

REVISITING THE EFFECT OF NON-COMPLIANCE WITH SECTION 9(3) OF THE ADMINISTRATION OF CRIMINAL JUSTICE (REPEAL AND RE-ENACTMENT) LAW OF LAGOS STATE 2011: KADIRI V THE STATE OF LAGOS IN FOCUS*

Abstract

Confessional statements obtained at the point of investigation have remained the best evidence relied on by prosecutorial agencies in proving the guilt or otherwise of an accused person. Challenges associated with the process of obtaining extra-judicial statements have propelled the enactments of significant laws to eliminate abuses inherent in the practice, and to regulate the admissibility of same during trial. The Evidence Act 2011, being the primary law that regulates the admissibility of evidence in Nigerian courts provides for conditions to be fulfilled by such statement to be admissible – the most fundamental being that it must have been obtained voluntarily. Legally, the burden is fixed on the prosecution to prove the voluntariness of such statement, where it is in dispute. The Administration of Criminal Justice (Repeal and Re-enactment) Law, 2011 of Lagos State is a landmark legislation intended to streamline these issues. This paper explores the admissibility of confessional statements under the Evidence Act, the scope of the provisions of section 9(3) of the Administration of Criminal Justice Law of Lagos state and the effect of non-compliance with the provisions on admissibility of such statements. In addition, the twist introduced in the case of Kadiri v The State of Lagos will be examined side by side other decisions of the appellate courts that appear to be in conflict with that decision. It is our finding that the position of the law before the decision in Kadiri is preferable.

Keywords: Confessional Statement, Criminal Justice, Admissibility, Non-compliance, Decision

1. Introduction

The introduction of state legislations into the legal analysis of the admissibility or otherwise of confessional statements have generated a lot of judicial and academic interests. Specifically, Section 9(3) of the Administration of Criminal Justice Law (Repeal and Re-enactment) Law of Lagos State 2011('the ACJL') introduced new conditions for the admissibility of confessional statements, or so we thought. In several cases, albeit decided by the Court of Appeal, the law before 2019 was that non-compliance with this provision rendered such statements inadmissible. However, in 2019, learned jurist, Ugochukwu Joseph Ogakwu, Justice of the Court of Appeal, rendered a decision that fundamentally departed from the erstwhile position. Following the case of *Kadiri v The State of Lagos*¹ where the decision was reached, legal practitioners and courts below the Court of Appeal must now contend with these conflicting decisions in order to determine how to argue or decide their cases respectively. The position of the law before and after the judgment would be considered anon. It will be argued that the position in the cases decided before *Kadiri's case* is to be preferred. This article will culminate in recommendations for ensuring that the days of coercing accused persons into making confessional statements are long past.

2. Meaning and Place of Confession under the Evidence Act, 2011

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.² A confessional statement freely made is regarded as the strongest form of evidence, presumably because it proceeds from the mind of a person burdened by guilt who desires to make a clean breast of the weight of guilt.³ Admissibility of evidence, generally, is governed by the Evidence Act, 2011. Under this Act, the basis for admissibility of confessions is reliability, determined by the presence or absence of oppressive circumstances during the making of the confession. Oppression under the Act includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture.⁴ Section 29 of the Evidence Act, 2011 provides as follows;

- (1) In any proceeding, a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
- (2) If, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained-
 - a. By oppression of the person who made it; or

*By **D. O. OKANYI**, Senior Lecturer, Nigerian Law School, Augustine Nnamani Campus, Agbani- Enugu. Tel: 0803969775. Email: okanyidonjude@yahoo.com

¹ (2019) JELR 91811 (CA)

² Section 28 of Evidence Act Cap E14 LFN 2004. See also the case of *Sunday v. Federal Republic of Nigeria* (2013) LPELR 2019 2(CA)

³ *ibid*

⁴ Section 29(5) Evidence Act 2011.

- b. In consequences of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow such confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (Notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.
- (3) In any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either subsection (2) (a) or (b) of this section.
- (4) Where more persons than one are charged jointly with an offence and a confession made by one of such persons in the presence of one or more of the other persons charged is given in evidence, the court shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct.
- (5) In this section 'oppression' includes torture, inhumane or degrading treatment.⁵
By the provision of sub-section (1) of section 29, the admissibility of a confessional statement is predicated on two important factors, to wit:
- a) Relevance to the particular proceedings; and
 - b) Non exclusion by virtue of other provisions of section 29

Whilst the issue of relevance may be easily determined by reference to the charge and the contents of confessional statement, the issue of exclusion by other provisions of the section tends to be contentious.

