ILLEGALLY OBTAINED EVIDENCE IN NIGERIA: JUXTAPOSING THE PROVISIONS OF THE EVIDENCE ACT 2011 AND THE ADMINISTRATION OF CRIMINAL JUSTICE LAW 2010 OF ANAMBRA STATE[1]

Abstract
The question of what evidence ought to be admitted and the process of admission largely depends on the provisions of the Evidence Act. Thus, any evidence not in conformity with the requirements of the Evidence Act (EA) 2011 and in line with the provisions of Section 2 of the Act becomes inadmissible. In some cases, especially in criminal cases, it is sometimes tricky getting an evidence to assist the prosecution of the case. In the bid to get the evidence, it may lead to doing an illegal act. The question then becomes; what probative value should be ascribed to such illegally obtained evidence? What should weigh in the court's mind in considering its admission? What yardsticks should be deployed? Are there drawbacks to the admissibility of the illegally obtained evidence? How and in whose favour should the pendulum swing when this issue comes up before the courts? Are provisions of the Evidence Act sacrosanct in the face of relevant and seemingly inconsistent provision of any other enactment such as of Administration of Criminal Justice Law (AJCL) 2010 of Anambra State of Nigeria on the subject? Hermeneutic analysis of these and similar posers constitutes the methodology used in this paper.
Keywords: Illegally obtained evidence, Criminal justice, Anambra State, Jurisprudence, Admissibility

1. Introduction

Evidence is an item in the exclusive legislative list. It is within the legislative competence of the National Assembly. Prior to 2011, the extant law on Evidence in Nigeria was the Evidence Act of 1990 which was later christened Cap E14 of the Laws of the Federation of Nigeria 2004. In 2011, this Evidence Act was repealed and in its stead the current legislation that is the Evidence Act 2011 became the reigning king within the sphere of Evidence in Nigeria. It is imperative to state that the first legislation on Evidence in Nigeria was enacted in 1943 and its application commenced in 1945. The Evidence Act 2011 drew its life from this near seven-decade old predecessor. Thus, the current state of the Law on Evidence owes its provisions to the amendments to the first Act of 1943.

The Administration of Criminal Justice Law 2010 of Anambra State is the extant procedural law on criminal matters in Anambra State. Its application on criminal causes in

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the state took effect in 2010. This Law repealed the Criminal Procedure Law[2] as contained in the Revised Laws of Anambra State.[3] It is relevant for ease of understanding to state that procedural laws in criminal matters are within the competence of the state legislative assembly.

In this discourse, the issue of illegally obtained evidence will be considered from the prisms of these two pieces of legislation to ascertain if in reality, they have offered a new vista to the subject matter under consideration. We should also consider whether they have their own drawbacks and generally whether there exists a radical departure from the *status quo* viewing same from the known principles of common law and other earlier decided cases.

2. Definition of Evidence

It is relevant to state that 'evidence' like other legal concepts does not yield easily to one acceptable definition. The *Black's Law Dictionary*[4], defines evidence as something including testimony, documents and tangible objects that tends to prove or disprove the existence of an alleged fact. The *Black's Law Dictionary* also made use of the definition by Thayer[5], when he stated that, "Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact."[6] Evidence has also been defined as every type of proof legally presented at trial, which is intended to convince the judge and or jury of alleged facts material to the case.[7] The Court of Appeal, Per Salami JCA, in *Citizens Int. Bank Ltd v SCOA &anor*[8], adopted the *Black's Law Dictionary* definition of Evidence and thus held evidence to be "any species of proof or probative matters legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc for the purpose of inducing belief on the mind of the Court". The above definition shows that evidence is any fact or set of facts by which the existence or non-existence of facts is proved or disproved. It is pertinent to state that evidence may be classified in several ways depending on the author involved. Some authors[9] classify evidence into direct and circumstantial, oral, documentary and real evidence.

