RECENT DEVELOPMENTS IN THE LAW OF EVIDENCE AND PROCEDURE RELATING TO CRIMINAL TRIALS IN NIGERIA*

Abstract

The administration of justice is concerned, principally, with establishing a system of fairness in the approach of judicial bodies saddled with the responsibility of determining right and wrong between individuals, entities or between individuals and entities. Whether it will be regarded as equality of privileges or of rewards, or with Plato, as a harmony of interests, justice in every case gets its meaning from adjustments of real or putative dissensions. Thus, adjustment, harmonization, concordance, are the product and character of active justice, while correlative passive quality is the virtue of obedience-obedience to the law, human or divine, the recognition and observance of rights. This work seeks to highlight some recent Nigerian enactments which, through adjustment of older enactments, pushed further the high ideals of active justice in Nigeria. There are basically two major developments in the near past that have shaped the law of evidence in Nigeria and have indeed injected new ideas into the administration of criminal justice. These developments have been introduced through the enactment of the Evidence Act 2011 and the Administration of Criminal Justice Act 2015. This work considers some of the salient provisions of these two statutes and also briefly comments on recent decisions of superior courts record including the Supreme Court of Nigeria in these regards. The two pieces of legislation that have impacted on this field of criminal justice administration are carefully explored hereunder.

Keywords: Justice, Criminal Justice, Revolutionary Provisions, Confessional Statements, Electronic Signature, Public Documents.

1. The Evidence Act 2011

The legislation contains some revolutionary provisions in the main, which have either completely reversed the provisions of the 1990/2004 Acts or have reshaped them in an unprecedented fashion. Some of these provisions are discussed later in this work but first let us ask and answer the following question. Are the provisions of the Evidence Act, 2011 superior to other legislations in Nigeria on Evidence related issued? The Act makes its provisions superior to any other enactment with respect to the admissibility of evidence. It has achieved this feat by the proviso to its section 2. The entire section reads:

> For the avoidance of doubt, all evidence given in accordance with section I 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 subject to all such conditions as may be specified in each case by or under this Act.[1]

To avoid according a destructive interpretation to this section and thereby negative its interventionist intentions, care must be taken. The phrase 'unless excluded in accordance with this or any other Act or any legislation' means that either the Evidence Act or any other legislation in force in Nigeria can, by its provisions exclude any type of evidence from being admitted in a judicial or quasi-judicial inquiry. The phrase 'or any legislation' coming after 'other Act', the latter of which is always known in Nigeria to denote legislation passed by the National Assembly have been broadened the scope of the provision-by contemplating laws made by a State House of Assembly or other procedural laws made by dully authorized authorities, for example, heads of the various courts established in Nigeria pursuant to powers vested by law or the Constitution on such heads of courts. But for any such other Act or legislation' to play this crucial role, it must be 'validly in force in Nigeria'.

The proviso to section 2 of the Act has, however, limited the role of any such 'other Act or legislation' can play in the admissibility of any piece of evidence. The limitation is such that if there is any conflict between the provisions of any such Act or legislation with the Evidence Act with respect to admissibility of evidence, the latter shall prevail. This can be gathered from the phrase 'admissibility of such evidence shall be subject to all such conditions as may be specified in each case by or under this Act'. The net, if we limit ourselves to the proviso in section 2, would have been that in the absence of any conflict, or when the Evidence Act is silent on an issue, the provisions of that other Act or legislation will still hold sway when it comes to admissibility of any piece of evidence, but this conclusion becomes suspect when we consider the provisions of section 3 of the new Act, which are as follows: 'Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria'.[2] There is an apparent contradiction between the proviso to section 2 and the provisions of section 3 of the Act, for if 'admissibility of such evidence shall be subject to all conditions as may be specified in each case by or under this Act', as contained in the proviso, is it still possible to provide in

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[1] The Evidence Act, 2011.
[2] Evidence Act, 2011.

section 3 that nothing 'in this Act shall prejudice the admissibility of any evidence made admissible by any other legislation validly in force in Nigeria'? One sure way out of this legislative quagmire is to turn to rules of statutory interpretation, as follows:

(a) Where two or more provisions of a statute conflict, the latter or least of them prevail, because the legislature is deemed, by promulgating that latter or least provision, to have amended the earlier.[3]

In this case, section 3 of the Act should be deemed to have amended the proviso to section 2 of the Evidence Act. This means that when an Act or other legislation makes a piece of evidence admissible, the Evidence Act cannot, by its provisions, render it inadmissible.