The implication of sub-section (2) above is that, only a confession made voluntarily can be admitted in evidence. It further places the burden on the prosecution to prove that the confessional statement was not obtained by oppression, threat, inducement, or promise. Such proof required may be done by adducing oral evidence, tendering the video recording of the manner by which the confession was obtained from the accused or by the statement itself which bears words of caution at the beginning and signed by the suspect. This position was upheld by the Supreme Court in the case of *Kamila v. The State*⁶, where the Supreme Court in upholding the admission held that: It is apposite to say, that this court has over the years evolved some requirements which a confessional statement must meet in order to be relied on by trial courts. Some of these requirements include the followings:

- (i) It must contain the words of caution,
- (ii) The cautionary words must have been administered in the language understood by the accused person,
- (iii) The statement was duly signed or thumb printed by the accused person,
- (iv) That the statement was recorded in the language understood by the accused person,
- (v) That the statement was after being recorded, read over and interpreted to the maker in the language it was recorded.

From the look of the statement of the appellant Exhibit D, it is crystal clear that all the above requirements were met or complied with, hence I also hold the view, that the trial court was right to accept and act on the extra-judicial statement of the appellant (Exhibit D).

3. Challenges with Obtaining Confessional Statements under the Old Regime

Under the old Police Act⁷ the police was saddled with enormous responsibilities with regard to investigation of crimes. The new Police Act did not change essentially the responsibilities of the Police in this regard. Section 4 of the Police Act, 2020 provides that:

The Police Force shall:

- (a) Prevent and detect crimes, and protect the rights and freedom of every person in Nigeria as provided in the Constitution, the African Charter on Human and Peoples Rights and any other laws;
- (b) Maintain public safety, law and order...

⁵ Evidence Act Cap E14 Laws of the Federation of Nigeria 2004

⁶ [2001] FWLR (pt.37)1078

⁷ Cap P19 LFN 2004

Pursuant to the above, the police is conferred with humungous powers with respect to investigation, prevention and detection of crimes. This brings them into constant contact with crime suspects and usually provides a convenient platform for the extraction of confessional statements from such suspects extra-judicially. In a radical attempt to combat the human rights abuses occasioned by the use of extra-judicial means to extract confessional statements from suspects, the Evidence Act and other laws have placed an onerous duty on the police to ensure the voluntariness of such statements.⁸ In addition to this, the judges Rules which was developed by Judges of the King's Bench Division in England, has been adopted in Nigeria as a further safeguard against possible infractions of the suspect's rights during investigation and interrogation. The Rules made certain important provisions. First, that the police are entitled to question anybody in the course of the investigation of a crime and unraveling the offenders. Second, that the police must caution a person where there is reasonable evidence to suspect that such person has committed a crime. Third, that a further caution must be issued where the suspect elects to make a statement to the police. Fourth, that the police must keep a record of questioning which must be signed by the suspect or the investigating officer. Fifth, that every formal written statement must be properly taken down and recorded.⁹

The Judge's Rules are merely rules of procedure and non-compliance with the rules will not render the confessional statement inadmissible¹⁰. Another practice which was adopted under the old regime as a means of testing the voluntariness of confessional statements was the practice of trial-within-trial. This was clearly provided for under the old Evidence Act and retained in the 2011 Act. This procedure was, however, abused by the defence counsel, who customarily would raise objections to the admissibility of the confessional statements even where evidence tilts towards the veracity of the statements. Even Judges have expressed reservations with the relevance of the trial-within-trial in the Nigerian Criminal Justice system. In the case of *Michael v The State*¹¹ the erudite Law Lord, Nnaemeka-Agu JSC criticized the concept in the following words: I must confess that I have my reservation about the continued need for a trial-within-trial in this country in which our judges are both judge and jury... In addition, Justice P.K Nwokedi had offered a subtle disapproval when he opined thus:

Personally, I have often wondered what is the necessity of a trial-within-trial before the admission of an alleged confessional statement in our courts. In England, where trial is by jury, it may be said that the jury may be prejudiced by the controversy as to whether the same had been made voluntarily or not, In this country, where the court is the Judge and jury, it seems to me that the Judge can as well resolve the issue as to voluntariness, with other issues, in his judgment. The prosecution if challenged as to the voluntary nature of a confession should lead all evidence at its disposal to establish same. The accused in his defense may lead refutal evidence. The Judge makes his findings at the conclusion of evidence. The same judge, who conducts the mini-trial, conducts the main trial. The issue of being prejudiced would not arise. Even if wrongfully admitted, the same may be expunged from the record while writing the judgment. The issue of mini-trial as far as this country is concerned, is an unnecessary, and at the same time, cumbersome adjunct to our criminal trial. It is carry-over from the English legal system which operates under a different background.¹²

4. The Innovation under the Administration of Criminal Justice Law of Lagos State 2011

The Administration of Criminal Justice Law of Lagos ('the ACJL) is one of the recent legislations that is geared towards the enhancement of our criminal justice administration. Section 9(3) thereof provides as follows:

Where any person who is arrested with or without warrant volunteers to make a confessional statement, the police officer shall ensure that the making and taking of such statement is recorded on video and the said recordings and copies if any 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 legal practitioner of his choice.¹³

The intervention intended by the introduction of the Administration of Criminal Justice Law on the forms and process of obtaining confessional statement is to save the court the time of conducting a trial-within-trial.

⁸ See Section 29 of the Evidence Act, 2011 and Section 9(3) of the ACJL.

⁹See Ojeih, Okanyi & Egemonu, *Criminal Litigation in Nigeria: Practice and Procedure* (Chenglo Limited;2019) p.81.

¹⁰ *Musa v. The State* (2013) LPELR-21866.

¹¹ (1990)1TLR (pt.1)34 at page 45.

¹²Unpublished Paper titled 'Admissibility of Confessional and other Statement' cited by Ogundare JSC in *Gbadamosi v The State* (1992) LPELR-1313(SC)

¹³ The Administration of Criminal Justice Act,2015 contains similar provisions in Section15(4)and 17(2)

5. Section 9 (3) of ACJL through the Lens of the Courts

In the course of trying to give a functional interpretation to the provisions of Section 9(3) of the ACJL, the appellate court appears to have run into murky waters on the true intendment of the legislators regarding that provision. In some judgments, the provision has been interpreted to be mandatory,¹⁴ while in some others, the Justices appear to have leaned towards a permissive interpretation.¹⁵ In the case of *Eneche v The People of Lagos State*¹⁶, Biobele Georgewill, JCA who delivered the lead judgment, had this to say on the mandatory nature of the provision under consideration:

I shudder to think how such a mandatory provision of the law made to safeguard the right of the citizen, such as the Appellant, alleged to have voluntarily confessed to the commission of a crime as heinous as Armed Robbery and which upon conviction carries the death penalty, can be lightly ignored by a trial court as being merely technical and was not to be allowed to defeat the cause of justice? This statutory provision is clear and without any ambiguity. It is also both mandatory on the police to comply with it and incumbent on the Court below to give effect to it by the use of the word 'shall' therein, which clearly underscores the compelling nature of the provision, as novel as it appears but in sync with what obtains in civilized and advanced criminal justice system in other climes, in the Administration of Criminal Justice Law of Lagos State.

Similarly, in the case of *Awelle v The People of Lagos State*¹⁷ the Court had upon a thorough consideration of this issue held inter alia:

I think the time has come for all active participants in our Criminal Justice system to follow the law and do what is just, right and proper. I think the provisions of Section 9(3) (in pari materia with Section 17(2) Administration of Criminal Justice Act) are also purpose made provisions designed to achieve transparency in arrest and arraignment process, they are provisions that are crafted for the protection of the accused person during arrest and trial process, they are mandatory and must be observed and respected. Where the prosecution fails to comply with the mandatory provisions of Section 9 (3) of the Administration of Criminal Justice Law, any confessional statement extracted from an accused shall be rendered impotent.

Equally, in *Awelle v. The People of Lagos State*¹⁸, Abubakar JCA had this to say on the same issue:

The purpose of Section 9(3)... is to provide conducive and assuring atmosphere for persons standing trial under our criminal justice system, to obviate incidence of abuse of human rights. I also see the provisions as a positive development in granting accused person's assurance of fair trial. It is a provision designed to check mate [sic] abuse of human rights by overzealous security officers who by all means, must ensure that an accused person is subjected to undue hardship and cowed to confession.