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[2] Cap 37, Laws of Anambra State 1991.
[3] 1991.
[4] B.A Garner (ed), *Black's Law Dictionary*, 8th Ed (2004) Minn St Paul, Thompson West Publishing Co., p. 595.
[5] James B. Thayer, 'Presumptions and the Law of Evidence', 3 *Harvard Law Review* 141-142 (1889) cited by the *Black's Law Dictionary*, *op cit,* p.595.
[6] *Ibid.*
[7] F. Nwadialor, *Modern Nigerian Law of Evidence*, (1999) Ethiope Publishing Corporation, pp. 4-5.
[8] (2006) 8 NWLR Pt 101, p. 353, para D-E.
[9] For Instance Nwadialor, *Modern Nigeria Law of Evidence* classified evidence as such

3. Admissibility of Illegally Obtained Evidence

3.1 The General Rule

The general rule is that illegally, improperly and unfairly obtained evidence remains admissible in law, whether adduced by the plaintiff, prosecution or by the defence. This principle dovetails into the trite principle that evidence regardless of how it was obtained is admissible, the material consideration being relevancy.[10] Sections 4-6 of the Evidence Act[11] support the reliance on relevancy as a safe perimeter to admit evidence. It would be a dangerous obstacle and an impediment to the administration of justice to insist that illegally obtained evidence should not be used against an accused person.[12] In *Kuruma v R*[13], the Privy Council upheld K's conviction for unlawfully possessing ammunition, notwithstanding that the ammunition had been found in the course of an illegal search. Similarly, in *Jeffrey v Black*[14], drugs were found during an unlawful search of B's room. This evidence was held to be admissible at B's trial for illegal possession. Lord Widgery CJ stated that, 'we must firmly accept the proposition that irregularity in obtaining evidence does not render the evidence inadmissible.'

The rule of illegally obtained evidence is not confined to illegal searches; its tentacles spread to evidence obtained by secret 'bugging' or listening devices even where the devices in question are planted by means of unlawful actions amounting to trespass to land or property or criminal damage to private property. In *R v Khan*[15], the House of Lords refused to accept the arguments that the inviolability of a citizen's home should be upheld by the automatic exclusion of any evidence obtained by illegal bugging devices of that kind. It was recognized that the conduct of the Police in this case amounted to violation of the human rights provision in Article 8 of the European Convention on Human Rights[16]. This gave rise only to the discretion to exclude the offending evidence which could properly be exercised only if admission would be unfairly prejudicial. Thus, a violation latched more in damages made out in a civil suit; it never stopped the court from admitting the evidence. The same general principle applies to evidence obtained by undercover police operations. In *R v Apicella*[17], the Court of Appeal upheld a rape conviction based upon the results of tests carried out on a specimen of a body fluid obtained from A for medical reasons whilst he was on remand. The specimen showed that he suffered from a strain of venereal disease which had also been contracted by his victims. In all these instances, notwithstanding how

[10] *Ogu v M.T& M.C.S Ltd* (2011) 8 NWLR Pt. 1249 p 371 para A-E.
[11] 2011.
[12] *Jones v Owens* (1870) 34 JP 759.
[13] (1955) AC 197.
[14] 1978 QB 490.
[15] 1997 AC 558.
[16] In *Kahn v UK* (2000) Crim. Lr 684, the European Court of Human Rights confirmed inter alia that Khan's right to privacy had indeed been infringed owing to absence of any legal framework regulating such action.
[17] 1986 82 Cr App R, 295.

the pieces of evidence were obtained, the court admitted them as they were relevant. Relevancy weighed more on the mind of the court than the manner of obtaining them.

3.2. Exceptions to the General Rule

It is noteworthy that case law has shown that there are exceptions to the general rule discussed above. The common denominator in these cases is that the enactments in question pursuant to which the issues arising in the facts were resolved sealed the fate of the courts divesting them of the latitude to admit such evidence. These cases would be highlighted to draw home the point made in this paragraph.

If evidential specimens are wrongfully obtained, there are circumstances in which the relevant legislation expressly declares them to be inadmissible. Section 15(4) of the Road Traffic Offences Act[18] provides that a specimen of blood shall be disregarded unless taken from the accused with his consent by a medical practitioner. Section 15(5) provides that the prosecution cannot use evidence of a blood or urine specimen, unless that specimen was divided when it was taken and one part of the specimen supplied to the defendant. Section 16 lays down conditions governing the circumstances under which documentary evidence may be used to show the results of tests on specimens without calling the testimony from the officers or analysts concerned. Section 8 of the same enactment provides that the Police must obtain two specimens of breath for analysis and that only the lower of these may be relied upon in court and that if a driver elects to have a specimen measuring under 50ug alcohol per 100 ml of breath replaced by a specimen of blood or urine, which he then provides, the original breath specimen can no longer be used. It follows that a prosecution cannot succeed on the basis of evidence derived from a single specimen or from a specimen that is not the lower of the first two provided by D or from a breath specimen that has been replaced by a blood specimen that the police or their analysts have subsequently lost or spilled.

