of the legislature because if it had intended the Evidence Act to prevail, it would not have enacted the Statute. It is further submitted that a knowledge of the law already in existence must be presumed, since it is the same authority that enacts the laws. The Matrimonial Causes Act now requires Standard of prove in Matrimonial Cases to be at the reasonable satisfaction of the Court.[27]

For purposes of brevity and limiting the scope of this introductory Chapter, it is not necessary to go into some of the provisions of some of these Statutes that contain matters of Evidence.

The third principal source of the Law of Evidence in Nigeria is what can be described as residuary source. That is to say, the

source of last resort. It is therefore the Common law. When the Evidence Act or any other Statute can not be applied, the Courts may turn to the Common law and admit such evidence under Section 5(a) of the Evidence Act. This Section gives the Nigerian Courts authority to apply any Law of Evidence that was applicable before 1 June, 1945 or that would be applicable after 1 June, 1945. The relevant judicial pronouncements on this source of the Nigerian Law of Evidence are usually classified into two categories. In the first category are those decisions that were handed down before 1 June 1945 - i.e. before the Evidence Act. The second category of cases are those that are post 1 June, 1945 when the Evidence Ordinance (now Act) was already enacted. Today, Nigerian Courts rely on both classes of judicial decisions.

However, where a Nigerian Court has to turn to the Common Law to admit an item of evidence under Section 5(a) of the Evidence Act, care must be taken in the following circumstances:
(a) That any evidence that is specifically declared as being not admissible by the Evidence Act, cannot be and should not be admitted under the rule of Common law. This is the only instant the provisions of the Evidence Act prevails over Common law.
(b) No rule of Common law should be used to exclude an item of evidence that is admissible under the provisions of the Evidence Act or the provisions of other Statutes.

(b) APPLICATION OF EVIDENCE ACT

The Evidence Act is limited in its application. Primarily, the Evidence Act is limited by the Evidence Act itself. Section 1(4) of the Evidence Act provides as follows:[23]

"This Ordinance shall apply to all judicial proceedings in or before any Court established in the Federation of Nigeria but it shall not apply:-

(a) to proceedings before an Arbitrator; or

(b) to a field general Court Martial; or

(c) to judicial proceedings in or before a Native Court unless the Governor in Council shall by order confer upon any or all Native Courts in the Region jurisdiction to enforce any or all of the provisions of this Ordinance".

Under the interpretation Section of the Evidence Act, "Court" includes all Judges and Magistrates and except Arbitrators, all persons legally authorised to take evidence.

It is submitted that by the provision of Section 1(4) of the Evidence Act, the Evidence Act is applicable 'in toto' to Magistrate Courts and all Courts of Superior records in the Federal Republic of Nigeria. These Superior Courts include: the States and Federal High Courts, Court of Appeal and the Supreme Court. However, the Area and Customary Courts are to be guided by the Evidence Act. Where an Area or Customary Court fails to apply those Sections of the Evidence Act that these Courts are supposed to apply, that failure would not necessarily affect the ruling of the Court, unless it is being established that there is a miscarriaged of justice. The reason for such restriction of the Evidence Act could be better understood in the that, even after the establishment of the British System of Courts in Nigeria, there were still three systems of courts namely:

(a) The established British System of Courts.

(b) Customary Courts.

(c) Islamic Courts.

It was therefore only rational that the Act would or should not be applied in toto in the last two groups of Courts. It is

submitted that the fact that a Customary Court or Sharia Court applies a Section of the Evidence does not alter the position of that Court at all. Furthermore, the position is not altered by lawyers appearing in such Courts.

In CHIEF KARIMU AJAGUNJEN AND 5 ORS V. SOBO OSHO OF YEKU VILLAGE AND 13 ORS,[30] it was held that as with Native Courts, the Customary Courts are not expected to apply the Common law of England, nor do the rules of pleadings and practice which are obtained in the High Courts apply in these Courts. It was further held that a Customary Court does not lose its character because it is presided over by a member of the legal profession or members of such a legal profession appearing before it.

The Evidence Act is further restricted or limited by the provisions of the Constitution.[31] The Constitution being regarded as the Supreme Law of the land, any other law inconsistent with the provisions of the Constitution, the provisions of the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.[32] Some of these Constitutional provisions have been suspended as earlier observed in this chapter by Decree Number One of 1984.[33] It is therefore submitted that any conflict between the provisions of the Evidence Act and Constitutional provision that come within the suspended and modified Section of the Constitution, may not have to be resolved from a Constitutional view point. However, each situation will depend on the nature of the Conflict.

Another limitation on the Evidence Act is the other Statutes. We have already discussed in this chapter that other Statutes Constitute what may be regarded as a Supplementary source of Nigerian law of Evidence. Such Statutes as already discussed will

prevail over the Evidence Act in case of conflict hence they constitute a serious limitation to the Evidence Act.

The Evidence Act is further limited by the rules of interpretation of Statutes. Whenever there is an ambiguity with regard to the application of a particular Section of the Evidence Act, that Section must be subject to judicial interpretation. Therefore, because of our system of judicial precedent, such an interpretation becomes binding on other lower Courts and if by the Supreme Court, binds all Courts from the Court of Appeal to the lowest in the hierarchy.

In this chapter we have been trying to introduce the topic of the thesis by stating its objectives, scope, research methodology and also briefly examining sources and application of Nigerian Law of Evidence.

In the next chapter, we shall focus attention on the concept of "relevance and admissibility", some matters declared relevant under the Evidence Act, facts relevant in special circumstances, similar facts evidence, character evidence and evidence illegally obtained, all under the big heading "relevance and admissibility".

FOOT-NOTES TO INTRODUCTORY CHAPTER

1. Cap. 62 Laws of the Federation of Nigeria and Lagos 1958.
2. Section 33(a) of the Evidence Act, Cap. 62.
3. Section 6(a) and Section 159(d).
4. Section 28.
5. Section 34 Constitution of the Federal Republic of Nigeria 1979.
6. Section 34 Constitution of the Federal Republic of Nigeria 1979.
7. Section 33(a) - (c).
8. Ordinance No. 7 of 1914 (Cap. 4 of the 1923 Laws of Nigeria).
9. Ordinance No. 45 of 1933.
10. Ordinance No. 23 of 1943.
11. Ordinance No. 24 of 1943.
12. The Constitution of the Federal Republic of Nigeria 1979.
13. Section 240 Ibid. However, such establishment is limited to State level and for any State that so requires it. It is therefore not obligatory.
14. Section 245 Ibid. The same position as in the establishment of Sharia Court of Appeal.
15. Evidence Law Cap. 49 of the Laws of Northern Nigeria 1963.
16. Evidence Act Cap. 49 of the Laws of Eastern Nigeria 1963.
17. 1979 Constitution of the Federal Republic of Nigeria.
18. Section 4 of the Constitution of the Federal Republic of Nigeria 1979.
19. Section 1(1) and (3) of the 1979 Constitution.
20. Schedule I of Decree No. I, Constitution (Suspension and Modification) Decree 1984.
21. Section 5(a) Evidence Act.
22. [1961] 1 All N.L.R. 462.

23. It is very doubtful whether Nigerian Courts adopt this position especially when one examines the decisions under the doctrine of Res gestae.

24. (1959) F.S.C. 113, (1959) W.R.N.L.R. 119.

25. These are only a few examples of the many Statutes that fall in this group.

26. (Unreported) Ibadan Suit No. 1/211/65, October 20, 1970.

27. Section 82 Matrimonial Causes Act 1970.

28. Section 1(4) Evidence Act.

29. Section 2(1).

30. (1977) 5 F.S.C. at 89.

31. Section 1(1) Constitution of the Federal Republic of Nigeria 1979.

32. Section 1(3) Ibid.

33. Constitution (Suspension and Modification) Decree 1984, No.1.

CHAPTER TWO

RELEVANCE AND ADMISSIBILITY

1. RELEVANCY

The entire law of evidence is dependent, in the main, on the rules governing admissibility and inadmissibility of evidence; and whether the fact to be established by the evidence is relevant to the facts in issue.[1] "Relevent facts" and "facts in issue" are defined by sections 3 and 2(1) of the Nigerian Evidence Act respectively.[2] It can therefore be said that relevance implies a relationship; and it may be that relationship which exists between two facts which gives rise to an inference of one fact from the other fact.

The legal admissibility of facts is for the most part determined by their logical relevancy to the issue; or that connection between the two, which, in the ordinary course of events, renders the latter probable from the existence of the former. However, relevancy being founded on logic and human experience, and admissibility on law, which may change in different jurisdictions and periods, the two concepts do not wholly coincide.[3] Therefore, many facts which in ordinary life are relied on as rendering other facts probable are rejected by the law on grounds of policy or precedent, for example as being remotely connected,[4] or too slight in probative value to form the basis of judicial decisions; or as tendering to confuse the jury and judge by a multiplicity of issues; or as creating unfair surprise and prejudice to the parties; or as infringing some safeguards of public policy or personal privilege. Such facts include, inter-alia, hear-say evidence, opinion evidence, evidence of bad character etc. This exclusion of matter otherwise relevant, it is submitted, is one of the distinguishing features of the Nigerian

Law of Evidence.

On the other hand, numerous facts are legally admissible, although they may have no logical bearing on the issue, e.g. the fact that witness has or has not been sworn in a particular manner, or that a hearsay declarant is deceased at the date of trial, or that proper search has or has not been made for a lost document, which are conditions required, not by logic, but by juridical policy that may change from time to time[6]. The result, therefore, is that relevant facts are often rejected and irrelevant facts often received. It is submitted, therefore, that evidence is not a matter of mere logic but a convenient, practical way of ascertaining the facts that are in dispute. Such an inquiry must be reasonable, practical and fair[7]. There are fact which, though logically relevant, would consume an undue period of time or would raise issues of equal or greater difficulty than those actually in dispute or would even increase the risk of mistake or fraud. Experience also has shown that in certain cases "short cuts" may be taken where the inference is logically not the only, or necessarily the right one. There may be matters which are such that their prejudicial effect outweighs their probative value so much that their admission may tend to render the trial unfair and in cases where there is a rule laid down by Statute, it can not be affected by considerations either of logic or relevancy.

What then is the test and scope of relevancy? In the case of R. v. KILBOURNE[8], Lord Simon gave what is regarded as a modern definition to relevancy. His Lordship stated that "evidence is relevant if it is logically probative or disprobative of some matter which requos proof". Meanwhile Stephen's Digest in its

later editions gives the meaning of the word "relevant" as "any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in conjunction with other facts, proves or renders probable the past, present, or future existence, or non-existence of the other". In article 2 it is stated that 'Evidence may be given in any proceeding of any fact relevant to any fact in issue, unless it is hereinafter declared to be deemed to be irrelevant, and of any fact hereinafter declared to be relevant to the issue, whether it is, or is not, relevant thereto, provided that the Judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case'.[9] As earlier noted, Section 6(a) of the Nigerian Evidence Act provides for a similar situation. It is submitted that the test here is not that of relevancy but remoteness. If relevant but too remote to be material to all circumstances of the case, will not be admissible. And if relevant but not too remote to be material to all circumstances of the case, will be admissible.

As quoted above, the phrases "deemed to be relevant" and "deemed to be irrelevant" are, however, apt to mislead, since they appear to imply that legal logic is something different from the lay man's logic, and that the court may regard facts as logically relevant or irrelevant when they are not really so. It is submitted, therefore, that the whole purpose of this is that, in certain cases courts admit or reject facts irrespective of their logical relevancy. Therefore, in practice, it is preferable to use the terms "relevant" and "admissible" simply meaning by the former that which is logically probative, and by

the latter that which is legally receivable, whether logically probative or not.[10]

However, in the absence of Statutory Provisions, nothing that is not logically relevant is admissible, but that many facts that are logically relevant may be excluded for various reasons based on practical considerations to reasonableness and fairness in administering justice; and these reasons sometimes lead the court being contented with evidence which, though logically relevant, is not logically conclusive. It could, therefore, be concluded that, it has generally been accepted in legal principles that "Relevancy" is determined by human knowledge and "Admissibility" by rule of law. In the case of R. v. BOND,[11] it was stated that "our law undoubtedly excludes evidence of many matters which any one in his own daily affair of moments will regard as appropriate in coming to a decision".

It will however be necessary at this point, to distinguish between "relevant" and "material" because the term "material" is often used as a synonym for "relevant". It is however, sometimes confined to facts which are in issue, or pleadable. The term "material" is sometimes extended to as in perjury cases, to all admissible facts, whether in issue, relevant to the issue or relevant merely to credit,[12] or punishment,[13] and sometimes used to indicate merely the weight or importance of the evidence.[14] The relevancy of a fact may not appear at the time it is proved but may at a latter stage. Where in a jury system, irrelevant evidence has in fact been left to the jury, the party affected will not be allowed to rebut it.[15]

Where evidence is admissible for some purposes but not for others, in civil cases facts in aggravation or mitigation of

damages are relevant on the question of amount but not on the question of liability[16] and the rule operates in ciminal proceedings as well. Thus a confession, though may implicate fellow prisoners, is generally only evidence against the maker. Where the Judge fails to caution the jury as to the limits of evidence and substantial miscarriage of justice occurs, a conviction on such evidence may be quashed.

Finally, it is necessary to note that facts can be relevant and admissible for more than one purposes. The rule governing multiple relevance and admissibility is that, if evidence is relevant and admissible for one purpose, then it can not be rejected on the grounds that it cannot be admissible for other purposes. Thus in the case of WILLS v. BARNARD[17], Lord Justice Tindall, was of the opinion that, nothing renders the administration of justice more difficult than where evidence which is offered for one purpose or persons may accidentally apply to another. That this type of evidence constitute a base upon which all evidence is subjected and exclusion on such grounds would clearly occasion greater mischief than the reception of the evidence.

After examining "relevancy" and "admissibility" which constitute the foundation-stone of this thesis, we shall proceed to examine other areas that come within this armbit of the thesis. It must be emphasised that, considering the wide scope of this topic, only a few selected areas will be treated.

2. SOME MATTERS DECLARED RELEVANT UNDER THE EVIDENCE ACT

As already stated earlier on this chapter, facts in issue and relevant facts are defined by Sections 2(1) and 3 of the

Evidence Act. Every fact in issue is a relevant fact and such has to be proved by means of adducing evidence. The mode of adducing evidence, of course is governed by the substantive and the procedural laws of which the law of evidence is an integral part. There are also in addition various rules of practice that govern the courts in their administration of justice.

It is submitted, therefore, that what facts may be in issue depend on the nature of each case and are also determined largely by the nature of the procedure before the court that is charged with the largest responsibility in making the final decision which could be in a civil or criminal case. Experience has shown that facts, no matter how small, their appearance do normally occur on the facts in issue. It will, therefore, be necessary as stated in the introductory chapter of this thesis, to examine some matters declared relevant by Evidence Act in order to make the thesis coherent.

Sections 7 to 18 of the Evidence Act provide for a wide variety of matters that are said to be relevant under the Act. It is, however, important to note that, there are certain matters that may become relevant at a subsequent stage of the proceeding and such facts should also be considered relevant. This will be examined in detail herein.

Section 7 dealing with Relevancy of facts forming part of same transaction makes relevant facts forming part of the same transaction even though such facts are not in issue but are connected to the facts in issue.

A learned author on Nigerian Law of Evidence, Dr. Aguda submits that in determining whether a particular set of facts

is so connected with a fact in issue as to form part of the same transaction, resort must be had to the normal reasoning process of the tribunal. He outlines two types of facts that will come under this heading: (a) facts which occurred at the same time and place with the facts in issue, and (b) facts which occurred at a different time or place from the fact in issue. In both cases, however, the facts must be so connected with the facts in issue as to form part of the same transaction.[19]

Under (b) above, it may be difficult to determine whether a fact which occurred at a different time and place from the fact in issue is nevertheless so connected with it as to form part of it. As no hard and fast rules can be laid down, in deciding this issue, it is submitted that the court must make use of logical reasoning. This section however will be critically examined in Chapter Three in relation to the doctrine of res gestae.

Section 8 makes facts which are the occasion, cause or effect of facts in issue relevant.[20] It is submitted that, this section cannot be relied upon to admit what, under the English Common Law, is termed hearsay evidence.[21]

Section 9 makes relevant facts which show or constitute motive or preparation for any fact in issue or relevant fact or even subsequent conduct of one of the parties in a proceeding.[22]

"Motive" as used in the Section can be equated with the reason for an act, that is, what impels one to act. It is, therefore, submitted that any fact showing the existence of motive is a relevant fact as tendering to show a person did the act alleged.[23] However, where the Commission of an offence is sufficiently proved by the evidence as a whole, it is no answer

to say that no motive has been shown.[24] Furthermore, in ordinary cases, facts showing motive are not intended to be among other facts in issue but may be included among other facts declared to be relevant.[25]

Also when the credibility of a witness is in question, motive is relevant in deciding it. Under section 9(iv), where a defence of an alibi is raised by an accused person, a declaration by the complainant that it was the accused who assaulted him is relevant.[26]

Section 10 makes relevant: facts necessary to explain or introduce relevant facts. This section is identical to section 7 of the Indian Evidence Act.[28]

There are numerous circumstances when facts are relevant under this section and by the general rule of admissibility, such relevant facts will be admissible in evidence. However, care must be taken when such facts are statements made to third parties in relation to facts in issue, that the evidence of the statements is admissible only to establish that the statements were made not that their contents are true.

Section 11 makes relevant things said or done by conspirator in reference to common intention.[29]

However, where statements made by individual conspirators as to measures taken in the execution or furtherance of any such common intention will not be relevant against such conspirators except those by whom or in whose presence such statements are made, as it is the case with a confession under section 27(2) of the Nigerian Evidence Act which is relevant as against the maker only. Confession will be critically examined in chapter four of this thesis.

In [30] ALOGUN v. POLICE, A, B, and C were charged with conspiracy to steal some bags of Cement and stealing the same. They were convicted of the offences, and A appealed. B and C had made statements to the Police in the absence of A, which statements incriminated him. There was, however, some other evidence which tended to show that A was party to the conspiracy. The court held that although the statement could not be used against A in proof of the conspiracy, other acts of B and C done in execution or furtherance of the conspiracy could be used.

It is submitted that, evidence given which relates to things said or done by one conspirator or the other in the execution or furtherance of the common intention of all the conspirators is admissible against all of them.[31] Furthermore, evidence may be given that statements setting up the same alibi were made to the police by each of two accused persons in the absence of the other, not as proof of the facts stated but as showing that they were acting in concert and as indicating a common guilt.[32]

However, facts which are made relevant under this section cannot be made use of in proving the conspiracy itself. That must be shown to exist by proving some other facts. As the Supreme Court held in [33] ANTHONY EMAHORO v. R; if in the course of a trial, the case for the prosecution suggests that a conspiracy existed between the accused and the other persons, and there is evidence which the court accepts as prima facie ground for believing in the existence of such conspiracy, it is then that the provisions of the section would apply.

Under Section 12 facts not otherwise relevant may become relevant, under certain circumstances. Such circumstances include:

(a) inconsistency with any fact in issue or relevant fact;

(b) if facts either by themselves or inconnection with other facts under the existence or non-existence of facts in issue or relevant facts probable or improbablo.

In OLOYEDE AKINGBADE v. CYRYIPO ELEMOSHO[35], the plaintiff sued defendant for a declaration of title to a piece of land which was a plot of land out of many other plots on a layout. In order to establish the identity of the land indispute, the plaintiff tendered deeds of conveyance with plans attached in respect of other plots of land on the same layout which were executed in favour of other purchasers by the same person who sold the land to the plaintiff. The trial Judge rejected these conveyances as being irrelevant. On appeal, however, the Supreme Court held these conveyances were relevant under the provision of Section 12.

Section 13 and 15[36], in line with Section 12 discussed above, also state the circumstances under which facts which are not otherwise relevant may become relevant. These sections are also in line with section 148 which deals with presumptions.

Section 14 states circumstances when customs can be relevant and admissible[37]. The Section further states circumstances when a custom can be judicially noticed by the court and circumstances when if not judicially noticed, are required to make it relevant.

The necessity for considering the evidence of Customs occur(s) more frequently in civil than in criminal cases[38]. It is submitted that even though the Section has not adequately made it easier (because there is still the requirement of proof of our Customs to be regarded relevant and admissible in evidence), it is a great

improvement upon the earlier position of the law before the Evidence Act was enacted. In FASUNMI SULE FARINDE v. SALAMI AJIKO AND ANOTHER[39], the plaintiff relied on an alleged Custom in order to establish his case. In order to do so, he relied only on the decision of a court given in 1892. It was held that this was not sufficient and that what was required was frequent proof of the Custom in the Courts.

In some of the cases however, it was held that it is unnecessary to bring evidence to prove particular Customs which have come so frequently before the courts to be well established and notorious[40]. It is submitted further that; if Section 14 is given greater attention by our Judges, evidence of our Customs can easily be made relevant, avoiding such requirements as expressed by Taylor F.J. in LIADI GIWA v. BISIRIYU ERINMILOKUN[41]. His Lordship stated that Customary Law could be judicially noticed only "if it is of such notoriety and has been so frequently followed by the Courts."

It will appear in this case that the learned Justice did not in any way advert his mind to the provisions of the Act. However, a detailed study of evidence of Customs is not within the scope of this thesis. The effort here is simply to high light some circumstances when evidence of Customs is declared relevant.

Section 16 makes relevant facts showing existence of state of mind or of body or bodily feeling[42].

In R. v. OJITA AGWUNA[43], where accused was charged of uttering seditions words at a public meeting on November 7, 1948, in the course of which the accused re-affirmed a lecture he had given on October 7, of the same year, evidence of the lecture was held

admissible to prove the intent with which the words were spoken on November 7. Similar decision were also held in SERVICE PRESS LIMITED v. ATTORNEY-GENERAL AND D.P.P. v. CHIKE OBI.[44] Furthermore in R. v. JOHNSON,[45] on a trial for murder by poisoning, statements made by the deceased in a conversation shortly before the time at which the poison was administered were held admissible to prove the state of health of the deceased at the time. However, such statements will not be admissible if made as to the fact that the accused gave the deceased the poison and these were made in the presence of the accused.[46]

Section 18 makes relevant the existence of any course of business, according to which it naturally would have been done if, there is a question whether a particular act was done.[47] This principle is the same as under the common law. If it is necessary to prove that a particular letter was posted, evidence that it was delivered to a Messenger who was in the habit of taking letters to the post office for posting even though he cannot remember the particular letter is relevant.

Finally on this heading, facts declared relevant by the Evidence Act can not all be treated in this thesis and, therefore, the scope has been limited to the ones mentioned.

Furthermore as we have seen and will see as the discussion progresses, relevancy per se, does not constitute admissibility in evidence. Even though a fact may be relevant, it may not be admissible if it does not meet other requirements. The test is usually a very stringent one.

3. FACTS RELEVANT IN SPECIAL CIRCUMSTANCES

While some facts have been declared relevant by the Evidence Act as we have just discussed, there are certain facts in normal

circumstances are considered irrelevant and, therefore, not admissible as evidence.

However, there are cases that under special circumstances, such facts could become relevant and admissible. The list of such facts could be lengthy, and indeed, in-ex-haustible. So it is intended here to consider briefly some of these special circumstances as provided in Sections 44, 45 and 46 of the Evidence Act.

(a) Section 44 of the Evidence Act provides:

> "Where the titles to or interest in family or communal land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant".

According to Dr. Aguda,[49] this rule which has no foundation in English Common Law, is clearly a convenient and commensense rule under the prevailing circumstances of this country, which developed, no doubt, as a result of the practice of the courts in admitting such evidence. If that be the position, it means notwithstanding the provision in the Land Use Act, evidence with regards to Customs is allowed. This will, however, has to pass the stringent test in Section 14 of the Act of proving such a custom as a fact unless where courts have taken judicial notice of it. In COMMISSIONER OF LAND v. KADIRI ADEGUN[50], the West African Court of Appeal stated as follows:

> "It is the undoubted practice in this country to accept as admissible in cases as to title to family ownership. Literacy among the people of this country does not go back very far, and the oral tradition is generally the only evidence available as to ownership of land earlier than the memory of living witnesses. The weight to be given to traditional evidence is, of course, another matter, depending on how far it is supported by other evidence of living people of facts within their own knowledge".

It is submitted that even though traditional evidence may be distorted, it could constitute the best evidence to establish

circumstances under section 44, if such evidence is well taken.

Also that each case should be treated on its own merits and there should be some relaxation to the requirements of Section 14 of the Evidence Act which deals with prove and relevancy of Customary Law, because that section has direct effect on the smooth application of Section 44 of the Act.

Our legal system should, therefore, be made to give greater effect to our Customs.

(b) Section 45 deals with the Second Category of Special Circumstances when irrelevant facts could be made relevant.[51] The Section provides:

> "Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other lands so situated or connected therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land".

This Section, it is submitted, is well known and made use of so frequently that there is now hardly any dispute as to its exact meaning and scope.

Hence reported cases on its provision are quite common.[52] In OKIC'UKU v. OKAFOR,[53] the Federal Supreme Court held that by virtue of Section 45, judgment be given in favour of the plaintiffs because the plaintiffs' act of possession and enjoyment of the lands adjoining the disputed lands claimed and possessed under the same grant as that under which the plaintiffs claimed the land in dispute, together with the erection by them of boundary pillars, constituted sufficient evidence to support the plaintiffs' claim of title to the disputed vacant and unenclosed lands under the grant.

However, evidence relevand and admissible under this Section

only raises a probability not a presumption of ownership of the land.[54] The Section will, however, not apply if there is no proof or admission by the other party that the land in dispute is surrounded by other lands belonging to the plaintiff.[55]

(c) Section 46 deals with the Third Category under this heading.[56] The Section deals with evidence of Scienter upon charge of receiving stolen property. The provisions of this Section are identical with those of Section 43(1) of the English Larceny Act now repealed. Evidence admitted under this Section is material only for purposes of proving guilty knowledge, and the fact of receiving goods to which the charge relates must be proved aliunde.[58]

Furthermore, it is submitted that, when these types of relevant facts are to be brought up against the accused, the prosecution must be sure that the charges which such facts are being adduced to support, fall within the limit of the offence as stated in the Act. In ODUTADE v. POLICE,[59] the appellant was charged with being a rogue and vagabond. Evidence of convictions over 10 years old was given. He was acquitted on the vagabond charged but convicted of receiving. It was argued on appeal that the previous convictions were inadmissible as evidence of guilty knowledge under Section 46(b). For the Police it was argued that the convictions were put in for the vagrancy charge and that it was only on that charge that the Magistrate mentioned them. It was held that Section 46(b) was inapplicable and that the appellant did not have a fair trial.[60]

That single act of introducing appellant's previous convictions, it is submitted, offended one of the cardinal principles of law, that one's previous convictions must not be disclosed except in Special Circumstances and this was not one of such Special Circumstances.

However, a Judge has a discretion to exclude the evidence made admissible under this section if its prejudicial effect greatly outweighs its probative value.[61] This, again is one of those circumstances that determine the application of this test of relevancy as the basis for admissibility in Nigerian Courts being the more purpose of this thesis. We shall continue to see the determining factors of this test as we progress in the discussion. The next heading to be examined is similar facts evidence when relevant and admissible in evidence.

4. SIMILAR FACTS EVIDENCE

One may begin this topic by stating in the words of Professor Nokes, that "the phrase 'similar facts' is obviously a contradiction, for the adjective implies a comparison. The use of the phrase in the law of evidence is mainly confined to a comparison of other facts with the facts in issue in particular litigation. Hence, a similar fact is usually a fact which is similar to a fact in issue".[62]

Phipson on the other hand states that:

> "Subject to two exceptions stated below, evidence of facts or transactions similar to the facts or transaction directly in issue is admissible if it is logically probative, that is if it is logically relevant in determining the matter which is in issue, and is not otherwise excluded, e.g. by the rule against hearsay".[62]

The views of the two learned authors stated above can be summarised to the effect that evidence of similar facts must be confined to the facts in issue and logically relevant to determine

the matter in issue. Such similar facts evidence will be excluded otherwise by the rule against hearsay and other rules of exclusion. It is further submitted that each matter where similar facts evidence has to be applied must be treated on its own merits.

Section 17 of the Evidence Act[64] makes provision for admissibility of similar facts evidence. The section states as follows:

> "When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant".

It is submitted by Dr. Aguda that, this Section states, in a Statutory form, the English Common Law rule as to the admissibility of similar facts evidence, that is the "evidence of improper conduct of the parties" on other occasions[65].

The phrase "evidence of improper conduct of the parties", (underlining - mine) as used above, with the greatest respect, will appear not very appropriate in that content.

First of all 'similar facts' evidence of the acts of parties in civil cases may not be evidence of "improper conduct".

Secondly,'similar facts' covers a wider field than 'similar acts' of a party or indeed of one who is not a party. A is charged with living on a particular day upon the earnings of B's prostitution. Evidence of similar acts on days prior and subsequent to the alleged date was held admissible as explaining their relationship on that date[66].

The Court of Appeal in MOOD MUSIC PUBLISHING COMPANY LIMITED v. DE WOLFE LIMITED[67], followed earlier authorities in regarding the "similar facts" rule as the same in civil and Criminal Cases. It is submitted, therefore, that where in a Criminal Case "Similar facts" evidence does indicate improper

conduct on the part of the defendant, the court has to consider whether to reject it in the exercise of its general discretion or to reject evidence whose prejudicial effect outweighs its prejudicial value. The rule as such, however has nothing to do with "improper conduct."[68]

Evidence under Section 17 is often confused with evidence of character,[69] which will be dealt with in the next heading. Therefore, often in the application of the section, evidence of bad character of the accused is let in and this offends one of the most fundamental principles of the law. The common law rule on this matter is as laid down by Lord Herschell L.C. in MAKIN v. ATTORNEY-GENERAL FOR NEW SOUTH WALES:[70]

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury; and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which could otherwise be open to the accused."[71]

It is therefore submitted that, as stated by the Lord Chancellor in the above case, evidence of similar facts is generally inadmissible, if it is to show propensity, though exceptions to the rule do exist.

The position of the law as stated in Makin's case has been approved by the House of Lords in many cases,[72] and remained unchallenged for fifty years. However, in 1946 a judgment of the court of Criminal Appeal in the case of R. v. SIMS,[73] contained dicta which in effect reverted to the older law, reversing the settled approach to this subject, by laying down that evidence of similar facts was relevant and admissible unless there was some

ground for exclusion.[74] As per Lord Goddard C.J.:

> "If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not here to seek a justification but is admissible irrespective of the issues raised by the defence, and we think is the correct view".

This view of the Lord Justice was criticised by the Judicial Committee of the Privy Council in the case of NOOR MOHAMED v. R.[75] In that case the lower court had, at the trial of the appellant for murdering his Mistress by poison, admitted evidence that about two years before the alleged murder, the appellant's wife had died of similar poison. The admission of that evidence was held to be wrong and consequently the conviction was quashed.

In 1952, this question came directly before the House of Lords in HARRIS v. DIRECTOR OF PUBLIC PROSECUTION.[76] In this case Harris, who at all material times was a Police Constable on duty in a market when most of the gates were closed, had been indicted on eight counts each of which alleged a separate breaking into the some offices in the market and stealing therefrom between May and July. All the counts were tried together, so that the jury heard evidence relating to all the eight offences. The evidence showed that on each occasion the thief had entered the building by the same method and had stolen part only of the money which could have been taken. There was no evidence to connect the accused with the first seven thefts other than opportunity; but a trap was laid on the last occasion, and the Constable was found by detectives near the building very soon aftet the ringing of an alarm bell, which could have warned him to hide the stolen marked money where it was afterwards discovered. The jury acquitted the accused on the first seven thefts but convicted him

on the last count, and the conviction was upheld on first appeal. However, the House of Lords, by a majority of four to one, quashed the conviction. The House considered that the two issues on the last count were whether the money was stolen on a particular date, and whether the accused stole it, and held that the evidence of earlier thefts was irrelevant to both these issues. Viscount Simon L.C. expressly approved the principle laid down in Makin's Case and saw no reason for modifying it, and the whole House occurred with the stated principle.

The decision in this case has given rise to much discussion among academic writers. Some have insisted that the true rule implicit in the cases is that any relevant evidence is receivable, except where there is a specific rule of inadmissibility[77]. This argument, it is submitted is in accordance with the law in Nigeria[78], where the Evidence Act prohibits evidence of an accused's bad character being given in criminal proceedings except under the circumstances stated in the Act. It may be thus stated that, the rule in relation to similar facts is one of inclusion rather than one of exclusion. However, the rule so stated is subject to exceptions; and another writer has pointed out that the formulation of the rule is not a matter of substantial significance[79].

The view of the House of Lords approving the statement of the law in Makin's Case was emphasized including an additional ground of exclusion of similar facts evidence base on discretion. The House of Lords has even held in later cases[80] that in exceptional cases, evidence that the accused has been guilty of other offences will be admissible if it shows that those other offences have some common features with the offence charged, or those other offences by their unusual nature and striking similarities have much in

common with the offence charged.

In Nigeria, before the enactment of the Evidence Act, a number of cases were decided after the decision in Makin, based on the principles laid down in that case. In R. v. EFFIONG EDET ITA,[81] the West African Court of Appeal approved the dictum of Jackson, Assistant J., to the effect that "when the gist of an offence is fraud, intent is material and evidence of other similar acts is admissible to prove that intent". In an earlier case R. v. ADENIYI,[82] the same court had held that in a charge of preparation for coining current silver coins,[83] evidence of previous uttering by the accused was admissible. In AKERELE v. R,[84] the accused a Medical Practitioner had given injection to the deceased. Evidence of similar facts regarding children that had died by injection from the same mixture was admitted to show knowledge.

With the enactment of the Nigerian Evidence Act in 1945 and with particular reference to Section 17 of that Act which has been stated in this chapter, all the cases would be similarly decided because that section has not materially altered the relevant English Common Law position on the matter. In R. v. GRILLOPOULOS AND OTHERS,[85] the accused were charged with receiving stolen tin from P., and evidence was given to show that they received, on the same day and also a week earlier, stolen tin from other persons. It was held that evidence of the other instances of receiving stolen tin could not be used to prove the act of receiving charged; that act must be proved aliunde. If the particular act of receiving is proved, the other instances would then show that the receiving was accompanied by guilty knowledge that the tin received was stolen.