On the effect of non-compliance with the provisions of Section 9(3) of the Administration of Criminal Justice Law, 2011, the court in *Charles v. Federal Republic of Nigeria*¹⁹, and *Nnaedozie v. Federal Republic of Nigeria*²⁰ held that where a confessional statement is obtained without strict compliance with the provisions of Section 9(3) ACJL, such confessional statement shall be inadmissible. It is worthy of note that these decisions have not been overruled by the Supreme Court of Nigeria. They are, therefore, binding on all lower courts until a contrary decision is reached by the apex court.

6. The Twist Introduced in *Kadiri v. The State of Lagos*²¹

As we have established earlier from the line of decided cases cited above, the law appeared settled that non-compliance with the provisions of Section 9(3) of the ACJL of Lagos State is fatal to the case of the prosecution and, ipso facto, renders such confessional statement inadmissible. The recent decision of the Court of Appeal in *Kadiri's* case fundamentally departed from the above position, thereby introducing a twist to the true intendment of Section 9(3) of the ACJL. We shall proceed to take a look at the facts of the case, the reasoning of the court and proceed to give our opinion on the contested decision.

¹⁴*Zhiya v The people of Lagos State* (2016) JELR2346 (CA); *Eneche v. The People of Lagos State* (2018) LPELR-45826(CA)

¹⁵ *Kadiri v. The state of Lagos* (2019) JELR 91811(CA)

¹⁶ (2018)LPELR -45826(CA)

¹⁷ (2016)LPELR-(41395)1@31

¹⁸ *Ibid*

¹⁹ [2018]LPELR 43922 CA

²⁰ [2018]LPELR-43925

²¹ (2019)JELR 91811(CA)

Facts of the Case

The facts of the matter were that at about 5:00am on 24th May 2011, the Complainant was on her way to board her office staff bus to go to work when she was accosted by three persons who snatched her handbag and ran away. She went back home, got another hand bag and some money from her husband, and left the house again to go and board the staff bus. At the bus stop, she saw one of the three persons who snatched her bag, she raised an alarm and her colleagues helped her apprehend the person, who happened to be the 1st Defendant at the lower court. He was taken to the police station and in the course of investigations the Appellant, who was said to be one of the three persons, was arrested. Before the matter went to trial, the complainant died and consequently did not testify at the trial. The prosecution however called two witnesses, being the police officers who investigated the complaint. The statements made by the complainant as well as the confessional statements of the Appellant, the 1st Defendant at the lower Court were tendered in evidence. The Appellant and 1st Defendant testified in their defence at the trial and retracted their confessional statements. They did not call any other witness. At the end of the trial, the lower Court held that the offences charged had been proved beyond reasonable doubt, convicted the accused persons as charged and imposed a sentence of twenty-one years imprisonment on two counts of conspiracy to commit robbery and ordered that the sentences run concurrently. The Appellant was dissatisfied with the judgment and appealed against same.

Judgement of the Court of Appeal

The Court of Appeal, per Ugochukwu Anthony Ogakwu, JCA, in his lead judgment had this to say on the meaning, purport and intendment of Section 9(3) of the Administration of Criminal Justice Law of Lagos State, 2011:

The above provision has both imperative or mandatory as well as permissive or directory components as the words ‘shall’ and ‘may’ are therein employed in setting out the requirements to be adhered to. Firstly, it makes it mandatory that where a confessional statement is volunteered, the making and taking of such a statement is to be recorded on video. It then makes a proviso that in the absence of video facility, the statement shall be made in the presence of a legal practitioner of the choice of the person arrested. The permissive or directory aspect of the stipulation is that the video recording MAY be produced at trial. Without equivocation, the provision does not stipulate the video recording must be produced with the confessional statement when it is sought to tender the confessional statement in evidence. The video recording is not sine qua non to the tendering of the statement and so the confessional statement is not inherently inadmissible. The question that consequentially arises is when would it be necessary to produce the video recording in evidence? The answer lies in the *raison d’etre* for the provision, which is to ensure that the defendant is not ‘intimidated’ or ‘cowed’ into making a confessional statement, *id est*, that the statement was not made voluntarily. It is my deferential view that a judge should not be a servant of the words used. He should not be a mere mechanic in the power-house of semantics. He should be the man in charge of it. Therefore, the approach in deciding whether the provisions of section 9 (3) has been complied with or not, should always bear in mind the mischief that necessitated the provision. So, it is only if during trial when the confessional statement is sought to be tendered, and objection is raised that it was not made voluntarily that the stipulation requiring that the video recording may be produced at the trial kicks in. Where no such objection is raised, the prosecution is not obligated to produce the video recording, since the confessional statement is not inherently inadmissible²²