In *Howard v Hallet,*[19] the police officer conducting the evidential breath test in that case was not fully familiar with the new breath analysis machines which had only just been introduced and omitted to obtain the second of the two specimens required within the period of the machine's standard operating cycle. He should at that point have restarted the machine in order to take the second and H should have been charged or released on the basis of whichever reading was the lower. Instead, the first specimen was disregarded and two more specimens were obtained, the prosecution proceeding on the lower of these. No evidence was given as to the reading obtained in respect of the initial specimen but it was admitted that it was the lowest of the three. On these facts, the Divisional Court quashed H's conviction. Section 8(1) [20] provides that the lower of two specimens shall be used and the other disregarded. It follows that in the event of more than two specimens being taken, the lower of the first two specimens must be relied upon. This case shows that full

[18] 1988 of UK.
[19] 1984 RTR J53.
[20] Road Traffic Offences Act.

compliance with the statutory specimen taking procedure is essential to the success of any prosecution.

In a similar vein, in *Wakely v Hyams*[21], the defendant was acquitted of the offence for no better reason than that having provided a lower breath specimen containing just 50ug alcohol per 100 ml breath, he should have been offered the option of a blood or urine test under Section 8(2) of the Act[22] but was mistakenly required to provide blood, which he did. The Court upheld his argument to the effect that the blood test made the results of the breath test inadmissible, whilst the fact that he had been required, rather than invited, to provide the blood rendered that test invalid as well. This is despite the fact that the tests were both positive and corroborated each other. In this case, the defendant/appellant argued that the blood specimen was invalid because it had not been provided in accordance with the section at all. Thus, even though Section 8(2) admittedly requires the exclusion of breath specimen once blood or urine has been provided under this section, an improper extraction of the blood test rendered nugatory this provision.

Section 64(1) and (3b) of the Police and Criminal Evidence Act[23] are also instructive in this regard. Section 64(1) provides that finger prints or samples taken from a defendant in connection with charges that he is acquitted or were later dropped must be destroyed. Section 64(3b) further provides that information derived from a sample which is required to have been destroyed may not be used: (a) in evidence against the person entitled to its destruction or (b) for the purposes of any investigation of an offence. The scope and effect of this rule was examined by the House of Lords in Attorney General's Reference (No 3 of 1999).[24]

The brief facts of the case are as follows: An elderly woman was assaulted, tied up and horrifically raped in her home in January of 1997. The rapist's DNA was extracted from swabs taken from the victim and stored in the National DNA Database. In January 1998, B was arrested in connection with a different burglary. His DNA was obtained by means of a mouth swab. Because he had given a false name, the Police did not then realize that he already had a criminal conviction for affray. Had they known this, they could have obtained a DNA sample on the basis of that conviction which could then lawfully have been retained, regardless of the outcome of the burglary charge. As it was, they obtained the sample in connection with the burglary alone and when B was acquitted of that burglary charge in August 1998, the sample should have been destroyed in accordance with Section 64(1). The sample however had already been submitted to the DNA Database for the purpose of a speculative search and soon after that, it was matched to the rape of the elderly woman. The police took fresh DNA samples from B, who was found on arrest to be in the possession of a knife, which itself is a recordable offence on the basis of which fresh DNA

[21] 2001 2WLR 56.
[22] Road Traffic Offences Act.
[23] (1984) of UK.
[24](2001) 2 WLR 56.

Samples could have been obtained. Nevertheless, the evidence derived from the original DNA sample had played a key role in the investigation of the offence, at a time when it ought no longer to have existed. The trial Judge accordingly excluded the evidence; the case of the prosecution collapsed and on a reference to the Attorney General, the Court of Appeal held that the trial Judge's decision was correct.

In *R v Weir*[25], a DNA sample was obtained from W in 1997 in the course of an investigation into a suspected drugs offence. Evidence derived from this sample should have been destroyed when the proceedings against him in respect of that offence were discontinued, but for some reason it was not destroyed. In January 1998, a couple was savagely assaulted by a burglar in their home and the husband died. DNA samples obtained from the scene of the crime were found to match those previously obtained from W. A fresh DNA sample was then obtained from W, which also matched. The random match probability was assessed as being less than one in a thousand million but W's conviction for murder, burglary and assault were quashed on the basis that none of the DNA evidence was admissible under Section 64(3b).

These cases negate the general rule that illegally obtained evidence is admissible. The relevant laws under consideration in those cases make certain conditions a pre-requisite for such evidence to be admitted. Failure to comply with the pre-requisites renders nugatory such admission.