In another case of SAMUEL THOMAS v. COMMISSIONER OF POLICE,[86] the appellant was issued with books of "tote" tickets for sale to

the public at a race meeting. It was proved that he had removed a few tickets from the bottom of each of some of the books, instead of from the top down-wards serially. Evidence was given that, on a former occasion on which tickets had been entrusted to him for the same purpose, some had been found to have been removed from the bottom of the books as in the case in hand. It was held that this evidence was both relevant and admissible.

On like the English Common Law position expressed in Makin's Case, Section 17 of Nigerian Evidence Act does not in term allow evidence of similar facts to rebut a defence which would otherwise be opened to an accused person. This again is one of those callous provisions of the Act, giving over-protective status to the accused person. It is submitted that, whenever similar facts evidence is relevant, such evidence should be admitted and acted upon. That, this position creates a much more balanced treatment of the accused person and the victim. The Common Law position as established in Makin's Case and other later cases will appear more appropriate because these cases do not introduce the issue of excluding similar facts evidence if admitting such evidence, will rebut a defence otherwise opened to the accused.

However, the researcher here, has not come across any reported case on this area and it is therefore submitted that the extra-use of similar facts evidence as elaborately expressed in Makin's case and subsequent cases, can be properly read into Section 17 of the Nigerian Act. Furthermore, it is submitted that for a proper administration of justice in our courts, Section 5(a),[87] although this section has its own inherent problems, can be invoked in aid so as to bring the law in this regard in line with the English law by allowing the admission of this type of evidence to rebut a defence which would have been opened to the accused person. Our courts owe the nation the responsibility to prevent injustice

through mere technicalities which can not stand the test of logic or reason. It is sad that our courts have sometimes used the provsions of the Evidence Act as well as other statutes in a less critical manner, such that this test of relevancy and admissibility has lost its credibility.

It is also submitted that relevancy under Section 17 of the Act is a different thing from admissibility. That even if evidence is held to be relevant under Section 17, the court may nevertheless exclude it, if it considers the evidence prejudicial to the fair trial of the accused person.[38]

The exclusion of relevant facts, however, for purposes of admissibility is not a perculiar feature of Section 17 only. It is a discretionary power given to the courts which was emphasised as an additional ground by the House of Lords in the celebrated Makin's Case.

Where even evidence of similar facts is admissible in law, the court in civil case has a discretion to and should reject such evidence, unless if accepted it would not merely afford a reasonable presumption as to the matter in dispute but would be reasonably conclusive, and would not raise a difficult and doubtful controversy of precisely the same kind as that which the jury have to determine.[39] On principle therefore, the court should exercise the same discretion in a criminal case, whether the evidence is tendered by the state or the accused.

It is submitted in this regard that the court may, be inclined to exercise its discretion in favour of an accused or defendant who tenders such evidence, unless the evidence adversely affects the case of the co-defendant or accused.

Furthermore, as earlier stated, where evidence is tendered during a proceeding, it is subject to the over-riding discretion of the court to reject such evidence where its prejudicial effect

outweighs its evidential value. This is especially so in criminal proceedings. In that case, where the prejudicial value outweighs the evidential value, the Judge might intimate to the prosecution that evidence of similar facts affecting an accused, though admissible, should not be pressed.[90]

Also when evidence of similar facts has been admitted; the Judge should warn the jury where there is a jury system but in Nigeria where no jury system exists, the Judge should warn himself, not to give it more than its true weight,[91] though such a warning may prove ineffective and be the basis of a successful appeal.[92]

However, in other cases when such evidence has been admitted, an appellate court may quash a conviction. In the case of R. v. DOUGHTY,[93] where the accused had been convicted of indecent assaults on young girls after the admission of evidence of doubtfully indecent incidents of a different nature with other young girls, the conviction was quashed on this ground. It is submitted that in exercising its discretion under this section, the court should, like in all judicial discretions act judiciously. This principle of law, is very fundamental, because, it is to my mind the back-bone to the test of relevancy and admissibility as to the administration of justice in our courts.

Section 17 of the Evidence Act, applies not only to criminal cases, but does apply to civil cases as well. It must however be noted that, the Section is conspicuously applicable in criminal cases, as we have in the cases so far treated in this respect. In HALES v. KERR,[94] A sued B, a barber, for negligence for shaving him with an unsterilized razor whereby he was infected with ringworm. Evidence that other persons shaved by B had contacted the same infection was held admissible.

The Supreme Court of Nigeria in the case of JIMOH ISHOLA v. THE STATE,[95] has also pointed out that evidence is admissible as to

acts which are so closely and inextrically mixed up with the history of the criminal act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentation of the case without the evidence being thereby rendered un-intelligible.

Unlike facts declared relevant by the evidence act, which have been discussed, similar facts are not relevant per se. Similar facts have to be proved relevant before they are admissible in evidence. Similar facts will be excluded if they are irrelevant to the facts in issue. However, similar facts may be relevant on more grounds than one, hence it may be convenient to deal with the usual types of case where there is a special connection between similar facts and the facts in issue, so as to make the similar facts relevant and admissible.

The court has a judicial discretion to exclude similar facts evidence and even when does admit such evidence, to give less weight to it, if the probative effect is greater than the evidential effect.

Section 17 of the Nigerian Evidence Act which provide for the admission of similar facts evidence, has not adequately as already observed provided for the application of similar facts evidence in Nigerian Courts as laid down in Makin's and subsequent English cases. There is therefore need for amendment which will be recommended in the concluding chapter of this thesis.

That is so far the brief discussion on similar facts evidence. Our next discussion will be on "Character evidence" when relevant and admissible in evidence. Once more, we shall go into the task of trying to determine this test of "relevancy and admissibility" in Nigerian Courts. It is a hard-test that, no clear-cut line has

been drawn in determining it, such that it has to be applied according to each circumstance even with the laid down principles in some cases.

5. CHARACTER EVIDENCE

As a general rule, evidence that an accused person has committed some other offences or other misconduct on other occasions or is of bad character or reputation is not allowed to be given in proof of the offence charged, such evidence being irrelevant in law and under the Nigerian Evidence Act in particular.

This general rule of exclusion, which is subject to exceptions, applies primarily to the character of the parties in a litigation, for witnesses stand in a more exposed position. However, it is submitted that the rule turns more favourable to the accused person because his position and his witnesses in a litigation seem to be the determining factors for the dispension of justice. This, as we know, is the common law rule applicable in Nigeria that, the accused must remain innocent until he is proved guilty.[97] This position of the law, it must be noted, tends to give the accused too much advantage thereby tilting the balance in the accused's favour.

As earlier observed, evidence of similar facts is sometimes confused with character evidence. The character of a person means his reputation,[98] although in a few cases reputation may bear little relation to true character,[99] evidence of disposition or actual conduct is theoretically irrelevant to character. More so, such evidence is rumours or suspicious,[100] yet in fact reputation may be founded on such shifting sands.

However, in practice, when evidence of character is admissible, it is not always possible to confine such evidence to reputation. It is therefore submitted that character sometimes means a combination of reputation and disposition.[101]

By Section 71 of the Nigerian Evidence Act,[102] the word "character" is defined to mean "reputation" as distinguished from disposition. Under that Section therefore, where evidence of general reputation may be given and except in the circumstances provided for by Section 68(2) (a and b) and Section 159(d)(i-iii) of the Act,[103] evidence of character in the form of previous conviction may not be given. It must be noted that previous convictions tend to establish disposition, provided they can be treated as conclusive or at least receivable as evidence of the facts upon which they were founded. Therefore, the character of a witness is certainly not confined to his reputation. Both his conduct and any conviction recorded against him, may be relevant when his credit is attacked.

It must be noted further that, a witness could be asked for his estimation of the disposition of one of the parties and finally evidence might be given of that party's reputation, the general opinion of his disposition prevailing among those who know him. When this is adopted, the evidence is often regarded as evidence of character, although the word character is frequently used to mean reputation and not disposition. In the circumstance, evidence of evil disposition like for example in the case of WAHABI ALAO LAWAL v. THE STATE,[104] being a member of a notorious gang is not regarded relevant but evidence of reputation under circumstances mentioned in the evidence Act will be regarded relevant.

The law requires that each offence charged must be proved on its own, without reference to the commission of another offence

by the accused. This principle derived from the English Common Law is well illustrated in the case of R. v. RODLEY[105]. In that case, the accused was charged with house-breaking with intent to commit rape, and evidence that the accused on the same night went down the Chimney of another house and had sexual intercourse with one of the inmates with her consent was received, the Judge considering such evidence to be of some relevant as showing lustful dispostion. It was held by the Court of Appeal that the evidence was irrelevant and therefore inadmissible.

Section 66[106] of the Evidence Act makes provision for character evidence in civil cases. The character of the partices to civil litigation is not usually relevant. Where, for example, a will is impeached for fraud, the defendant or the plaintiff will not be allowed to prove their good characters in answer. Similarly in an action for damages for breach of contract, neither the character of the plaintiff nor that of the defendant can be relevant.

The Section, however, provides for an exception and that is when the character appears from other facts which are otherwise relevant. Dr. Epuda[107], is of the opinion, that many of such occasions cannot be imagined but that in a suit for defamation where the defendant pleads justification, evidence in support of the plea may elicit evidence of the character of the plaintiff which may, therefore, become relevant and admissible. However, whether evidence of specific acts, reputation or rumours can be received is dependent upon the pleadings in each case.[108]

It is submitted therefore that the exceptional circumstances under this Section does not provide adequate opportunity where evidence of character could easily be admissible in a suit. And

with no Nigerian decision, to the best of the researcher's knowledge, based on that exceptional circumstances, it will appear that exceptional circumstances serve no purpose. The exceptional circumstances, it is submitted, is much more appropriate in criminal cases than in civil cases. Further, evidence on the exceptional circumstance of Section 66, will be readily admissible under similar facts evidence.

However, in a suit, where parties in a witness box give evidence in chief, they are liable to cross-examination, which could include cross-examination as to credit in that capacity. And in this wise questions as to credit may involve asking questions relating to the character of the parties. In line with receiving evidence from witnesses, any answers that may be given by a witness are final and the court will not allow evidence to contradict such answers. However, a witness who gives false evidence under the above circumstance may be charged for an offence.[109] The exceptions to this rule are where a witness denies previous convictions and a witness who denies his impartiality may be contradicted by evidence of such convictions or impartiality. It is settled law[110] that the credit of a witness in a proceeding can be generally impeached. It is, however, submitted that each case ought to be treated on its own merits.

Section 67 of the Act[111] makes provision for the evidence of the good character of an accused person in criminal cases. The section therefore deals with the relevance of the good character of a person charged for an offence. Generally under this section, the accused is allowed to give evidence of his good character, in his evidence in chief, by his own testimony. Or by cross-examination of the witnesses for the prosecution or from witnesses

of other accused persons during the cross-examination of such witnesses. Also the accused may call witnesses to testify to his own good character.

It can, therefore, not be denied that the evidence of the good character of the accused is a very relevant fact in the determination of what punishment to meteout to the accused person after he has been found guilty of the offence. This is however only by way of allocutus. But the section does not show the purpose for which evidence under these circumstances is relevant. However, Dr. Aguda[112] submits that there is no doubt that such evidence will cover much more than the question as to the level of punishment after a finding of guilt. It is, therefore, relevant for the proper exercise of justice to all parties concern that such evidence of good character must be held under this Section to be relevant and admissible in proof of the guilt or otherwise of the accused person. The section however, leaves too much discretion to the courts as to the determination of such relevant evidence. If the Judge directs the jury as to the relevance of good character and it seems that he is not obliged to mention such evidence at all, it is certainly sufficient for him to say that a man of good character is less likely to commit an offence than a man of bad character.[113] However there are some offences which no one but a person of good character should be in a position to commit.

It is submitted that,[114] evidence of good character of the accused affects only his credibility, but its relevance must depend on the assumption that the accused always acts "in

character". If for an example an alarm of theft is raised at a charity bazaar, and the thief slips a stolen purse into the pocket of a Bishop, the episcopal character may allay suspicion; but if a Bishop should be caught in the act of 'shoplifting' the episcopal character would merely appear to be unmerited.[115]

Infact, in some cases such as embezzlement, it is the previous good character of the accused which provides the opportunity for the offence. The section merely states that evidence of good character is relevant but there is serious doubt if evidence of good reputation for one type of conduct will be held relevant when another type of conduct by the accused is in question. This again is one of the shortcomings of the section.

It is submitted that evidence of good character should be relevant to the offence charged. If a man is charged with forgery, it is not important that he is known to be kind to animals. The evidence should be that of reputation.

The usual form of question to a witness for a defence, on charge involving dishonesty, is what is the prisoner's character for honesty? But even if 'reputation' is substituted for 'character' the witness is likely to give his own opinion or to say that he has never heard anything against the accused.[116]

In MUHAMADU HUSUNA AND ANOTHER v. POLICE[117], the two appellants were convicted of robbery and abettment respectively. The second appellant had called two witnesses who had testified as to his good character. In considering the evidence for the second appellant, the trial Magistrate had disregarded the evidence of the two witnesses as being irrelevant. The appeal court held

that in so doing, the trial Magistrate was in error and that, on the facts of the case the appeal would be allowed. This case merely illustrates the fact that an accused person can call witnesses to give evidence of his good character and such evidence may take various forms. Also the evidence should relate to the reputation of the accused within a reasonable time of the alleged offence.[118]

However, when evidence of good character of an accused is held relevant and admissible, any evidence supplied by the prosecution in rebuttal must also be admissible.

Section 68[119] provides for evidence of character of an accused person in criminal proceedings.

Subject to numerous exceptions, it is not permissible for the prosecution to adduce evidence,[120] showing or tending to show the bad character of the accused. This rule covers evidence of previous convictions, and its breach may result either in the trial being commenced denovo or in a conviction being quashed, unless an appellate court thinks that the trial Judge properly exercised his discretion or that no injustice has resulted.[121]

Section 68(2) and (3) of the Evidence Act provides some of the exceptions evisaged when evidence of bad character may be given. Under these subsections, evidence of bad character may be given in the following circumstances:

(i) when the bad character of accused is a fact in issue;

(ii) when the accused person has given evidence of his good character;

(iii) An accussed person may be asked questions to show that he is of bad character in the circumstances mentioned in paragraph (d) of the proviso to section 159.

The prosecution may adduce evidence of the bad character or of the previous convictions of the accused person when the bad character of the accused person is in issue. Such evidence of bad character in a wide sense is admissible for the prosecution before verdict as a similar fact or on charges under special Statutes, for example, a charge on being a rogue and vagabound under Section 250(1) of the Criminal Code[122], proof of a previous conviction for being an idle and disorderly person under Section 249 of the Criminal Code[123] is necessary to establish the offence. The previous conviction here being a fact in issue must be proved.

There has hardly been a settled meaning for previous conviction. However, in the case of A. v. OSITA AGWUNA AND ORS[124], the West African Court of Appeal made an attempt to consider the exact meaning of previous conviction. In that case, the first appellant had made some Seditions Statements during a lecture delivered at Tom Jones Hall on 27, October, 1948. He was not convicted of this offence until 22 February, 1949. But on 7 November, 1948, he and the co-accused persons delivered another lecture at the Glover memorial Hall for which they were also charged with Sedition. One of the grounds of appeal against sentence in the later trial was that the trial Judge wrongly treated the conviction of the 22 February, 1949 as a previous conviction even though the present offence charged was committed before the Judgment in the earlier offence. The Court held that previous conviction is "one in which conviction took place before the Commission of the offence for which the accused is instantly charged".

Section 224 and 225 of the Evidence Act[125], lay down the procedure to be followed in proving a previous conviction. From the provisions of the Act, proving previous convictions is usually a tedious and long process. Therefore, where such evidence is not properly

adduced, and it is admitted by the trial court, the appellate court will quash a conviction based on such evidence for being prejudicial to the fair trial of the case.[126]

However, from the prevailing circumstances in our Nigerian Society, such strict requirements contained in the above stated Sections can be considered as adequate for the proper administration of justice. The court, therefore, after a previous conviction has been duly obtained, has the final say as to its admissibility and what weight to attach to it.

Another exceptional circumstance when evidence of bad character can be given, is when the accused person gives evidence of his good character. The prosecution at this stage may not only cross-examine him as to his bad character, but may even give evidence of the same in rebuttal. In most cases, evidence in rebuttal include evidence of previous convictions.[127]

It must, however, be observed that, unless some specific act can be put to a witness for the defence, he is not always cross-examined on his evidence as to the accused's good character.[128] The court of Criminal Appeal has held that a witness for the defence, speaking as to the accused's character in relation to sexual morality on a charge of indecent assault, may be cross-examined as to the accused's previous conviction involving dishonesty.[129] The accused can,therefore, not just claim good character in certain respects.

It is submitted that whenever the accused gives evidence of his good character, whether by cross-examination on his behalf or by his own or others' testimony, the prosecution may rebut it either by cross-examination,[130] or by independent testimony. However, this rule will not apply where such evidence of good character has

been inadvertently introduced,[131] or has been extracted from him in cross-examination.[132] Furthermore, the rule will not apply when, in order to explain his conduct, the accused puts in an instance of bad character, for example that the reasons why he ran away from the Police on arrest was that he had a conviction for assault and had not paid the fine.[133]

The test for the determination of relevant evidence under this heading is usually a difficult one and it is, therefore, the duty of the trial court to handle this with the greatest care. The court's discretion in this respect as will apply to other judicial discretions, should be exercised in a balanced form. Justice need to be done to all parties concern. It is therefore, important that before an accused person commences to give evidence of his good character, the court should warn him of the danger to which he is about to expose himself, especially where he is unrepresented by counsel.[134]

The third exceptional circumstance, is when the accused may be asked questions to show that he is of bad character in the circumstance mentioned in paragraph (1) of Section 159 of the Evidence Act.[135] The exception is to the effect that an accused person cannot be compelled to give evidence in his trial but if he volunteers to give evidence, then he will be subject to the rules laid down in Section 159(d). However, a detailed discussion of this exception lies outside the scope of this thesis. It is, however, important to note that the test of relevance and admissibility cannot easily be determined under this exception, because Section 159(d), provides instead a very powerful shield to an accused person who decides to give evidence at his trial. When an accused person goes to the witness box to testify, he is, for all purposes, a witness in the case and, therefore, subject to cross-examination as to credit. But Section 159(d) still places

such an accused person in a favourable position. Infact Section 159(d) as in the case of other Sections of the Evidence Act, raises a number of problems, a detailed discussion of which is not within the scope of this thesis.

Section 68(4) of the Evidence Act is to the effect that whenever evidence of bad character is relevant evidence of a previous conviction is also relevant. This is therefore to the effect that once the bad character is proved relevant and if the prosecution can adduce evidence of previous conviction as provided under the Act and also laid down by WACA in Agwuna's Case, such evidence will be relevant as against the accused person. This, it is submitted, it is a more positive proposition of the law. However, there are occasions when evidence of a previous conviction may be adduced by the accused himself in defence; as when he pleads autre-fois convict[136] or relies upon a conviction to establish some fact relevant to his case.[137]

It will appear therefore that the conviction of a co-accused person may be admissible as relevant to the accused's defence. It is submitted that Section 68 of the Act, even with its loopholes is a better provision than Section 67 which leaves a wide discretion to the courts. However, it is a general feature of the Evidence Act that the courts are left with wide discretionary powers which ought to be exercised judiciously according to the circumstances of our society. Our courts should therefore avoid as much as they can relying on common law precedents, although the Evidence Act itself is largely based on common law Evidence.[138]

Section 69 makes provision for evidence of character as affecting Damages.[139] Under this Section, in civil cases, the fact

that the character of a person is such as to affect the amount of damages which he ought to receive e.g. in defamation and cases of breach of promise to marry is relevant. The Section creates no doubt as to when such evidence can be relevant and admissible. Meanwhile under the English Common Law, some doubt exists as to whether or not the good character of the plaintiff is admissible in aggravation of damages in a civil case.[140] In a small number of cases, the character of the plaintiff may materially affect the amount of damages which he or she recovers.

If, as it appears from the Section, evidence of the good or bad character of the plaintiff is admissible in aggravation or in mitigation of damages, then it is submitted, such facts relating to the character of such a person must appear on the pleadings. Such facts must, as stated, affect the amount of damages which the plaintiff ought to receive.

In addition for breach of promise, evidence of the plaintiff's bad character may be admissible to reduce damages,[141] and the same will apply to the petitioner in divorce case based on adultery.[142] Furthermore in action for Seduction,[143] or possibly enticement, the character of the woman concerned may be relevant in mitigation of damages.

Section 70 of the Evidence Act,[144] makes provision for evidence of character in defamation cases. The Section, unlike Section 69 which is applicable to all civil cases, is applicable only to actions brought in defamation. In effect, the Section could be regarded as a proviso to Section 69.

It is therefore submitted that, it was unnecessary for the law makers to enact Section 70 separately from Section 69. If even the whole purpose was to stress a particular issue, the Section could have conveniently be made a subsection to Section 69.

Any-way, whatever the position, it would appear, the intention of the law makers is the same. In cases of defamation under the Section, the bad general reputation of the plaintiff is admissible, but not rumours or suspicious to the same effect as the libel, nor particular facts showing bad character or disposition.[145] The provisions of Section 70 are similar to those of Order 82, Rule 7 of the Rules of the Supreme Court in England.[146] It is, however, doubtful whether an apology after an action has been brought can be included.[147] The Section will not prevent the plaintiff being asked on cross-examination such questions as are forbidden by the Section for the purposes only of testing his Credibility.

The plaintiff's answers to such questions are, however, final and evidence cannot be led in rebuttal.[148] Where questions are asked only to test the credibility of the plaintiff, the trial court must take care to consider such issues as to credibility where admissible and the quantum of damages in respect of which they are inadmissible.[149] In HOBBS v. TINLING, it was held that the cross-examination could be entertained to test the witness's credibility as to other matters deposed to by him, but not in mitigation of damages, and consequently no evidence was admissible to rebut his denials.

This is so far the brief discussion on relevancy and admissibility of character evidence. The next and last heading in this chapter is on "illegally obtained evidence", whether such evidence is relevant and admissible in Nigerian Courts.

6. ILLEGALLY OBTAINED EVIDENCE

This is one of the controversial aspects of the test of "relevance and admissibility" in the law of evidence generally

and what operates in Nigeria in particular. A detailed examination of this area of the law is not within the scope of this thesis. Attention will be mainly focused on relevance and admissibility of evidence obtained illegally. Three reasons exist for this limitation: First, the Nigerian Evidence Act follows the traditional approach of treating a confession obtained from an unlawful search differently from an involuntary confession even though they are both species of illegally obtained evidence.

Secondly, it is not intended here to deal with the question of whether an illegal arrest should vitiate the jurisdiction of the trial court.[150] We are only concerned here with the use of evidence from such an illegal arrest. Finally the limitation is for practical convenience.

The Nigerian Evidence Act does not directly provide on the effect of evidence secured in consequence of illegal search or seizure. However, this type of evidence, is generally admissible in Nigeria under Section 29 of the Evidence Act. We shall come back to this Section later.

Evidence obtained from illegal search and seizure have been given some considerable treatment by a number of writers. Rudd treats such evidence as part of confession,[150(a)] relying heavily on an article in the (English) Law Quarterly Review,[151] and concludes by citing the case of KURUMA v. R,[152] that such evidence "is generally admissible in England and Nigeria."

Professor Nwabueze, in one of his admirable books on the Nigerian Constitution is of the view that "where a person is arrested on a warrant, it is prima facie unlawful to search the house, but if the search, though unlawful initially, disclose matters relevant to the charge against the person arrested or relevant evidence as evidence of the Commission of an offence

by any one, these may be lawfully seized. The search and seizure being thus excused by the interest of the State in the preservation of material evidence." The learned Professor relies on ELIAS v. PAUL[154] as authority in support of the above proposition. However, it is not clear from the author's book whether the above quoted passage was intended to represent the law in England and Nigeria.

We shall again turn to Section 29 of the Act which provides that evidence of this nature is generally admissible by virtue of that section.[155] The Section provides:

> "Where information is received from a person who is accused of an offence, whether such person is in custody or not, and as a consequence of such information any fact is discovered, the discovery of that fact, together with evidence that such discovery was made in consequence of the information received from the accused, may be given in evidence where such information itself would not be admissible in evidence."

The Section quoted above, it is submitted if applied in a broad sense, can render admissible evidence illegally obtained. The Supreme Court of Nigeria in a vital case on this area of the law, however did not rely on the Section to admit evidence illegally obtained but instead preferred to fall back on the English Common Law for guidance. This was in the celebrated case of SADAU AND ANOTHER v. STATE.[156] The accused persons were alleged to have been involved in a racket by which Vehicle Licences and similar forms were printed at the government press without authority and illegally sold for money. The Police, armed with a search warrant searched the house of the first accused while he was away and removed some incriminating materials which were tendered in evidence during the trial. The first accused contended that the incriminating materials were planted in his house by the Police Officers who

conducted the search. He argued that the search was illegal in that it did not comply with the provisions of Section 78(1) of the Criminal Procedure Code,[157] and that the incriminating materials obtained in breach of that Code should be rejected by the Court.

From the prevailing circumstances, apart from the Police Officer who conducted the search, there was no other person present. No explanation was given by the Police Officer as to why they did not comply with the provisions of the Criminal Procedure Code. The Supreme Court then, faced with this factual situation did not invoke Section 29 of the Evidence Act but preferred to fall back on the English Common Law for guidance. The court decided to admit the evidence derived from the illegal search, quoting with approval the decision of the Privy Council in Kuruma, Son of Kaniu v. R where it was held that:

> "The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained..... There can be no difference for this purpose between a civil and criminal case. No doubt in a criminal case a Judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."[158]

The Supreme Court of Nigeria having not given a wide interpretation to Section 29 of the Act to admit the illegally obtained evidence in this case, but by preferring to fall back on the English Common Law for guidance, must have done so under the provision of Section 5(a) of the Act. Considering this decision of the Nigerian Supreme Court, one is forced to ask the question whether, the court acted properly in admitting the illegally obtained evidence in Sadau? One way to answer the question is to go back to the facts and ruling in Kuruma on which the court relied, to discover the rationale of the principle of law

formulated.

The appellant, a Kenyan African, was stopped at a Police road-block and searched by two Constables, both of whom were below the rank of Assistant Inspector of Police, a search which contravened, Regulation 29 of the Emergency Regulations of Kenya.[159] The two Constables alleged that they found on the appellant two rounds of ammunition and a penknife. The appellant contended that he was never in possession of the ammunition and penknife and that the incriminating evidence being the fruit of an unlawful search should not have been received in evidence by the trial Judge. The Privy Council held that the incriminating materials are relevant and admissible, but that there is a discretion to exclude them if their admission would operate unfairly against the accused.

A critical examination of the evidence in Kuruma's Case even though held relevant is not reliable. Consider for examples that even the pocket penknife he was alleged to be carrying was never tendered in evidence and the three people the police claimed witnessed the search were never called to testify. In effect, it was the evidence of the accused and the two Police Constables that was considered. Where a law like Regulation 29 of the Emergency Regulations of Kenya Requires specifically that a search has to be by an Assistant Inspector of Police, not be an ordinary Constable, there must be a strong reason that evidence taken by the former should be more reliable than that taken by a Constable.

It is therefore submitted that in deciding to accept the evidence despite the contravention of Regulation 29, the court in effect was substituting its own test of reliability for that

intended by the Legislature.[160]

On the same reasoning, the evilence admitted in Sadau would also seem to be unreliable. The provisions of Section 78(1) of the Criminal Procedure Code are quite clear and unambigous. It has been submitted that because of the zealousness of Police Officers in securing evidence that will lead to a conviction, there is need that this provision be strictly complied with.[161]

It is likely that if the premises are searched in the absence of the owner and without compliance with section 78(1), nothing stops a Police Officer from planting incriminating evilence on the premises. When this does happen and such illegally obtained evidence is tendered in court, invariably, the court tends to admit such evidence as relevant. The probability is higher if the accused is a person with a criminal record.

However, in discussing search and seizure under the Criminal Procedure Code, Special Reference has to be made to Section 79. The section provides:[161(a)]

> "If any place to be searched is an apartment in the actual occupancy of a woman, not being the person to be arrested, who according to custom, does not appear in public, the person making the search shall, before entering the apartment, give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then enter the apartment."

The above Section, even though is intended to preserve certain customs, defeats the whole purpose of search and seizure in Nigerian Law. Is it not possible that a woman who is given notice to withdraw, can carry away any incriminating materials in the apartment and even the material, the main purpose of the search? It is therefore submitted that the fairness of this section in the actual application of the law in this area is

highly questionable. It must be noted that this type of provision is peculiar of the Criminal Procedure Code.

Anyway, arguing further on Section 78(1) and Sadau's Case, it is submitted that the evidence in Sadau should have been rejected as being unreliable. In exercising its discretion in that case, could the court not do so in favour of the accused? Lord Goddard said in Kuruma's Case that judicial discretion to exclude evidence exists if the illegally obtained evidence would operate unfairly against the accused. The Lord Justice gives an instance of such unfairness when evidence was obtained from the accused by a trick.

There have been several cases after Kuruma that the courts have excluded evidence obtained by tricks on basis of illegality.[162] The law in Kuruma on which the Nigerian Supreme Court heavily relied in Sadau's Case, has been further explained by the Privy Council in an appeal from the Jamaican Court of Appeal in the case of HIBY v. R.[163] Their Lordships, in that case, while accepting that unfairness to the accused person is a factor in deciding whether to exclude the evidence or not, held that the concept of "unfairness to the accused" is not susceptive of close definition and quoted with approval this observation of Lord MacDermott C.J. in R. v. MURRAY.[164]

> "It must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence, may all be relevant. That is not to say that the standard of fairness must bear some sort of inverse proportion to the extent to which the public interest may be involved, but different offences may pose different problems for the police and justify different methods."[165]

Their Lordships seem to hold the view here that the case was not that in which judicial discretion should be exercised. But

the observations of Lord Cooper in LAWRIE v. MUIR[166], which were adopted by their Lordships[167], would have certainly led to the exclusion of the illegally obtained evidence. Lord Cooper, applying the test of considering the nature and circumstances of the irregularity, held that a deliberate disregard for the procedure laid down for obtaining evidence will lead to the exclusion of the evidence so obtained, unless non-compliance with the procedure can be explained away on the ground of urgency.

On this reasoning, it is unfortunate that the decision of the Nigerian Supreme Court in Sadau is silent on why the court felt that it would not be unfair to the accused person by not excluding the illegally obtained evidence. It is submitted that because those was a deliberate violation of the laid down procedure in obtaining evidence and which could not be justified on the ground of urgency or otherwise, the evidence so obtained should have been excluded by the Supreme Court. The court had the opportunity to examine the case on its own merits and not placing too much reliance on an English Common Law decision.[167(a)] It is further submitted that, the violation of the procedure if held deliberate, it was the duty of the prosecution that must prove that it was not possible to comply with the provisions of the Criminal Procedure Code. Such burden of proof in this case is as that of proving voluntariness of a confession, which is always on the prosecution.

RIGHT TO PRIVATE AND FAMILY LIFE

After the discussion so far on admissibility of illegally obtained evidence, we shall now proceed to examine the rational behind such evidence in relation to the Constitutional Provision

on right to private and family life. The question here, then is whether this constitutional provision affects the application of the principle in Kuruma in Nigeria. The importance of this question is not only limited to Nigeria but also to Common Law African countries with provisions similar to those of Section 34 of the Nigerian Constitution.[168]

Section 34 provides as follows:

> "The Privacy of Citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby gauranteed and protected".

The same or similar provision was contained in Section 23 of the 1963 Constitution.[169] This right, as well as any other fundamental right under chapter four of the 1979 Constitution, is justiciable. By the provision of Section 42 of the same Constitution,[169(a)] the High Courts of the States have jurisdiction to determine matters arising from the violation of any of these fundamental rights. Therefore, any person who alleges that any of these fundamental rights has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

In the case of Sadau, the Supreme Court of Nigeria, even though never specifically raised the effect of Section 23 of the 1963 Constitution, on Kuruma's Case, that court made a passing reference to it. Coker J.S.C., while reading the judgment of the Court, said:

> "While the appeal was being argued this court referred to section 23 of the Constitution of the Federation, but learned Counsel for the appellant did not submit that the right reserved by that Section had been violated, and it is unnecessary to consider whether evidence in breach of the Section would be admissible."

The above observations as rightly pointed out by Kasunmu[170] are

pregnant with meaning. It is quite clear from the above observations that the court was aware of the importance of Section 23 of the Constitution in deciding the case but unfortunately with the greatest respect, did not give any definite ruling as to the effect of that Section. The court seems to be of the opinion that the accused did not raise the unconstitutionality of the evidence before the High Court. The question, therefore, is whether such a question could be raised for the first time on appeal or whether the appellant could be deemed to have waived his right to challenge the unconstitutionality of the evidence?

It is submitted that the above question does not affect the reasoning that the Supreme Court ought to have determined the serious constitutional issues involved in the case. It is seriously contended further that an act of unauthorised search and seizure constitutes a flagrant violation of the individual's fundamental rights as gaurenteed and protected by the Constitution of the Federal Republic of Nigeria and this is justiciable by the provision of Section 42 of the Constitution.

In examining further the Constitutional issues raised in Sadau's case, one must of course be guided by the experiences of other countries with similar provisions as Section 34 Nigerian 1979 Constitution and Section 23 Nigerian 1963 Constitution. Attention is to be focused in this regard, on judicial pronouncements in those countries with constitutional provisions similar to Nigeria. However, this is not to suggest that Nigerian Courts must be bound by decisions of courts of these countries, but at least a deviation must be justified by the social and other conditions prevailing in Nigeria.

Lord Cooper (in a Scottish Case) expressed the dilemma that confronts someone who tries to pursue such constitutional issues state above.

> "The law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the Commission of a crime and necessary to enable justice to be done shall not be withheld from courts of law on any mere formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection for the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action for damages. The protection is not intended as a protector for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities by irregular methods".[172]

The differences between English and American law in the field of illegally obtained evidence, it is submitted are not due to the fact that American have sensitive consciences while English have blunt ones as observed by Professor Paulsen, but seem to be due primarily to the fact that American Judges are expounding a written Constitution.[173] However, the Judges are still not unanimous on the evidential value and the legal effect of illegally obtained evidence. In the case of PEOPLE v. DEFORE,[174] Justice Cardozo was very explicit in expressing his opposition to exclusion of illegally obtained evidence.