(b) The above rule shall, however, be qualified by some other rules of statutory interpretation. The first is that where such 'other legislation' is neither the Constitution itself nor another enactment, it shall, under the doctrine of hierarchy of legislation, give way to provisions of the Evidence Act.[4] Also, where the 'other legislation' is a mere rule of court or practice direction enacted by any duly authorized authority like a head of court, it shall give way to the Evidence, because the Evidence Act is a substantive Federal enactment.[5]

(c) Finally, under the rule of interpretation whereby general provisions give way to more particular provisions, the court will always have to critically and conscientiously compare the provisions of the Evidence Act and such 'other legislation' particularly a Federal Act, to see which is more particular on the question and then rule in its favour.[6]

The conclusion, therefore, is that in spite of the ambitious intention of the legislature in the proviso to section 2 of the Evidence Act to make the Act the *numero uno* in respect to admissibility of evidence, section 3 of the same Act has unwittingly created some hurdles in the way of this legislative intention. Each case must, therefore, be determined on its merits, bearing in mind the above adumbrated rules of statutory interpretation.

In any case, while commenting on the provisions of section 1 and 2 of the Evidence Act, 2011, Eko JSC, who delivered the lead judgment of the Supreme Court, held in *Kekong v State*[7], as follows:

> Section 1 of the Evidence Act is to the effect that evidence may be given of the facts in issue and relevant facts. Proviso (b) thereto is categorical that the section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law/for the time being in force. There is no doubt that by virtue of section 2 of the Evidence Act…a piece of evidence excluded either by the Act itself or any other legislation validly in force in Nigeria cannot be admissible in evidence. It is therefore, not only relevancy that governs admissibility. A piece of evidence may be relevant and yet could by operation of law, be inadmissible.

The above dictum neither addresses the proviso to section 2 nor the provisions of section 3 of the Act. The position seems to be that the ambitious declaration in the said proviso will still be subjected to the rigours of the principles of statutory interpretation.

2. Admissibility of Illegally obtained and Prejudicial Evidence

Before promulgation of the Evidence Act, 2011, the law on prejudicial or illegally obtained evidence was basically the common law. Decisions of English Courts and Courts of other Common Law jurisdictions were, therefore, applied generally by Nigerian Courts. But section 14 and 15 of the Evidence Act, 2011, have now clearly defined and delimited the scope of the power of a court to receive improperly obtained evidence. There is no doubt that the provisions of those sections are comprehensive and have knocked off many decisions on the vexed issue. A consideration of some of the decisions reached before the enactment of section 14 and 15 of the Act will, therefore, be critically done here, to find which fit into the said provisions and which do not.

From the wording of sections 14 and 15, the discretion of a judge to rule one way or the other on illegally obtained evidence has been enacted into statutory law. Thus, the Supreme Court, in *Kekong v State*[8] held that relevance is not the sole yardstick for admissibility of evidence which was improperly obtained. Eko JSC held on page 138 that learned counsel's arguments along this line were 'not too correct' and that is amounted to 'over

[3] *Attorney General of Anambra State v. A.G. Federation* (1993)6 NWLR (pt 302) 693 SC and *NPA Superannuation Fund v. Fasel Services Ltd* (2001)7 NWLR (pt 742) 261 AC.

[4] See *A.G. Abia State v. A.G. Federation* (2003) 35 CNJ 158 at 208; *Okafor v. Okonkwo* (2002)17 NWLR (pt. 796) 262 and *A.G. Osun v. International Breweries Plc* (2001)7 NWLR (0t. 713) 647 at 663 CA.

[5] *Afribank Nig Plc v Akwara* (2006) All FWLR (pt. 304) 401 SC. See also *Ali v Osakwe* (2009) All FWLR (tp. 467) 41 at 80, where the practice directions by the President of the Court of Appeal were held to be inferior to the provisions of the Electoral Act, 2006.

[6] See on this rule of interpretation: *Oruba v NEC* (1988)45 CNK, 400 at 434 and *Matari v Dangaladima* (1993)2 SCNJ 122.