4. Admissibility of Improperly Obtained Evidence in Nigeria: EA 2011versus AJCL 2010

Prior to the dawn of the Evidence Act[26], the law on prejudicial or illegally obtained evidence was basically the common law. Courts in Nigeria applied the decisions of English Courts and other courts of common law jurisdiction to resolve the issue. However, the Evidence Act 2011 has made provisions on this issue. Sections 14 and 15 thereof provide as follows:

Section 14: Evidence obtained-

(a) Improperly or in contravention of a law; or
(b) In consequence of an impropriety or of contravention of a law;

shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.'

Section 15: For the purposes of Section 14, the matters that the court shall take into account include-

(a) The probative value of the evidence;
(b) The importance of the evidence in the proceeding;

[25] 2000 ALL ER (D) 761.
[26] 2011.

(c) The nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
(d) The gravity of the impropriety or contravention;
(e) Whether the impropriety or contravention was deliberate or reckless;
(f) Whether any other proceeding(whether or not in court) has been or is likely to be taken in relation to the impropriety or contravention;
(g) The difficulty, if any, of obtaining the evidence without the impropriety or contravention of law.

As can be gleaned from the sections, the gist of the provisions is that the court has the discretion to admit or not to admit the evidence provided that the injustice averted by admitting the evidence will supersede the injustice occasioned by its exclusion. The courts are to be guided by some yardsticks in so doing. The operative word is 'include'[27]. In the section 15 of the Evidence Act, it shows that the variables the court will consider are not restricted to the contents of Section 15. In line with the argument of Hon[28], 'it is important to state , first of all that those decisions to the effect that the exclusion of such evidence was a matter of discretion and not law are no more good law in Nigeria in view of Sections 14 and 15 of the Act. Suffice it to say that such discretion from the contents of Sections 14 and 15 has now been enacted into law. In this circumstance, certain propositions that held sway in the pre-2011 period still hold subject to minor variations. One of such that applies is the general rule of law in civil and criminal law that evidence which is relevant is not excluded merely because it was illegally obtained'.[29] Hon also argues that 'this rule is subject in criminal cases to the discretion of a trial judge to exclude such evidence against a defendant, by setting the essentials of justice above the technical rule if its strict application would operate unfairly against the accused.'[30] It is to be noted that in the case of *Abubakar v Chuks,*[31] the Supreme Court relying on *Sadau & anor v The State*[32] held that the source of evidence is not relevant to admissibility but how relevant such evidence is to the proceedings.

Be that as it may, there seems to be a conflict between the provisions of the Evidence Act on the subject and those of Section 13 of the Administration of Criminal Justice Law, Anambra State [33] as regards recording the confessional statement of an accused person. The said Section 13 provides thus:

[27] By definition of terms include entails- To contain, comprise or embrace-(a) as a member of an aggregate or a constituent part of a whole-(b) as a sub ordinate element, corollary or secondary feature. (c) to place in a class or category; to embrace in a general survey; or to reckon in a calculation. See *Mandara v AG Fed* (1984) 4 S.C 8, pp. 11-12.
[28] S.T Hon, *Law of Evidence in Nigeria* (Vol 1) p.23
[29] *Haruna v AGF* (2012) All FWLR Pt 632, 1617 at 1636
[30] *Op Cit*, pp. 23-24
[31] 2008 All FWLR Pt 408, 207 SC.
[32] 1968 N.M.L.R. 208.
[33] Administration of Criminal Justice Law 2010, of Anambra State.

> 13(1). Any person who is arrested, whether with or without a warrant, shall be taken with all reasonable dispatch to a police station or other place for the reception of arrested persons, and shall without delay be informed of the charge against him. Any such person while in custody shall be given reasonable facilities for obtaining legal advice, taking steps to furnish bail, and otherwise making arrangements for his defence or release.
> (2). Where any person who is arrested with or without a warrant volunteers to make a confessional statement, the police shall ensure that the making and taking of such statement is recorded on video and the said recording and copies thereof may be produced at the trial provided that in the absence of video facility, the said statement shall be in writing in the presence of a private legal practitioner or any other person of his choice.
> (3) The Legal Practitioner or any other person referred to in subsection (2) shall also endorse with his full particulars, the confessional statement as having witnessed the recording thereof.