> "A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstance may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and a murderer goes free."

Meanwhile - Justice Holmes, on his own part, in the same case expressed the following opinion;

> "We must consider two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that crimes should be detected, and to that end too all available evidence should be used. It is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime, I do not see why it may not as well pay them for getting it in the same way and I can attach no importance to protestation of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to chose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."

In the Scottish Case already referred to above,[175] the full Bench of the High Court (Lord Cooper reading the opinion of the Court) made another observation that ought to be considered together with the rest of the passages cited here.

The Board observed:

> "Irregularities require to be excused and infringements of the formalities of the law are not to be lightly condoned. Whether any given irregularity ought to be excused depends on the nature of the irregularity and the circumstances under which it was committed. In particular the case may bring into play the discretionary principle of fairness to the accused which have been developed so fully in our law in relation to the admission in evidence of confessions or admissions ..... that principle would obviously require consideration in any case in which this departure from strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick..... on the other hand to take an extreme instance ..... it would usually be wrong to excuse some highly incriminating production in a murder trial merely because it was found by a Police Officer in the course of search authorised for a different purpose or before a proper warrant had been obtained."[176]

Those who are against the exclusionary rule in the United States of America have suggested that a total exclusion of the evidence is too high a price to pay for the protection of a citizen's civil right especially when such exclusion would lead to the acquittal of an otherwise guilty person. To provide an alternative merely, it has been further suggested that civil and/or criminal liability should be imposed on the particular

officer or the governmental organ, which is usually the Police Force, responsible for a violation of the individual's constitutional right against an illegal, unlawful search.[177] However, it is submitted that the effectiveness of civil and/or criminal liability as a deterrent against police excesses has been doubted by many writer.[178]

On this submission, it is argued that, the person injured as a result of an unlawful search might find it difficult to win in a civil suit, especially if he had been convicted in the criminal action where the illegally obtained evidence had been used. That, even if such a person wins the civil suit, he may find himself in possession of a judgment against a person who is unable to pay, as Police Officers are neither wealthy nor bonded.[179] Okonkwo in his book "The Police and the Public in Nigeria",[180] holds a similar view as that expressed by Professor Paulsen above. He observes as follows:

> "The citizen who is the victim of such Police excesses will usually not bother to initiate private criminal proceedings. He usually belongs to the poorer section of the Community and can not, therefore, afford the financial expenses involved. Even if he could, he might be afraid of police retribution."[181]

On the reasoning of the arguments stated above, exclusion of illegally obtained evidence is thought of as the most effective way of gaurantteeing the individual's basic rights as enshrined in the Constitution. That would therefore amount indirectly to some sort of punishment to the individual who obtained such evidence illegally because he cannot use the evidence to prove his case. However, it must be noted that applying the exclusionary rule in Nigeria, does not necessarily mean that the consequences of admitting illegally obtained evidence should be the same as in America, if an individual's basic rights are violated as a result of an illegal search, such violation will necessarily lead to a

conviction being reversed.

In as much as one appreciates such a position in America, it might not be very appropriate to recommend same in Nigeria, principally on the grounds that the American Society is more advanced educationally, politically, socially etc. than Nigerian Society, and that, therefore, support the fact that, Nigerian Courts should pay greater attention to prevailing circumstances in our society rather than strict reliance on precedents.

Secondly - where evidence illegally obtained is admitted, the appellate court instead of automatically reversing the conviction could uphold it by invoking Section 226 of the Evidence Act.[182] However, it is argued that "grave" violation of one's Constitutional right under Section 34 of the 1979 Constitution corresponding to Section 23 of 1963 Constitution, should lead to an exclusion of the evidence and in such cases there should be an automatic reversal of the conviction. But usually, it will be difficult to determine whether a violation is grave or not. It is, therefore, submitted that each case should be considered strictly on its own merits. However, it must be noted that the application of the exclusionary rule in American is not without some limitations, which we do not intend to discuss in this thesis. In Nigeria, Section 34 of the 1979 Constitution and even Section 23 of the 1963 Constitution will appear to have nothing to the effect that the exclusionary rule will not apply to evidence illegally obtained by private individuals. However, it would be suggested that the Constitutional Provisions be followed to the hilt, to the extend that evidence illegally obtained should be rejected.

The principle laid down in Kuruma's Case as adopted by the Nigerian Supreme Court in Sadau's Case may appear simple on paper, but its actual application presents difficulties. The test of

relevance and admissibility must be regarded as a loose concept. The issues, as we have seen, are delicate and it is, therefore, submitted that, where Statutory and Constitutional Provisions are explicit on an issue, such provisions ought to be adhered to so that respect for the law is observed. If to do so results in gross injustice, then necessary amendments should be made.

In this chapter, we have been trying to vigorously examine the concept of "relevance and admissibility", some matters declared relevant under the Evidence Act, facts relevant in Special Circumstances, similar facts evidence, character evidence and evidence illegally obtained, all under the big heading "relevance and admissibility". The heading "relevance and admissibility" can be said, constitute the foundation of this thesis, as the rest of the thesis (headings, Chapters) has to be rested on it. After determining the concept of "relevance and admissibility", we then proceed to determine other circumstances that require the application of this test. The test of "relevance and admissibility" as we have seen so far is a very flexible one. In the next Chapter, we shall examine the doctrines of "Res Gestae" and "Dying Declaration" as applied in Nigerian Courts. How the test of "relevance and admissibility" operates in the application of these doctrines. We shall also examine some striking similarities and differences between the two doctrines.

FOOTNOTES TO CHAPTER TWO

1. Dr. T. Akinola Aguda: Law and Practice Relating to Evidence in Nigeria Para. 3-01.
2. Sections 3 and 2(1) Evidence Act, Cap. 62 Laws of the Federation of Nigeria and Lagos 1958.
3. See Phipson on Evidence (12th Edition) Para. 153.
4. Section 6 Ibid.
5. See Phipson on Evidence Ibid.
6. Ibid Para. 636 P. 273.
7. Ibid Para. 153 P. 61.
8. [1973] A.C. 729 at 756.
9. Phipson on Evidence Para. 154 P. 61.
10. Ibid.
11. [1906] 1 K.B. 389 at 410.
12. R. v. Baker [1895] 1 Q.B. 797.
13. R. v. Wheeler [1917] 1 K.B. 283.
14. Stephen's Digest Article 2.
15. R. v. Cargill [1913] 2 K.B. 271.
16. Houndsditch Warehouse Co. Ltd. v. Waltex Ltd [1944] K.B.579.
17. (1832) 2 Bing - 376.
18. Section 7 Evidence Act, Cap. 62, Laws of the Federation of Nigeria and Lagos 1958.
19. See Law and Practice Relating to Evidence in Nigeria by Dr. Aguda Paras 3-15 P. 33.
20. Section 8 Ibid.
21. Peter Osude v. Inspector-General of Police [1965] 1 All N.L.R. 102.
22. Section 9 Ibid.
23. Jimoh Ishola v. The State (1978)9 & 10 S.C. 81 at 104.
24. John Bamgboye v. Attorney General, Western Nigeria (1966) N.N.L.R. - 266.
25. Godwin Emonkare v. John Adewumi [1966] 1 All N.L.R. 129 at 133 or (1967) N.M.L.R. - 45 at 48.

26. R. v. Christie [1914] A.C. 545 or 10 Cr. App. Rep. 141.

27. Section 10 Ibid.

28. No. 1 of 1872.

29. Section 11 Ibid.

30. (1953) 20 N.L.R. 148.

31. Samson Aigbe and another v. The State (1976) 9-10 S.C. 77.

32. Nawaz Khan and another v. R. [1967] 1 A.C. 454 or [1967] 1 All N.R. 80.

33. (1965) N.N.L.R. - 265 [1965] 1 All N.L.R. - 125.

34. Section 12 Ibid.

35. Federal Supreme Court F.S.C. 353/62 - April 9, 1964.

36. Sections 13 and 15 Ibid.

37. Section 14 Ibid.

38. See the Cases of Taiwo v. Taiwo (1958)3 F.S.C. 80, and Olubunmi Cole and Others v. P.A. Akinye and Others (1960)5 F.S.C. 84.

39. (1940) 6 W.A.C.A. 108.

40. See the Case of Lawani Buraimo and Others v. Taiwo Bangboye and Others (1940) 15 N.L.R. 139.

41. [1961] 1 All N.L.R. 294 at 296.

42. Section 16 Ibid.

43. (1949) 12 W.A.C.A. 456.

44. (1952) 14 W.A.C.A. 176, and [1961] 1 All N.L.R. 186.

45. (1847) 2 Car. & Kir, 345; 175 E.R. 146.

46. Aveson v. Lord Kinnard (1805) 6 East 188; W2 E.R. 1258.

47. Section 18 Ibid, see R. v. Crililiopoulos (1953) 20 N.L.R.114.

48. Section 44 Ibid.

49. See Aguda Ibid Para. 7-04 P. 102.

50. (1937)3 W.A.C.A. 206.

51. Section 45 Ibid.

52. Aguda Ibid Para. 7-05 P. 102.

53. [1961] 1 All N.L.R. 685.

54. Ededen Archibong v. Ntoe Asim Ita (1954) 14 W.A.C.A 520.

55. D.O. Idundun and Others v. Daniel Okumagba (1976) 9-10 S.C. 227 at 249.

56. Section 46 Ibid.

57. See 1916 English Larceny Act Section 43(1).

58. R. v. Griliopoulos (1953) 20 N.L.R. 114.

59. (1952) 20 N.L.R. 81.

60. See also R. v. Davis [1953] 1 Q.B. 489 or 37 Cr. App. Rep.16.

61. R. v. List (1966)1 W.L.R. 9 at 50, Cr. App. Rep. 81, and R. v. Morron [1967] 1 Q.B. 107 or 50 Cr. App. Rep. 132.

62. See an Introduction to Evidence by G.D. Nokes (4th Ed.) Chapter 6 P. 109.

63. See Phipson Ibid Para. 441 P. 175. See also Mood Music Publishing Co. Ltd. v. De Wolfe Ltd. (1976)2 W.L.R. 451 at 456 or [1976] 1 All E.R. 763 (C.A.) at 766 Per Lord Denning M.R.

64. Section 17 Ibid.

65. See Aguda Ibid Para. 3-47 P. 45.

66. R. v. Hill [1914] 2 K.B. 386, See also Phipson on Evidence Ibid Para. 468 P. 191.

67. Supra, See also Hales v. Kerr [1908] 2 K.B. 601.

68. Phipson Ibid Para. 445 P. 177.

69. See Sections 68 and 159 Ibid.

70. [1894] A.C. 59 at 65 (P.C.). See Chaudhry pp. 95-96.

71. See R. v. Scarrot [1978] 1 All E.R. 672, 675-676.

72. See R. v. Ball [1911] A.C. 47, Thompson v. R. [1918] A.C. 221.

73. [1946] A.C. 531 at 537, See also Hannelmann "Evidence of Evil Propensity" (1949) 12 M.L.R. 1; R. v. Sims in England and the Common Wealth" (1959) 75 L.Q.R. 333.

74. Professor Montrose disagreed with this interpretation of the dicta, "Basic Concepts of the Law of Evidence" (1954) L.Q.R. 527 at 546. But his next sentence attributed to the text a meaning which it could not bear.

75. [1949] A.C. 182.

76. [1952] A.C. 694.

77. See Montrose; Op. Cit. at 552-554, See also Newark, "A Note on Similar Act Evidence" (1952) 10 N.I.L.Q. 35 at 36.

78. See Sections 68 and 159 Ibid.

79. C. & C. 159; Carter "The Admissibility of Evidence of Similar Facts" (1953-54) 69 L.Q.R. 80, 70 L.Q.R. 214 at 242-244.

80. Boardman v. D.P.P. [1974] All E.R. 887, Also D.P.P. v. Kilbourne [1973] A.C. 729, [1973] 1 All E.R. 440.

81. (1943)9 W.A.C.A. 35.

82. (1937) 3 W.A.C.A. 185.

83. Contrary to Section 148(3)(c) of the Criminal Code Cap. 42, The Laws of the Federation of Nigeria and Lagos, 1958.

84. [1943] A.C. 255, 261.

85. (1953) 20 N.L.R. 114.

86. (1949) 12 W.A.C.A. 490.

87. Section 5(a) Ibid.

88. See Aguda, Ibid, Para 3-52 P. 48, See also the Case of R. v. Olubunmi Thomas (1958) 3 F.S.C. 8, Harris v. D.P.P. (Supra).

89. As per Lord Watson in Metro District Asylum v. Hill (1882) 47 L.T. 29 at 35, See also Wilkinson v. Clark [1916] 2 K.B. 636.

90. See Harris v. D.P.P. (Supra) at 707.

91. See Harris v. D.P.P. (Supra) at 711-712.

92. See R. v. Brown (1963) 47 Cr.A.R. 204.

93. (1965)1 W.L.R. 331, See also R. V. Filzpatrick (1963)1 W.L.R.7.

94. [1908]2 K.B. 601.

95. (1978) 9 & 10 S.C. 81 at 105.

96. See Sections 68 and 159 Ibid.

97. See Section 33(5) 1979 Constitution of the Federal Republic of Nigeria.

98. Hobbs v. Tinling & Co. Ltd. [1929]2 K.B. 1, C.A., See also Plato Films Ltd v. Speidel [1961] A.C. 1105 (H.L.).

99. See Stephen's Digest, 201; See also Friman "Character" (1962) 1 Solicitor Quarterly, 211.

100. Scott v. Sampson (1882) 8 Q.B.D. 503 at 504.

101. Per Simon L.C. in Stirland v. D.P.P. [1944] A.C. 315 at 325, H.L.

102. Section 71 Ibid.

103. Sections 68(2)(a & b) and 159(d)(i-iii) Ibid.

104. (1966) W.N.L.R. 343 or [1966] All N.L.R. 107.

105. [1913] K.B. 468.

106. Section 66 Ibid.

107. Ibid Para. 10-08 P. 132.

108. Hlubo Films Ltd. v. Speidel [1961] A.C. 1090.

109. See Section 205 Evidence Act Ibid.

110. See Section 209 Ibid.

111. Section 67 Ibid.

112. Ibid Para. 10-10 P. 133.

113. R. v. Bellis (1966) 1 W.L.R. 234.

114. See as Per Lord Simon L.C. in Stirland v. D.P.P. (Supra) 324-326, See also Jones v. D.P.P. [1962] A.C. 635 (H.L.) Passim.

115. Nokes - An Introduction to Evidence (4th Ed.) P. 137.

116. Ibid. at p. 138.

117. (1967) N.N.L.R. 37 (1967) N.M.L.R. 145.

118. R. v. Swendson (1702) 14 How. St. Tr. 596. (cited in Nokes p. 138).

119. Section 68 Ibid.

120. Ibid, Or otherwise inform the tribunal: R. v. Grimsby Q.S. [1956] Q.B. 36, 451, D.C.; R. v. Thomas (1957) 1 W.L.R. 1091, C.C.A. To exhibit to the Jury Photographs of the accused with prison numbers on their clothes amounts to evidence of previous conviction: R. v. Dwyer [1925] 2 K.B. 799 at 801, 802, C.C.A.

121. R. v. Butterwasser [1948] 1 K.B. 4, C.C.A.

122. Section 250(1) C.C. Ibid.

123. Section 249 Ibid.

124. (1949) 12 W.A.C.A. 456.

125. Sections 124 and 125 Ibid.

126. Odutade v. Police (1952) 20 N.L.R. 81.

127. See Archbold, Para. 1050, Criticised in Stephen's Digest, 202, 203. The rule does not apply when a witness Volunteos Evidence of Good Character: R. v. Redd [1923] 1 K.B. 104, C.C.A.

128. See Nokes Ibid P. 140.

129. R. v. Winfield (1939) 2 C.A.R. 139.

130. See Stirland v. D.P.P. (Supra) at 327.

131. R. v. Redd [1923] 1 K.B. 104.

132. R. v. Beecham [1921] 3 K.B. 464.

133. R. v. Thompson (1966)1 W.L.R. 405.

134. Jeley v. D.P.P. [1970] A.C. 304 (H.L.).

135. See also Section 68(3) Ibid.

136. See R. v. Thomas [1950] 1 K.B. 26 C.C.A.

137. R. v. Thompson (Supra).

138. See Stephen's Digest of the Law of Evidence (12th Ed.).

139. Section 69 Ibid.

140. See Phipson Ibid Para. 543 and Cross on Evidence (5th Ed.) P. 133.

141. Jefferson v. Askwell [1916] 1 K.B. 57 at 68, C.A.

142. Butterworth v. Butterworth [1920] 126 at 145.

143. Parry v. Watkins (1836)7 C. & P. 308.

144. Section 70 Ibid.

145. Plato Films v. Speidel [1961] A.C. 1090 (H.L.) See also Scott v. Odhams Press [1967] 1 Q.B. 333 (C.A.) - where it was held that previous convictions within a relevant period of the plaintiff's life were cogent evidence that he had a bad reputation and were admissible in mitigation of damages.

146. Rules of Supreme Court in England, which however does not alter the law as laid down in Scott v. Sampson (Supra). See also Mangena v. Wright [1909] 2 K.B. 958.

147. Weber v. Birkett /1925/1 K.B. 724, 2K.B. 152.

148. See Section 205 Ibid.

149. /1929/2 K.B. 1.

150. However, it must be noted that the court will have jurisdiction, no matter how a person is brought within the jurisdiction. See Njoven v. The State, (1973) N.M.L.R. 331, See also Okolie v. Police (1959) W.N.L.R. 282 Sections 101 CPL, and 384 CPC.

150(a) See Rudd, The Nigerian Law of Evidence P. 146.

151. Gotlieb "Confirmation by Subsequent Facts" (1956) 72 L.Q. R. 209.

152. /1955/ A.C. 197.

153. Nwabueze Constitutional Law of the Nigerian Republic P.361.

154. /1934/2 K.B. 164.

155. Section 29 Ibid.

156. (1968) N.M.L.R. 208.

157. Section 78(1) Criminal Procedure Code of Northern Nigeria.

158. /1955/ A.C. 197 at 203.

159. Regulation 29 of the Emergency Regulations of Kenya.

160. See A.B. Kasumu, Nigerian Law Journal "Admissibility of Illegally Obtained Evidence in Nigeria" P. 89.

161. Kasumu Ibid.

162. Callis v. Gunn /1964/1 Q.B. 495 at 501. Commenting on this case, Lord Parker said "I would add that in considering whether admissibility would operate unfairly against a defendant, one would certainly consider whether it had been obtained in an oppressive manner, by force or against the wishes of an accused person". However the court had earlier ruled in this case that the evidence (finger prints) was not illegally obtained, since it is not necessary to administer a caution before finger-prints. See also R. v. Payne (1963) 1 W.L.R. 637.

163. /1969/1 A.C. 304.

164. /1965/ N.I.L.R. 138 at 149.

165. /1969/ (Supra) at 319.

166. 1958 S.C. (J.) 19 at P. 27.

167. [1969] Supra at 315.

167(a) American Courts adopt a different approach to the English in respect of evidence obtained by means of illegal search or seizure. See the case of Mapp v. Ohio (1961) 367 U.S. 643, Wolf v. Colorado (1949) 25 U.S. 40, People v. Cahan (1955) 43 Calif. L.R. 565; See also E.H. Ofori-Ansankwah, Criminal Law in the Northern States of Nigeria, P. 107.

168. 1979. See e.g. S.20 Kenya 1963, S.23 Uganda 1962, S.18 Sierra Leone 1961 Constitutions.

169. Section 23, 1963 Constitution of the Federal Republic of Nigeria.

169(a) Section 42(1) of 1979 Constitution.

170. Kasunmu Ibid P. 92.

171. Kasunmu Ibid P. 93, See also Kuewumi, "The Constitutionality of Admitting Illegally Obtained Evidence in Nigerian Criminal Trials," Vol.I, The Advocate (1968) pp. 49-60.

172. Lawrie v. Muir (Supra) at P. 26.

173. Kasunmu Ibid P. 94, See also Karlen, Anglo-American Criminal Justice (1967), P. 105

174. (1926) 242 N.Y. 413.

175. Lawrie v. Muir, Op. Cited.

176. The Court quashed the conviction of the accused since it had been based on evidence of an illegal search that had been wrongly admitted.

177. Kasunmu Ibid P. 95.

178. E.L. Barrett Jr., "Exclusion of Evidence Obtained by Illegal Searches - a Comment on People v. Cahan" (1955) 43 Calif. L.R. 565, See also Foote, "Tort Remedies for Police Violation of Individual Rights" (1955) 39 M. L.R. 493.

179. Professor Paulsen "The Exclusionary Rule and Misconduct by the Police" (1961) 52 Journal of Criminal Law, Criminology and Police Science 255 at 260.

180. Chapter 9, Sanctions Against Police Illegality: Remedies and Liabilities.

181. Ibid at P. 70.

182. See Section 226 Ibid.

CHAPTER THREE

STATEMENTS MADE IN SPECIAL CIRCUMSTANCES

1. RES GESTAE

The principle "Res Gestae" is a common law principle, which may be said to mean things done. The principle is contained in the English law of Evidence but it does not have an exact meaning in English language. The principle is not expressly referred to in the Nigerian Evidence Act.

The res gestae principle was restated by the Judicial Committee of the Privy Council in the case of RATTEN v. R.[1] as follows:

> "The expression 'res gestae,' like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms."

In the context of the law of evidence it may be used in at least three different ways:

1. When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end;
2. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, of facts in issue i.e. are the relevant facts or part of;
3. It may be used to refer to a piece of hearsay, evidence, and normally where the victim or "by-stander" makes statements indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae.[2]

In the case of HOLLS v. NEWMAN[3], Lord Tomlin observed that, res gestae provides "a respectable legal cloak for a variety of cases to which no formula of precision can be applied." It is therefore submitted that the use of the principle res gestae is loose and it will appear that academic writers have attempted to relegate to various categories evidence admitted as part of the res gestae[4]. This treatment of the subject by academic writers is in advance of that of the courts. The test of 'relevance and admissibility' does not therefore have a standard application in this area of the law in our law courts. One can, therefore, say that there is much evidence of bad law and harsh decisions that are effected in certain leading cases. It will, however, be necessary to continue the discussion by examining, what types of facts come within res gestae to qualify for admissibility.

According to Professor Nokes[5]:

> "The conventional uses of the term embrace facts which either form part of, or accompany and explain, a fact in issue. If any facts do not comply with either condition they are outside the rule, and may be inadmissible because they are irrelevant. Facts within the rule may include acts, omissions, oral and written statements, and occasionally other circumstances."

Phipson, states that:

> "Acts, declarations, and incidents which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party, as forming parts of the res gestae."[6]

Meanwhile Sir Rupert Cross, on his part is very brief on the issue and states that:

> "The assertion that an item of evidence forms part of the res gestae roughly means that it is relevant on account of its contemporaneosity with the matter under investigation."

We shall now proceed to examine under what conditions, an item is admissible as forming part of res gestae. That means, such an item which can be admissible must be found relevant to the facts in issue. This is where, it is submitted, the whole doctrine of "res gestae" and the test of "relevance and admissibility" come into serious consideration. It is here, the doctrine and the test have been loosely used resulting in injustice.

There are certain prescribed conditions that must be met, before evidence forming part of res gestae can be held relevant and admissible in law. These conditions are:

1. The statements must be contemporaneous with the facts in issue.
2. The statements must explain the fact in issue.
3. The statements must be made by the actor.

We shall examine these requirements one after the other.

(1) The statements must be contemporaneous with the facts in issue. As submitted by Lord Cross:[8]

> "The raison d'etre of this exception to the hearsay rule is that the statement throws light on the nature of a relevant act because of its proximity to it. In the absence of such proximity, the statement would lack connection with the act and becomes a mere hearsay assertion about it."

This requirement is very strict and it is submitted that, this has made, some judicial decisions to be regarded as very unjust, harsh and unreasonable in the eyes of the ordinary man.

In the case of TEIBA v. R.,[9] the court observed that:

> "If not absolutely contemporaneous with the action or event, at least so clearly associated with it in time, place and circumstance that they are part of the thing being done."

The distance in time, it is submitted is a question of fact, and

must be judged from the circumstances of each case.

It is further submitted that, Spontaneous and immediate exclamations, as a result of sudden pain or fright, are more likely to be true than a calculated statement made after reflection; but unless such exclamations are to be regarded as evidence of the truth of the fact stated, that criterion is irrelevant.[10]

In one other case, this requirement of contemporaneosity was strictly applied and evidence adduced as constituting part of res gestae was held irrelevant and inadmissible. This was in the case of R. v. RODLEY[11]. In that case, the accused was charged with house-breaking with intent to commit rape, and evidence that the accused on the same night went down the Chimney of another house and had sexual intercourse with one of the inmates with her consent. The prosecution wanted to adduce that evidence as part of res gestae, that it was connected to the fact in issue. It was held by the Court of Criminal Appeal that the previous conduct of the accused, was not sufficiently connected in time, place or circumstance. In other words, it did not satisfy the requirement of Contemporaneosity, it is submitted.

A classic case where this strict requirement of Contemporaneosity was heavily emphasised, is the much earlier case of R. v. BEDINGFIELD[12]. In that case, the accused was charged with murder by cutting a woman's throat, and his defence was that she committed suicide. The deceased came out of the room in which the prisoner was subsequently found. Her throat was cut and she immediately cried "See what Bedingfield has done to me". She was evidently seeking assistance, but died before it could be given. The above quoted evidence was subsequently adduced and

tendered as res gestae evidence. Following the strict requirement of contemporaneity, the court held that; that part of the evidence can not form part of res gestae; for it did not accompany the act. The woman's statement was held not near enough in time to the act of cutting the throat.

This decision, like most subsequent decisions, clearly illustrates the harshness of this doctrine of res gestae to the victim, whom even in his grave cries that justice be done to him. The test of "relevance and admissibility" becomes more a subjective test than objective. Cockburn, C.J., observed in the Bedingfield's case that anything uttered by the deceased at the time the act was being done, would be admissible as, for instance, if she had been heard to say something as 'Don't Harry'.

This observation, however, will appear to come within the strict requirement of Contemporaneity. But situations of this nature are real because the assailant usually does everything to conceal his act from human knowledge. In most cases, the victims are discovered after the act and the attacker gone or about to go. Therefore, it is just reasonable that statements by such victims relating to the act be held relevant and admissible.

In another case, R. v. CHRISTIE[13]. where the defendant was charged with assaulting a boy. His defence was alibi. It was stated in evidence that a few minutes after the incident, P had returned to the spot with his mother and in the presence of his mother and a Police Constable had touched the accused and said "This is the man". On being asked what the accused had done, P described the assault. The court held that although the statement "this is the man" is admissible as being part of the act of identification, since it accompanied and explained it, his explanation as to how the assault took place was inadmissible. However, it

will appear that in civil cases, the courts may be more lenient.[14]

(2) The second requirement is that the statements must explain the facts in issue. To illustrate this requirement, we shall refer to the case of the Douglas,[15] involving an action for negligence by leaving unlighted a wreck in the river Thames, it was held to be wrong to reject evidence of a message to the harbour master, and of his promise to have the wreck lighted. However, in the leading case to illustrate this requirement, another qualification of the rule was recognised. The case is AGASSIZ v. LONDON TRAMWAY CO. LTD.[16] Just after a collision in which a tramcar was involved, an indignant passenger said of the driver, "By Jove, this fellow's conduct ought to be reported." The conductor retorted, "He has already been reported, for he has been off the line five or six times today; he is a new driver". This statement was held by the court of Exchequer to be inadmissible, as the collision was over and the statement referred to some earlier conduct of the driver.

Some of these statements are not made by a party to the proceedings, or by a person having an identity of interest with him. But when statements are made by such a person, they will often be admissible on the ground that they are admissions and in Nigeria, such admissions will be admissible under Section 19 of the Evidence Act. Then the distinction between statements which are part of res gestae and those which are narrative of past events, and therefore inadmissible, will not be material. Statements accompanying and explaining a fact in issue may be admitted to prove either physical condition or mental states. With regard to Mental Conditions, particularly intention, the general rule as to the res gestae is applicable, as has been shown with regard to a promise to light a wreck. But statements as to a party's thoughts on the nature of a transaction, which might otherwise fall

within the second group of res gestae mentioned above, are inadmissible when the party's state of mind is not in issue, even though the statements are nearly contemporaneous[17], yet sometimes statements of intention, which are not contemporaneous with the facts in issue, are received upon another ground, such as their constituting conduct within the third group of res gestae.

(3) The statements must be made by the actor. This requirement poses a serious problem in cases of murder or culpable homicide. This is because, it may not be possible for the deceased to make a statment during the act. Also, it is not possible for the accused or the assailant to shout and say "I am killing deceased". A killer, as earlier observed, tries to hide. Fact in issue normally do not occur in absolution. It is therefore, submitted that, this requirement as well as others create extreme hardship and it is difficult to say whether justice can be done to the deceased in murder or culpable homicide cases.

The doctrine of res gestae, which we have been discussing so far, unlike most of the principles of the law of evidence, is inclusionary. As we have seen so far, under it, evidence may be received although it infringes the rule against hearsay, the opinion rule or the rule which generally prohibits evidence of bad disposition on the part of one of the parties, and there may be other exclusionary rules which are mitigated by the operation of the doctrine. At the beginning of the discussion on this topic, it is stated that, the principle of res gestae (or doctrine of res gestae) is a common law principle, which is not directly referred to in the Nigerian Evidence Act. After a

general and brief discussion so far on this principle, we shall now see whether this principle (or doctrine of res gestae) is applicable in Nigeria.

The question whether the doctrine of res gestae is applicable in Nigeria has been a subject of great debate among eminent scholars on Nigerian Law of Evidence. Therefore, it is submitted that a "Yes" or "No" answer is by no means satisfactory. In an attempt to answer the question, we shall examine the literature on the subject as well as the attitude of the courts.

AVAILABLE LITERATURE

(a) Nwadialo, states in his book as follows:

> "Although the phrase does not appear in the Evidence Act, the Nigerian Courts recognise and apply its principles. Since it is a Common Law principle, the admissibility of a fact which constitutes res gestae can be justified by section 5(a) of the Act. The principle is partly incorporated in section 7 of the Act".[18]

(b) Rudd, in his book also states as follows:

> "The law relating to res gestae is clearly set out in English cases but in Nigeria, the Evidence Act does not use this stuff although it recognises that this type of evidence is relevant".[19]

(c) Aguda, in his famous book states as follows:

> "The English Common law doctrine of res gestae is not directly applicable under the Evidence Act. As we have seen above, the provision of Section 7 of the Act covers a wider field than is covered by the doctrine. Any evidence which will be admissible under the English law would be admissible in this country by virtue of Section 7. Furthermore, by virtue of Section 5(a) of the Act, the doctrine can be made use of in admitting evidence but not in excluding evidence which is declared relevant under the Act".[20]

ATTITUDE OF THE COURTS

In order to examine judicial pronouncement on the subject, we shall group the cases into two categories:

(a) Cases that were decided before the enactment of the Evidence Act in June 1945.

(b) Cases that were decided after the enactment of the Evidence Act.

We shall discuss only one principal case decided before the introduction of the present Evidence Act in 1945 for purposes of coherence and then concentrate on post 1945 cases as these constitute the main root of the discussion in this area.

In BANG WEYEKU v. R,[21] appellant was charged with murder. There was evidence that, shortly after the deceased had been stabbed, the deceased said, "Bang has short me". Or to that effect. In referring to the principle of res gestae, the West African Court of Appeal, observed, among other things, that the statement was clearly not part of res gestae, since it was made some time after the actual wound had been inflicted. The Court heavily relied on the case of Bedingfield and the decision of the Court therein. The Court took the ruling in Bedingfied as a guiding law. Here, we can see strict reliance on precedents. However, at that time, the decision could be defended in respect of following precedents because there appear to be no local legislation to guide the court and secondly the West African Court of Appeal fell within the hierarchy of English Courts in the Colonies, with the Judicial Committee of the Privy Council as the highest court for the Colonies .

In OYENAMI v. OYEDELE,[22] decided after the passing of the Act there was a collision between two vehicles. After the collision, the defendant driver told the plaintiff that his brakes had failed and that he had to choose between falling into a river or colliding with the plaintiff's motor vehicle. It was held that

the statement was sufficiently contemporaneous with the collision to be admissible as forming part of the res gestae.

This decision, it is submitted, is indefensible, the reason here being that there had been similar cases, with similar situations and the statements of the drivers have been rejected as not forming part of res gestae. In one of such cases, JUSTIN v. ARNOLD AND ORS.[23], where the driver made written statement admitting fault, the statement was rejected as not being contemporaneous. The submission, it is, however, contented, does not take into consideration the fact that the Evidence Act was already enacted and the Nigerian Courts could admit such evidence under Section 19 which deals with admission without necessarily upholding to the doctrine of res gestae.

Unfortunately, the court in that case, did not even refer to Section 5(a) of the Act which allows such common law principles as res gestae to be applied in Nigeria or Section 7 of the same Act, which is so wide as to admit such evidence. However, despite the short-comings of the court in that decision, it is submitted that the decision amounts to a more flexible and positive application of the doctrine of res gestae. The decision appears more balanced than most of the English decisions so far considered, though more of these English decisions are on criminal matters, where the res gestae requirements are usually more strict.

Another case, to consider in this area is the case of SUNDAY AKPAN v. THE STATE[24]. The appellant was convicted of murder. The only eye-witness called for the prosecution was a boy, twelve years of age. His evidence was that he went to bed on the night of the incident and that he later heard his mother shout "Sunday has killed me." When he ran out he saw the appellant cutting his

mother with a matchet. The court held that the statement of the deceased (as narrated by the boy), "Sunday has killed me" was admissible both as a dying declaration and as part of the res gestae. The statement accompanied and explained the fact in issue which was the murder of the deceased. Again, according to the evidence after almost twenty years of the enactment of the Nigerian Evidence Act, there was no reference to Section 5(a) or Section 7 of that Act.