[7] [2017]18 NWLR (pt 1596) 108 at 136 SC.

[8] [2017]18 NWLR (pt 1596)108 at 135 SC.

generalization'. His Lordship, however, argued on page 135 that:[9] 'A careful perusal of sections 14 and 15 of the Evidence Act, 2011, reveals that the trial court has enormous discretion in admitting or refusing to admit in evidence any piece of evidence improperly produced of procured in contravention of the law'. Thus, certain general propositions that held sway in the pre-2011 period still hold sway now, subject to minor variations. One such proposition that still applies is the general rule of law in civil as in criminal cases, that evidence which is relevant is not excluded merely because it was illegally obtained.[10] This rule was, however, 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 the strict application 'would operate unfairly against the accused'.[11] The exception shall now apply to civil cases as well, in view of the fact that sections 14 and 15 cover both criminal and civil proceedings. The word 'accused' in those previous decisions should, therefore, be now interpreted to include parties to or defendants in civil suits. The decision of the Nigerian supreme court in *Sadatu v The state*[12] to the effect that the trial judge can, where the interest of justice demands, exclude evidence which otherwise would be relevant, considering the circumstances of its discovery and production, is therefore, still relevant under sections 14 and 15, the only minor addition being that parties to civil suits should also be permitted to take benefit of this rule[13]. Thus, the UK decision of *Jones v University of Warwick*[14] to the effect that the Judge's discretion extends to civil suits is of persuasion to Nigerian courts, subject to the fact that such 'discretion' has now been promulgated as sections 14 and 15 of the Nigerian Evidence Act, 2011.

3. Confessions no more to be used against makers only

Section 27 (2) of the repealed Evidence Act, which provided that a confession, if made voluntarily was deemed to be a relevant fact against the person making it only, has been deleted by the promulgations of the Evidence Act, 2011. However, by virtue of section 29(4) of the Evidence Act, 2011, where a defendant in a joint trial, has made a confession in the presence of a co-defendant the court shall not take such confession into consideration against the silent defendant unless he adopts it by word or conduct. But the provisions of section 29(4) of the Act will not apply unless the said confession is made in the presence of 'the other defendant or accused person'. Thus, if the confession was not made in his presence, even with the repeal of section 27(2) of the old Act, he will not be bound by its contents, even if it implicates him. In spite of this opinion, case law is abundant on this sub-topic, and we therefore direct our attention in that direction. It is generally the law that a confession is relevant against the maker only[15]. However, recent developments in the law on this subject have altered the situation for accused persons standing trial in Nigeria, and we are discussing these here as exceptions to the general rule. In *Hassan v State*[16], the Supreme Court held that if the police or prosecution decides to use the statement against a co-accused, 'then the prosecution is bound to make the incriminating statement available to the co-accused'. Also, in *Adeleke v State*[17] Peter Odili, JSC held that the general rule of the confession of an accused not binding a co-accused should not be 'taken, book, line and sinker without exception'. Further, that where there exists 'a strong connection from other independent evidence' with the confession, the general rule must' give way for the reality on the ground'. The Supreme Court also provided another exception in *Kayode v State* as follows:

> It is noteworthy and clearly on the record that the statement made by the 1st accused Kolawole Okunade led to the arrest of the appellant, as one of those with whom he carried out the attack on Pro 1. It is the law that in a trial for conspiracy, evidence of what one accused person says in the absence of the other conspirators is rendered admissible against such others on the basis that if they were all conspirators, what one of them says in furtherance of the conspiracy would be admissible evidence against them, even though it was said in the absence of the other conspirators. This is said to be an exception to the hearsay rule.[18] See *R v Luberge Ors* (1932) CAR. 133; *Wahabi O. Mumni & Ors v. The State* (1975)1 ALL NLR 295, (1975)6 S.C. perlrikefe JSC.[19]