Subsections (2) and (3) of the said Section 13 are poignant to the issue under discourse. The subsections have introduced a new dimension to the law on taking confession. Confession is provided for in the Evidence Act[34]. Confession has also been defined by the courts in several decisions.[35] It is to be remembered that matters relating to Evidence are under the Exclusive Legislative List. The question that will then be asked is, can the Court in the exercise of its discretion refuse to admit a confessional statement on the ground of non-compliance with the provisions of Section 13 of the ACJL 2010? Is the discretion in Sections 14 and 15 of the Evidence Act indefinite?

On this issue, a lot of factors would come in to affect and swing the pendulum. The doctrine of covering the field provides that in the face of any inconsistency between the federal law and state law, the federal law takes precedence. The inconsistency here is not only mere distinction on letters. It equally extends to the situation that where a federal law has provided for a variable, the state has no legislative latitude to provide for same, because if they do, the federal law will assume precedence.[36] This is without its own banana peel. Section 2 of the Evidence Act 2011 provides that for the avoidance of doubt, all evidence given in accordance with section 1 shall unless excluded in accordance with this or any other Act, or any other legislation validly in force in Nigeria, be admissible in judicial proceedings to which this Act applies provided that admissibility of such evidence shall be

[34] Sections 28-32.
[35] See *Hassan v State* (2001) 7 NSCQR, 107. *Gozie v State* 2003 NSCQR 754, *Nwachukwu v State* (2002) 11 NSCQR 663.
[36] See the following cases, *OSIEC v AC* (20101) 19NWLR Pt Pp 350-351, *G.G de Geo Physique v Etuk* (2004) 1 NWLR Pt 835, p 48-9, AG *Abia State v AG Fed* (2002) 6 NWLR Pt 763, 264, *AG FED v AG Lagos State* (2013) 16 NWLR Pt 1380.

subject to all such conditions as may be specified in each case by or under this Act." In addition to this, Section 3 provides that "nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria". It is deducible from these sections that there is a synergy between the Evidence Act 2011 and other pieces of legislation, the Administration of Criminal Justice Law 2010 Anambra State inclusive.

The thrust of these provisions is that the combined and co-ordinated reading and construction of the Evidence Act and any other legislation as the case may be determine the admissibility of particular evidence. This very feature sought to betray the doctrine of covering the field which is to the effect that since the federal law has provided on evidence, the state has no competence to legislate on same. On this score, there is nothing in the Evidence Act that forbids the application of Section 13 of the ACJL.

There is need for a court to mellow down if a position of law is mandatory even if only on a procedural level and accommodate a party that appears to have run foul of the dictates of a procedural law.[37] Thus, the Court even when Section 13 of the ACJL of Anambra State has not been complied with should still admit the evidence. Furthermore, the word 'shall' has no fixated meaning; its real purport depends by and large on the particular context of usage regardless of what enactment in which it appears, whether constitution, statute or rules of court. In relation to this principle, where the legislature has expressed no clear intention as to whether a provision is mandatory or merely permissive, the court has a duty to interpret the legislation by imputing to the legislation an interpretation which is most probable and consistent with reason.[38] There is nothing in the said section that fixates the meaning of 'shall' as the provision is silent as to whether it is mandatory or optional. It appears that given the jurisprudential purpose of the provision, the court will be most inclined to rule that it is optional. Similarly, in interpreting legislation, the court is bound to give an interpretation consistent with the smooth running of the system.[39] The question then stands to be asked, will the court throw away a piece of written confession material to the charge at hand, that has not detracted from the provisions of Sections 28-32 of the Evidence Act simply because of non-compliance with Section 13 of the ACJL? This is pertinent especially when there is a provision recognized by case law for trial within trial.[40]

5. Conclusion

From the above analysis, the issues that may arise with regard to the provisions of these two enactments have been summarized by the question asked above. The answer in our mind is that the Courts should not throw away such evidence provided it scales through the hurdles set out in Section 15 of the Evidence Act. Inasmuch as we do not encourage the abuse of individual rights in the guise of fishing and acquiring information, we still believe

[37] *BBN Ltd v Olayiwola& Sons Ltd* (2005) 3 NWLR Pt 912 pp. 457-8.
[38] *A.T Ltd v ADH Ltd* (2007) 15 NWLR Pt 1056 pp. 150-2.
[39] *Ibid.*
[40] *Eke v State* (2011) 3 NWLR Pt 1235 at 589.

that the security agencies need to be encouraged in doing their work knowing the peculiar circumstances we find ourselves with regard to modern methods of investigation. It is our conclusion that even though evidence may be improperly obtained provided it complies with the requirement of section 15 of the Evidence Act 2011, such evidence need be allowed under judicial discretion which must be exercised judiciously and judicially.