In a later case of OKOKOR v. THE STATE[25], evidence of statement by the deceased was admitted as part of res gestae. During the night of the incident two of the prosecution's witnesses in the case, who lived quite close to the deceased, heard him shout "Ovuomarienor has killed me!" "Ovuomarienor has dealt matchet blows on me!" As they ran out of their houses they saw the deceased lying in a pool of blood on the ground outside his house while the appellant, who was a few yards away, tried to run away. The statements were held admissible in evidence as already state above. In a similar situation in the case of SULE IYANDA SALAWU v. THE STATE[26], the doctrine of res gestae was applied to admit in evidence words used by the deceased. In that case, a number of persons one night heard the deceased cry "Sule is killing me," from a room. The witnesses rushed in to the room at once and saw the deceased in a pool of blood. It was held by the Western State Court of Appeal that the words were admissible as forming part of the res gestae of the offence. It is necessary to observe again, that even in 1971 when this case was decided, the Nigerian Court did not make reference to the relevant provisions of the Evidence Act in admitting evidence as res gestae.

However, it will appear that the Nigerian Courts are more liberal in admitting evidence as res gestae. This is demonstrated

in the cases we have examined so far. It could be argued that this attitude of the Nigerian Courts flows from some relevant provisions of the Evidence Act because in an earlier case of R v. BING WEYEKU[27], the court was heavily influenced by English decisions. Unfortunately, this argument can not even stand because even in all those cases we have examined so far, decided after the Evidence Act, the courts did not, as already observed, make reference to the relevant provisions of the Act in applying the doctrine of res gestae.

However, the Courts have not in all cases admitted evidence as forming part of res gestae. The Courts in Nigeria have, like English Courts, in their traditional, manner placed too much reliance on the strict requirements that will render such evidence relevant and admissible. In UDO v. THE QUEEN[28], the deceased received the injuries to her neck as a result of an assault committed on her by the appellant. After the injury the appellant did all he could to treat her. The appellant sent for the wife of a neighbour who arrived to find him trying to treat her and asked them both what the matter was. The appellant said nothing but the deceased said that the appellant had "put his hand between her legs, carried her up, and knocked her to the ground-head-long". On the following day the deceased sent for her brother and repeated the same statement to him as the cause of her injuries. It was held that the evidence of the deceased's statements was not part of the res gestae. In this case too reference was not made to Section 5(a) or Section 7 of the Evidence Act.

We shall at this point briefly examine Sections 5(a) and Section 7 and even Section 33(a) of the Evidence Act in an attempt to determine their relevance in the application of the

of res gestae in Nigeria. However, Section 33(a) will be considered under dying declaration.

Section 5(a) provides:[29]

> "Nothing in this Ordinance shall-
>
> (a) prejudice the admissibility of any evidence which would apart from the provisions of this Ordinance be admissible".

The question one may ask is whether Section 5(a) as quoted above provides any justification for applying the English Common Law doctrine of res gestae in Nigeria.

The purpose of the Section 5(a) is to admit evidence, where the Nigerian Evidence Act is silent on the admissibility of this type of evidence. On that basis, the section can be invoked to admit an item of evidence where the Evilence Act does not specifically provides for its exclusion, provided it is also admissible under the Common Law. The Section was used by the Supreme Court in R. v. ITULE,[30] to admit a confessional statement which contained facts favourable to the accused person. Brett Ag. C.J.F., who read the Court's ruling commented as follows:

> "The matter is not dealt with expressly in Sections 27 to 32 of the Evidence Act, and the Common Law rule, therefore, applies by Virtue of Section 5(a)".

Commenting on Section 5(a), Dr. Agula has said that it is a rule of inclusion and not one of exclusion, meaning that if evidence is admissible under the Act, it can not be excluded merely by arguing that such evidence is inadmissible at Common law.[31] There is judicial authority for this proposition, for in R. v. AGWUNA,[32] the West African Court of Appeal declared as follows:

> "It is worthy of note that while Section 5(a) provides that nothing in the Ordinance shall prejudice the admissibility of any evidence which would, apart from the provisions of the Ordinance, be admissible, there is no provision in the Ordinance which allows any evidence to be rejected as inadmissible save as provided in the Ordinance itself."[33]

A Critical examination of Section 5(a) is not within the scope of this thesis, but it is necessary to make some observations. Section 5(a) was copied Verbatim from the English Evidence Act of 1938.[34] The marginal notes on the Nigerian Evidence Act itself acknowledge this fact. The English Evidence Act, is a remedial Act in that it provides for the admissibility of written hearsay evidence under certain conditions. Since the law of evidence in England is still largely unwritten Section 6(a) in the 1938 was inserted to bring out this point. Apart from the 1938 Act, the rules governing the admissibility of evidence are still those of the Common law. However, in Nigeria, the position is quite different as the law of evidence is codified. To interpret Section 5(a) the way it is done in England, it is submitted, will defeat the whole object of having an Evidence Act, and it might well be, as Mr. Flynn,[35] has suggested, that the provision was inserted in error in the Nigerian Evidence Act and that its presence has tended to nullify rules of exclusion appearing in the Evidence Act itself.[36] The section was either inserted in error or at least not intended to be interpreted the way it has been by the Courts is apparent if one looks at Section 91 of the same Act.

Furthermore on this section 5(a), the Courts themselves have not been consistent in its application and interpretation. The Section does not allow the exclusion of any evidence unless that rule of exclusion is stated in the Evidence Act itself. The Nigerian Act makes admissibility conditional on relevance, though relevant evidence can be excluded if it is "too remote to be material".[37] However, the Nigerian Courts, inconsistent with their interpretation of Section 5(a), have, relying on the Common law, assumed that they have a discretion to exclude relevant evidence

in criminal cases on the grounds of unfairness and prejudice. It is this exercise of wide discretionary powers by the courts that put this test of relevance and admissibility into question.

As observed in some of the cases, so far discussed, the Courts in Nigeria have applied the English Common Law doctrine of res gestae, without reference to Section 5(a) of the Act, which as we have seen allows the application of such English or other Common law principles in Nigeria. Whether or not reference was made to Section 5(a) in the application of the doctrine of res gestae in Nigeria, the Section will only apply as earlier observed, where the Nigerian Evidence Act has not made provision as to the admissibility of such evidence. In the case of evidence that can be regarded as forming part of res gestae, Section 7 of the Nigerian Evidence Act as earlier observed is wide enough to admit such evidence. The Section provides:[38]

> "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places".

An examination of the section will reveal first of all, that, if not expressly at least, a wide interpretation of the Section will indicate the inclusion of the doctrine of res gestae. At the same time, the section expressly covers the law more than the doctrine of res gestae covers. As we have seen, one of the requirements for the application of this doctrine is 'Contemporaneity' i.e. the event must be Contemporaneous with the facts in issue. There must be proximity with regard to time, place.

Under Section 7 of the Act, it is clearly stated that such facts are relevant if there occur at the same time and place or at different time and places. Therefore, where a fact Constitutes

However, in practice, it seems that a Court will have to take two steps in respect to the application of the doctrine. First of all, if an item of evidence is tendered to Constitute res gestae, the Court will first of all examine it, to ascertain whether the fact or evidence fall within the strict requirements of the doctrine. If the facts or evidence fall within the strict requirements of the doctrine, the court will invoke the provision of Section 5(a) of the Act and admit the evidence. Secondly, if the fact or evidence tendered does not meet the strict requirements of res gestae, the court will probably invoke Section 7 of the Evidence Act and admit the evidence. This will appear, it is submitted, to be a more reasonable position of the law. The Courts in Nigeria have applied the doctrine of res gestae without reference to Section 5(a) or Section 7 of the Evidence Act.

2. DYING DECLARATION

The doctrine of "dying declaration" is covered generally by Section 33 of the Nigerian Evidence Act.[39] The discussion in this thesis will be based on Section 33(a). However, reference will be made to other subsections of that Section for purposes of coherence. The purpose here once - more is to determine and assess this test of "relevance and admissibility" in the Nigerian Courts.

It is a requirement that every person who is in possession of material evidence, should give such evidence in person. The position, however may be different when such evidence emanates from a deceased. It is, on this basis that, it has been strongly established that statements made by deceased persons Constitute one of the most important exceptions to the English hearsay rule.

We shall briefly examine the hearsay rule in course of the discussion in this chapter.

It is true and clear that statements made by persons who are dead must be proved, if they are to be proved at all, by some other persons. Section 33 of the Nigerian Evidence Act, prescribes the cases in which such statements, if they relate to relevant facts, are themselves relevant and, therefore, admissible in evidence. The discussion, however, in this thesis, as stated above, will be based on Section 33(a).

Before we proceed to examine dying declaration as provided for in Section 33(a) of the Act, it is important to observe that admissibility of dying declarations is not confined to the Common law and the Evidence Act alone. According to the Moslem law of the Maliki School, a conviction for murder or culpable homicide can properly be made on proof of a dying declaration but it must be supported by the Kasama Oaths.[40]

It is submitted that although the marginal note to Section 33(a) speaks of "dying declaration". There is nothing in the subsection itself stipulating that there must be a formal declaration before it is applicable. It would appear that, what is actually required is a mere statement. Section 33(a) of the Evidence Act provides, that statements, written or verbal, of relevant facts made by a person who is dead are themselves relevant facts:

> "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question; such statements are relevant only in trials for murder or manslaughter of the deceased person and only when such person at the time of making such declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery".[41]

It is stated that the statements can be written or verbal and further that such statements are relevant only in trials for murder or manslaughter of the deceased person. In that circumstance or

situation, the deceased person must have believed himself to be in danger of approaching death, although he must have entertained some hopes of recovery. The other types of dying declarations as provided in the rest of Section 33 of the Evidence Act,[42] are relevant and admissible in both criminal and civil proceedings. The purpose of relevance of lying declarations, it is submitted is with regard not only that the statement were made but with regard to the truth of their contents.

At this point, the question one may ask is; what is the rationale of this doctrine of dying declaration. The rationale of this doctrine was stated in 1739 by Eyre C.B. in R. v. WOODCOCK,[42] as follows:

> "The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

It would appear that the above quoted opinion by Eyre C.B. is to the effect that, when a person is at the point of death, the chances of lying at that moment are minimal, if not removed altogether. It is submitted that, there is some form of religious over-tone in this, because it seems to imply that no one would like to die with lies on his lips. This likens the situation with one where a person has taken an Oath to speak the truth. This decision was appropriate in the 18th century when people's morality was relatively higher. But in the modern world today with no high regard for moral values and ethics, the decision is highly questionable.

However, notwithstanding any criticism of that decision in WoodCock's Case, it is certain that the rule or the doctrine is

not dependent on the religious belief or disbeliefs of the declarant. The origin of the doctrine seems to have arisen from the need to do justice to the deceased as well as the accused. This is accepted to, where the only other witness apart from the deceased is the accused himself.

In practical terms, it is submitted that whenever mention of doing justice is made in criminal cases, the impression created is that of justice to the accused person, not the deceased. This impression will appear to place the test of relevance and admissibility in an unbalanced position. That is to say, more infavour of one of the parties and that is the accused. This postion, it is further submitted, does not amount to fair dispensation of justice in Courts. Some Judges in Nigeria and even of the highest Court have made very powerful observations as for justice to be done not only to the accused but also to the deceased.

In OKAGBU v. THE STATE[43], Aniagolu, J. observed as follows:

> "It so happens that in criminal cases, the defence only talks of justice referring to only the accused person. Very often as it affects the victim, it is either forgotten or ignored by the defendant. But just as it is essential that justice be done to the prisoner, so also must it be done to the deceased who in the loneliness of his grave cries out that justice be done to him".

In another case HAFIU RABIU v. THE STATE[44], Justice Irikefe made a similar observation. The Justice observed as follows:

> "Justice as I see it would cease to be just if viewed from the end of the accused only. There must also be justice from the end of the wronged".

One can, therefore, state that the relevance and admissibility of dying declarations as earlier noted, are vital to the administration of justice and great care, therefore, must be taken in applying the test of relevance and admissibility.

In discussing dying declaration, it is necessary at this point to examine the Nigerian aspect separately from the English Common Law aspect. Under Section 33(a) as stated already, the following conditions are required to make a declaration relevant and admissible in evidence:

(a) The declaration itself which may be written or verbal must be of relevant facts;

(b) The declarant must have died before evidence of the declaration is required to be given;

(c) The declaration must related to the cause of the death of the declarant or as to any of the circumstances of the transaction which resulted in his death; and the cause of the declarant's death must be in question in the trial;

(d) The declaration is relevant only in trials for murder or for manslaughter of the declarant;

(e) The declarant must have believed himself to be in danger of approaching death (and the trial judge must make a specific finding that the particular deceased did in fact believe in the danger of approaching death when making the declaration).

In the case of ORSHIOR KUBE v. THE STATE[45], the relevant proposition stated is that the deceased must have believed himself to be in danger of approaching death, and the fact that the deceased entertained the hope of recovery would be immaterial.

At this point, we shall briefly refer to the English position on relevance and admissibility of dying declarations. Although the doctrine of dying declaration is essentially based on the English Common Law, there is a distinction between the Nigerian law and the English law. Unlike the requirements under the

Nigerian law as we have seen, the English Common law requirement, is that the deceased must have made the statement under "a settled hopeless expectation of death".[46] It is submitted, therefore, that no doubt exists that there is no fundamental distinction between the condition of a person who has "a settled hopeless expectation of death" and that of a person who only believes himself to be in danger of approaching death and who at the same time entertains hope of recovery.

We shall now examine the attitude of the Nigerian Courts in the application of dying declarations. We shall, first of all, examine a case decided before the enactment of the Act. In R. v. BANG MGYEKU[47], on a charge of murder the principal evidence against the accused was that the deceased shortly after he had been stabbed said, "Bang has shot me". Accused was not present. There was no evidence that deceased believed himself in danger of death. There was other evidence to connect the accused with the crime but it was by no means conclusive. The trial Judge admitted deceased's statement and convicted accused. On appeal held that the evidence of the deceased's statement was inadmissible, whether as a dying declaration or as part of the res gestae, and it was impossible to say that without this evidence the trial Judge must inevitably have come to the same conclusion as he did. The Court in this case as we observed earlier in our discussion under Doctrine of res gestae, relied solely on English Common law Evidence and particularly on the case of R. v. BEDINGFIELD.[48]

The second category of cases are those decided after the enactment of the Evidence Act in 1945. These cases were then decided under the Act and it is in this area, we are more concern in our discussion. In the case of R v. JOHN OGBUEWU[49], the deceased

who was in hospital weak and in pain, was asked by a police officer the following day after he had been wounded, whether he could make a statement. He said he could. The Police Officer then asked him if he thought he was going to die, to which he replied: "I don't know whether I am going to die." The deceased then made a statement as to the cause of his injuries which was taken down in writing. It was held that this statement was not admissible as a dying declaration as there was no proof that the deceased when making it, believed himself to be in danger of approaching death. Any declaration made after the deceased has abandoned the belief of being in danger of approaching death will not be admissible under this heading.

In another case of MOMO GARBA AND ANOTHER v. R,[50] after suffering an attack which ultimately caused his death, the deceased told the first person who found him injured that he was going to die, that he had been beaten, and that one Momo had instigated the beating. It was held that this evidence was properly admissible under this heading. After the deceased had been taken home and given water, he made a further statement as to how he received his injuries, in the presence of two persons. According to them, the deceased then said nothing about his expectation of death. In spite of objection to this evidence, the trial Judge admitted it, taking the view that the first statement made this second statement admissible as the former had contained wordings showing an expectation of death. He said "that is a sufficient belief in impending death to support further declarations made the same evening." The Federal Supreme Court, however, held that that was too wide an expression because of the possibility that the expectation of death might have been, owing to his being at home and among friends, removed the fear of death

from the mind of the deceased, and that therefore the evidence of the latter declaration was wrongly almitted. It is submitted that a statement admissible under the provision is for purposes of proving the causes and circumstances of the declarant's death, not the expression of his opinion on his killer's motive.[51]

There are fundamental arguments that can be raised against the notion that the declarant of a statement purported to be a dying declaration must believe himself to be in danger of approaching death although he may entertain hopes of recovery at the time of making such statement.

First of all, the notion as earlier observed, places too heavy a burden on the victim and those who may be called upon to prove the statement after the death of the declarant. It, therefore, becomes a problem here to positively apply the test of relevance and admissibility. There are even occasions when a person may not either expressly or impliedly manifest belief in being in danger of approaching death, and yet, shortly thereafter dies of the very injuries sustained. The victim or his doctors is quite possible may not be in a position to appreciate the fatal nature of the injury or injuries the victim has sustained.[52]

There are cases where the condition of a patient may be such that death is virtually certain, subject only to divine intervention. The doctor attending to such a patient may know but not the patient himself. Take, for example, where X hits Y on the forehead with an iron rod. Y sustains injuries that affect his brain. Medical opinion here is that death from this type of injury is certain. In ordinary circumstances, the fact that death is a virtually certain would be known only to the

victim's doctor or doctors but not to the victim hemself. It is, therefore, submitted that the law appears hard in this circumstance to expect or require the victim to express when asked, a resolved mental state or belief in danger of approaching death. However, the example stated above may be extreme, but it is hoped that it may serve to illustrate the law on dying declaration in Nigeria. Considered medical opinion is that when a person is in grave pain and distress, there is hardly any room in his mind to speculate on his chances of survival or death.[52(a)] This medical opinion can, therefore, be regarded as contrary to the popular belief that the law seems to convey or represent.

In Nigerian Society, as it could apply in other societies probably, there are individuals, among them the elderly and traditional society leaders, who would not knowingly alarm members of their families and their people by openly expressing belief in fear of approaching death, even if they were in a position to foresee their pending death. A direct question to such persons as to whether or not they thought they were going to die would not necessarily produce or extract an affirmative answer regarding fear of impending death.[53]

It is argued further that in every situation, the court or tribunal is charged with the responsibility of determining the mental state of a dead person. This creates quite a serious problem to the Court. It is even not easy for the Court to determine the mental state or state of mind of a living person, let alone that of a dead person. It has long been acknowledged, even in the science of law, that not even the devil is capable of accurately determining what goes on in the mind of a person at any given time. Inevitably, the Courts should even be more cautious in holding that a particular point or moment in time a

person either "believed himself to be in danger of approaching death", or "could not have believed himself to be in danger of approaching death." In the case of Momo Garba[54] as we have seen, the accused told the first person who found him that, he was going to die because of the beating instigated by Momo Garba.

It is submitted that there are situations when a victim declares "I am dying" such declarations in most cases are due to pain and not because the victim believes himself to be in danger of approaching death, although death may eventually result from the injuries. This situation, however, is different from the one where a person not at pains lying on a hospital bed calls his wife and children for prayers on grounds that he is dying. In this particular situation it is suggested that the patient felt and believed that the end of his life in this world was at hand.

It must be noted as a conclusion to the discussion on Section 33(a) that,whenever there is any doubt as to the application of dying declaration as well as any other legal principle in criminal cases, such doubt is usually resolved infavour of the accused person. This has been accepted in Nigerian Legal System. It is unfortunate that whenever "doing justice" becomes an issue, particularly in criminal trials when either the liberty or the life of the accused is at stake, e.g. in trials for manslaughter or murder, the law and those administering it seem to become overzealous with tipping the scale of justice infavour of the accused. Section 33(5) of the Nigerian Constitution[55] provides for every person who is charged with a criminal offence to be presumed innocent until he is proven guilty. It is also a cardinal principle in law that it is better for 99 guilty people to go free than for 1 innocent man to be hanged.

It is submitted that all these dogmatic principles in law are intended to enable justice to be done. That justice must not only be done but seen to be done is an old legal maxim. However, there is a cautions reminder here, and ought to be at all times, that the dead victim is also desirous of seeing that justice is done to him.

As earlier indicated, a discussion separately on other subsections of Section 33 of the Evidence Act 55(a) do not come within the scope of this thesis. However, dying declarations under these other subsections of Section 33, are relevant and admissible in evidence. Such declarations must past through stringent tests to be declared admissible generally in both criminal and civil trials. Dying declarations under the other subsections of Section 33 are therefore substantially different from dying declarations under subsection (a) of the Section 33 which are relevant and admissible only in murder and manslaughter trials.

Under Sections 34, 35 and 36 of the Evidence Act, statements made by persons who cannot be called as witness can be relevant and admissible in evidence. This type of evidence to be deemed relevant and admissible, has to fulfil various requirements. A detailed discussion on these Sections is not within the scope of this thesis.

The discussion had been on dying declarations generally, with a detailed examination of Section 33(a) of the Evidence Act. We shall next briefly compared the doctrine of "res gestae" as applied in Nigeria, and the doctrine of "dying declarations" under Section 33(a) of the Evidence Act.

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3. "RES GESTAE" AND "DYING DECLARATION" UNDER SECTION 33(a) COMPARED

Generally the principles of "res gestae" and "dying declaration"

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are treated as exceptions to the hearsay evidence. In English Common law, the evidence of a statement made to a witness by a person who is not himself called as a witness is called "hearsay" if the object of such evidence is to establish the truth of what is contained in the statement. This may be in form of an oral or a written statement but such evidence is generally speaking, under English law, inadmissible as evidence of the truth of what is asserted.[56]

In the strict sense of it, as far as Nigeria is concerned, the rule against hearsay, is not by virtue of being a rule of the English Common law part of Nigeria law. But like many other Common law rules, the rule is largely applied in Nigeria as part of our law. The rule against hearsay is a rule governing inadmissibility of evidence. However, a detailed discussion on the hearsay rule is not within the scope of this thesis. What we intend to highlight here is simply the fact that "res gestae" and "dying declarations" even though are hearsays, and will be inadmissible in evidence, they have by statute and judicial pronouncements be classified as some of the exceptions to the hearsay rule. It will appear, it is submitted the necessity to group these rules among the exceptions to the hearsay rule, has to do with the peculiar nature of such evidence of res gestae or dying declarations in the administration of justice.

The doctrine of res gestae is generally applicable in both criminal and civil cases. That means, the doctrine can be made use of in both criminal and civil trials. It will appear in civil cases, the courts are more lenient[57] in the application of the doctrine of res gestae. However, in criminal cases, the courts will appear to be more strict on the requirements that will render a piece of evidence relevant and admissible as part of res gestae.[58]

On the other hand, the doctrine of dying declarations as contained in Section 33(a) of the Evidence Act,[59] is relevant in trials for murder or manslaughter of the deceased person. That means unlike res gestae that is applicable to civil and criminal trials generally, dying declarations under Section 33(a) are restricted to trials of the victim's attacker. This, as we have seen in the discussion so far, is one of those peculiar principles of the law.[60] It must be noted, however, that dying declarations under Section 33(b) - (e) of the Evidence Act are relevant and admissible generally in both criminal and civil trials.[61]

The doctrine of res gestae is an English Common law doctrine which like other English principles not directly provided in Nigerian law, can be applied in Nigerian Courts by virtue of Section 5(a) of the Evidence Act.[62] It has been warned that while Section 5(a) provides for the admissibility of evidence which could not be admissible under the Act, the Section should not be used to exclude evidence merely by arguing that such evidence is inadmissible at Common law.[63]

In some murder or manslaughter cases, the courts in Nigeria have held statements made by the deceased persons either admissible or not admissible as dying declarations or as part of res gestae.[64] It will appear therefore that in murder or manslaughter trials, if a statement or piece of evidence is proved relevant and admissible as part of res gestae, such evidence can be admissible as dying declarations. This, will of course depend on the facts of the particular case.

The doctrines of 'res gestae' and 'dying declarations' come within the heading of statements made in special circumstances. These special circumstances, as we have seen, will include, statements by the deceased as to the cause of his death, statements

by a witness as in the case of OYENAMI v. OYEDELE as to the cause of the accident. The list of statements or facts made and admissible in Special Circumstances can be inexhaustible, so for purposes of brevity and convenience, the scope of the thesis as earlier stated had to be limited to res gestae under Sections 5(a) and 7 and dying declarations under Section 33(a) in particular.

Conclusion, what we have stated so far above, constitute some comparative features of res gestae under Sections 5(a) and 7 and dying declarations under Section 33(a) of the Act. The list may not be very exhaustive, but the whole purpose is just to identify the relationship between these two peculiar principles as have been applied in Nigerian Courts. The test of relevance as a basis of admissibility in our Courts, will appear to be in a much more unpredictable position as we have seen in the application of these principles. The strict requirements that must be met to render evidence relevant and admissible under these headings, will appear to work unfavourably against the victim. The test of relevance and admissibility, as a determining factor can be seen, then, not to play that noble role of fairness to all parties concerned in a trial.

The discussion on this chapter has been on 'res gestae' and 'dying declarations' as statements made in Special Circumstances. In the next chapter, we shall discuss "admissions and Confessions".

FOOTNOTES TO CHAPTER THREE

1. [1972] A.C. 378. See also Heylon Evidence, cases and material p. 336.
2. R. v. Bedingfield (1879) 14 Cox C.C. 341.
3. [1931] 2 Ch. 112 at 120. See Heylon Evidence p. 334.
4. See Stone, "Res Gesta Reagitata" (1939) 55 L.Q.R. 66 at 68, 80, 85, Wigmore would have wholly repudiated the phrase: Wigmore, Practice, vi, 182.
5. See Nokes, An Introduction to Evidence (4th Ed) P. 88.
6. See Phipson on Evidence (12th Ed.) Para 168 P. 63.
7. See Cross on Evidence (5th Ed.) P. 575.
8. Cross Ibid P. 570.
9. [1952] All E.R. 447.
10. See Nokes, Ibid P. 91.
11. [1913] 3 K.B. 468.
12. (1879) 14 Cox C.C. 341.
13. [1914] A.C. 545 at 556, 566, See also Sparks v. R. [1964] A.C. 964, P.C.
14. See Davies v. Portior Ltd. [1952] All E.R. 1359.
15. (1882) L.R. 7 Q.B. 151, C.A.
16. (1873) 21 W.R. 199.
17. Spittle v. Spittle [1965] W.L.R. 1155; See also Taylor [1967] P. 25.
18. Nwadialo, Modern Nigeria Law of Evidence P. 36.
19. Rudd: Nigerian Law of Evidence, 1964 Ed. P. 75.
20. Aguda Ibid Para. 3-16, P. 33.
21. (1943) 9 W.A.C.A. 195.
22. (1957) L.L.R. 37.
23. (1915) L.J.K.B. 2214.

24. (1967) N.M.L.R. 185.

25. [1969] N.M.L.R. 189.

26. [1971] 1 N.M.L.R. 249.

27. (1943) Supra.

28. (1964) 1 All N.L.R. 21.

29. Section 5(a) Ibid.

30. (1961) 1 All N.L.R. 462.

31. Ibid at p. 6.

32. (1949) 12 M.L.R. 456.

33. At P. 458.

34. See Section 6(a) of English Evidence Act 1938.

35. Peter Flynn, "Relevance, Common Sense, and the Nigerian Evidence Act", Vol. 1, The Advocate, 3 at P. 5, Note 13.

36. There is the additional danger that resort will often be made to the Common law instead of the Courts attempting to see whether the problem posed can be solved by making use of the Act. For example in R. v. Itulo (Supra) where the Court was faced with a confessional statement part of which was in favour and the other part against the accused person. Section 27 of the Act deals with the admissibility of statements against the accused and the court resorted to the Common law to admit that part which was in his favour. It would however appear that without resorting to the Common law, the court could have admitted the evidence under Section 47 of the Evidence Act.

37. See Section 6 Ibid, see also Peter Flynn, note 20 supra, PP. 5-11.

38. Section 7 Ibid.

39. Section 33 Ibid.

40. Kawule Dan Tukur Indabo v. Kano N.A. (1957) 2 F.S.C. 4.

41. Section 33(a) Ibid.

42. (1789) 1 Leach 500, 502; 168 E.R. 353.

43. (1979) 11 S.C. 56.

44. Nafiu Rabiu v. The State (1980) 8-11 S.C. 130.

45. (1969) N.M.L.R. 153, S.C.

46. R. v. Peel (1860)2 F. & F. 21; 175 E.R. 941 Per Willes J., See also R. v. Perry [1909] 2 K.B. 697.

47. R. v. Bong Weyeku (Supra) See also R. v. Harry and Others (1938)4 W.A.C.A. 37, R. v. Daniel Bebesobe (1938) 4 W.A.C.A. 67.

48. R. v. Bedingfield (Supra).

49. (1949) 12 W.A.C.A. 483.

50. (1959) 4 F.S.C. 182.

51. See Aguda Ibid Paras. 5-12. See also the case of Bassa Vorgho v. The State /1972/1 All N.L.R. (Part 2) 1.

52. A Medical doctor of the Ahmadu Bello University Teaching Hospital with whom I discussed this topic attributed this situation to a series of factors, both medical and non-medical. Lack of efficient and reliable facilities from time to time in some of our hospitals is not altogether unknown.

52(a) As in note 52 above.

53. I wish to express profound gratitude to my father and my Uncle Mr. B. Ashelia with whom I discussed some aspects of this portion of the heading on dying declarations.

54. Momo Gamba and Another v. R. (Supra).

55. Section 35(a) 1979 Constitution.

55(a) Section 33(b) - (e).

56. Aguda Ibid Para 5-03 P. 80.

57. Daris v. Portior Ltd (Supra).

58. Most of the decision on this area especially English decisions and Nigerian decisions before enactment of the Act, have rejected evidence as not Constituting part of res gestae. Some of these decisions have been discussed in the chapter.

59. Section 33(a) Ibid.

60. It has been submitted that the purpose of this legal principle has to do with the notion that justice must not be seen only on the side of the accused but that the deceased is also desirous of justice be done to him even while in his grave. See R. v. Woodcock, Okegbu v. The State, Nafiu Rabiu v. The State (Supra).

61. See Section 33(b) - (e) Ibid.

62. Ibid.

63. Aguda Ibid, See also R. v. Agwuna (Supra).

64. See R. v. Bong Weyeku (Supra).

CHAPTER FOUR

ADMISSIONS AND CONFESSIONS

1. INTRODUCTION

A powerful proposition of the law in this area is stated by Eyre C.B. in the case of R v. HARDY[1], as follows:

> "The presumption is that no man will declare anything against himself, unless it were true, but that every-man, if it were in a difficulty or in view of one, will make declarations for himself".

It is submitted that, the application of this principle or rule which is exclusionary, may at times lead to a situation where evidence that would otherwise establish the fact in issue or the relevant fact will not be admitted and, therefore, there is the risk of miscarriage of justice[2].

In the case of CORKE v. CORKE AND COOK[3], a husband petitioned for divorce on the ground that the wife committed adultery. The wife had been in the co-respondent's bedroom, so that the husband suspected adultery. The Co-respondent denied adultery and immediately telephoned a Doctor to come and examine them in order to issue a Certificate to the effect that no sexual intercourse had taken place between them. The Doctor however refused to carry out the examination. The trial court admitted that the act of telephoning the Doctor was consistent with the innocence of the respondent and co-respondent. But on appeal, it was held that the telephone conversation ought not to be admitted in evidence for the reason that the medical doctor' examination would have been futile. That is to say, the respondents must have prepared themselves for the examination to avert the truth. Furthermore by that standard, the respondents knew the examination will be negative. However, it is submitted that the doctor would

have gone ahead with the medical examination, as it was the only way of proving that there had been sexual intercourse. In the circumstance, for such an examination to produce any positive result, it must be done just immediately the act of sexual intercourse is discovered.

A statement made that is adverse or against the interest of the maker will be admissible in evidence as the truth of the content. By the various provisions of the Evidence Act, such statements which are either admissions or confessions are applied in both civil and criminal proceedings. The rationale for admitting such statements is that the statements merely contradict the party's present assertion. If, for example, in a confession or admission, the defendant had admitted the commission of the crime, but during the trial, the same defendant denies, this contradicts his earlier assertion. A similar illustration can be stated in a civil case, where for example 'A' agreed that a valid contract existed between him and 'B', but during the trial, the same 'A' denies the existence of such a valid contract.

The value of the evidence in these circumstances stated above, it is submitted, enhance or increase the probative value or evidential value and not admissibility. In effect, such evidence can be admissible, but what matters is the weight to be given to it. The test of relevance as a basis for admissibility in our courts as we have seen so far, must not be treated as a general rule. It must apply according to the peculiar facts of each case. Further, admissibility of an item of evidence does not necessarily give rise to general reliance on it by the Court. The Court will, therefore, appear to be the ultimate determining

institution as to what is relevant and admissible in evidence and the weight to be attached to such evidence thereafter.

2. ADMISSIONS

As defined in Section 19 of the Evidence Act[4] an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by one of the persons and in the circumstances specified in the Act. This definition will appear to relate to what is known as an informal admission. It is, therefore, submitted that a more general definition is that an admission is an express or implied concession by a person of the truth of an alleged fact.[5] This general definition of admissions will, therefore, include formal and informal admissions. We shall then discuss each of these types of Admissions separately.

(a) INFORMAL ADMISSIONS

An informal admission by a party or his representative is often admissible in evidence as the truth of the content. Such admission must, however, comply with certain requirements which we shall see later in the discussion and are usually regarded as an exception to the hearsay rule under the English Common law.

A verbal admission has no formal requirement, such an admission, it is submitted, can be made in any form and in any circumstance. For example, a self confession which is over-heard by a third party is relevant and admissible in evidence. It must, however, be noted that, the person to whom an admission of this nature or type is made is generally immaterial. It is submitted therefore that a statement made by a person to himself if over-heard by someone else may be received in evidence if it amounts to an admission.