[9] Supra.
[10] See *Haruna v A.G. Federation* [2012] All FWLR (pt 632) 1617 at 1636 SC. And *Ibrahim v. Ogunleye* [2012]1 NWLR (pt. 1282) 489. C.A. This general proposition seems to be applied even to the post 2011 period, for which see *Ememchukwu v. Okoye* [2018] All FWLR (pt. 929) 226 at 249 CA.
[11] *Karuma, Son of Kaniu v Queen* [1955] A.C. 197 at 203.
[12] [1968]2 ALL NLR 125 S.C-where Karuma's case was cited with approval.
[13] See for instance, the Pre-2011 decision of *Ababukar v Chuks* [2008] ALL FWLR (pt. 408) 207 SC. See also, *Aoegbesola v Oyinlola* (2011) ALLFWLR (pt. 570) 1292 CA.
[14] [2003] ALL ER, 760.
[15] *Umar v State* [2018]7 NWLR (pt. 1617]72 at 87 SC and *COP v Alozie* [2017] ALL FWLR (pt. 302) 808 at 828 SC.
[16] [2017] ALL FWLR (pt. 830) 738 at 769-770 SC.
[17] [2014] ALL FWLR (pt. 722) 1652 at 1674 SC, reliance on *Oyakhire v The State* [2006]12 SCM (pt.1) 369 at 380 and 381.
[18][2016] ALL FWLR (pt. 857) 468 at 491-492 SC.
[19] See *R. v Luberge* Ors. (1932) CAR. 133; *Wahabi O. Mumni & Ors. v The State* (1975)1 ALL NLR 295, (1975)6 S.C Perlrikefe JSC.

Another exception on the authorities is when accused persons are tried together. Thus, in *Asimi v State*[20], the Supreme Court held that when accused persons are tried together, the incriminating statement of one accused will be lawfully admitted against a co-accused in the same trial. Similarly, when the evidence being given is by an accused whilst in the witness box, it will be receivable and admissible, even if it is incriminating against co-accused. The Supreme Court settled this position in *Kolawole v State*[21] as follows:

> The learned counsel for the appellant had made much of the fact that the confessional statement of a co-accused can only be used against the maker and not the other accused. That is a generalization which I dare say is not the completeness of what the law on confessional statements of a co-accused represent. This is because the current policy is that the evidence of a co-accused on oath is admissible against other accused persons as the peculiar circumstances of a particular case may present. In this regard would fall ... a confessional statement to which there was no opposition when admitted at the point of tendering on oath by the Investigating Police Officer as was the case with exhibit G, statement of the 2nd accused which tallied with the statement of the appellant in exhibits C, E and F.[22]

Yet another exception is if the accused persons adopt the confession of another person or a co-accused. Thus, it has been held that a confession can be used against a co-accused if made in his presence and he adopts it by word or conduct.[23] Also in *Ajaegbo v State*[24], the Supreme Court held that by virtue of section 29(4) of the Evidence Act, 2011, a statement amounting to a confession may be used against the maker alone and not against any co-accused unless it was made in his presence and he adopted it. Adoption by an accused of the confession of a co-accused, according to the apex court, could be by words or by conduct, but that evidence must be adduced by the prosecution to prove this, in the absence of which such confession cannot be used against the accused but against the maker only. It concluded that in the absence of evidence in this case that Exhibits 21 and 36, the confessional statements made by Innocent Ekeanyanwu, were made in the presence of the appellant and he adopted same, they could not be used against him.

In view of the comments above on the repeal of section 27(2) of the old Act[25] therefore, all the decisions of superior courts of record that confessions bind their makers only and none other will surely give way to those decisions that say other defendants implicated in the confessions are also bound by them, but, again, as submitted above, even this latter set of decisions must also be interpreted subject to the provisions of section 29(4) of the Evidence Act, 2011. This further means that authorities like *Dibie v State*[26], which were to the general effect that by virtue of section 27(3) of the repealed Act, a man's confession is evidence against him alone and not against his accomplices or other co-defendants, unless those other persons have adopted it by word or conduct, is only partially good law, with the repeal of section 27(2) of the old Act. If the legislature had intended to make such confessions inadmissible against co-defendants or accomplices, it would have retained section 27(2). This submission becomes more grounded when it is noted that section 29(4)- similar to section, 27(3) of the Old Act which was relied upon by the Court Appeal in Dibie's case is limited by the question whether the defendants are charged jointly with an offence. This means that if they are not charged jointly, such confession will be admissible against the co-defendants or accomplices without much ado. If the legislature had intended a contrary interpretation, it could not have deleted the provisions of section 27(2) of the Old Act. Not even section 29(1) of the 2011 Act which has provided that 'a confession made by a defendant may be given in evidence against him' will alter this position, as section 29(1) is not couched in the same prohibitively exclusionary terms as section 27(2) of the repealed Act.