Our Argument

Having read the decision of the Court in the above case and plethora of other cases on the subject, it is our view that admissibility of evidence is one thing, while weight to be attached to evidence is an entirely different thing; for while a piece of evidence may be admissible and indeed admitted in evidence, it may be bereft of any probative value in the resolution of the issues before the court. Thus, it does not follow that once a piece of evidence is admitted, it automatically carries the needed weight in the resolution of issues in contention. This distinction, though thin and, in some instances, almost blurred, is still important to be borne in mind because while it is the Evidence Act, 2011 that deals with the issue of admissibility of a statement amounting to a confessional statement of a defendant in a criminal trial in Lagos State, it is the ACJL that deals with both the potency and weight of such a statement admitted as a confessional statement.²³ What this means is that whether or not a confessional statement will be accorded probative value is a matter left to the discretion of the Judge, which must be exercised judicially and judiciously²⁴, taking into cognizance the peculiar facts of each case and,

²² Per Ogakwu, JCA in *Kadiri v The State of Lagos, Supra*

²³ Per Justice Biobele Abraham Georgewill, J.C.A in *Eneche v People of Lagos State (supra)*

²⁴ *R. Lauwers Import-Export v. Jozebson Industries* (1988) JELR 35499(SC)

in this case, compliance with extant law.²⁵ In Lagos State, the extant law is the ACJL, which provides in section 9(3) as follows:

Where any person who is arrested with or without a warrant volunteer to make a confessional statement, the Police Officer shall ensure that the making and taking of such statement is recorded on video and the said recording and copies if any 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 legal practitioner of his choice.²⁶

Thus, it is mandatory that the Police comply with this provision by ensuring that the making of the statement is recorded on video or, in the alternative, that a legal practitioner of defendant's choice is present. It is important to note the mischief which the above provision is intended to cure, to wit: that suspects in custody of the police or other law enforcement agents are protected from the use of force in extracting confessional statements from them.

Leaning towards any permissive interpretation of the above clearly mandatory provision will have the unpleasant effect of taking our criminal justice system back to Egypt. May God forbid! The Police must not be given an opportunity to think that compliance with the above provision is discretionary. In fact, it should be argued that effective compliance with section 9(3) of the ACJL could dispense with the requirement of trial-within-trial which usually slows down the wheel of justice in criminal trials. We are therefore clearly in support of the earlier interpretation of the section as seen in the cases decided before *Kadiri*. That is to say that non-compliance with section 9(3) of the ACJL should render such a statement, not only impotent, but out rightly inadmissible.

7. Conclusion and Recommendations

From the foregoing arguments, we have established that, although confessional statements can be relied on by the courts in arriving at the guilt of a defendant in a criminal trial, the court must ensure that such confessional statements pass the test of admissibility as provided for both under the Evidence Act and other extant laws regulating criminal trials. Where the law creates a condition precedent for the admissibility of a confessional statement, such condition must be met before reliance could be placed on such evidence by the court. We have established that compliance with section 9(3) of the ACJL is a condition precedent for admissibility of a confessional statement in Lagos State. This takes the issue outside the discretion of trial courts. To make the duty of the Police in complying with the provisions of section 9(3) easier, we recommend that the government should provide the needed finances for the installation of CCTV cameras and other needed detective tools against torture in Police Stations. Police officers should be trained and retrained on the need not to torture and to understand that prosecution is not same as persecution and that their duty is to serve the honourable ends of justice to all parties and society and not to convict by all means. Also, Police officers should be individually prosecuted for any established infraction of the fundamental right to dignity of suspects at the point of obtaining extra-judicial statements. We recommend that any future amendments of the ACJL should include a provision making it mandatory for the prosecution to include the evidence of video recording of the suspect's statement in compliance with the provisions of Section 9(3) of the ACJL or evidence of presence of the suspect's legal practitioner as part of the proof of evidence while filing the charge. This will take away the issue of discretion on the prosecution to tender or not tender the evidence as held by erudite Justice Ogakwu, JCA in *kadiri's* case.

²⁵ *Agu & Anor. v. COP* (2016) JELR 37176 (CA)

²⁶ The Administration of Criminal Justice Act, 2015 contains similar provisions in sections 15(4) and 17(2)