In R. v. SIMONS[6], it was proposed on a charge of arson, to call a witness to prove what the prisoner said to his wife on leaving the Magistrate's room after committal. The court allowed the witness to be called because "what a person is over-heard saying to his wife, or even saying to himself is evidence." It certainly therefore means that a remark made by a man to his wife on leaving court, if overheard, may be proved by a third person.[7]

Although in the statutory definition of admission, reference is made to statements, it is submitted that conduct may also amount to an admission.[8] Conduct therefore of third persons or parties is not hearsay. The conduct will then be admissible either as a relevant fact or as an implied admission. It is further submitted that apart from demeanour, which may sometimes be a factor in an implied admission, active conduct may constitute an admission. In MORIARTY v. LONDON, CHATHAM AND DOVER RAILWAY,[9] when a plaintiff suborned witnesses to commit perjury in support of a claim to damages for injury in a railway accident, proof of this fact was held admissible, and was treated by one of the Judges expressly as an admission by conduct that the plaintiff's claim was false. The same view has been adopted for suborning false evidence for the defence in criminal matters,[10] and the suppression of evidence may be similarly regarded.[11]

However, these cases may also be looked at in respect of other cases. In as much as conduct or statements can amount to an admission, it is submitted that in an action to recover compensation for damages done to the property of the plaintiff by the defendant, the plaintiff cannot succeed by merely proving an admission of liability by the defendant if in fact no damage is suffered by the plaintiff.[12]

In JOHN WILBERFORCE BANIRO v. S.C.O.[13], the plaintiff claimed damages from the defendants for injury caused to his house by vibrations during the building operations of the defendants. The defendants had written to the plaintiff telling him that "his house would be repaired after completion of our store and as this is not finished yet, we cannot do anything until the completion of the building." The plaintiff's counsel contended that this letter was clear admission of liability and an undertaking to repair the plaintiff's house. It was held, however, that the fact that the defendants in their letter appeared to admit some damages made no difference as no damage to the plaintiff's house was in fact proved.

In another case of CHIEF D.T. AKINBIYI v. RALIATU ANIKE,[14] the conduct of a party was held to amount to admission. In that case, the appellant sued to recover a sum allegedly paid by him on behalf of the respondent who counterclaimed for the return of goods wrongfully detained. The Magistrate dismissed the appellant's claim and entered judgment for the respondent on the counterclaim. In support of her claim the respondent had tendered in evidence a list of goods which she alleged the appellant had detained which showed the value of the goods. This list was admitted in evidence by the Magistrate without objection or any cross-examination on the accuracy of the list by the respondent. It was held that failure to cross-examine the respondent as to the accuracy of the list produced by her amounted to an admission that it was correct.

However, sometimes, it seems that some other policy considerations are taken into account by the courts in determining which statements or conducts can be relevant as admissions. The

courts in these circumstances may not expressly say so.

In MODUPE CLOKO v. SIMEON OLATUNDE OLOKO & ANOR.[15], the respondent cross-petitioned for the dissolution of the marriage between himself and the petitioner on the ground of adultery. The respondent had made an allegation of adultery by the petitioner to a Police officer in her presence and to her hearing. The petitioner did not deny it. It was held that this could not be taken to be sufficient proof of an admission of the adultery by the petitioner.

In Matrimonial Cases generally the courts appear reluctant to accept in evidence certain items unless such items are both cogent and convincing. Silence in this circumstance may amount to admission. In BESSELA v. STERN[16], the plaintiff sued the defendant for breach of promise of marriage, and called her sister who deposed to the fact that she heard the plaintiff say to the deft; "you know you always promised to marry me, and now you don't keep your words", to which the defendant made no answer beyong giving her money to induce her to go away. It was held that the defendant's silence amounted to an admission of the promise to marry the plaintiff.

But in MIDDEMANN v. WALPOLE[17], corroboration of an alleged promise to marry was sought in the failure of the defendant to deny the promise. These, letters had been written to the defendant stating that he had promised to marry the plaintiff. The defendant had ignored the letters, and the court held that the defendant's failure to reply did not amount to an admission. The Judges drew a distinction between business and other correspondence; failure to answer a business letter might be some evidence of the truth of the statements in it, because in some commercial transactions a

reply might be expected; but in social matters importunities are often best ignored. However, Kay L.J. declined to lay down any general rule, holding that all the circumstances must be looked at to determine whether the failure to reply alone amounts to an admission. Such failure to reply has sometimes been treated as an admission.[18]

It is submitted that, although in very exceptional circumstances, an inference may be drawn from a failure to give an explanation or disclaimer, as a general rule, where a person is informed that an accusation has been made against him, his silence alone cannot give rise to an inference that he accepts the truth of the accusation, furthermore, the fact that he was not informed of his right not to reply to the accusation can not support an inference that his silence was not in exercise of that right.[19]

(b) FORMAL ADMISSIONS

Unlike informal admissions, formal admissions are conclusive and binding, such that they cannot be explained away or restricted to specific litigation or procedure. Dr. Aguda states that formal admissions, are admissions made by a party to civil proceedings so as to relieve the other party of the necessity of proving the matters admitted.[20] It has been held that when both parties have agreed about a particular matter in their pleadings, such matter need not be proved and they should accept such an agreed fact or "stipulation" as established.[21]

Under the various existing rules of the High Courts:

> "any party to a suit may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the writ of Summons, Statement of claim defence or other statement of any other party".

Once a fact is admitted in this way in the pleadings, it is taken as established and no proof of that fact is required. Furthermore:

> "any party may, by leave of the court, call upon any other party, by notice filed in court and served under order of the court, to admit any document or fact, saving just exceptions, and on granting such leave the court shall fix the terms and conditions thereof, including the time within which the admissions are to be made".[22]

Usually it is at the option of a party to a civil proceeding or his counsel to admit facts at the trial and the court in that circumstance may not allow evidence to be given on such admitted facts. It is submitted that in some cases the court may insist on further proof of even a fact admitted in the circumstances stated above.[23] Furthermore even if such admitted facts are admissible in evidence, little or no weight may be given to them. However, all these, it is submitted, depend on the special circumstances of the case.

Formal admissions apply only to civil cases. Section 74 of the Evidence Act[24] specifically makes provision for formal admissions in civil proceedings. Formal admissions like informal admissions can be in written, documentary and oral forms provided such formal admission are clear and made in open court during the proceeding.[25] There could, however, be an implied formal admission, as submitted by Dr. Agula,[26] provided it can be reasonably inferred from all the circumstances. It has been held that pleadings delivered in a previous trial can not be used as admissions in a subsequent trial.[27] Also it would appear that the depositions and oral testimony of a party's witness in a previous proceeding are not receivable against him as admissions.[28] However, this is not a general proposition because in case of affidavits the position is different.[29] On the application of a party to a proceeding,

claim admitted by the opponent without necessarily waiting for the determination of any other issues between the parties.[30] Such judgment or order will, however, depend on the discretion of the court. The stage at which admissions under this heading are made usually depends on the rules and procedures obtainable in the various courts.

The Nigerian 1979 Constitution has empowered the superior courts in the land to make their own rules and practice to govern them.[31] It is however, cautioned that each of such rules and practice should be in conformity with Section 74 of the Evidence Act. However, by the provision of Section 24 of the Evidence Act,[32] Oral Admissions informal or formal as to the content of documents are generally not relevant and, therefore, inadmissible. In any case where a witness shows that he is entitled to give secondary evidence of the content of such documents, it can be admissible. Alternatively, where the genuineness, or authenticity of the document is in question, such secondary evidence can be allowed.

Furthermore under Section 25 of the Evidence Act,[33] if an admission is made with the express understanding that it will not be given in evidence during a civil proceeding, such an admission will not be admissible. However, where there is lack of express understanding as stated above, it will appear, the admissibility may be deduced from the circumstances under which the admission was made.

An admission whether informal or formal, before it is admitted as evidence, it is submitted, need to meet certain requirements. There are two of these essential requirements which are worth noting here:

(a) The types of persons making the admissions. This is usually very important in determining the relevance and admissibility of such facts as admissions. As we noted earlier, admissions by infants, persons of unfound minds may not be admissible per se.

(b) The person to whom, the admission may be made, also matters alot. The essential statutory requirements governing conditions under which admissions may be made are contained in Sections 20 - 25 of the Evidence Act.[34]

It is submitted that these provisions of the Act are not exhaustive. There may be rules contained in other Statutes, which may be substantive or procedural that treat or supplement the law provided in the Evidence Act.[35]

Section 20 of the Evidence Act[36] makes provisions for parties to proceedings and their agents to make admissions. A detailed discussion on this, may not be necessary here. What is important to note as applies in other situations, is that such admissions must pass through the test of relevance as a basis of admissibility. Even when such facts regarded as admissions are relevant, they may not necessarily be admitted because there is the wide judicial discretion in admitting and placing weight on such evidence.

Section 21 and 22 of the Evidence Act[37] also make provisions for other third parties that may make admission. In the case of R. v. MALONE[38], it was observed that, if a person is said to have particular information, he is a referee and whatever he says amounts to an admission. If a man refers another upon any particular business to a third person, he is bound by what that

third person says or does concerning it, as much as if that had been said or done by himself. However, it is important that if an admission made by an agent is to bind the principal or person on whose behalf the admission was made, that admission ought to be made during the existence of the agency relation.[39]

At this stage of the discussion, it is important to observe that, the general rule as contained in Section 23 of the Evidence Act,[40] is that admissions are relevant and probable only against the maker or his representative in interest. There are, however, certain conditions stipulated in Section 23 of the Act which must be satisfied to make such admission relevant. It is, important to note the case of OYENAMI v. OYE[illegible][41], where beside the statement made first as to the cause of accident for which he was prosecuted, the defendant made a statement to the Police as to his negligence. It is submitted here that the admission by the defendant to the Police cannot be binding on his master because the statement was that of the defendant (driver).

Then finally, the legal consequence of admissions usually depends, first of all, on the circumstance of the particular-case. This is very important if the test of relevance and admissibility is to be applied in a more rational manner for justice to be done to all parties concerned.

Secondly, the legal consequences of admission will also depend on whether the admission is formal or informal. Then furthermore formal admission has more to do in civil cases than in criminal, while informal admission can apply in both criminal and civil cases. Also the provisions of Section 74 of the Evidence Act appear as we have seen to restrict formal

admissions to civil cases only.

Then, it is submitted, that after everything else, the value of an admission depends on the circumstances under which it was made. It is for the trial court to decide the issue and to give due weight to the alleged admission and the explanatory facts or circumstances[42]. This vests the test of relevance as a basis for admissibility almost completely in the hands of the court. The Statutory Provisions will appear more or less to be as road-signboards.

It is very important, it is submitted, a trial court should be satisfied of the truth of an admission before acting on it and each case be treated on its own special facts, applying the relevant provisions of the Evidence Act.

We have been examining admissions, when relevant and admissible in evidence. We shall next examine confessions and Judges' Rules and (Statements to Police Officers) Rules 1960.

3. CONFESSIONS AND JUDGES RULES

(a) CONFESSIONS

The manner by which confessions were obtained has always been in controversy. There had been judicial, statutory and even literal inconsistency regarding the law of confession. However, by the middle of the 19th century, the law on confession was consolidated to some extent. This commendable attempt to resolve this controversial issue was in the well celebrated case of R. v. BALDRY[43]. In this case, a Constable said to the prisoner that he need not say anything to incriminate himself, but that what he did say would be taken down and be used as evidence against him. He was convicted on the basis of his confession. His appeal to the Court of Crown Cases Reserved failed. Pollock,

C.B. stated:

> "I am of the opinion that the conviction is right, that the evidence was properly received. I consider that the grounds for not receiving such evidence, are not those stated by the learned counsel in his elaborate and able argument from a review of all the cases, that there is a presumption of law one way or other. The ground for not receiving such evidence is, that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false or that the law considers such statements cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the Jury".

A Confession, it can be said, is a species of admission.[44] Under Section 27(1) of the Evidence Act, Confession has been defined as follows:

> "A Confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."

A strict examination of the above quoted subsection will indicate prima facie that only a person who is being charged with a crime will make a confession. The subsection has, therefore, been liberally interpreted by the courts in Nigeria. In the case of R. v. UDO EKA EBONG[46], the West African Court of Appeal held that a statement may amount to a confession even if made before the accused was charged with the offence. "Charged" here will mean formally charged. However, it must be noted that a statement made before the Commission of an offence cannot amount to a confession.

One may at this point still ask, what is a confession? According to Professor Nokes,[47] the word "admission" is often used as an admission of some fact relevant to a crime, while the term "Confession" is sometimes confined to a full admission of guilt. Nwadiolo,[48] submits that as species of admissions, confessions are governed by different rules with regard to their

admissibility, and therefore treated separately from other admissions. .. Confession here is mainly concerned with statements made by accused persons in criminal cases to Police Officers or other law enforcement agents. Such statements may not necessarily amount to full confessions.[49] From a more pragmatic point, it is submitted that a confession denotes admission of guilt by an accused person or a person charged with an offence or crime. A confession, therefore, ought to be distinguished from mere admission.

When the concept of admissions is transferred to the criminal arena, it may merely constitute admission of some facts that may be relevant to the Commission of the offence. Those facts by themselves do not suggest that the person who makes the confession has committed the offence. E.g. a robbery takes place at a Supermarket. The Police are called to the scene. Along their way to the Supermarket, the Police come across some people running away from the Supermarket. These people are arrested and taken to the Police Station to help the Police in their investigations. During the interrogation .., one of these arrested, said "he heard everything that was said as regards the robbery and was present". That statement by .. is an admission that does not indicate that A took part in the robbery i.e., it is not a conclusive admission. This may lead the Police to further investigation which may reveal afterwards that A participated in the crime.

A Confession may take two forms:

(1) May be formal or judicial. That is a confession made in a court of law.

(2) Extra-judicial or informal when made out of court. This latter type of Confession is the main subject matter of this heading and is referred to here simply as confession.

It is submitted that Section 27(1) of the Evidence Act does not impose any restriction with regard the manner, stage, procedure at which a person may make a confession.

In OLUSEGUN OTUFALE AND OTHERS v. THE STATE,[50] the appellants were convicted of robbery. The facts accepted by the learned trial Judge and upon which the first appellant was convicted were in the evidence of the first prosecution witness, a self confessed accomplice who was formerly charged along with the other accused before he turned prosecution witness, and some other prosecution witnesses. The appellant appealed against the judgment. It was held on appeal that, an extra-judicial confession though made orally would carry no less weight than one made in writing. It is as strong as a written extra-judicial confession. If the testimony of the witness to whom it was made be accepted by the court. Though the statement of an accused person could be used against him, it would not be used as evidence against another accused person.

Another question that can be asked at this point is, once a confession has been made, what are the conditions or basis on which it can be admitted in evidence? Relevance of evidence usually constitutes the basis for admissibility. This test, as we are trying to investigate, has hardly had a standard and satisfactory application in our law courts. It has, therefore, been difficult to determine or say whether justice is really done to all parties concerned. Even the provisions of the Evidence Act have in no significant way helped to alleviate the situation because of either their inadequacy or the attitude of our Judges towards Common law precedents. However, to go back to the question, it is submitted that, for the purpose of evidence, a confession is admitted as evidence of the truth of its content.

If a confession is to the effect that a crime has been committed that confession is admitted as the truth of what it states. However, certain conditions must be satisfied for a confession to be admissible in evidence.

(1) The confession must be relevant as a fact and definitely only as against the maker.[51]

(2) .. confession must be made by the person who committed the offence himself and can not be made on his behalf even by his Counsel. This is one of the characteristics that distinguishes confession from admission.

In R. v. SUQUO ETIM INYANG,[52] the accused was resident in Calaber and went through a form of marriage in the Church there. some eighteen months later, proceedings were taken against him in the Magistrate Court to enforce maintenance Order made against him in a London Court in respect of a marriage the accused had contracted in England seven years previously. Before the Calabar Court, the counsel for the accused admitted the facts of the London marriage. Then criminal proceedings in a charge of bigamy were instituted against the accused and the prosecution relying solely on the two marriage certificates and the admissions made before the Calabar Magistrate. It was held that the admissions could not be treated as confessions for the purposes of proving the criminal charge as they were not made by the accused himself.

(3) .. confession must be direct and positive, or, as it is often said, "unequivocal". What this means, is that the statement made must leave no doubt whatsoever about the particular of the crime alleged to have been committed.[53]

This requirement of a confession that it must be direct and

positive will appear to tilt the balance towards the accused because usually it is not easy to prove both words. A confession may be positive and not direct. It is submitted that once, there are some elements of the confession by the accused pointing to the commission of the offence, such a confession should be admissible. What might vary in that circumstance is the weight to be placed on it.[54]

(4) A confession must be voluntary.[54(a)] The Courts have held that the onus or burden of proof that the confession was voluntary rests with the prosecution.

In JOSHUA ADEKANBI v. ATTORNEY-GENERAL WESTERN NIGERIA[55], the appellant had been asked whether he had made a statement to the Police and signed it. He admitted that much but denied the assertion that he had read it over before signing. He further complained that the statement was not correct. On appeal, Brett J.S.C. was of the view that the trial Judge by reaching a conviction on this basis had overlooked the fact that the burden of affirmatively proving voluntariness of a confession lies always on the prosecution.

It is submitted that the standard of proof of voluntariness of a confession required of the prosecution as stated above is like in any criminal case, that is the proof has to be beyond reasonable doubt. In R. v. SATORI GAIN AND PHILIP[56], on an objection to the admission of two of three statements to the Police as not being voluntary, it was held per Edmund Davies, J., that the burden of proof lies on the prosecution to satisfy the jury of the guilt of the defendants, if the evidence of the prosecution had failed to satisfy that burden and the statements

were, therefore, inadmissible.

The rationale for the strict requirement of the voluntariness of a confession has much to do with the test of relevance as a basis of admissibility. A confession has to be satisfied to have been made voluntarily, before it can be considered relevant and admissible in a particular circumstance. For purposes of fairness to all parties concerned, it is much better to treat each case on its own merits. There could, of course, be many reasons for this strict requirement of the voluntariness of a confession.

The Courts have usually ensured that before the acceptance of such voluntary confessions in evidence, much caution must have been exercised, the reasons here being that since confession denotes guilt, it means if admitted in evidence, that could amount to automatic conviction of the accused.

Secondly the court at times is mindful that a voluntary confession may not be true. The content of the confession may not be true. The content of the confession may not necessary be what happened. A fact that has been declared relevant and admissible in evidence may serve a purpose that is prejudicial to the trial. The maker of the confession may be completely innocent.

Thirdly, there is the attitude of Police torture, harassment, intimidation to extract information. If such improper method is used, confession cannot be said to be voluntary. However, there could be other reasons as earlier observed for this strict requirements of the voluntariness of a confession. How positively and objectively is the requirement that a confession must be voluntary, being applied in our law courts, is a matter of concern

which we shall see as the discussion progresses.

We have seen in Section 27(2) that a confession, if voluntary is deemed to be relevant facts as against the person who makes such a confession. It has, however, also been held[57] that a confession made by an accused person in the presence of a co-accused shall not be taken into consideration as against the co-accused in whose presence it was made unless he adopted the same statement by words or conduct.

We shall proceed now to examine circumstances that amount to an involuntary confession. An involuntary confession will, therefore, not be admissible in evidence. It will be important in this regard to examine Section 28 of the Evidence Act. That Section provides as follows:[58]

> "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 any inducement, threat or promise having reference to the charge against the accused persons, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused persons grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature."

The above quoted Section is therefore a guide as to when a confession is not voluntary. It must be noted that the Evidence Act does not define the word "voluntary." This will appear therefore to give wide discretionary powers to the courts to give a definition to the word. It is submitted that since Section 28 of the Act states the condition under which a confession will be irrelevant and, therefore, inadmissible, it will appear that any confession not coming within any of these conditions, will be relevant and admissible under Section 27(2) as being voluntary. Not withstanding this submission, courts still have a discretion

to exclude a voluntary confession if it has been obtained in circumstances that make its reception unfair to the accused. Dr. Agula,[59] submits in this regard that, apart from the question of admissibility, it is essential for the Judge, if the admissibility of such a statment is challenged on the grounds that it is not voluntary, to try the issue of admissibility as a separate issue. After seeing and hearing the witnesses, the Judge may be in a better position to decide whether or not to admit the confession regardless of the finding that it was infact made voluntarily.[60] This submission is in line with our constant observation in this thesis, that relevance per se does not amount to admissibility, especially where such relevance is challenged. Also even when relevant and admissible, the court still has a discretion whether or not to act on such admissible evidence. The test of relevance as a basis for admissibility therefore poses a serious problem in the administration of justice in Nigerian Courts, if the Nigerian Courts are to strictly rely on precedents.

We shall now examine these conditions under Section 28 that will make a confession inadmissible if not voluntarily obtained.

(1) INDUCEMENT:

A confession which is obtained as a result of an inducement will not be admissible. The inducement here, it is submitted, that will render a confession irrelevant and inadmissible, is an inducement merely to make a statement. It need not be an inducement to confess the truth or one which is calculated to make the confession an untrue one. In R. v. NIMIEL VILBONG,[61] a Police Sergeant in cautioning an accused person had said to him: "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 evilence" or "so that it may be evilence for you". After hearing this the accused made a confession of the offence with which he was charged. Hurley S.P.J. (as he then was) said:

> "The caution was clearly an inducement to speak. An accused person can hardly be expected to keep silent when told that he need not say anything, but that anything he says will be written down and taken before the court to be evilence, or evidence for him, he is being given amply sufficient grounds for supposing that by speaking he will avoid the evil of being condemned unheard".

It is submitted that an inducement is usually held to be a promise of advantage or a threat of disalvantage. Therefore, the circumstances under which a statement was made may also determine whether or not it was voluntary or induced. Such inducement, it is further submitted, may be by words accompanied by conduct from which the promise or threat can reasonably be implied.[62]

It will appear that in England a promise of an alvantage or avoidance of any evil as submitted above has been held to include "tell me where the things are and I will be favourable to you",[63] and "if you don't tell me you may get yourself into trouble and it will be worse for you".[64] However, the advantage or evil must be one of a temporal nature. A mere moral adjuration to speak the truth would not be regarded as an inducement for this purpose. In MADU P.TUMANI v. R.,[65] the appellant was caught soon after killing the deceased in an attempt to steal from him. He was taken back to the scene of the killing and told by the Village Head that he should not trouble his fellows, and that if he was the one who did the killing he should say so. Defence counsel's submission that any statement which the accused made after that was inadmissible was rejected as "the remark of the Village Head was ..... merely a moral adjuration".

It is submitted that it is usually difficult to distinguish

remarks which can be regarded as moral adjuration and those that do not constitute or amount to moral adjuration. The remarks of the Village Head in this case are not so much far from inducing the defendant to make a statement. It is important that much caution be exercised before confessional statements of this nature are admissible in evidence. That is why, it has always been observed in this thesis that each case be treated on its special facts and circumstances, with restricted reliance on precedents.

(2) Threat:

Where an accused person makes a confession as a result of physical violence inflicted on him or of threat of such violence, such a confession is involuntary and therefore inadmissible.[66] In QUEEN v. HASKE,[67] the appellant was charged with murder. There were circumstances giving cause for suspecting him and the Chief of his Village summoned the Villagers and said to them that they would all be in the case and would be goaled if they did not tell him the truth. He further told the appellant that he would inform the Police of the circumstances of suspicion against him. Thereupon the appellant confessed to him that he killed the deceased. It was held that the Chief's Statement was clearly a threat and that it was also an inducement in that the converse was true if the guilty persons told the truth the other Villagers would not be goaled. The confession was therefore, inadmissible.

It is submitted in respect of the above decision, with all respect, that in as much as it is highly desirable that a confession must be voluntarily obtained, the confessional statement here which has high probability of the appellant having committed the offence, ought to be admissible in evidence. The appellant

believed he had committed the offence and, therefore, confessed, rather than for innocent Villagers to be goaled. One, therefore, finds it difficult sometimes to rationalise some judicial pronouncements with the reality of life, especially where the judge adopts an attitude of total commitment to precedents.

The case of R. v. EBONG,[68] where a confession within the meaning of Section 27(1) was held Voluntary and admissible even though it was made out of fear of "juju", will appear to give some support to the above submission in respect of Haske's case. The question of fear, must not be treated as a subjective matter, because fear, of say "juju", can be common within a certain community and, therefore, has to be determined from the point of view of a reasonable person of that community. However, Haske and Ebong cases have some distinguishing features, so therefore we do not totally rely on Ebong's Case in our submission in respect of decision in Haske.

(3) PERSON IN AUTHORITY:

According to Section 28 of the Act, for an inducement to make a confession inadmissible, it must have been held by a person in authority. Unfortunately, the Evidence Act does not even define who is "a person in authority". This is one of those shortcomings of the Evidence Act. The Common law description of such a person is someone engaged in the arrest, detention, examination, prosecution or punishment of the accused.[69]

An analysis of the various judicial decisions will lead one to the reasonable conclusion that, a person in authority may be said to be any one whom the prisoner or accused person may feel is capable of influencing the course of the prosecution of the case and also the final outcome of the case. The class of persons that come within "Person in Authority" will appear to be very

wide and may include Police, Magistrate, Traditional Rulers, investigating officers[70] etc.

In MADU FATUHANI v. R.[71], R. v. BABA HASKE[72] and in several other cases, it has been held that a Village Head is a person in authority for this purpose. A confession made to the owner of property when the maker knows fully well that the person he is making the confession will appear to come within the principle of a person in authority.[73]

It is, however, submitted that a confession is not induced merely because it is made to a person in authority. For a confession to be regarded as "induced" the person in authority must have held out to the accused by word or conduct of some inducement, promises or threat which makes the confession not voluntary.[74] The issue of inducement usually difficult to determine. However, it will appear that if a person not in authority holds out an inducement in the presence of a person in authority, then in that case, the issue or subsequent confession by the accused person will not be admitted unless the person in authority disassociates himself from the inducement. The situation is however difficult to establish. In R. v. CLEARY[75], C was convicted of manslaughter, the only evidence against him being a statement made by him to the Police. C's father had said to him in the presence of Police Officers "put your cards on the table and tell them the lot .... if you did not hit him, they can't hang you". The Judge ruled that this was not an inducement held-out in the presence of a person in authority and therefore, C's subsequent statement was admissible. But it was held on appeal that, these words were capable of being an inducement. It should then have been for the jury to decide whether in fact there was an inducement and whether the prosecution had proved C was not affected by it. The Judge having ruled that

in law there was no inducement, the jury were not so directed.

It is submitted that, the rational behind the rule that a person in authority must disassociate himself from the confession is that the mere presence of the person in authority undoubtedly influences the confession so made.[76]

Under Section 30 of the Evidence Act,[77] if a confession is made after the impression caused by an inducement, threat or promise has, in the opinion of the court, been fully removed, such a confession is relevant and admissible. It is, therefore, submitted that, the confession as provided in the above Section, cannot be regarded as caused by that inducement. However, if the threat or promise under which a first statement was made still persists when the second is made, then it is inadmissible. But if the time limit between the two statements or the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has dissipated, then the second statement can be admitted as a voluntary statement.[78] In QUEEN v. HOPE,[79] the first confessional statement made by the appellant was induced by threat and, therefore, inadmissible. Some days later he made further confession in a statement to the Police. The evidence against him on which he was convicted consisted of these two confessions. The Federal Supreme Court quashed the conviction on the grounds that it could not safely say that the trial Judge would have held that the inducement made to the appellant had been dissipated at the time of the second confession or that if he so held, he would have necessarily convicted on that second confession alone. It was also stated in an earlier case of COMMISSIONER OF POLICE v. QUARSHIE,[80] that where the first statement is inadmissible because there was no caution before it, a second properly cautioned statement is not rendered

inadmissible thereby, for there was nothing to show that the first statement so operated on the mind of the accused as to make the second one involuntary. However, the court has a discretion according to the provision of Section 30 of the Act to determine the admissibility or inadmissibility of such a second statement.

It is submitted that, there are no hard and fast rules with regards to the state or manner in which it can be determined, whether the influence of threat of inducement has ceased to have effect on the mind of the accused. The court should, therefore, consider the various features of each particular case.

A confession may not necessarily be rendered inadmissible because of promise of secrecy, lack of caution and so on. Section 31 of the Evidence Act states:[81]

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

With the greatest respect, the above quoted Section causes a great deal of concern when one tries to reconcile its provision with what has been discussed so far in this thesis about the fundamental legal requirements of a voluntary confession. A confession which does not meet these legal requirements is involuntary and, therefore, inadmissible. It is submitted that, absence of inducement, threat or promise, presupposes a state of mind capable of making a choice rational or otherwise. If a suspect makes a statement due to deception or influence of

drugs, can it be said in all honesty that he volunteered the statement? The mental condition of a person is very vital in determining his criminal responsibility. In the Criminal Code[82] and Penal Code[83] involuntary intoxication constitute a defence to an accused person. Intoxication and insanity both impair the mind, and, therefore, a person is presumed to be incapable of either forming an intention or knowing the nature of his acts or omissions. A curious situation therefore arises in practice when Section 31 of the Act is read together with the provisions of the Criminal Code and the Penal Code. There is, therefore, need for much caution to be exercised by our courts in admitting evidence under Section 31 of the Act, and it will be suggested that there is need for amendment.

Not withstanding the questionable nature of Section 31 of the Act, the Courts have received in evidence confessional statements on the basis of that Section. In OMISADE AND OTHERS v. THE QUEEN[84], the Supreme Court held that, in view of this provision, as the trial Judge was satisfied that the statement of one of the appellants was free and voluntary, the fact that it was in the form of question and answer did not make it inadmissible. The statement in question was taken in answer to questions put to the appellant by the Police.

However, it will appear that if in any particular case, it should appear to the court that the taking of a confessional statement is not truly voluntary, the court should not admit it in evidence. It will appear a confessional statement made by an accused person at a state when he was sobbing and frightened and later become hysterical will be admissible[85]. Each case must, therefore, be treated on its own facts and peculiar circumstances.

In Nigeria, in the case of S.IDU v. THE ST.TE[85(a)], the Supreme Court stated that, under the Nigerian Criminal law, no statement made by an accused is admissible against him unless it is proved that the statement was made voluntarily. This decision therefore supports the argument against such indiscriminate admissibility of evidence under Section 31 of the .ct, that is to say that great caution must be exercised by the courts to avoid the inconsistency of Section 31 of the .ct with some other existing Statutes and some of the fundamental legal principles regarding the voluntariness of a confession. It must be noted that the mental state of a person who makes a confession will apply in both criminal and civil cases.

Under Section 32 of the .ct,[86] evidence in other proceedings amounting to a confession is admissible. It is submitted that by this provision confessional statements made in one proceeding may be used in another proceeding subject to the conditions laid down therein. The position of the law on confession in this Section will appear clear but as always observed, the court should treat each case on its facts and circumstances.

In respect of confessions of other offences in addition to those charged, it has been held that where an accused person has made a voluntary confession both of the offences charged and other offences, the portion of the statement relating to the other offences must not be admitted in evidence.[87] Dr. .gula,[88] therefore, submits that the decision in R. v. O.L.NI ESOLOGB. .ND OTH.RS[89] (decided before the Evidence .ct came into existence) to the effect that such a statement should be rejected entirely is now of very doubtful authority unless the statement is such as is not severable.[90] The position of the law as stated in Eraruwomi Otedia's Case and

the submission of the learned Nigerian jurist Dr. Aguda appear reasonable because rejecting the evidence entirely will appear to defeat the whole purpose of fair trial to all parties concerned.

It will be important at this point to state that facts discovered in consequence of inadmissible information given by accused person which is usually admissible under Section 29 of the Evidence Act[91] will not constitute any substantial portion of this chapter. Evidence of this nature had been considered in our discussion on admissibility of illegally obtained evidence where we made reference to Section 29 of the Act. It must, however, be noted that the provision of Section 29 of the Evidence Act has its basis in a long line of English Common law decisions.[92] Unfortunately the English law on the subject today still remains uncertain a situation which greatly affects Nigerian law as the Nigerian Judges appear to place much reliance on English precedents.[93]

According to Section 29 of the Act, it can be said that facts discovered as a result of an inadmissible confession can be proved in evidence if their relevance can be established without resorting to any part of the confession. "Facts" in this Section, it is submitted must be confined to real evidence and that the provision can not be made use of to admit oral confessions not otherwise admissible.[94] The provision will admit evidence obtained as a result of an illegal search. However, it must be conceded that the Evidence Act is silent on the issue of the admissibility of illegally obtained evidence.

EFFECT OF CONFESSIONS

If a person makes a free and voluntary confession which is direct and positive, and is properly proved, he may be convicted on the confession alone, without any further evidence. In James

OBI ACHABUA v. THE STATE[96], the Supreme Court held that confession alone even without corroboration can support a conviction so long as the court is satisfied of the truth.

However, it is submitted that although a man may be convicted on his own confession alone if it is free, voluntary, direct and positive, it is necessary as a matter of practice to look for some independent "corroborative evidence" to support such confession if it is the only evidence available.[97]

It is submitted that since a confessional statement voluntarily taken and admissible in evidence, an accused person can be convicted on such a confessional statement, with or without being corroborated, the courts should exercise much caution in admitting such confessional statements. Each case should be treated on its own facts and circumstances. That there should be no reliance on precedents, but the courts may refer to previous cases purely for guidance purposes in determining the voluntariness and admissibility of a confessional statement.[98]

It should further be noted that, the fact that an accused person denies making a confessional statement does not render the confessional statement inadmissible.[99] However, it will appear the denial will certainly be a matter to be considered in deciding upon what weight to attach to such a confession.[100]

With all respect, it is submitted on the principles stated above, that it is much better that where an accused person denies having made a confessional statement, it is desirable to have apart from such confessional statement, some evidence, be it slight, of the circumstance which made it probable that the confessional statement was true[101], even though if admitted the issue of weight to be attached may come into consideration.

In all cases, the whole of the confession which a party gives of a transaction must be taken together. Therefore, the admission by an accused person of a fact disadvantageous to him should be received with a Conteporaneous admission of a fact favourable to him as admissible evidence of the alleged fact. This rule that a confessional statement should be taken as a whole does not debar the prosecution from tendering in evidence statements made at the time of arrest or subsequently by an accused person.[102]

However, the principle stated above does not apply where the confession relates to other offences in addition to the one for which the accused is being tried. The confession relating to these other offences is irrelevant and inadmissible.[103] Furthermore, it must be noted that a confession is evidence only as against the person who made it only.[104] It is, therefore, submitted that a statement made to a Police Officer by an accused person is not evidence against a co-accused and a Magistrate or Judge must warn himself of this fact so that his mind will not be affected by that statement in considering the case against the co-accused.[105] Furthermore the Magistrate or Judge should make a note showing that he realises that the statement is inadmissible against the co-accused.[106]

However, the position stated above may be different where an accused person goes into the witness box to give evidence, wherein what he says becomes evidence even if it is against a co-accused person. The co-accused person may cross-examine him on such evidence.[107] In this manner therefore, it will appear, a co-accused person could give as evidence any in-criminating statement against a co-accused contained in a confessional statement made out of court by him. It will, however, be necessary that the incriminating statement be fully narrated in court for the Magistrate or Judge

to hear it and thus determine its veracity.[108]

It must also be noted that, since English is the language of the courts in Nigeria (may be Area and Customary Courts excluded) where the confessional statement had not been made directly in English, and an interpreter had been used in taking down a confessional statement, that confessional statement is inadmissible unless the interpreter as well as the person who wrote down the confessional statement are called as witnesses.[109] Where the interpreter is not called as a witness, the confessional statement in English or any other language version will be regarded as hearsay and inadmissible in evidence.[110]

Even though it is highly desirable for an interpreter to sign or mark a confessional statement for identification, a failure does not render the statement inadmissible.[111] The above principle, it is submitted with all respect, is highly questionable, especially as common knowledge indicates that in the case of such confessional statements, if not signed or marked by the interpreter, there is the high probability of them being tampered with. It is, however, undesirable to use the very Police Officer who took a statement as an interpreter in interpreting back to an accused person a statement made in a language which is not of the court's language.[112]

Finally, it is submitted that the strictness of the rules of admissibility of confessional statements is aimed at ensuring that innocent persons are not unduly deprived of their liberty.