4. Changes in the Requirements That a Confession Must Be Voluntary, to Be Admissible

To be admissible, a confessional statement must have been made voluntarily. However, section 28 of the Old Evidence Act, which laid out the elements of involuntariness in great details, has been repealed and replaced by section 29(l)-(3) and (5) of the 2011 Act. The provisions of section 29(l)-(3) and (5) are to the following effect:

> 29-(l) 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.

[20]The Supreme Court reached the same decision in *Salawu v State* (2015)2 NWLR (pt 1444)595 at 613 SC.
[21] (2015) ALL FWLR (pt.778) 864 at 882 per Peter Odili, JSC, lead judgment.
[22] See also *Balogun v State* (2018)13 NWLR (pt. 1626)321 at 332 per Galinje, JSC lead judgment and *Oyakhire v State* (2006)12 SCM (pt.1)369 at 380-381, (2007)ALL FWLR (pt. 344)1.
[23] *Alo v State* [2014]ALL FWLR (pt. 733)1855 at 1881 SC.
[24] [2018]11 NWLR (pt. 1631) 484 SC.
[25] Which was formerly section 2(3) in the repealed Act.
[26] [2005] ALL FWLR (pt. 259) 1995 C.A.

> (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
> (b) in consequence of anything said or done which was likely in the circumstance existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the 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.
> (5) In this section, 'oppression' includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture.

It must be noted that by not reenacting the wood 'inducement' contained in section 28 of the repealed Act, the legislature has clearly evinced an intention to discountenance the inducement of a defendant to make a confession as a vitiating factor that would render inadmissible such confession. Also not reenacted, and therefore no more vitiating factors, are 'promise' and 'having reference to the charge against the accused person'. The removal of the later phrase from the provisions of section 29 means a confession will, if voluntary at the time it was made, have no relationship with the charge subsequently proffered against the defendant. The submission is further supported by the provisions of section 31 of Evidence Act, which are to the following effect:

> (c) 31 - if a confession is otherwise relevant, it does not become irrelevant mainly because it was made under a promise of secrecy, or in consequence of a deception practiced on the defendant for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of these questions, or because he was not warned that he was not bound to make such statement and that evidence of it might be given.[27]

The above submission still holds water notwithstanding the provisions of section 28 of the Evidence Act, 2011, which have defined a confession 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'.[28]
In spite of the submissions above, particularly the repeal of section 28 of the Old Evidence Act, the Supreme Court seems to have extended the frontiers of section 29 of the Act, in *Ogun v C.O.P*[29] 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 (Section 28. Evidence Act). For a confession to be admissible in evidence, the prosecution must satisfy the court beyond reasonable doubt that it was made voluntarily. If it is shown that it was obtained under duress or in consequence of any form of inducement, the statement will not be admitted by the court (Section 29(1) and (2) of the Evidence Act).

The apex court again seemed to have extended the frontiers of section 29 when it held *Obiter* in *Darlington v F.R.N*[30] relying on some English decisions[31] and section 29(2) of the Evidence Act, 2011, that 'a confession is inadmissible if the accused person was tricked into telling the truth'. One would then ask, if someone tells the truth, is that not what is most desirable in litigation and even in all life situations? Since duress and inducement are not part of the provisions of section 29, the apex court, with due respect, was too expansive in its interpretation thereof, in the two decision above.

5. Repeal of Provision Relating to Corroboration for Sexual Offences

Section 179 (5) of the Old Evidence Act, which required corroboration for sexual offences has been omitted in the Evidence Act, 2011. Consequently, once proof has been tendered by the prosecution against a sexual offender and he has no valid defence to the charges, he will be pronounced guilty without the necessity for corroboration. One hopes that the prosecutors of the perpetrators of the rape against little Ochanya, the little

[27] Evidence Act, 2011.
[28] Ibid.
[29] ([2018) ALL FWLR (pt. 928) 31 at 60 SC.
[30](2018)11 NWLR (pt. 162) 152 at 167 SC.
[31] *R. v Madison* (1988)1 WLR 139 and *R. v Nath* 8 WR 53, etc.

Benue State girl who was buried sometime in December, 2018, will fully appreciate this development in the content of our Evidence Law.

6. Introduction of Provisions Relating to Electronic Signatures

Section 93 of the Evidence Act, 2011, introduces for the first time provisions relating to proof of electronic signatures in Nigeria's Evidence Law. The said section 93 provides as follows:

> 93 (1) If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that persons handwriting must be proved to be in his handwriting.
> (2) Where a rule of evidence requires a signature or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law or avoids those consequences.
> (3) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the persons.[32]

The above provisions are quite timely, given the growth in e-commerce and other e-transactions. By legislating in this wise, the pains and desperations of practitioners and businessmen alike have been abundantly assuaged by the National Assembly.

7. Developments as enacted in the Administration of Criminal Justice Act (ACJA) 2015

The Administration of Criminal Justice Act (ACJA) 2015 is one of the most revolutionary legislations to have been enacted by the National Assembly in recent time. A genuine effort has been put forward by the legislature to radically affect the status of Criminal Justice Administration in Nigeria. A few of the provisions of the Act relating to evidence will be briefly commented on here.

8. Video Recording of Confessions

In an attempt to stem issues of alleged torture of accused persons with a view to extracting confessions from them, Section 15(4) of the ACJA makes the following mandatory provision, namely:

> (4) Where a suspect is arrested with or without a warrant volunteers to make a confessional statement, the police officer shall ensure that the making and taking of the statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audio-visual means.[33]

One would have been tempted to interpret the word 'shall' in the above provision as mandatory, but subsection (5) of the same section appears to have frustrated such interpretation. It provides thus:

> (5) Notwithstanding the provision of subsection (4) of this section, an oral confession of arrested suspect shall be admissible in evidence.[34]

By this subsequent provision in subsection (5), failure to comply with the provisions of section 15 (4) will not render any oral confession obtained from the suspect inadmissible. There is even more confusion here-by the use of the phrase 'oral confession'. Is the use of this phrase meant to explain the difference between a confusion recorded down and the one not so recorded; or is it in relation to the video recorded confession-since by section 258(1)[35], a video or audio recording is a 'document'? The laudable effort shown in the enactment of section 15(4) of the ACJA, therefore, seems to have been wasted by the enactment of section 15(5) of the same Act.

The National Assembly is, therefore, hereby respectfully requested to amend the ACJA-by deleting subsection (5) of the ACJA, 2015.

9. Recording of Statement in the Presence of Legal Practitioner, etc

Section 17(1) and (2) of the ACJA, 2015 provides as follows:

> 17(1) where a suspect is arrested on allegation of having committed an offence, his statement shall be taken, if he wishes to make a statement.
> (2) Such statement may be taken in the presence of a legal practitioner of his choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an Official of a Civil Society Organization or a Justice of the Peace or any other

[32] Evidence Act, 2011.
[33] Administration of Criminal Justice Act, 2015.
[34] Ibid. S. 15(5).
[35] Ibid. S. 258(1).

> person of his choice. Provided that the Legal Practitioner or any other person mentioned in this sub-section shall not interfere while the suspect is making his statement, except for the purpose of discharging his role as a Legal Practitioner.

Notwithstanding the word 'May' in section 17(2) above, the provisions of that subjection carry a mandatory connotation, for the following reasons:

(a) It is a settled law that the word 'May' shall be interpreted as 'shall' when it imposes a duty upon a public functionary for the benefit of a private citizen.[36] In this case, section 17(2), which is complied with will confer benefits on a suspect, is a mandatory provision, notwithstanding the word 'may' therein.
(b) The phrase 'if he wishes to make a statement' in section 17(2) gives the suspect the right not to make any statement at all. Since this right is unfettered, such suspect can decide to exercise it subject to certain conditions especially those named in subsection (2).
(c) Under the mischief rule of interpretation,[37] this provision should be interpreted as hindering/cutting down on the excesses of the police-whereby even lawyers attending to suspects are harassed and at times even assaulted and forced to abandon their clients.