> "It is to ensure that the innocent in our society is not deprived of his life and liberty that our laws have laid down very strict test of admissibility for confessional statements before they become available evidence for assessment and evalution".[113]

The above statement of the law by the Supreme Court of Nigeria appears sound and therefore may be regarded as a powerful proposi-

tion in this area. But the question is whether in practice this test operates fairly in Nigerian Courts?

(b) THE JUDGES RULES

A discussion on confession without reference to the Judges Rules will appear incomplete. We shall, therefore, briefly examine these rules and their applicability in Nigeria. The Judges Rules in England deal with the manner in which the Police should take statements from persons connected with crimes. These rules which were first formulated in 1912 by the Judges at the request of the Home Office for the guidance of the Police were revised in 1964.[114] The whole purpose of the rules is to ensure that the confessional statements are voluntary. It must be noted, however, that these rules do not have the force of law; they are administrative directives the observance of which the Police authorities should enforce upon their surbordinates ensuring the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the Judge presiding at the trial.[115] It is submitted that these rules ought to be upgraded to have the force of law, as this will make the Police more cautious in their application and will give the courts the opportunity to stress more on their observance. Therefore, the compliance or non-compliance with the rules by Police Officers will have a stronger legal consequence which usually has to be determined by the courts. However, even if the rules were upgraded to have the force of law, the courts still has to determine whether a confessional statement obtained in compliance or non-compliance with the rules is voluntary.

It is not possible to state in detail these rules in this thesis, but some of the rules can be highlighted.

RULE 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. This is so whether or not the person in question has been taken into custody, as long as he has not been charged with the offence or informed that he may be prosecuted for it.[116] (a) The rule allows Police Officers to question members of the public generally. (b) Also to question a person in Custody with regard to offences other than that for which he is in custody.[117]

RULE II

As soon as a Police Officer has evidence which would afford reasonable ground, for suspecting that a particular person has committed an offence, he shall caution that person or cause him to be cautioned before putting him any questions, or further questions, relating to that offence.[118] It will appear that the duty to caution here does not arise until the Police Officer has enough evidence to prefer a charge.[119] Therefore answers given by a suspect to questions put to him by an investigating Police Officer before the officer has information that would enable him to charge the suspect to court, even though not given under caution are admissible.[120] The caution state in Rule II above is to be in the following terms:

> "You are not obliged to say anything unless you wish to do so but whatever you say may be put into writing and given in evidence".

RULE III

(a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned 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".

After this question, no other one relating to the offence should be put unless they are necessary to clear up an ambiguity and in such cases a further caution is prescribed.[121]

RULE IV

If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence, and a Police Officer wishes to bring to the notice of that person any statement made by another person in respect of the same offence, 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 starts to say something he shall at once be cautioned or further cautioned as prescribed by Rule 3(a).[122]

RULE V

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.[123] The question very often that will arise, in the application of the Judges Rules is whether a statement by an accused person is inadmissible either because the caution stipulated by the Rules was not administered at all or not correctly administered before it was made by the accused. It will appear that a confession made without a caution may be rejected in

evidence.[124] But it can further be stated that since the Rules are not rules of law but of administrative practice only, a confession may be admitted if the court is satisfied that it was voluntary in spite of the absence of a caution.[125]

However, in a recent English Court of Appeal Case,[126] it was categorically stated that the admissibility of an alleged confession does not depend upon whether or not there has been compliance with the Judges Rules but depends on whether it is shown that the confession has been made voluntarily. The Supreme Court of Nigeria has also like the English Court of Appeal, held in the case of SUNDAY ONUNGA v. THE STATE,[127] that a confession made without caution and even before the maker was charged with an offence is admissible provided it was voluntary. It would appear also that when a suspect, who has been cautioned, is making a statement, there is no need to caution him again when he begins to make the confession.[128]

The Judges Rules will, therefore, it is submitted appear to have not that strong force as their high sounding wordings. The Court still has to determine at the trial whether the confessional statement was voluntary in each particular case. The Judges Rules have been applied in Nigerian Courts without any specific statutory authorisation. However, the West African Court of Appeal in R. v. UGWUOGO AND OTHERS,[129] said, inter alia, "They ('Judges Rules') should be followed, mutatis mutandis, so far as is possible and practicable in this country".

It will appear Rule VIII of the old Rules (now Rule V) was perhaps the most difficult of these Rules in its application. In R. v. JOSE AND OTHERS,[130] it was held that in its application to Nigeria that Rule should be modified by the addition of the following clause:

> "Provided that when the person charged is illiterate the statement may be read over or interpreted to him by some person other than a Policeman. Anything said to such reader by the person charged when the statement is read shall not be admissible in evidence but if, after the statement has been so read, he shall be desirous of making a statement to the Police in reply, such statement shall be taken only after the usual caution has been administered".

It is submitted that the Police should not interrogate prisoners with reference to any charge against any one of them, or invite from one defendant a statement against a co-defendant; and they should not obtain evidence by confronting prisoners with another.[131] There is however too the need for caution to posing of a photograph by an accused person which may be used in the evidence against him.[132]

As is the position in England, the application of the Judges Rules in Nigeria applies to Police Officers as well as other persons, for example, to gaolers[133] and Village Heads.[134]

It is important, even though this practice is not provided for in law or Police standing Order or the Judges Rules, it is a wise practice that where practicable, an accused should be taken before a superior Police Officer to confirm his confessional statement.[134(a)] However, where the Police fails to take the accused to a superior Police Officer to confirm the confessional statement; contrary to the usual practice, the statement should not necessarily be viewed with suspicicion, and such failure does not reduce the weight to be attached to the statement if made voluntarily.[135] The discretionary power of the court to determine the voluntariness of a confession not withstanding the manner in which such a confession was taken must also be exercised with a lot of caution if justice is to be done to all parties concerned.

It is, finally, submitted in this heading that if an accused person who is taken before a superior Police Officer, admits a self-incriminating statement as his, and that it was made voluntarily, it should be admitted in evidence even if the accused did not resign the statement.[136]

4. (STATEMENTS TO POLICE OFFICERS) RULES, 1960

In addition to the Judges Rules in England which are applicable in Nigeria as we have seen, the Chief Justice of the then Northern Region of Nigeria, exercising the powers conferred upon him by Section 373(1) of the Criminal Code,[137] made Rules which are essentially similar to the Judges Rules in England. These Rules may be cited as the Criminal Procedures (Statements to Police Officers) Rules, 1960, which came into force on the 30th day of September, 1960.[138]

We shall not go into any detailed discussion of these Rules because as already stated above, the Rules are essentially similar to the Judges Rules in England. Also, like the Judges Rules, the whole purpose of the Northern Rules is to ensure that confessional statements are voluntary.

The Northern Region Rules, like the Judges Rules will appear not to have the force of law; they are administrative directives the observance of which the police authorities should enforce upon their surbordinates as tending to the fair administration of justice.

By the provision of the Northern Region Rules,[139] except as provided in the Evidence Act, no statement to a police officer by a person against whom he has decided to make a complaint shall

be admissible in evidence in any court unless such statement is made in accordance with these rules.

It is submitted that according to the above rule, the rules shall be complied with by Police Officers involved in recording confessional statements. However, not withstanding a strict compliance by such Police Officers with the rules in obtaining a confessional statement, the admissibility of such a confessional statement is subject to the provisions of the Evidence Act dealing with confession. Therefore, the court still has to determine whether the confessional statement was voluntarily obtained. It must be noted that the rules laid down by the then Chief Justice of the then Northern Region, from the Nigerian Context, constitute slightly an improved model of the Judges Rules in England. The Northern Region Rules took care of the difficulties that will arise in the application of rule 8 (now rule 5) of the Judges Rules, in Nigeria in respect of illiterate persons in the proviso to rule 7(1) of the Rules.[140] By that proviso where such a person is an illiterate, the statement may be read over or interpreted to him apart by some person other than a Police Officer and anything said to such reader by such person when the statement is read shall not be admissible in evidence against him. If such a person desires to make a statement in reply, a caution shall be administered.[141]

It is therefore, submitted that the Northern Region Rules, even though substantially similar to the Judges Rules in England, have taken into consideration some local circumstances in Northern States. However, there appear to be no difference now in the application of the Northern Region Rules in the present Northern States and the Judges Rules in England in the other States in

Nigeria.[142]

Finally, it must be noted that under Section 126 of the Criminal Procedure Code, it is expressly stated that the prosecution can put in evidence the record of a confession made in the case dibly.[143] This Section, it is submitted, should be read together with the Northern Region Rules.[144]

It is not necessary for the Police Officer who recorded the confessions to give oral evidence that he signed it.[145] However, it must be noted that Section 126 does not excuse the appearance of the Police Officer as a witness. It is submitted that the admission of a confession under Section 126, like under the (Statements to Policers) Rules, is subject to the provisions of the Evidence Act.[146] Therefore, it implies that this Section and the Rules are not intended to prevail over the Evidence Act, and that the criterion is voluntariness, which is ascertained not by any specific rules but by all the circumstances of the case. As always observed, much caution must therefore be exercised by our courts in applying the test of relevance as a basis of admissibility in these circumstances.

In this chapter, an attempt was made to examine the relevance of admissions and confessions as a basis of admissibility in Nigerian Courts. Also the Judges Rules in England and their application in Nigeria, and (Statements to Police Officers) Rules 1960, which are prescribed procedures in obtaining confessional statements from suspects and accused persons, were briely examined. In the next chapter we shall focus attention on opinions of third persons.

FOOTNOTES TO CHAPTER FOUR

1. (1794) 24 St. Tr. 199 at 1093, 1094.

2. However the rule of exclusion will appear not to operate where such statements are against the interest of the maker.

3. [1953] 1 All E.R. 224.

4. Section 19 Ibid.

5. See Nokes, An Introduction to Evidence (4th Ed.) P. 287.

6. (1834) 6 C. & P. 540.

7. See Rumping v. D.P.P. [1964] A.C. 814 at 853.

8. See Phipson On Evidence (12th Ed.) Para. 688, P. 301.

9. (1870) L.R. 5 Q.B. 314 at 323.

10. R. v. Watt (1905) 20 Cox C.C. 852.

11. See James v. Biou (1825) 2 Sim. & St. 600.

12. See Aguda Ibid Para. 4-07 P. 52.

13. (1941) 7 W.A.C.A. 150.

14. (1959) W.R.N.L.R. 16.

15. (1961) W.R.N.R. 101.

16. (1877) 2 C.P.D. 265.

17. [1891] 2 Q.B. 534.

18. Gaskill v. Skene (1850) 14 Q.B. 664.

19. R. v. Hall [1971] All E.R. 322, R. v. Whitehead [1929] 1 K.B. 99, R. v. Lockey [1944] K.B. 80.

20. Ibid Para. 11-13 P. 145.

21. Chief Okparaeke of Ndiakaeke and Others v. Obidike Egbuonu and Others (1941) W.A.C.A. 55.

22. Order 13, Rules 1 & 2, Northern States High Court (Civil Procedure) Rules, Order 16, Rules 1 & 2, Western and Bendel States High Court (Civil Procedure) Rules, Order 31, Rules 1 & 2, Eastern States High Court Rules, Order 28 Rules 1 & 2 Lagos State Rules, and Order 29 Rules 1 & 2 Federal High Court Rules.

23. In a situation where such a party that makes the admissions is an infant or a man of unsound mind, the court will treat the test of relevance and admissibility differently. See the case of Akpan Obong Udofia and Another v. Okon Akpan Udofia (1940)6 W.A.C.A. 216. It has also been held that judicial discretion as it/heavily exercised here, ought to be exercised judiciously as there have been some doubts as to this concept of judicial discretion. See the case of Seismograph Services (Nigeria) Ltd. v. Chief Keke Ogbenegweke Eyorefe (1978) 9 & 10 S.C. 135.

24. Section 74 Ibid.

25. Chief Baron Nwizuk and Others v. Chief Weribo Eneyok and Others (1953) 14 W.A.C.A. 354, See also Re Benny [1894] Ch. 499.

26. See Aguda Para. 11-14, P. 145, See also the case of Freeman v. Cox (1876) 8 Ch.D. 148.

27. Babatunde Idise Thanni v. Yaya Lemonu (1977) 2 S.C. 89,115-116.

28. See Aguda Ibid, Para 11-15 P. 146, See also the case of British Thomson-Houston v. British and Helsby Cables Ltd. [1924] 2 Ch. 160.

29. See Simmons v. London Joint Stock Bank [1891] 1 Ch. 270.

30. Bello Iyanda and Others v. Famuyisan, Unreported, Ibadan Civil Suit No. 1/6/64 May 23, 1966, See also Amudatu Apata v. Adebesi Oladele and Another CCHCJ/11/73/113.

31. See the following Sections of the Nigerian 1979 Constitution. Section 216 relates to Supreme Court, Section 227 - Court of Appeal, Section 233 - Federal High Court, Section 239 - States High Courts, Section 244 - Sharia Court of Appeal and Section 249 Customary Court of Appeal.

32. Section 24 Ibid.

33. Section 25 Ibid.

34. Sections 20-25 Ibid.

35. See Penal Code, Criminal Code, Matrimonial Causes Act, 1979 Constitution Provisions relating to law of evidence.

36. Section 36 Ibid.

37. Sections 21 and 22.

38. (1884) 13 Q.B. - 33, See also Williams v. Innes (1808)1 Camp. 364.

39. Peto v. Hague (1804)5 Esq. 134, See also Edwards v. Brookes (Milk) Ltd. [1963] W.L.R. 795 D.C.

40. Section 23 Ibid.

41. Ibid.

42. Nii Abogsey Okai II v. Nii Ayikai II, (1946)12 W.A.C.A. 31, See also Joe Iga and Others v. Ezekiel Amakiri and Others (1976) 11 S.C. 1, 11.

43. (1852)2 Den. C.C. 430.

44. Anandagoda v. R. [1962]1 W.L.R. 817 at 832, See also Commissioner of Customs v. Harz and Power [1967]2 W.L.R. 297.

45. Section 27(1) Ibid, See also Sections 218 and 314 C.P.A., Sections 157(1) 161(2), 187(2) C.P.A.

46. (1947) 12 W.A.C.A. 1.

47. Nokes Ibid P. 298.

48. Nwadialo, Modern Nigerian Law of Evidence P. 117.

49. Obosi v. The State [1965]N.M.L.R. 119.

50. [1968]N.M.L.R. 261, See also Uche and Another v. The Queen [1964]1 All N.L.R. 195.

51. Section 27(2) Ibid.

52. (1931)10 N.L.R. 33.

53. Afolabi v. Police (1961) All N.L.R. 654. Held here that, as the alleged confession was neither direct nor positive as to the items contained in the charges, it was not admissibl

54. This Common Law principle which is also fully applicable in Nigeria, that once there is any doubt as to an item of evidence, such a doubt be resolved in favour of the accused person appears to create a lot of hardship to the victim.

54(a) Section 27(2).

55 [1966]1 All N.L.R., 47, Asake v. The State [1968]2 All N.L.R. 198, R. v. Baldry (Supra), Callis v. Gunn [1964]3 ..E.L. 677, See also Section 139(1) Ibid, Dawa v. State (1980) 8-1 S.C. 236.

56. [1961]Crim. L.R. 397.

57. Sunday Kennedy Alias Sunday Abete and Others v. The State (unreported) Appeal No. FCA/K/5/84 - P.2, See also Section 27 (3) Ibid.

58. Section 28 Ibid.

59. Aguda Ibid Para 4-34, P. 62.

60. See the case of R. v. Middleton /1974/2 A.E. 1190, /1975/Q.B. 191, See also Queen v. Igwe (1960)5 FSC 55 (that the issue of voluntariness or otherwise of a confession must be decided upon by a trial judge before its admission). See also Saidu v. State (1982)4 S.C. 41, Ekpo v. State (1982)6 S.C. 22.

61. (1961) L.L.R.N.L.R. 47, See also R. v. Nyinya Kwaghbo, (1962) N.N.L.R. 4.

62. Ebhoridon and Others v. The Queen (1963)1 All N.L.R. 365.

63. See Aguda Ibid Para 4-36 P. 63, See also the case of R. v. Thompson (1783)1 Leach 291.

64. Ibid, see the case of R. v. Coley (1868) 10 Cox C.C. 536.

65. (1950)13 W.A.C.A. 39, see also Ajege and Another (1935)2 W.A.C.A. 353.

66. R. v. Bodom (1935)2 W.A.C.A. 390.

67. (1961)1 All N.L.R. 330, see also R. v. Smith 43 Crim. App. Rep. 121.

68. (1947)12 W.A.C.A. 139.

69. See Phipson on Evidence (12th Ed.) Para 805. See Archbold par 1381, p. 679.

70. Juliah Ode v. The State /1974/1 All N.L.R. (Pt. 2) 411.

71. Supra.

72. Supra.

73. R. v. Wilson and Anor. /1967/2 Q.B. 406, However, a person who is a likely witness to the prosecution, does not make him in authority, Igbinoria v. State (1981)2 S.C. 5.

74. Samuel Akinrolabu v. The State /1971/1 N.M.L.R. 25.

75. (1963)48 C.A.R. 117.

76. R. v. Upchurch (1836)1 Mood C.C. 465. See also R. v. Moore (1852)5 Cox C.C. 555.

77. Section 30 Ibid.

78. Nwadialo Ibid P. 123, see the case of R. v. Smith 43 Crim. App. Rep. 121, followed in Queen v. Haske (1961)1 All N.L.R. 330.

79. Queen v. Haske (supra).

80. (1939) 5 W.A.C.A. 130.

81. Section 31 Ibid.

82. Section 29(2) Criminal Code, Cap. 42, the Laws of the Federation of Nigeria and Lagos 1958.

83. Section 52 Penal Code Law (Cap. 89 Laws of Northern Nigeria 1963). Also see Section 51 Penal Code Law Ibid, in respect of unsound mind. See also the case of Saidu v. The State (1982)4 S.C. 41. See Ofori-Amankwah, pp. 182-216, Chukkol, Defences to Criminal Liability in Nigeria Law pp. 52-56 and 30-32.

84. /1964/1 All N.L.R. 233.

85. R. v. Isequilla /1957/1 All E.R. 77.
85(a) (1982)4 S.C. 41.

86. Section 32 Ibid.

87. Eraruwoni Otedia (1959) W.R.N.L.R. 43, See also R. v. Knight (1946) 31 C.A.R. 52, See also Section 47 of the Act.

88. See Aguda Para 4-45 P. 67.

89. (1943) 17 N.L.R. 24.

90. See further Section 47 Ibid, and Aguda Para 7-07.

91. Section 29 Ibid.

92. R. v. Warwickshall (1783)1 Leach 263; R. v. Mosey (1784) 1 Leach 265N, R. v. Barker /1941/2 K.B. 381.

93. See Kuruma v. The Queen /1955/A.C. 197, Sadau And Another v. The State (1968) N.M.L.R. 208. These cases have been greatly examined and criticised on our discussion on illegally obtained evidence.

94. See Aguda Para 4-67, See also case of Customs and Excise Commissioners v. Hare and Power /1967/1 A.C. 760, 817.

95. Queen v. Obigwa (1962)1 All N.L.R. 651. See Goni, Digest of Supreme Court Cases (1956-84) Vol.2 p. 259.

96. (1976) 12 S.C. 63, See also Edet Obosi v. The State (1965) N.M.L.R. 119, Paul Onochie and 7 Others v. The Republic (1966) N.M.L.R. 307, and Jimoh Yesufu v. The Republic (1975) 6 S.C. 167 Note, Position similar in Moslem Law, See Wonanaka v. Sokoto N.A. (1956)1 F.S.C. 29.

97. Obosi v. The State, (1965) N.M.L.R. 119. See also Kopa v. State /1971/1 All N.L.R. 150, Udedibia v. The State (1976) 11 S.C. 133.

98. See D.P.P. v. Pinglin /1957/3 All E.R. 175.

99. Ikpasa v. State (1981)9 S.C.7, See also Queen v. Igwe (1960) 5 F.S.C. 55.

100. See Queen v. Itule /1961/1 All N.L.R. 462.

101. Jimoh Yesufu v. The State (1976)6 S.C. 167. See also Ekpo v. State (1982)6 S.C. 22. Note: The determination of voluntariness of confession is usually done by the Court through "trial within trial". See Gani Fawehinmi, p. 248.

102. See Queen v. Itule [1961] All N.L.R. 462.

103. See R. v. Ekologba and Others (1934)17 N.L.R. 24, See also Section 47, R. v. Otedia (Supra).

104. See Section D7(3), See R. v. Bodon (1935)2 W.A.C.A. 390.

105. Commissioner of Police v. Dogbe (1938) 4 W.A.C.A. 189, See also Idisa v. Commissioner of Police (1961) W.N.L.R. 81.

106. R. v. Ajani and Others (1936) 3 W.A.C.A. 3.

107. R. v. Akatia (1946)12 W.A.C.A. 98.

108. R. v. Ume and Others (1942)8 W.A.C.A. 123, See also R. v. Alli 12 W.A.C.A. 432.

109. Queen v. Zakwakwa of Yono (1960)5 F.S.C. 12, See also Jegah v. The State (1971) N.M.L.R. 134.

110. Zemba Shivero v. The State (1976)3 S.C. 63.

111. Queen v. Maske (1961)1 All N.L.R. 330.

112. Queen v. Okoro (1960)5 F.S.C. 134.

113. Saidu v. State (1982)4 S.C. 41 at 69.

114. See Home Office Circular No. 31/1964, Aguda Para 4-46 P. 67.

115. See Nwadialo P. 127, See R. v. Voision [1918] K.B. 531 at 539 as Per Lawrence J.

116. Rule 1, See the case of R. v. Straffen [1952]2. Q.B.911. (Held here that "in Custody" meant Custody of the Police and that it did not refer to persons in Broadmoor".)

117. R. v. Buchan, [1964] W.L.R. 365

118. Rule 2.

119. See Aguda Para 4-48 P. 68.

120. R. v. Osborne [1973] Q.B. 678, [1973] All E.R. 649.

121. Rule 3, See Nwadialo Ibid.

122. Rule 5, See R. v. Omorewure Sapele and another (1957)2 F.S.C. 24.

123. Rule 6, See the Case of R. v. Nichols (1967) 51 C.A.R. 233 (Held here that a store Manager is not a professional investigator and does not therefore come under this provision.

124. See R. v. Bass [1953] 1 Q.B. 680.

125. See Nwodiolo P. 128, See the case of R. Voisin (Supra).

126. R. v. Prager [1972] 1 W.L.R. 260.

127. (1976)2 S.C. 169.

128. Bangara v. The State [1965] All N.L.R. 59.

129. (1943)9 W.A.C.A. 73 at 74.

130. (1934)2 W.A.C.A. 118.

131. See John Eyibuoruwan and Others v. C.O.P. (1961). W.N.L.R. 257 at P. 259.

132. Ugama v. The Queen (1959)4 F.S.C. 330.

133. R. v. Barimah (1945) 11 W.A.C.A. 49.

134. R. v. Fatumani (1950)12 W.A.C.A. 39, See also R. v. Nweke (1959)4 F.S.C. 225, and Queen v. Haske (1961)1 All N.L.R. 330.

134(a) See R. V. Omorowuro Sapele and another (Supra). Because there will be a higher probability of fairness to all parties concerned. It is common knowledge that junior Police Officers who take down confessional statements often temper with such statements either against or in the interest of the accused person.

135. Nwigboke v. Queen (1959)4 F.S.C. 101.

136. Oke v. The Republic (1968) N.M.L.R. 69. See also Nwigboke and Others v. Queen (Supra).

137. Section 373(1) Criminal Procedure Code Law in the Northern States of Nigeria 1960.

138. Rule 1.

139. Rule 9 Criminal Procedure (Statements to Police Officers) Rules, 1960.

140. See Rule 7(1).

141. See Rule 7(2), See also the case of R. v. Ajose (Supra) though decided before the Northern Region Rules were made, the principle established in the case explains the difficulty taken care of by Section 7(1) and (2) of the Northern Region Rules in respect of illiterates.

142. What is important is that caution should be exercised by Nigerian Courts as warned by W.A.C.A. in R. v. Ugwuogo and Others (Supra) in applying not only the Judges Rules but also the Northern Region Rules. Experience has also shown that our Police Officers especially those involved in investigating crimes can not be very much trusted.

143. See Section 126 Ibid, See Peter Uche and Another v. Queen. /1964/ All N.L.R. 195, The State v. Ibwon Jik and Others, (1968) N.M.L.R. 19.

144. Audu Tenko Juwa v. The State (1969) N.M.L.R. 168.

145. Dalba Ghuma v. The State (1965) N.M.L.R. 162.

146. Section 27.

CHAPTER FIVE

OPINIONS OF THIRD PERSONS

1. INTRODUCTION

Evidence of opinion falls within the scope of relevance and admissibility of facts; for the existence of an opinion may be a fact, and opinions may establish a fact. Professor Cross[1] holds the view that a witness may not give his opinion on matters which the court considers call for special skill or knowledge of an expert unless he is an expert in such matters, and in that situation, he may not give his opinion on other matters if the facts upon which it is based can be stated without reference to it in a manner equally conducive to the ascertainment of the truth.

It can, therefore, be submitted that, the opinion of a witness, whether he is a party himself or a third person, is, as a general rule, irrelevant and inadmissible. Section 65 of the Evidence Act[2] provides as follows:

> "The fact that any person is of opinion that a fact in issue, or relevant to the issue, does or does not exist is irrelevant to the existence of such fact except as provided in Section 56 to 64 of this Ordinance".

It must be observed here that the proviso to this provision refers to the exceptions to the general rule which mainly constitute the discussion in this chapter of the thesis.

The section does not appear to define the word "opinion" in detail and, therefore, we shall turn to what some learned authors on the subject have had to say about the word. Professor Cross says:[3]

> "In the law of evidence "opinion" means any inference from observed facts, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them."

Nwadialo on his own part is brief on the issue, but very meaningful. He states:[4]

> "In essence, an 'opinion' is a sort of a conclusion. If the opinion is not based on any evidence, it is logically worthless. If it is based on evidence, then it is a usurpation of the function of the court for it is for the court and not for a witness to draw conclusions from facts proved".

From the provision of Section 65 of the Evidence Act and the opinions expressed by the above learned authors, it is submitted that, generally the opinion of a witness is irrelevant and inadmissible.[5] As observed by Nwadialo, the drawing of inferences is the function of the court, while it is the business of the witness to state facts perceived by him. However, the law recognises that as far as matters calling for Special Knowledge or Skill are concerned, the courts are not necessarily properly equipped to draw the right inferences from such facts testified to by witnesses. In that situation, a witness is allowed to state his opinion in respect of such matters, provided he is an expert in them.

It is submitted that, though the distinction between fact and inference is clear enough, there are still some borderline cases. Therefore, the statement that a car was being driven on the right side of the road is plainly one of fact, while the assertion that a particular piece of driving was negligent is also clearly a matter of inference from observed facts.[6]

From the foregoing discussion, one can rightly state that, evidence involving identity of persons, things, speed, temperature, and handwriting is, however inseparably made up of fact and inference. Allowance is, therefore, made by the law in respect of these borderline cases by allowing witnesses to state their opinion without calling for Special Knowledge.

Two broad spheres of evidence of opinion can be identified. The first category has to do with matters that require specialised skill or knowledge. The questions that will appear to arise in this category are whether the subject to be inquired into does raise issues calling for expertise and also whether the supposed witness is a qualified expert. It is submitted that under this category, the testimony of non-experts will be excluded. The second category of opinion evidence is opinion of non-experts. This generally has to do with opinions of certain persons in respect of general custom or right, or with certain usages, tenets or as to the existence of the relationship of one person to another. Evidence from this source is generally relevant and admissible in law.

The court, however is usually placed in a position to receive evidence from any witness to determine the matter before it. It must, however, be cautioned that if witnesses are freely allowed to state their opinions concerning a particular issue before the court, there is the danger that the court will be unduly influenced. Professor Cross gave the illustration in support of this point:

> "If a cardinal of the Roman Catholic Church is testifying before a jury mainly composed of Catholics, and states that, in his opinion, the defendant was driving negligently, it can hardly be supposed that the verdict would be other than for the plaintiff".[7]

The above quotation may appear extreme, but it is much more likely

that the court or jury in that circumstance can hardly apply strictly the test of relevance as a basis of admissibility, and the whole purpose of the test for the administration of justice will be defeated.

It is submitted that even where the court is receiving evidence from an expert, the witness should be cautioned against stating his opinion on an ultimate issue, such as reasonableness of a covenant in restraint of trade[8], or the construction of a document.

Finally, evidence of witnesses generally must be treated by our Courts with much caution. The court, therefore, occupies that Supreme position to determine evidence of witnesses, as to their final relevance and admissibility.

Under the exceptions to the general rule, we have just discussed, opinions of experts constitute what is normally referred to as "expert evidence". The Courts as stated by Professor Cross, have been accustomed to act on the opinion of experts from early times. As long ago as 1553 SAUNDERS, J., said:

> "If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation".[9]

According to the above observation, the opinion of an expert then will appear to bind the court absolutely. It is submitted that the early expert was often a member of the jury, and there was no question of his opinion being disregarded by that body.[10]

However, expert witnesses began to play their modern role in the eighteenth century. In FOLKES v. CHADD,[11] Lord Mansfield

had this to say about Mr. Smeaton, a famous engineer, who was allowed to testify as to his opinion on whether or not an embankment had caused the silting of a habour:

> "Mr. Smeaton understands the construction of harbours, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called..... Handwriting is proved everyday by opinion; and for false evidence on such questions a man may be indicted for perjury."

Expert evidence is admissible in Nigeria under Section 56(1) of the Evidence Act.[12] That Section provides:

> "When the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art, or as to the identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, native law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are relevant fact".

Subsection 2 states:

> "Such persons are called experts".

One may then say that a simplified definition of an "expert" within the context of the Evidence Act may be a person who is specially skilled in the subject upon which he is required to express opinion for purposes of evidence. Such subjects may include: foreign law, native law or custom, science, art, handwriting or finger impression. Expert opinion therefore is only necessary where the expert can furnish the court with scientific or other information of a technical nature that is likely to be outside the experience and knowledge of the judge of facts.[13] Therefore, for example, the facts upon which a medical expert bases his opinion that the death of the deceased was self-inflicted, or that a person is insane, or was drunk at a relevant time, must be given to the court.[14] It must be noted however that, in a situation where there are conflicting opinions of two experts,

the court may prefer the opinion of one to the other,[15] and in that situation the court is not duty bound to give reasons for being more impressed with the evidence of one expert than he is with another expert.[16]

2. WHO IS AN EXPERT?

The important question here is: who may be classified as an expert? It is submitted that the proper legal position is that before a court of law or tribunal declares a person as an "expert" a specific finding of facts must be made by the Judge which must include the fact that the person in question is sufficiently skilled in the area, subject on which he is suppose to testify.[17]

It is generally recognised that a person may become an expert in a given field either through a course of formal instructions or by experience. It is therefore submitted that a string of paper qualification and institutions of learning appearing after a person's name ought not to be the sole criteria in pronouncing a person as an expert in any field of study. If this attitude is adopted, it will serve our courts the fair application of the test of relevance as a basis for / admissibility of evidence from this area.

Dr. Aguda, the prominent jurist on Nigerian Law of Evidence has described an expert in the following words:

> "A person can be regarded as an expert in a particular field even though he did not acquire his knowledge after a systematic tutoring in the particular field, provided that he has had, in the opinion of the court, sufficient practice in the particular field of knowledge as professional or as amateur, to make his opinion reliable".[18]

In the case of MICHAEL JOHN AOUAD AND ANOTHER v. INSPECTOR-GENERAL OF POLICE,[19] where the appellants were being tried for an offence under Section 427 of the Criminal Code dealing with

receiving stolen property or fraudulently obtained, a witness gave evidence that he was an inspector of mines appointed under the Minerals Act[20] and that he made certain tests in order to ascertain the nature of the Ores in question. He was not cross-examined as to his personal qualifications, as to his ability to make these tests or as to the accuracy of the conclusions he drew therefrom. He was put forward by the prosecution as an expert and he was accepted as such by the Magistrate. It was held that the nature and duties of the witness's public office and the technical or scientific tests he made, which were not challenged, constituted prima facie evidence of his qualification to be admitted as an expert witness.

It must, however, be observed at this point that most legal Practitioners who have had extended experience in dealing with experts have very often cautioned against positive or persuasive first impression based on what they call "academic credentials"[21]. It is, therefore submitted that for the proper application of the test of relevance as a basis for admissibility in our courts, each witness called as an expert must be systematically tested and proved as an expert. Even though the first test should be of educational background, it does not imply that a person must possess a great string of college certificates to qualify him an expert. Some of the best qualified people lack formal education.