The following dictum of Rhodes-Vivour, JSC, in *Owhorule v C.O.P*[38] favours the opinions stated in (a), (b) and (c) above:

> The Court of Appeal described the defence of the appellant as confused. This is true. The reason is simple. The appellant did not have the services of a legal practitioner when he wrote exhibit E, a day after the incident. It must be noted that most crimes are committed by people with little or no education, consequently they are led along by the investigating Police Officer to write incriminating statements which legal minds find most impossible to unravel and resolve. Confessional statements are most at times beaten out of suspects, and the courts usually admit such statements as counsel and the accused are unable to prove that the statements (were) not made voluntarily.

One needs say nothing more beyond this profound pronouncement from the Zenith Court.

10. Supreme Court's New Position on Admissibility of Public Documents

There seems to be both positive and negative recent developments on the admissibility of public documents under the Evidence Act. We shall describe these developments respectively. First, contrary to the long-held view that only certified copies of public documents are admissible[39] the Supreme Court has settled the issue once and for all,[40] that original copies of public documents are also admissible in evidence. Second, one sees as negative the Supreme Court's insistence in recent cases, contrary to the age long globally accepted practice that certified copies of public documents can be tendered by any person in possession thereof,[41] without the necessity of calling the maker. That old position, which was even and continues to be more in tune with the provisions of the Evidence Act, was also extended to such documents being tendered from the bar.[42] In a great deal of cases, however, and without formally over ruling itself, the supreme court has of recent started insisting that even when public documents are duly certified, their makers must be called, otherwise they will not be accorded any value, even if admitted in evidence[43]. This is worrisome because Nigeria is probably the only country in the world where a public servant must be called to tender a certified public document. Not even the Evidence Act has ever, since 1958, contemplated this-as the provisions of the various Acts over the years on public documents have remained

[36] *Ude v. Nwara* [1993]2 SCN 47 at 62. *Sino-Afric Agoic & Ind. Co Ltd v Ministry of Finance Incorp.* [2014]10 NWLR (pt. 1416)515 CA.
[37] For which see *A.G. Lagos v A.G. Federation* [2014]9 NWLR (pt. 1412)217 at 320 SC, *Ugwu v Ararume* [2007] ALL FWLR (pt. 377) 807 at 854, 855 SC, etc.
[38] [2015] 15 NWLR (pt.1483) 557 at 576 SC.
[39] See *Nwabuoku v Onwordi* [2006] ALL FWLR (pt. 331) 1236 at 1251-1252 *SC. & Lawson v Afani Continental CO. Nig Ltd* [2002] FWLR (pt. 109) 1736 CA. This can also be gathered from the opinion of Uwais, JSC (as he then was), in..*Anatogu v Iweke* [1995] 8 NWLR (pt. 415) 547 at 572; see more firmly, *Araka v Egbue* [2003] ALL FWLR (pt. 175) 507 SC; *Obadina Family & Executors of Chief. J.O. Ajao v Ambrose Family* [1969]1 NMLR 25 at 30 and *Fawehinmi v. IGP* [2000] FWLR (pt. 12) 2015 CA.
[40] *Kassim v State [*2018] ALL FWLR (pt. 932) 733 SC; *Emeka v. Chuba. Ikpeazu* [2017]] 15 NWLR (pt. 1589) 345 at 394 *SC and ALL Progressive Congress v INEC* [2014]17 NWLR (pt. 1437) 525 at 563 SC, *Goodwill & Trust Inv. Ltd v Witt & Bush Ltd* [2011] ALL FWLR (pt. 576) 517 SC; *Oyenyi v. Bukoye* [2013] ALLFWLR (pt. 694)64 at 86-87 C.A. etc.
[41] *Anatogu v Iweka II* [1995]9 SCNJ I., *Motanya v Elinwa* [1984] 7-8 SCNJ (pt. 111) 625; *Agagu v Dawodu* [1990]7 NWLR (pt. 160) 56 C.A., etc.
[42] *Isibor v. The State* [1970]1 ALL NLR 248 SC; *Magaji v Nigerian Army* [2005] ALL FWLR (pt. 257) 1511 at 1531 C.A. etc.
[43] *See Andrew v. INEC* [2018]9 NWLR (pt. 1625) 507 at 576 SC and *Ikpeazu v Olti* (2016)8 NWLR (pt. 1513) 38 at 107 SC.

largely unaltered till date. Section 146(1) of the Evidence Act, 2011, which is a direct replication of section 114 of the 1990/2004 Act, provides that there is a presumption of genuineness in favour of a certified public document, while subsection (2) of section 146 mandates that court to presume that the certifying authority had at the time of certifying the document, the authority to do so. Thus, in *Tabik Investment Ltd v. G.T.B Plc*[44], the Supreme Court, per Rhodes-Vivour, JSC, held thus:

> Certified copies are by Statute Deemed to be originals where there is not certification, the presumption of regularity will not be ascribed to it, so it ought to be certified in order that the court is left with no alternative but to accept the authenticity of its contents.

Similarly, in *Odubeko v. Fowler*,[45] the Supreme Court held that in the absence of any evidence to the contrary, a document certified by any officer in Nigeria authorized in that behalf is presumed to be regular by virtue of section 113(1) of the repealed Evidence Act[46]. Thus, that in the absence of any evidence to the contrary, there is a presumption that things are rightly and properly done in accordance with the Latin maxim, '*omnia praesumuntur rite esse acta*'. And in *Uzamere v. Urhoghide*[47], the Court of Appeal held, relying on *Omoboriowo v Ajasin*[48], that by virtue of section 114 of the repealed Evidence Act, once a document is shown to be a certified true copy, it is presumed to be genuine; and the genuineness also extends to its contents. However, that this presumption is a rebuttable one. Fundamentally too, it has been held that the rationale for certification of public documents by a designated official before its admissibility is to obviate the necessity of calling the official concerned to come and testify on the genuineness of the copies made from the original and to prevent those original copies from being removed from their place of proper custody.[49] It has been further held that once certified, there is no need to call a witness to verify a public document.[50] To insist that the maker of the public document must be called, as the Supreme Court has held in its recent decisions as explained earlier, with due respect, amounts to tacitly annulling the above named provisions of the Act, which have created rebuttable presumptions in favour of a certified public document. What if the public is dead or cannot be found? Also, what is the essence of creating/maintaining public records? The answer is simple: such records survive the public officers creating/maintaining them-since public institutions themselves also outlive their officers.

In view of the above, therefore, it is very ripe time for the Supreme Court, with due respect, to return to the previous position of the law that since a public document is duly and properly certified, it can be tendered in evidence without its maker being called to testify. If any party or person has issues with the presumption of genuineness, he can tender evidence to rebut the presumption-since that presumption has been held to be rebuttable. The above averments of this author here is lent support/credence even by no less an authority than the Supreme Court itself by its decision that the original of a public document can be tendered even from the bar-and that it should be accorded its due weight.[51] If the lawyer tendering the original of a public document is not the maker, what stops any other person (including such lawyer) from tendering a certified copy of the same document? Especially when the apex court held in *Tabik Investment Ltd v G.T.B Plc*,[52] that 'certified copies are by statute deemed to be originals'?

11. Conclusion

Both the Evidence Act, 2011 and the ACJA, 2015 have made far-reaching revolutionary provisions on matters relating to evidence relating to criminal justice administration as adumbrated above. However, in discourses like this that are academic and persuasive, strong suggestions are made, as has been done herein, for improvements to be made. Such suggestions are not criticisms of the bodies concerned but are borne out of a genuine intention of having things straightened as much as possible for the overall good of society in the spirit of the hallowed and time honoured principles of justice for all.

[44] [2011] ALL FWLR (pt. 602] 1592 at 1608 SC.
[45] [1993]7 NWLR (pt. 308) 637 SC.
[46] Now amended and standing as section 106 of the Evidence Act, 2011.
[47] [2011] ALL FWLR (pt. 558) 839 C.A.
[48] (1984)1 SCNLR 108.
[49] *Daggash v Bulama* (2004) ALL FWLR (pt. 212) 1666 C.A., Reliance on A*nyakoro v Obiakor* (1990) 2 NWLR (pt. 130)52.
[50] *Orlu v Gago-Abite (*2010) ALL FWLR (pt. 524)1 S.C.
[51] *Udo v State* (2016) ALL FWLR (pt. 840) 1178 at 1209 SC. Contra: *FRN v Michael* (2018)6 NWLR (pt. 1616) 438 at 466 and 473 SC.
[52] *Tabik Investment Ltd v G.T.B Plc* Supra (see note 37).