In the case of R. v. SILVERLOCK[22], a Solicitor was held to be an expert in handwriting though never had acquired knowledge of handwriting as an amateur. Lord Russell in the case, in setting out the type of test that will be necessary to determine whether a witness is an expert, stated:

> "It is true that the witness who is called upon to give evidence founded upon a comparison of handwriting must be peritus; he must be skilled in doing so; but one cannot say that, he must have been peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled?, has he an adequate knowledge? ..... there is no decision that evidence of a man who is skilled in comparing handwriting and who has formed a reliable opinion from passed experience should be excluded because his experience has not be gained in the way of his business".[23]

However, it is submitted that generally there must be enough material before the court to warrant treating a witness as an expert and the reception of his evidence as relevant.[24] Such requisite materials which the court may need for this purpose would include such facts as the Credentials of the witness, his experience, training and the nature and duty of his office as far as these relate to the subject of his evidence.[25]

After the discussion so far on expert opinion, it is necessary at this point to consider, what is often regarded as one of the controversial aspect of the topic. That has to do with the role or function of evidence of an expert in the administration of justice.

3. FUNCTIONS OF THE EXPERT WITNESS

The functions of expert witnesses were clearly stated by Lord President Cooper in DAVIE v. EDINBURGH MAGISTRATES[26], when he said:

> "Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

It is, therefore, submitted that the opinion of an expert, no matter how eminent the expert, is not binding on the Judge or Court. That means, no matter how renowned an individual is in

a particular field, when he gives testimony on that particular field, especially where such testimony conflicts with Common sense, the court will treat his evidence like evidence of any other witness. When it comes to arriving at the final conclusion the court may even disregard his opinion altogether.[27] In MGBOKO v. STATE,[28] the Supreme Court of Nigeria stated that the evidence of a medical Practitioner is not binding on a trial Judge and he coul thus pick whichever part of the testimony of the medical Practitio that the justice of the case requires.

Believing the evidence of an expert witness is a matter for the court and if the Judge has some doubts about the evidence of expert, he may decide not to act on it. In effect, it is the Judg that will finally determine relevance as a basis for admissibility of any piece of evidence by an expert, as well as the weight to be attached thereto. However, where there is expert evidence, which is unchallenged and uncontradicted, the court should accept such expert evidence and act on it.[29]

It is submitted with respect that the fact that expert evidenc is unchallenged and uncontradicted should not generally be binding on the Judge. This is especially so in criminal cases where such expert evidence may be highly technical and counsel on the other side is not sufficiently equipped to challenge or contradict such expert evidence. It is the law, as stated by Lord Cooper,[30] that the duty of an expert is to furnish the Judge or jury with the necessary scientific criteria to test the accuracy of their conclusions so as to enable the Judge or jury to form their own independent opinio by the application of these criteria to the facts proved in evidence Therefore, the Judge still has the discretion whether or not to ad and act on expert evidence, whether such evidence has been contradic ted or not.

It is important to note however that for both the Court and Counsel to effectively ultilize an expert evidence, they must

themselves have some reasonable knowledge of the subject matter of the expert evidence. This knowledge can be achieved by engaging into some stuly or investigation into the field of skill or Specialization of the expert. This is usually not an easy task for the Judge or Counsel, but it is important if the Judge or Counsel must sufficiently make use of expert evidence.

It must further be noted that, even when the court is receiving expert evidence, the court generally will not allow an expert to State his opinion on an ultimate issue[31], though it is sometimes difficult to keep to this rule. In R. v. MASON[32], the defence to a charge of murder was that the deceased had committed suicide, and a doctor who gave evidence was asked whether it was his opinion that the fatal wound had been inflicted by some-one other than the deceased. The court of Criminal Appeal held that his answer was inadmissible as an opinion based upon an assumed State of facts.

It is submitted that the admissibility of evidence on an ultimate issue by an expert will have to be determined by the Court and each case has to be treated on its own facts and circumstances. The Courts have even admitted evidence which came very near to infringing the rule[33] that an expert must not be allowed to state his opinion on an ultimate issue.

Furthermore it should be noted that where a court is being persuaded to accept an opinion expressed in a textbook of a well known expert, who unfortunately is not called as a witness, the proper thing to do is to extract an opinion from any other expert in the same field who is called as a witness as to the reputation of the textbook. If this is confirmed, it properly becomes part of the evidence in the case and may be considered as such by the

Court.[34] The opinions of the writers on Nigerian law, which are often cited for persuasive effect only because they are not Nigerian judicial decisions or Statutory law, will appear not to come within the above proposition of the law.

We shall at this point isolate some issues contained in Section 56 and other Sections of the Evidence Act in respect of expert opinion and briefly examine them.

OPINIONS OF EXPERTS ON MATTERS OF SCIENCE OR ART:

Under Section 56 of the Evidence Act, opinions of experts on science and art are admissible. The term "Science and art", it is submitted, includes not only the well established disciplines and branches of almost any matter which is the subject of special knowledge.[35] Where a man of science or art is to testify as an expert, he must show evidence of Special Skill in the particular branch of knowledge in which he is called upon to testify. In YAU TITTIDABLE v. SOKOTO NATIVE AUTHORITY[36], the appellant was convicted of culpable homicide on the basis of the testimony of an unnamed 'dispenser' that death resulted from the appellant's blow to the deceased. The High Court reversed the conviction, holding that this testimony was inadmissible as opinion evidence since the dispenser was not shown to be specially skilled in determining causes of death. In the case, the Court stressed the point that even if the evidence had established the dispenser as an expert, his testimony would have been entitled to very little weight since he had not revealed the factual basis for his opinion.

The decision of the High Court in the above case, it is submitted appears to be in line with most of the principles we have been trying to stress on expert evidence, especially the

principle that the Court has the ultimate responsibility to determine, inter alia, who is an expert, the whether or not to admit the evidence of an expert, and even when such evidence is admitted, the weight to be attached to it. This role, it is often cautioned must be exercised with great care if justice must be done to all parties concern. An expert when testifying, it must be noted should confined his opinion to the matter in which he is specially skilled.[37] In R. v. KUSMACK, Porter J. observed as follows:

> "The subject on which the witness is testifying must be one upon which competency to form an opinion can only be acquired by a course of Special Stuly or experience. It is upon such a subject and such subject only that the testimony is admissible".

OPINION AS TO FOREIGN LAW:

Section 57 of the Evidence Act provides for opinion as to foreign law. The determination of foreign law by the court under this Section is a question of fact, usually done by means of evidence by expert on such foreign law. An expert in foreign law, according to the section need, not be one qualified to practice in the Courts of that country, but it will appear more weight could be placed on the opinion of an expert who has practiced in that foreign country or one who is qualified but has not practiced that law.[39]

It will appear that, since the Evidence Act does not define "foreign law" the laws of other countries will come within this category. That will appear to be the broad understanding of what is foreign law. What may not be clear is whether some Nigerian legal Practitioners who have been called to the English Bar can be treated as experts in English law.[40]

However, as it has been the attitude of our courts to rely on precedents, a court in Nigeria will assume and rely on any foreign law if no evidence is tendered to the contrary before it.[41]

Any person, whose position has made him conversant and experienced with that particular branch of the foreign law can be treated as an expert in that foreign law.[42]

It must be noted that an expert witness in foreign law may produce to the court the books which he relies on to constitute works of authority upon the foreign law being investigated. The Court will then construed such books after receiving all necessary explanations from the expert.[43] However, only opinions of that aspect of foreign law that is positively established and from an expert in that particular aspect of the foreign law, may be held relevant and admissible in evidence.

OPINIONS AS TO NATIVE LAW AND CUSTOM

Section 58 of the Evidence Act,[44] provides for opinion as to Native law and Custom. The provision of the above Section is in addition to Section 56 of the Act relating to the Proof of Customary law by experts in such law. We do not intend to concern ourselves here with the application of Customary law or with any detail discussion on Customary law. What we intend to briefly examine is Customary law as a matter of evidence in respect of persons considered as experts in that law.

Native law and Custom as it has long been established, are matters of evidence to be decided on the facts presented before the court in each particular case, unless it is such notoriety and has been so frequently followed by the Courts that judicial notice would be taken of it without evidence required in proof.[45]

According to the Provisions of Section 58 of the Act, any book or manuscript recognised as a legal authority on Customary law is relevant. In ADESEYE v. TIWO,[46] the Federal Supreme Court treated laws and Customs of the Yoruba people by Ajisafe and the laws and Customs of Egba land by Folasin as authorititos.

It must, however, be noted that for a book or manuscript to be relevant and admissible under this provision, two conditions must be fulfilled. First of all the book or manuscript must be shown to be one recognised by the natives as a legal authority and secondly the book or manuscript must be tendered.[47]

It is submitted, with respect, that the requirement of recognition by the natives as a legal authority, must be treated with great caution to suit strictly our Nigerian situation and in respect of that particular community, taking into consideration their level of understanding.

It must be noted that Sections 56 and 58 of the Evidence Act merely mention inter-alia of 'Native law and Custom' and it will, therefore, appear that for this purpose, Moslem law is regarded as Customary law, which also must be proved by evidence.[48]

It is submitted that in Customary and Area Courts and Sharia Courts respectively, presided over by persons indigenous to the Area of jurisdiction of the Court and who are learned in those laws, the requirement that Customary and Moslem law must be proved in evidence will not apply to trials in these courts.[49] In PAM GYANG v. NYAM GYANG,[50] Bate J. stated:

> "An Area Court, such as a trial court, is presumed to know the law applicable in a civil case ..... (and) the Native law Custom prevailing in its area of jurisdiction ..... unless and until the contrary is shown".

It will appear however that if the Customary Court before which a rule of Customary law comes for determination is presided over by a person not specially learned in that law, then evidence on the point may be expected to be given.

Opinions as to Native law and Custom, must be treated with great caution for purposes of admissibility in our courts. The provisions of the Evidence Act that deal with these, are not very adequate and therefore the Courts have to apply their noble rules to determine the issues.

Finally in respect of opinions of experts, Section 59 of the Act provides:

> "Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant".

This Section, it is submitted, will appear different from the rest of the Sections we have examined on this topic. The Section, extends to admitting not only relevant expert opinion but also irrelevant facts bearing upon such relevant opinion evidence. The Court, therefore, has a duty here to determine not only the relevance of the opinion evidence, but also the relevance of the irrelevant facts. However, such irrelevant facts which are made relevant by opinions of experts, may like such opinions not be binding on the Court.

4. NON-EXPERTS OPINIONS

When, as stated by Professor Cross, quoting an American Judge,[51] "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form

it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury. The British law Reform Committee expressed the matter thus:

> "Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of facts, witnesses would find themselves unable to communicate to the Judge in an accurate impression of the events they were seeking to describe".[52]

Common instances in which non-expert opinion evidence is admissible include; age, speed, handwriting weather and identity in general. It must be noted that opinion of non-experts should be treated with great care by the court in the administration of justice. There appear a greater duty in the court to determine opinions of non-experts than opinions of experts. However, this observation will be more elaborated upon later on. We shall now examine some of those instances stated above, when non-expert opinion is relevant and admissible in evidence as provided by the Nigerian Evidence Act.

OPINION AS TO HANDWRITING

Handwriting may be proved by the experts and non-experts alike. The non-expert witness in this regard if he is familiar with another person's handwriting, he may be asked whether in his opinion, a disputed document was written by that person in accordance with Section 60 of the Evidence Act which provides as following:[53]

> (1) "When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

> (2) .. person is said to be acquanted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him".

This Section is too wide and therefore, gives the Court also wide powers to determine the relevance of this type of evidence. The Court has to exercise much care and treat each case according to the facts and circumstances. Where the Section has to be applied, a Statement by the person called as a witness that he is acquainted with another's handwriting is generally sufficient in his examination-in-Chief, but the opponent must be given the opportunity to cross-examine as to means and extent of such knowledge. Evidence of opinions of non-experts in regard to handwriting will therefore, be relevent and admissible if to reject it, will frustrate the course of justice.

In S.L.J.I L.W.L v. COMMISSIONER OF POLICE[54], the trial Magistrate accepted the evidence of opinion of a witness who was not an expert but who stated that he was conversant with the appellant's signature as they had worked together, as proof that the appellant was the author of certain signatures in dispute. It was held on appeal that the trial Magistrate was right in law in accepting the evidence of the witness.

However, it must be noted that evidence of non-experts under Section 60 of the Act is distinguishable from evidence of opinion of experts under Section 56(1) of the Act. As noted under Section 56(1), a Police Officer could be regarded as an expert witness in the case of a disputed handwriting, and "handwriting" here is held to include "typewriting".[55]

It is submitted that, apart from the above stated ways or methods of proving a disputed handwriting, the court should compare

in court the disputed writing with an accepted writing of the accused.[56] This will afford the court the opportunity to determine each case on its own facts.

In QUEEN v. WILCOX,[57] the appellant was convicted of uttering a forged cheque. Expert evidence was not called to prove the forgery, but the trial judge in open court compared the signature on the cheque with the true signature of the purported drawer and found it to be a forgery. It was contended on appeal on behalf of the appellant that the trial Judge was wrong by personally comparing the signature. Rejecting this submission, the Federal Supreme Court held that a trial Judge, sitting without a jury in a criminal case involving writing, is entitled without the assistanc of expert evidence, to personally compare the writing in question with other writings which are acknowledged to be genuine, and to find from such comparison whether the writing is or is not a forgery. However, care must be taken to make sure that the writing in question is not used to compare with any writing which does not purport either on the face of it or in some other way to have been written by the person in question.

It has been held that the court may not, however, rightly discard the evidence of handwriting expert infavour of its own comparison.[58] However, in GEORGEY OZIGBO v. COMMISSIONER OF POLICE,[59] the evidence of two experts as to the authority of a piece of handwriting was diametrically opposed. The trial Judge was, however, "more impressed" by the evidence of one of them. It was held that in order to satisfy himself that his impression was correct, he might compare the disputed writing and accept one by virtue of Section 107 of the Act.

It is, therefore, submitted that, like opinions of experts, opinions of non experts or ordinary witnesses are not binding on

the Court.[60] In any case, it will appear the chances of the court accepting and acting on opinions of non-experts or ordinary witnesses are more remote than the position with opinions of experts. There is, however, no clear-cut rule, so it will all depends on each particular case, and the attitude of the court.

GENERAL CUSTOM OR RIGHT

The law in respect of this, is provided for in Section 61 of the Evidence Act as follows:[61]

> (1) "When the Court has to form an opinion as to the existence of any general Custom or right, the opinions, as to the existence of such Custom or right, of persons who would be likely to know of its existence if it existed are relevant.
>
> (2) The expression 'general custom or right' includes customs or rights common to any considerable class of persons".

The Section deals with 'general custom' as well as 'general right'. A 'Custom', however, is defined by Section 2(1) of the Evidence Act to mean "a rule which, in a particular district, has, from long usage, obtained the force of law". We do not intend to go into discussion on custom here because the relevant discussion on custom had been under Section 58 of the Act.

It must, however, be noted that Section 61 of the Act allows the opinion of any person to be admissible in proof of a general custom or a general right if such a person is one who would likely know of its existence. In that circumstance, such a person need not be an inhabitant of the area concerned. The Court will appear satisfied if sufficient proof is shown that the person is likely to know of the alleged general custom or general right.

The Provision of Section 61 of the Act will appear to cover a wider ground, it is submitted, than Section 58 of the Act. Great Caution should be exercised by the Court in determining

opinion evidence under Section 61, especially as opinion evidence here is that of non-experts. Unfortunately, the researcher has not come across any judicial pronouncements based on the provisions of Section 61.

OPINIONS AS TO USAGES, TENETS, WHEN RELEVANT

Section 62[62] of the Evidence Act provides:

"When the Court has to form an opinion as to -

(a) The usages and tenets of any body of men or family; or

(b) The Constitution and government of any religious or charitable foundation; or

(c) The meaning of words or terms used in particular districts or by particular classes of people;

the opinions of persons having special means of knowledge thereon, are relevant facts".

The Section broadly covers areas when evidence of opinions of non-experts or ordinary witnesses can be admissible. Under the Section, it will appear a person who deals either personally or through an agent in a particular market, such a person will be bound by the usages of that market.[63] The usages, however must be those generally known by the buyers and sellers of that market. It is, therefore, submitted that such usages, unlike customs, need not to have been long established but that the usages must be reasonably certained and with some presumed elements of a contract.[64]

Dr. Aguda[65] submits, however, that a written or oral agreement cannot be contradicted by evidence of a usage but that such evidence may be admitted to explain the meaning of peculiar or technical terms, or to show that a party has knowledge of the subject-matter of the usage.

Any-way whatever the circumstances, opinions of non-experts in respect of usages and other instances stated in the Section may be relevant and admissible. The expert and the non-expert

alike must show to the Court that, he is a person with Special means of knowledge of any of or all those various matters mentioned in Section 62 of the Act.

Finally, we do not intend to go into any detailed discussion of the Section as what is relevant has been highlighted. It must be observed, however, that the researcher has not been able to lay hands on any Nigerian case that has made use of this provision. However, it regrettably sometimes happens that our courts make judicial pronouncements on issues to which the Evidence Act is applicable, without reference to such relevant provisions of the Act.[66] It is submitted that our Courts should make maximum use of Act rather than fall back so often to Common law.

OPINION ON RELATIONSHIP

Section 63 of the Evidence Act provides:

> "When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by Conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has Special means of knowledge on the subject, is a relevant fact:
>
> Provided that such opinion shall not be sufficient to prove a marriage in proceedings for a divorce or in a petition for damages against an adulterer or in a prosecution for bigamy".

Dr. Aguda,[67] the learned Nigerian jurist, submits that the above Section should be restrictively interpreted, in order that evidence of the sort of person mentioned in the Section should be sufficient to prove that a person is the child of another or that a woman is the wife of a particular man in proceedings other than proceedings for a divorce, or in a petition for damages against an adulterer, or in a prosecution for bigamy.

With the greatest respect, it is submitted that the proviso to the Section needs to be given its broad interpretation. There is need for some additional evidence or evidence stronger than the type required by the Section.[68]

The Court, however, has the power to determine the admissibility of evidence under the Section and the weight to be attached to it. It is, therefore, submitted that great caution should be exercised by the Court, especially as it is provided under the Section that the witness may, but need not be a member of the family provided he can establish before the Court his Special means of knowledge of the matter in which he is giving opinion evidence. Each case should be treated on its own facts and circumstances.

MISCELLANEOUS CASES

In addition to the cases already stated above where, expert and non-expert opinions are admissible under the Evidence Act, there is a miscellany of other matters in proof of which evidence of opinions of non-experts may be given. Evidence of opinion under these circumstances is admissible under the English Common Law and, therefore, by virtue of Section 5(a) of the Act, also admissible in Nigeria.[69]

We shall now briefly examine some of these matters non-expert opinion is admissible under the Common law and by virtue of Section 5(a) of the Evidence Act also admissible in Nigeria.

OPINIONS AS TO IDENTITY

Identification usually may take various forms, which will include, the comparison of finger-prints and other physical phenomena, for example, appearance of the person, or photograph, as well as other factors. It is, therefore, submitted that evidence

of identity is often regarded as the expression of an opinion that a person seen at one time resembles a person seen at another time. Such evidence, however, may be based on general resemblance. In line with the above submission, it will appear that an opinion may be formed by comparison between the witness's memory of a person previously seen and the actual appearance of one person seen later, whether casually or when paraded for identification with others, or between memory and a photograph duly proved at the trial.[70]

Dr. Aguda[71] submits that the practice in Nigeria is usually that when the identification of an accused person is being disputed, what the Police should do is to conduct identification parades. In such identification parade, a number of persons, including the suspect, usually persons of the same height, colour and manner of dressing are lined up and the witness is asked to identify the suspect among them.

It must be noted that under the above circumstances, it is totally improper to show the witness a photograph of a person to be identified shortly before the identification.[72] However, the situation is different when the Police are seeking information as to a Criminal;[73] so that a witness can be shown some photographs including that of the accused person before the identification parade.[74] But if evidence is given on this subjects, it is desirable to avoid the suggestion that the accused's photograph was available because of his criminal record, though the Judge has a discretion whether he should warn the jury where a jury system exist or himself, not to be prejudiced by the fact that the accused's photograph was in the possession of the Police.[75]

It should further be noted that if it is not clear on evidence as to what stage of the investigation a witness was shown the photograph, the propriety of an identification parade could not be impugned unless it is clear that the photograph was shown to him in order to enable him to identify the suspect at a subsequent identification parade. In SUNDAY OLUGA v. THE STATE,[76] there was no evidence as to what stage of the investigation to the charges a witness was shown the photographs of suspects, whether it was before or after the identification parade. Coker J.S.C. delivering the judgment of the Supreme Court, said:

> "Unless it was clear that the photographs were shown to the witness in order to enable him to identify the suspects at a subsequent identification parade, we cannot see how the propriety of the identification parade in the circumstances of the present case can be impugned".

However, it is important that, at a trial the evidence of an identification parade be given by the Police Officer who conducts the identification parade, where as the witness himself testified to the fact that he identified the suspect. This latter piece of evidence should not be given by the Police Officer, it is submitted.[77]

Finally, the identity of things may also be relevant in prosecution for stolen goods. The owner of the goods may give his opinion that the goods recovered are the same as the goods stolen.[78] Also identification may be relevant in an action for infringement of a copy right in which evidence of opinion as to the resemblance of an alleged infringing picture and an original one is given.[79] Even in libel actions, a witness may give his opinion that words complained about referred to the plaintiff or have a particular meaning.[30]

OPINIONS AS TO AGE

Most often, a witness gives evidence of his own age, or sometimes of another person's age, and either statement may involve opinion. It is common that evidence of the witness's own age is usually not challenged, though the witness obviously can not remember his own birth and relied for information as to the date upon hearsay, such that if challenged the evidence is inadmissible[81] apart from any question of opinion.

Dr. Agula submits that where it is essential for the age of a person to be proved for purposes of proving a Criminal Offence, evidence of the mother or of the fact or of a person who was present at his birth is essential, but that expert evidence may also be held sufficient in the absence of such other evidence.[82] It is submitted that expert evidence has even been preferred to the evidence of the parents and relations of the accused person.[83] This will, of course, depend on the facts and circumstances of the case. Great caution should be exercised by the Court here especially if the parents or relations of the accused person are literate and do have written records of the accused's age.

It must be noted, however, that, evidence by adults other than the mothers that children were under sixteen has been treated as relevant and admissible in criminal proceedings for wilfully neglecting the children.[84] And under the Criminal Procedure Act[85] the Court may presume the age of a person before it for the purposes of the Act.

The position of evidence of age is similar in civil cases. Where, for example, a defendant in a civil suit relies on the fact of his infancy in an action to recover the price of goods supplied to him.[86]

Finally, there are occasions when a non-expert witness may be allowed to say that a particular person was of a certain age. This could arise in a case where a witness who saw a person knocked down and killed by a car will be allowed to say what he thinks is the age of the deceased. Non-experts witnesses may also state their opinion in respect of age of documents. Where evidence stated under the above circumstances is not challenged, it may be held relevant and admissible. But as always cautioned, the Court must exercise great care in admitting and acting on evidence of non-experts.

OPINIONS AS TO MENTAL AND PHYSICAL HEALTH

The same principles apply to opinion evidence about health. In this circumstance a witness may be allowed to give evidence as to his own condition of health only,[87] and such evidence may be partly fact and partly opinion.

However, a non-expert witness will generally not be allowed to give evidence as to the conditions of health of other people. The witness here may only be allowed to give some details from which the condition of the relevant person can be made-out. But the opinion of experts in medical science is allowed to be given on the health of other people.

OPINIONS AS TO INTOXICATION

The proper position is that medical evidence on intoxication is expert evidence.[88] However, the practice in Nigerian Courts in addition to the above is that witnesses, especially Police Officers, are allowed to make assertions before the Court that a particular person was or was not drunk at the time in question. It is submitted that such non-expert evidence by Police Officers should

be treated with a lot of caution because Common experience has shown that the Police can fabricate the evidence to achieve a particular purpose.

OPINIONS AS TO SPEED AND VALUES

In proceedings arising out of road accidents, a statement as to the speed of the motor-vehicle by a layman merely expresses his opinion on the matter, which could be relevant and admissible. Section 178(4) of the Evidence Act[89] recognises this inherent weakness. The Section makes provision for corroboration where a person charged under the Road Traffic Act with exceeding a speed limit shall not be convicted solely on evidence of one witness's opinion of the speed of the motor-vehicle.[90] It will appear, it is submitted, the section provides only as to excessive speed. Therefore the position of any speed not in the category of excessive speed, may still present the inherent weakness.

VALUE OF GOODS

Laymen may give their opinions as to the value of objects, and such objects in Criminal trials are generally the subject-matter of the charge. In R. v. BECKETT,[91] the accused was charged with malicious damage to a plate-glass window of a post office valued over five pounds. A witness, the assistant superintendent of the post office, who was not an expert, was allowed to testify that in his opinion the glass window was of the value of about eight pounds.

Professor Cross, however, submits that the basis of the admissibility of the evidence in the above case is perhaps open to question on the ground that it raises insoluble problems of degree. The learned Professor states:

> "Is it confined to non-expert opinion concerning the value of common place objects? If so, what are common place objects? Does it only apply where the witness opines that the value of an article exceeds a specified sum by a considerable amount".[92]

Any-way in a South Australian Case where R. v. BECKETT was cited, it was said that the Court may always act on non-expert opinion as to value when no specialised knowledge is required.[93]

The above aspect brings us to the end of the discussion on cases under the English Common Law where evidence of non-experts is admissible and almissible also in Nigeria.

We shall then briefly too examine the provision of Section 64 of the Evidence Act[94] which states that:

> "Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant".

It is submitted, that, the requirement that such grounds on which opinion evidence as provided by the Section, is relevant; but further, that the Court will not attach much weight to the opinion evidence if such grounds are not disclosed to the Court. This will appear desirable where there is another opinion to the contrary.[95] The disclosure of the grounds to the Court is very desirable in order to give the court the opportunity to test the validity of the conclusion of the witness. The determination of the relevance and admissibility of evidence of experts and non-experts, as earlier stated, rests on the Court and even the weight to be attached to such evidence.

Finally, as earlier stated also, opinion evidence generally is irrelevant and therefore inadmissible. This proposition of the law, it is submitted, is largely true of non-expert opinion on an issue requiring expertise as well as opinion evidence concerning issues which do not call for expertise. Also it must

be noted that the reception of opinion evidence could sometimes usurp the functions of the Court.

In this chapter, we have been examining opinion evidence, when relevant and admissible.

FOOTNOTES TO CHAPTER FIVE

1. Cross on Evidence (5th Ed.) P. 442, See also the Case of Sherrand v. Jacob [1965] N.I. 151, at PP.157-8 Per Lord Macdermott.
2. Section 65 Evidence Act.
3. Ibid.
4. Nwadialo Ibid P. 86.
5. See Hallington v. Hawthorn & Co. & Co. Ltd. [1943] 1 K.B. 587 at 595.
6. Cross. Ibid.
7. Ibid P. 443, See also 60 L.Q.R. 262.
8. Haynes v. Doman [1899] 2 Ch. 13.
9. Ibid P. 445, See Buckley v. Rice-Thomas (1554), 1 Plowd. 118 at 124.
10. Ibid.
11. Ibid, (1782), 3 Doug. K.B. 157.
12. Section 56(1).
13. R. v. Turner [1975] 1 All E.R. 70.
14. See Aguda Para 9-03, P. 114.
15. Bayo Banjo v. Alli Jamal, Unreported, Ibadan Suit No. 1/122/69, Judgment 3/6/70, John Wilberforce Bamire v. S.C.O.A. (1941) 7 W.A.C.A. 150, R. v. Sodo, (1975)61 C.A.R. 131.
16. Ozigbo v. C.O.P. (1976)2 S.C. 67.
17. R. v. Onitiri (1946) 12 W.A.C.A. 58, See also Biesmorgh Service Ltd. v. Onokpasa (1972)1 All N.L.R. Part I 343.
18. Aguda Para 9-04 P. 114.
19. (1954) 14 W.A.C.A. 449.
20. Cap. 121 of the Laws of the Federation of Nigeria 1958.
21. My profound gratitude goes to Alhaji Abdullahi (S.A.N.), Dr. S.E. Mosugu, Mr. A.T. Ajala, Chief J.O.A. Shittu, Chief Tunji Arosanyin and Yunus Usman Esq., all distinguished Legal Practitioners in Kaduna, with whom I had the opportunity to discuss this aspect of the thesis.
22. [1894] 2 Q.B. 766, See also Ajami v. The Comptroller of Customs (1954) 14 W.A.C.A. 37, Round v. Inspector-General of Police (1954) 14 W.A.C.A. 449.

23. R. v. Silverlock (Supra) at 771.

24. Fasugba v. Inspector-General of Police (1964)2 All N.L.R. 15.

25. Fasugba v. INSPECTOR-GENERAL (Supra), See also R. v. Onitiri (Supra).

26. /1953/ S.C. 34, at P. 40, See Cross Ibid P. 446.

27. Elijah Okoh v. The State /1971/ 1 N.M.L.R. 140.

28. (1972)2 S.C. 123.

29. Obanor v. Obanor (1976)2 S.C.1, Seismograph Service (Nig.) Ltd. v. Akperuovo (1974) 6 S.C. 119, Seismograph Service (Nig.) Ltd. v. Ogbeni /1976/ 1 N.M.L.R. 290, R. v. Matheson (1958) 42 Cr. App. Rep. 145, 151.

30. Davies v. Edinburgh Magistrates (Supra).

31. Sills v. Brown (1840)9 C. & P. 601; 173 E.R. 974, See Cross Ibid P. 450, Haynes v. Doman (1899) 2 Ch. 13 at 24.

32. /1911/7 Cr. App. Rep. 67, See R. v. Holmes /1953/ 2 All E.R. 324, /1953/1 W.L.R. 686.

33. Lupien v. R. (1970)9 D.L.R. (3d)1, See Cross P. 451.

34. R. v. Somers /1963/3 All E.R. 808.

35. See Nwadialo P. 89, See also Nokes Ibid, P. 177, See the Case of Preston-Jones v. Preston-Jones /1951/A.C. 391.

36. Unreported, but at (1964) 1 Nigerian Law Journal 123. See Aguda Para 9-08 P. 116.

37. (1955)2 C.R. 365, 376. Aguda Para 9-09 P. 116.

38. Section 57.

39. Barford v. Barford and Mcleod /1918/ 1. 144. See Aguda Para. 9-11 P. 117. See also the case of Brailey v. Rhodesia Consolidated Ltd. /1910/2 Ch. 95.

40. See Wilson v. Wilson /1903/P. 157. See Aguda Ibid.

41. Joseph Adeniyi Ogunro and Others v. Christiana Ajoke Ogendengbe (1960) 5 F.S.C. 137.

42. Said Ajani v. Comptroller of Customs (1952) 14 W.A.C.A. 34. or (1954) 14 W.A.C.A. 37.

43. Section 57(1) of the Evidence Act.

44. Section 58 Ibid.

45. Liadi Giwa v. Bisiriyu Erinmilokun [1961] All N.L.R. 294, See also S.G. Alegboyega and Others v. Peter Igbinogun and Others (1969) N.M.L.R. 9, Ogbah v. Akpele [1975] 1 N.M.L.R. 201.

46. (1956)1 F.S.C. 84.

47. Alokobu v. Alowoyin (1951)13 W.A.C.A. 191, See also D.O. Idumbun & Others v. Daniel Okumagba (1976) 9-10 S.C. 227.

48. Timothy Tantoju Adesubokun v. Kasaki Yunusa (1971) N.N.L.R.77, Salari Batibi Opebiyi and Others v. Sakariyawa Kelani Noibi and others (1977) 12 S.C. 65, 81.

49. Nana Gyebi Ababio II v. Kweku Nsemfoo (1947)12 W.A.C.A. 127.

50. (1969) N.M.L.R. 99 at 100, See also A.O. Odufuye v. Jacob Adeoye Fatoke (1977)4 S.C. 11.

51. See Cross P. 448, Gibson, J., Cited in VII Wigmore, P. 12.

52. 17th Report of the Law Reform Committee, Para. 3. See Cross Ibid.

53. Section 60 Ibid.

54. (1960) N.N.L.R. 73.

55. R. v. Onitiri (1946)12 W.A.C.A. 58.

56. See Lawal v. C.P. (Supra) See also Section 107 of the Evidence Act.

57. (1961)1 All N.L.R. 631, See Lawal v. C.P. (Supra) Section 107(1).

58. Omisade and Others v. Queen [1964/1 All N.L.R. 233 at 271.

59. (1976) 2 S.C. 67, [1976] 1 N.M.L.R. 273.

60. See Footnotes 27 and 28.

61. See Section 61 of the Act.

62. See Section 62.

63. Forget v. Baxter [1900] A.C. 467, See also Forres v. Scottish Flax Co. (1943) 2 All E.R. 366.

64. Devonald v. Rosser [1906/2 K.B. 728.

65. Agula Para. 9-31 P. 125.

66. Especially some judicial pronouncements on the doctrines of res gestae where no reference was made to Sections 5(a) or 7 of the Act. See the case of Sunday Akpan v. The State (Supra).

67. Aguda Para. 9-32 P. 125.

68. Bater v. Bater [1951]35, Blyth v. Blyth [1966] 1 All E.R. 524, See Aguda Ibil.

69. Section 5(a) of the Act as already examined and Criticised in Chapter Three of this thesis, allows evidence under the Common law and other Statutes to be almissible where such evidence is not specifically excluded under the Evidence Act.

70. See Nwadialo P. 94, R. v. Tolson (1864)4 F.and F. 103.

71. Aguda Para. 9-34 P. 126.

72. R. v. Dwyer [1925]2K.B. 799, R. v. Haslam (1925)19 C.A.R.59.

73. R. v. Molany (1924)18 C.A.R. 2, R. v. Hinds [1932] 2 K.B.644.

74. R. v. Haslam (Supra) R. v. Hinds (Supra) See also R. v. Seiga (1961)45 C.A.R. 220.

75. R. v. Palmer (1914)10 C.A.R. 77, R. v. Wainwright (1925)19 C.A.R. 52, See Nokes Ibil, P. 164. For the power of the Police to take the photographs of persons suspected of having committed Criminal Offences, See the Prevention of Crimes of Regulations, regs. 12 and 18 male under the Prevention of Crimes Act (Cap. 157), S.6, See Aguda Para. 9-34 P. 126..

76. (1965)N.M.L.R. 5, [1964] 1 All N.L.R. 379.

77. R. v. Philip Jonah & Others (1934)2 W.A.C.A. 120.

78. See Aguda Para. 9-35 P. 126.

79. Lucas v. Williams and Sons (1892)2 Q.B. 113.

80. Fryer v. Gathercole (1849) 4 Exch. 262; 154 E.R. 1209 (to prove the publication of a libel in this case, a witness was allowed to say that she believed a copy of a pamphlet was that which she had previously received from the defendant, though she could not swear that it was).

81. R. v. Highworth [1842] 2 Q.B. 476, See Nokes Ibid P. 165.

82. Aguda Para. 9-37 P. 127, See R. v. Payne [1963] 1 All E.R. 848.

83. Olalimeji v. Queen (1964) N.M.L.R. 31.

84. R. v. Cox [1898] 1. Q.B. 179.

85. Section 208 Criminal Procedure Act, The Laws of the Federation of Nigeria and Lagos, Cap. 43. See Brett and Mclean's, The Criminal Law and Procedure of Six Southern States of Nigeria. Para.373, p.124.

86. Haines v. Guthrie (1884)13 Q.B.D. 818.

87. Harnett v. Bond [1924] 2 K.B. 517.

88. See R. v. Nowell (1948)32 C.A.R. 173.

89. Section 178(4) of the Act.

90. This issue is dealt with in a more detailed manner under the area in the Law of Evidence on corroboration which unfortunately does not come within the scope of this thesis.

91. (1913)8 Cr. App. Rep. 204.

92. Cross on Evidence (5th Ed.) P. 449, See also Agula, Para. 9-4 P. 128.

93. Wise v. Musolino [1936] S.A.S.R. 447 (In some cases judicial notice may be taken that the value of an object exceeds the specified sum or evidence of its purchase price might suffice) See Cross P. 449.

94. Section 64 of the Evidence Act.

95. Bayo Banjo v. Alli Jamal (Supra).

CHAPTER SIX

CONCLUSION AND RECOMMENDATION

1. CONCLUSION

RELEVANCE

Relevance as a basis for almissibility in Nigerian Courts has been examined in the preceding chapters. "Relevance and Admissibility" covers a wide area under the Nigerian Evidence Act. However, the discussion has been restricted to some selected areas.

Throughout the discussion in the thesis, the purpose has been to determine the adequacy or otherwise of relevance as a basis for admissibility. Relevance and admissibility as noted earlier, will appear to be a loose concept considering some provisions of the Evidence Act and especially judicial pronouncements. The Courts obviously remain the principal and final authority in determining relevance and admissibility. There is, therefore, need for a high duty of care and intellectual capability to be exercised by the Courts.

A relevant fact has been defined by the Nigerian Evidence Act.[1] It is, submitted that relevance implies a relationship between two facts which may give rise to an inference of one fact from the other fact. The legal admissibility of facts is for the most part determined by their logical relevance to the issue, or that connection between the two which, in the ordinary course of events renders the latter probable from the existence of the former. However, on other policy grounds[2], the Court may reject relevant facts. This, is one of those instances when the Court has the absolute power to determine relevance as a basis for admissibility. There is need, therefore, for the Courts to exercise much care in

this regard, and each case should be treated on its own merits.

SOME MATTERS DECLARED RELEVANT UNDER THE EVIDENCE ACT

The Nigerian Evidence Act in some of its provisions has declared relevant some matters. It will therefore appear that, the Court will not have much problem in determining such matters declared relevant by the Act. The list of matters declared relevant by the Act, is wide, but, efforts have been made to briefly examine some of those matters. However, facts declared relevant under the Evidence Act, will be admissible, if such a fact is relevant to the facts in issue, and facts in issue are usually proved by means of adducing evidence in accordance with the procedure of the Court that is charged with the responsibility in making the final decision.

SOME FACTS RELEVANT IN SPECIAL CIRCUMSTANCES

While some facts or matters are declared relevant by the Evidence Act, some others will be relevant only in special circumstances. That means in normal circumstances, such facts are considered irrelevant and, therefore, not admissible for purposes of evidence. But under special circumstances these facts can become relevant and admissible. The list of this set of facts is also quite wide and therefore the discussion is limited to Sections 44, 45, 46 and even 33 of the Nigerian Evidence Act. It is submitted that caution must be exercised by the Court in determining the relevance of evidence in this area especially as such evidence ordinarily is irrelevant and becomes relevant only in special circumstances. The special circumstances must be clearly established.

RELEVANCE OF EVIDENCE OF SIMILAR FACTS

Also, evidence of similar facts can become relevant and admissible in evidence. Evidence of similar facts in this regard, will have to be confined to the facts in issue and logically relevant facts to determine the matter in issue. "Fact in issue", however, has been defined by the Nigerian Evidence Act[3], to include:

> "..... any fact from which either by itself or in connection with other facts the existence, non-existence, nature of extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows".

The determination of similar facts evidence on the basis of relevance is therefore, not an easy task for the Courts.

Section 17 of the Evidence Act provides for the relevance of similar facts evidence. The Section, however, appears inadequate considering the decision in the celebrated English House of Lords case of MAKIN v. ATTORNEY-GENERAL FOR NEW SOUTH WALES[4]. Unlike the position of the law in the above stated case, Section 17 of the Evidence Act does not in turn allow evidence of similar facts to rebut a defence which would others be open to an accused person.[4(a)] This, it is submitted, creates an unbalanced position to the application of relevance as a basis for admissibility, making it more favourable to the accused person.

Furthermore, it will appear that relevance under Section 17 of the Act is a different thing from admissibility. That is to say, even if evidence is held to be relevant under the Section, as may be derived from Section 159 of the Act, the Court may nevertheless exclude it, if it considers the evidence prejudicial to the fair trial of the accused. However, the exclusion of relevant facts for purposes of admissibility is not a peculiar feature of Section 17 of the Act only. It is a discretionary power given to the Courts

which was emphasised as an additional ground by the House of Lords in the Makin's Case. This usually vests the determination of the test of relevance solely in the hands of the Court. And finally, evidence under Section 17 of the Act is often confused with evidence of character. Therefore, in the application of the Section, evidence of bad character of the accused is often let in.

EVIDENCE OF CHARACTER

Evidence of character is considerably covered by the provisions of the Nigerian Evidence Act. Generally, by the provisions of Section 68(1) of the Act, evidence that the accused person is of bad character is irrelevant and inadmissible. The general rule, is subject to certain exceptions[5]. However, it is submitted that these exceptions do not substantially alter the balance, in favour of the accused person. While evidence of bad character of the accused person generally can not be given, by the provision of Section 67 of the Act, evidence of good character of the accused person can be given.

The word 'character' is defined by Section 71 of the Act and by the definition, evidence of character to be relevant, is restricted to a certain category. The ability to determine the relevance of character evidence, therefore, like similar facts evidence, is highly technical. The Courts, therefore, must exercise much care in determining the relevance of character evidence.

It must be noted that, as a common feature of the Nigerian Evidence Act, under the provisions dealing with the relevance of character evidence, the Court has generally wide powers. It is, therefore, submitted that in a situation such as obtains in Nigeria where the Courts tend to place much reliance on common law precedents, there is the fear that these provisions of the Act will not adequately be applied. Relevance as a basis for admissibility in Nigerian Courts

has therefore, been regarded as a loose concept. And being so, if care is not taken by the Courts, there will be gross injustice.

RELEVANCE OF ILLEGALLY OBTAINED EVIDENCE

One of those controversial aspects of this thesis, is relevance of illegally obtained evidence. Evidence obtained from an illegall search and seizure, and from improper means, is usually admissible. The issue of the relevance of this type of evidence has taxed the minds of great legal scholars, legislators, judges and those people responsible for maintaining law and order in the society. Such evidence can be admissible under Section 29 of the Evidence Act, but, Nigerian Courts have admitted the evidence on reliance on Common law precedents[6], without reference to the Section. The Nigerian Supreme Court by relying on Common law for guidance will appear to have done so under the provision of Section 5(a) of the Evidence Act.

Evidence obtained by an illegal means as in the cases of 'Kuruma and Sadau, offend not only the laid down legal procedure in obtaining evidence, but also the fundamental right of the individual to his privacy and family life. A funlamental right of this nature is constitutionally recognised and guaranteed in Nigeria. Section 34 of the Nigerian 1979 Constitution and Section 23 of 1963 Constitution guarantee the right to private and family life. Generally, Section 1 of the 1979 Constitution makes the Constitution the Supreme law in Nigeria. It is, therefore, submitted that evidence obtained from illegal search and seizure violates this fundamental right and the relevance of such evidence is highly questionable. It must be noted that, a person who feels that any of his fundamental rights has been violated or about to, can, by the provision of Section 42 of the 1979 Constitution ask for a

redress from any of the high Courts in Nigeria.

The Courts of the United States of America, on the other hand, generally will vehemently reproach any act, deed, omission or statutory provision that even seemingly violates fundamental Constitutional rights. However, even there, the Judges have not been unanimous on the evidential value and the legal effects of illegally obtained evidence. In any case, the Scottish[8] position will appear most acceptable in determining the relevance or otherwise of illegally obtained evidence.

It must be noted that the principle established in Kuruma's Case, which was followed in Sadau, presents a lot of difficulties in its application especially if the interests of the accused person and the State or victim must be equally considered. It is, submitted that unfairness to the accused is a loose concept; and, furthermore, when such unfairness exists, exclusion of evidence is not automatic. The fact that the exclusion is not automatic was emphasised by the Privy Council in King v. R. in the following words

> "We do not read this passage as doing more than listing a variety of classes of oppressive conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration".[9]

It is, therefore, not possible to predict with certainty whether a particular item of illegally obtained evidence will be excluded or not. A rule of exclusion, on the other hand, can be based on Section 34 of Nigerian 1979 Constitution. A rule as this, apart from its effect in curbing improper Police methods, is fairly definite and easy to operate. It has, however, been doubted by writers,[9(a)] in Nigeria and America whether there can be any effectiveness of civil or criminal liability as a deterrent against Police excesses

THE DOCTRINES OF 'RES GESTAE' AND 'DYING DECLARATION'

In continuation of the discussion on the topic of this thesis, efforts have been made to examine the relevance of the doctrines of 'res gestae' and 'dying declaration' as applied in Nigerian Courts in particular. The doctrine of res gestae as noted earlier, is a Common law principle which as stated by the Judicial Committee of the Privy Council, like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms.[10] The doctrine has been used in different senses and hence it can be said to provide a "respectable legal cloak for a variety of cases to which no formula of precision can be applied".[11]

The facts which are admissible as forming part of the res gestae are usually declarations and acts which Constitute, accompany or explain the fact in issue. There are however prescribed conditions that must be met before evidence forming part of res gestae can be held relevant and admissible. The conditions are so stiff that one can hardly say if justice is ever administered, especially from the point of view of the victim or plaintiff as the case may be. The law on res gestae will, therefore, generally be regarded as harsh in the eyes of the lay-man.

The English Common law doctrine of res gestae is not directly applicable under the Nigerian Evidence Act. However, the doctrine can be applied by virtue of Section 5(a) of the Evidence Act.[12] It is however debatable whether the doctrine of res gestae applies in Nigeria by virtue of Section 5(a) of the act,(which appears inappropriate in this circumstance) or by virtue of Section 7 of the Act which can adequately admit evidence forming part of res gestae. Section 7 of the Act covers a wider field than it is covered by the doctrine. The Courts in Nigeria, unfortunately appear to apply the doctrine of res gestae without reference either to Section 5(a) or Section 7 or even Section 33 of the Evidence Act.[13] However, not

withstanding this, the Nigerian Courts, at least, appear to be influenced by the provisions of the Act while admitting evidence as forming part of res gestae, even before the enactment of the Evidence Act.[14]

Like the doctrine of res gestae, the doctrine of dying declaration constitute also one of the controversial aspects of this thesis. The discussion on dying declaration is in reference to Section 33(a) of the Act. The requirements of the law under Section 33(a) are stiff and unbalanced, such that one is forced to enquire as to what is the rationale of this doctrine of dying declaration. It is submitted that for all practical purposes, in order to do justice, both the accused and the deceased should be seriously considered. It has been observed by some distinguished Justices of the Supreme Court of Nigeria[15] that just as it is essential that justice be done to the accused in criminal cases, so also must it be done to the deceased.

The law on dying declaration, will appear too harsh to expect or require a victim to express when asked, a resolved mental state or belief in danger or approaching death. It is usually not easy for the Court even in the circumstance stated above to determine the mental state or state of mind of a living person, let alone a dead person. It is submitted that this position of the law under the Nigerian Evidence Act and similarily the Common law, constitute a serious obstacle to the administration of justice to all parties concerned in a trial.

Dying declaration under Section 33(a) of the Act is restricted and relevant in trials for murder or manslaughter of the deceased person. However, other dying declarations are relevant and admissible generally in both criminal and civil trials.[16] The admissibility

dying declarations also applies in Islamic law.

Like res gestae, dying declaration is an exception to the hearsay rule and, therefore, such declarations under Section 33(a) or statements forming part of res gestae, if they do pass the prescribed tests, will be held relevant and admissible. Statements made by a deceased person as to the cause of his death have been held not admissible as res gestae or dying declaration under Section 33(a) of the Act.[17] It must be noted that the doctrines of res gestae and dying declarations have been treated in this thesis as statements made in Special Circumstances because of their features.

RELEVANCE OF ADMISSIONS AND CONFESSIONS

Another area of much relevance in the discussion on relevance as a basis for admissibility in Nigerian Courts, is admissions and confessions. It is the presumption that no person will declare anything against himself, unless it is true. Furthermore, if a person is in difficulty or in view of one, will make declarations for himself.[18] The application of this principle of the law may sometimes lead to a miscarriage of justice because there may be a situation where evidence that would otherwise establish the fact in issue or the relevant fact will not be admitted. However, a statement made that is adverse or against the interest of the maker will be admissible in evidence as the truth of the content.

An admission is defined by Section 19 of the Evidence Act. Even though the definition appears to relate to informal admissions only, a general definition,[19] will include formal and informal admissions. An informal admission by a party or his representative is often admissible in evidence as the truth of the content. Such admissions must, however, comply with certain requirements and are often regarded as exceptions to the hearsay rule. An admission

whether informal or formal can be verbal or written and can be oral or otherwise. It will appear, that the Courts take into account other policy considerations even though they do not expressly say so in determining which statement or conduct especially in Matrimonial Cases can be relevant as admissions.[20] Relevance of facts here as is often the case will depend on the Court's determination.

Unlike informal admissions, formal admissions are conclusive and binding, such that they can not be explained away or restricted to specific litigation or procedure. Various Court rules are in existence in respect of the procedure in obtaining admissions under this category. Such Court rules, must however, be in conformity with Section 74 of the Evidence Act. It will appear that in some cases, the Courts, by virtue of its wide discretionary powers, do insist on further proof of even a fact admitted in the circumstances stated above.[21] Formal admissions apply only to civil cases and Section 74 of the Act is clear on that.

In determining the relevance and admissibility of an admission, the types of persons making the admission and the person to whom, the admission is made are important. The essential statutory requirements governing conditions under which admissions may be made, are contained in the Evidence Act.[22] These Provisions are not in any way exhaustive and, therefore, there may be substantive or procedural rules contained in other statutes like Penal Code, Matrimonial Causes Act and so on.

On confessions, the manner by which confessions were obtained have always been in controversy, giving rise to judicial, statutory and even literal inconsistency. It is, therefore, difficult to determine relevance as a basis for admissibility. The law on confession has however been, to an extend consolidated by the

decision in the case of R. v. Baldry.[23]

A confession is defined by Section 27(1) of the Evidence Act, which has been literally interpreted by the Nigerian Courts. The subsection appear not to impose any restriction as regards the manner, or stage at which a person may make a confession. A confession, however, has to be distinguished from mere admissions, because a confession denotes admission of guilt by an accused person or a person charged with an offence. A confession here, will be admissible as the truth of what it states provided it is free and voluntary and the onus or burden of proof of the voluntariness of a confession, rests on the prosecution. The Nigerian Evidence Act,[24] stipulates stiff conditions as to the voluntariness of a confession but fails to define the word "voluntary" and thereby leaving the Court with wide discretionary powers. Inducement as one of these vitiating circumstances is an inducement merely to make a statement. It need not be an inducement to confess the truth,[25] or one which is calculated to make the confession an untrue one. Such an inducement may be by words accompanied by conduct from which the promise or threat can reasonably be implied.

However, a mere moral adjuration to speak the truth would not be regarded as an inducement.[26] The determination of inducement here will usually not be an easy task. An inducement envisaged under Section 28 of the Evidence Act, must be from a person in authority. The Evidence Act, however, does not define a person in authority and, therefore reliance has to be placed on the Common law. But local rules have also been evolved centering around village head as a person in authority.

Section 31 of the Evidence Act makes a peculiar provision which appears difficult to reconcile with the law discussed on

voluntariness of a confession and some provisions of the Criminal and Penal Codes dealing with involuntary intoxication. However, the Nigerian Supreme Court has categorically stated that no statement made by an accused person is admissible against him unless, it is proved that the statement was made voluntarily.[27]

Admissibility of confessional statements under Section 32 of the Evidence Act will appear to pose no serious problem. Meanwhile the position is not the same under Section 29 of the Evidence Act.

An accused person can be convicted on his confessional statements where the confession is consistent with other ascertained facts which had been proved.[28] However, where an accused person contests the voluntariness of a confession, such voluntariness must be settled first before the issue of its admissibility is considered.[28(a)]

Any-way, not with-standing the mode of determining the voluntariness of a confession, the Court in D.P.P. v. Pinglin,[29] cautioned that, in deciding whether an accused person's statement was freely and voluntarily made and should be admissible in evidence it is useless just as in accident cases to sought for another case to which facts seem similar and treat it as binding. That facts vary infinitely from case to case. The Judge's part is to consider evidence before him be assess the implication and to decide the case on his own view of that evidence in the light of the basic established principle. It is, submitted that the decision in the above case, is in line with the constant caution in this thesis on reliance on precedents.

Finally, a confessional statement as provided under Section 27(2) of the Act, if voluntary, is evidence only as against the

maker. However, the above stated proposition may vary according to the circumstances of the case. Where, this happens, the necessary procedure must be followed if justice must be done to all parties concerned.

RULES

RELEVANCE OF JUDGES' RULES (STATEMENTS TO POLICE OFFICERS) RULES

The Judges Rules and (Statements to Police Officers) Rules, as noted earlier, usually make a discussion on confession complete and unique. The Judges Rules in England were formulated as guiding principles to Police Officers who are connected with investigation of crime. The whole purpose of the rules was to ensure that a confessional statement is voluntary. These rules, however, do not have the force of law; they are administrative directives, the observance of which the Police authorities should enforce upon their subordinates, ensuring the fair administration of justice. However, the admissibility of an alleged confession does not depend upon whether or not there has been compliance with the Judges rules, but depend on whether it is shown that the confession has been made voluntarily, which, the Court has to determine. 30

The Judges Rules in England have been applied in Nigeria, with Rule VIII of the old Rules (now Rule V) regarded as the most difficult, which was subsequently modified. It is usually cautioned that an accused person be taken to a Superior Police Officer to confirm his confessional statement.

Similar to the Judges Rules in England, are (Statements to Police Officers) Rules, made by the then Chief Justice of the then Northern Region of Nigeria, for that Region. The Northern Rules have however effected some modifications to the Judges Rules to suit local circumstances in Northern Nigeria. However, there appears

to be no difference now in the application of the Northern Rules and Judges Rules in England in other parts of Nigeria. It must be noted that, the Northern Rules should be read together with Section 126 of the Criminal Procedure Code but subject to the provisions of the Evidence Act dealing with voluntariness of a confession.

OPINIONS OF THIRD PERSONS, WHEN RELEVANT

Another area discussed extensively in this thesis, is the relevance of opinion of third persons. Generally, the opinion of a witness, whether he is a party to the proceedings or a third person, is irrelevant and inadmissible. The provision of Section 65 of the Evidence Act and the observation of some learned authors on the subject[31], are unambigous on this. However, Sections 56-64 makes provisions for some exceptions to this general rule. It is submitted, that if witnesses are freely allowed to State their opinions concerning a particular issue before the Court, there is the danger that the Court will be unduly influenced. The drawing of inferences, is therefore, the business of the Court, while it is the business of the witness to State facts perceived by him.

However, the law recognises that, as earlier State, as far as matters calling for special knowledge or skill are concerned, the Courts are not necessarily properly equipped to draw the right influences from such facts testified to by witnesses. A witness, is, therefore, allowed, to state his opinion in respect of such matters[32], provided he is an expert in them. An expert witness here, may not be allowed to state his opinion on an ultimate issue, such as reasonableness of a covenant in restraint of trade or the construction of a document. Also, where the evidence of experts conflict, the court may prefer the evidence of one expert to the other and need not state reasons. Expert evidence is admissible

in Nigeria under Section 56(1) of the Evidence Act.

It is important that the Court exercises much caution in declaring a witness as an expert. Reliance should not only be placed on paper qualifications and institutions of learning before a person's name.[33] There should be a finding of facts by the Court, it is submitted, if there can be a proper application of relevance as a basis for admissibility.

The opinion of an expert, no matter how sound it may be, is not binding on the Court.[34] Believing the evidence of an expert, is a matter for the Court and even the weight to be attached to such evidence if admitted. However, it will appear that unchallenged and uncontradicted expert evidence will be acted upon by the Court. Any-way, this proposition of the law is still strongly contested and the view is that, the Court has over-riding power over expert opinion. It is, however, important that both the Court and Counsel should have some reasonable knowledge of the subject-matter of expert evidence.

Under the provisions of the Evidence Act,[35] opinions of experts on matters of Science or Art, foreign law, or on native law and custom, are relevant. It is, therefore, submitted that, the Court should critically examine each of these matters when they do come up for consideration. Also, under Section 59 of the Act, facts otherwise relevant become relevant, if such facts bear upon the opinions of experts, when such opinions are relevant.

Under some special circumstances, opinions of non-experts are relevant and admissible in evidence. Common instances when opinion of non-experts are admissible include age, speed, handwriting, weather and identity in general. Section 60 of the Evidence Act provide for

opinion as to handwriting. Handwriting may be proved by experts and non-experts alike. The above Section appears too wide and consequently leaving the Courts with much discretionary power. Furthermore, Sections 61, 62 and 63 of the Act, make relevant the opinion of non-experts in respect of general custom or right, usages, tenets and relationship.

Then, under Section 64 of the Evidence Act, grounds of opinion, when relevant are stated. The Section, it is, submitted appears to apply to both expert and non-expert opinions. The Section is similar to Section 59 and the two Sections can be put into one.

Opinions of non-experts in respect of some matters under the Common Law, not provided under the Evidence Act, are admissible in Nigeria by virtue of Section 5(a) of the Evidence Act. These matters include, inter alia, identity, age, mental and physical health, intoxication, speed and value. The danger here is that Nigerian Courts will turn to rely on Common law precedents especifically as these matters are not provided for under the Evidence Act. Expert opinion has been preferred to non-expert opinions in some of the above stated matters.[36]

It is submitted that, great care be exercised by the Court in determining evidence of opinion of non-experts. This is because generally evidence of non-experts will pose more difficulties in proving than evidence of experts. However, like expert opinion, opinion of non-expert is not binding on the Court.

2. RECOMMENDATIONS

In the context of the foregoing discussion in this thesis, the following recommendations are respectfully being made in addition to those already made in the course of the discussion.

(a) Generally, relevance as a basis for admissibility should be handled in our Courts with great care. This is because, relevance

is vital in the administration of justice. The Courts usually constitute the major and final body in the determination of relevance. The Courts should, therefore, treat each case on its own merits.

(b) That once an item of evidence is relevant, it should be admissible and not rejected because, it is too remote to the facts in issue or prejudicial to the accused person. That, if this position is not adopted, only the accused persons interest will be seriously considered. This, therefore, renders relevance as a basis for admissibility of evidence more infavour of the accused person, making the position unfair to the victim. Furthermore, when such evidence is admitted, the Court should equally consider the interest of all parties concerned in attaching to it the appropriate weight.

(c) That Section 17 of the Evidence Act which deals with relevance of evidence of similar facts should be read in a way that will allow evidence of similar facts to rebut a defence which would otherwise be open to an accused person. This will be in line with the more positive and acceptable position of the law expressed in the English Case of MAKIN v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.[36(a)] In the alternative, Section 5(a) of the Evidence Act, can be invoked so as to bring the law in this regard in line with the English law by allowing the admission of evidence that will rebut a defence opened to the accused person.[36(b)]

(d) That, the provision of Section 67 of the Act, dealing with the relevance of the good character of an accused person, is too wide and ought to be restricted. Evidence of good character here, ought to be restricted to the offence charged. If a man is charged with

forgery, it is not important that he is known to be kind to animals. In the extreme, it is recommended that, not withstanding the use of Common sense and precedents, the Section be amended to read like Section 68 of the Act which makes evidence of bad character of accused person irrelevant except in the stated circumstances. This, it is submitted will endorse a balanced position to the test of relevance as a basis for admissibility. The fact that the law generally and on character evidence in particular appears to give greater protection to an accused person, is undesirable and, therefore, calls for review.

(e) It is recommended that a close review of Section 29 of Evidence Act and the law relating to illegally or improperly obtained evidence is necessary. Generally, the law should reflect an adherence to the procedural rules laid down in the Criminal Procedure Code and the fundamental rights guaranteed and protected by the Nigerian Constitution. The sanctity which the Nigerian Constitution treats a citizen's fundamental rights has been eroded by the application of the law in its present State. The position of the law expressed by Lord Cooper in the Scottish Case[37], will appear to be a sound proposition for Nigeria.

(f) The prescribed conditions that must be met before evidence forming part of res gestae can be held relevant and admissible in law are highly undesirable. The victim or plaintiff as the case may be, is usually placed in a disadvantageous position. It is, therefore, recommended that Nigerian Courts should admit evidence as forming part of res gestae by virtue of Section 7 of the Evidence Act which is a broader provision than Section 5(a) of the Act which allows the admissibility of such common law principle. The Nigerian

Courts, with all respect, should refer to the relevant provisions of the Evidence Act when admitting evidence as forming part of res gestae.

Finally, Section 5(a) of the Act should be very seriously restricted to cases where the Evidence Act has not at all made provision as to the admissibility of an item of evidence. Section 5(a) of the Act cannot be interpreted in Nigeria the way it will be if it were in England because evidence law in Nigeria is codified while in England evidence law is still largely unwritten. It is therefore, suggested that Section 5(a) of the Act was either inserted in error in Nigerian Evidence Act or at least not intended to be interpreted the way it has been by the Courts.[38]

(g) It is recommended that in light of the observations made in the thesis in respect of dying declaration, there is need for amendments to be effected in the present law in Nigeria. Section 33(a) of the Evidence Act should be amended so that dying declaration is relevant in evidence per se. The requirement of "belief in danger of approaching death" as an essential legal requirement, ought to be discarded. It should be noted that Islamic law treats dying declaration differently from common law and the Islamic law position appears more acceptable. A dying declaration in Islamic law is receivable in evidence if accompanied by the Oath of conjurators (Kasama Oath). The victim's bad reputation does not affect the probative value of his declaration even if his assailant is known to be of irreproachable character.[39]

Furthermore, the law on dying declaration should be amended so that when statements are to be recorded by Police Officers from Patients in hospital, the medical officers attending to the patient

should be present. There should be room, however, for variation in exceptional cases when for example, a patient is about to die and it would not be possible to have the attendant medical officer before the patient's death. Any medical officer available, can be present while the Police take statements from the Patient. The medical expert here, will, therefore, assist the Police and afterwards the Court in assessing and evaluating both the medical and mental conditions of the declarant at the time of making the dying declaration. However, this practice should be a general one, not withstanding the fact that the notion of belief in impending death will no longer be a legal requirement for purposes of admitting an otherwise relevant and admissible dying declaration.

(h) Section 19 of the Evidence Act which defines admission, appears to restrict the definition to informal admissions. It should therefore be amended to embrace a wider position of both informal and formal admissions. In the wider context, admissions can be defined as, an express or implied concession by a person of the truth of an alleged fact. This can be inform of a statement or conduct.

Furthermore, it is suggested that even though by the provision of Section 74 of the Evidence Act, formal admissions apply only to civil cases and the rule here arises partly for the need for pleadings to be ordered, formal admissions can be applicable in Criminal Cases. This is possible, where a plea of "guilty" is entered. In that circumstance, however, the Court must be absolutely certain that the accused knows what he is pleading. It is, therefore, highly recommended that the legal consequence of an admission, formal or informal, should depend on the circumstance of a particular case.

(i) That "Voluntariness" of a confession being an essential requirement, Section 27 of the Evidence Act should be amended to include a definition of "Voluntary". The same situation should apply to Section 28 which does not define "a person in authority". If these phrases are defined in the Act, the Courts will be better guided in the application of Sections 27 and 28 of the Act which constitute the main rules on confessions.

(j) That Section 31 of the Evidence Act should be amended. The Section appears to contradict other Sections of the Act dealing with the fundamental requirements of a voluntary confession. The Section also contradicts the provisions of the Criminal and Penal Codes dealing with involuntary intoxication. It is, therefore, submitted that Section 31 of the Act, which indiscriminately allows the admissibility of evidence of a drunken person will appear to offend not only the rigid attitude of the Court on the Voluntariness of a confession but also other existing Statutes.

(k) A Confessional Statement if, obtained according to the strict requirements of the law and the court exercising the due care in evaluating same, should be relevant and admissible in evidence. It is, therefore, recommended that an accused person should be convicted on such a confessional statement without necessary corroboration.

(l) The Judges Rules in England applicable in Nigeria and (Statements to Police Officers) Rules, 1960 applicable in the Northern States of Nigeria, should be upgraded to have the force of law. This will make the rules more effective in obtaining and determining confessional statements. However, it is important that the Court still have a final say as to the Voluntariness of a Confessional Statement in accordance with the relevant provisions

of the Evidence Act.

(m) For a proper application of the evidence of an expert, it is recommended that each witness called as an expert must be systematically tested and proved as an expert. That academic credentials alone, should not be regarded as the sole creteria in determining who is an expert in a particular field. Some of the best qualified people lack formal education.

(n) It is recommended that, unlike expert evidence, non-expert evidence should be treated by the Courts with more caution because there appear to be more chances of uncertainty in non-expert evidence. This, will, however, depend upon the facts and circumstances of each case. It is also recommended that, when a fact is to be proved by experts and non-experts alike, expert opinions should be preferred to non-experts opinion.

(o) It is recommended that the relevant provisions of the Evidence Act dealing with the relevance of opinion of non-experts, be amended to incorporate other cases under the Common law applicable in Nigerian Courts, when non-experts opinion is relevant and admissible. These other cases under the Common law will include: opinions as to identity, age, mental and physical health, intoxication speed and value. However, opinions as to intoxication should be restricted to expert opinion. Then the situation, whereby the opinion of expert is preferred to that of non-experts (e.g. Parents) in respect of the age of a child, should be restricted to the circumstances of a particular case. Or else, it is recommended that the opinions of the latter be preferred especially where the parents or relations are literate.

FOOTNOTES TO CHAPTER SIX

1. Section 3 Evidence Act.

2. If too remote to the facts in issue, see Section 6(a) of the Evidence Act, or if their prejudicial effect outweighs their probative value so much that their admission may tend to render the trial unfair and in cases where there is a rule laid down by Statute, it can not be affected by considerations either of logic or relevancy.

3. Section 2(1) Evidence Act.

4. Note 70 Chapter 2, (Supra).

4(a). See Aguda Para 3-51, p. 48.

5. See Section 68(2) (a & b) and Section 159(d) (i-iii) Ibid.

6. In the Nigerian Case of State v. Sadau (Supra) the Federal Supreme Court relied solely on the English Privy Council decision in Kuruma v. R. (Supra).

7. See Note 174 Chapter 2, (Supra).

8. See Notes 172 and 176 Chapter 2 (Supra).

9. [1969] 1 A.C. 304 at 318.

9(a) See Okonkwo "The Police and the Public in Nigeria" Chapter 9, Sanctions against Police illegality: Remedies and Liabilities. See also Note 178 Chap. 2 (Supra).

10. See Ratten v. R. (Supra).

11. See Homes v. Newman (Supra) Lord Tomlin's observation.

12. See Notes 18, and 20 Chapter 3 (Supra).

13. See Oyenami v. Oyedele (Supra), Sunday Akpan v. The State (Supra) Just to mention this two Cases to illustrate the attitude of Nigerian Courts in respect of the use of the Evidence Act in this regard.

14. See Bong Joyeku v. R. (Supra) the WACA in this case relied heavily on the English case of R. v. Bedingfield (Supra) in deciding whether or not the statement made by the deceased constitute part of res gestae.

15. See Notes 43 and 44 Chapter 3 (Supra).

16. See Section 33(b)-(c) of the Act.

17. See Note 47 Chapter 3 (Supra).

18. See R. v. Hardy (Supra).

19. A more general definition of admission is an express or implied concession by a person of the truth of an alleged fact.

20. See Notes 15, 16 and 17 Chapter 4 (Supra).

21. See Note 23, Chapter 4 (Supra).

22. See Sections 20-25 Evidence Act.

23. See Note 43, Chapter 4 (Supra).

24. See Section 27(2), 28 and 30 of the Act.

25. R. v. Zavecchas (1970) 54 C.A.R. 282. See Heylen Evidence p.180.

26. See Note 65 Chapter 4 (Supra).

27. Bailu v. State (1982)4 S.C. 41.

28. Ntaha v. State (1972)4 S.C. 1.

28(a). Dawa v. State (1980) 8-11 S.C. 236.

29. [1975]3 All. E.R. 175.

30. See Notes 126 and 127 Chapter 4 (Supra).

31. See Notes 1, 3, 4 and 5 Chapter 5 (Supra).

32. See Notes 9, 11 and 12 Chapter 5 (Supra).

33. In R. v. Silverlock (Supra) a solicitor was held to be an expert in handwriting though never had acquired knowledge of handwriting as an amateur.

34. See Note 28 Chapter 5 (Supra).

35. See Sections 56(1), 57 and 58 of the Evidence Act.

36. See the Case of Oladimeji v. Queen (1964) N.M.L.R. 31. In proving intoxication, the proper position is evidence of a medical expert.

36(a). [1894]7 A.C. 59 at 65.

37. Lawrie v. Muir (Supra).

38. See Section 91 Evidence Act. See Note 35 Chapter 3.

39. Maliki Law pp. 318-321.

40. Oladimeji v. Queen (Supra).

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