Criminal Armoury

Samuel Adewale Adeniji

CRIMINAL ARMOURY

First Published 2007

ISBN-978-057-389-5

Published by:

LIFE GATE PUBLISHING CO. LTD
5, Dalag way, Soka Bus-Stop, Felele - Mango Area
Lagos/Ibadan Expressway, Ibadan
Tel: 08036082370, 0805322140

Abuja Address:
14, Sule Kolo St. Foreign Affairs Qrts,
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P.O. Box 10914, Garki, Abuja.
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Foreward

More than ever before, law has taken the central stage in our lives. Stories pertaining to crime make front page news in our daily newspapers and weekly magazines.

Every citizen wants to know and defend his/her rights. Criminal Law therefore exists to protect individuals and their properties.

The essence of this book, like many others before it, is to provide the knowledge of criminal law and procedure. However, one unique thing about the book, is that it has gone a step further than its contemporaries in the analysis of criminal issues and cases.

The book contains three chapters. Each of the three chapters holds a peculiar strength.

It is not my wish to present any prefatory remarks on the chapters that may prevent the readers from going to the source. As the saying goes, the taste of the pudding is entirely in the eating.

Mr. Samuel Adeniji is not new to book writing. He is the author of "Legal Armoury" which was published in 2006. I wrote a foreword to that book. However, Mr. Adeniji has again invited me to write another foreword to his new book. I feel highly honoured.

One thing that continues to baffle me is that Mr. Adeniji is still a law student at Olabisi Onabanjo University, Ago Iwoye. From the records, he is a serious and brilliant student. How then is he able to cope, as a student, with the business of book writing. It is not for me to provide an answer. My only guess is that Mr. Adeniji must be exceptionally gifted and highly committed to whatever he sets his hands on.

In my view, this is a beautiful and commendable work. From the first to the last page, one could observe some evidence of assiduous research and industry. It is a book all must be proud to have in their libraries - private or public. I therefore commend the book as an important tool for researchers, professors, Legal practitioners, judges and all others who are interested in the development of criminal justice.

HON. JUSTICE L. O. ARASI (RTD.)
63, FAJUYI ROAD,
BODE FOAM BUILDING,
ADAMASINGBA, IBADAN.

Preface

I have carefully gone through the 150 pages manuscripts titled the **"Criminal Armoury" by Samuel A. Adeniji.** The book is divided into three (3) lengthy chapters which together is a reading delight. The author has approached the intricacies of the rules of the Criminal Law and Procedure with language that is simple and easy to understand.

One interesting aspect of the book is the choice of the chapters and the sub-topics which carefully combined the basics of the Principles of Criminal Law and Criminal Procedure as they relate to trials before the Magistrate Court, High Court and Federal High Court in Nigeria.

Also for the above reasons, the book presents a holistic picture of Criminal Law and Procedure for law Students and Practitioners of Law in such a way that the scenario of a Criminal Trial would be real in their imaginations.

I have pointed out few typing errors in the manuscript. Beyond this, I have no doubt that the book would be quite successful in the market as a useful manual to Students and Practitioners of Law.

I, therefore, congratulate Mr. Samuel A. Adeniji for yet another good contribution to the legal arena.

HON. JUSTICE (PROFESSOR) M. A. OWOADE
COURT OF APPEAL
NIGERIA

Comment

I had carefully gone through the draft of this book. The authorities cited had demonstrated sound knowledge of the principles and practice of criminal law and procedure marshalling his submissions and points with distinct assurance of his grounds. Those grounds fully supported in law. I found the treatment of the thematic concern in simple, flawless prose and disciplined writing most inviting. It compels the reader to keep reading.

The author brought to fore lucid and well illuminated treatment of defences rarely considered in major criminal law textbooks, but which are sure winning aces at criminal trials. It is creative to explore those defences and it certainly will open up the understanding of law students, and even practitioners to the working and applications of criminal defences.

The author has brought uniqueness in his approach of the arrangement of topics in the book. He effectively worked out a synergy between, the substantive and adjectival aspects of law.

I am gratified and most honoured to be asked to read the draft and to comment on the book. The book represents a rich corpus or vital weapons useful to any discerning criminal trial lawyer to excel and thereby further the course of access to quality justice delivery in our country.

I congratulate the author for yet another fantastic contribution to legal scholarship and training... Bravo!.

TONY OYERO ESQ
LECTURER
FACULTY OF LAW,
OLABISI ONABANJO UNIVERSITY,
AGO-IWOYE.

Acknowledgement

To God alone be all the Glory. I am exceedingly glad to be privileged to author this book titled: **"CRIMINAL ARMOURY".** The Chapter One of the book contains the powers of the Trial Courts in criminal trials cum not less than thirteen (13) grounds to object to any indictments, charges or offences, that could be profer against a suspect before a court of tribunal.

Chapter Two comprises of denfences to criminal charges. Not less than twenty-three (23) of such defences which cut across criminal legislations governing criminal matters in Nigeria are extensively discussed.

Chapter Three embraces grounds for faulting criminal proceedings before the appellate court. Twenty (20) of such grounds are examined with relevant authorities.

I cannot but profusely thank my father Mr. Hon. Justice L. O. Arasi (rtd) for his influence and impact in my life. My story in life will be grossly incomplete if His Lordship's name is not written in gold. Also, through tutelage and fraternity with Mr. Hon. Justice L. O. Arasi (rtd), I know his Lordship, Hon. Justice (Prof.) M. O. Owoade who doubles as my father also made a great impact on me. His Lordship wrote an historical preface of this book. I thank my amiable lecturer Mr. Tony Oyero who equally wrote a comment on this

book. I highly appreciate the effort of my friend (Mr. & Mrs. Olufemi Taiwo) in typesetting of this work

I am grateful to my mentor Mrs. Funmi Quadri and my publisher Lifegate Publishing Co. Limited for being there for me and investing in my future. I appreciate everybody who had been a blessing to me directly or indirectly.

All I am saying to **YOU** all is **I AM VERY GRATEFUL.**

Enjoy yourself and command exploit as you read and apply the principles of law in this book as the taste of the pudding is in eating it.

SAMUEL ADEWALE ADENIJI
L. L. B. III
OLABISI ONABANJO UNIVERSITY
AGO-IWOYE, OGUN STATE.

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SAMUEL ADEWALE ADENIJI
L. L. B. III
OLABISI ONABANJO UNIVERSITY
AGO-IWOYE, OGUN STATE.

Dedication

I dedicate this book to my family

- **CHIEF S. A. ADENIJI**
- **MRS. A. B. ADENIJI**
- **MRS. M. A. ADENIJI AND ALL THE KIDS AND KITHS OF ADENIJI'S FAMILY**

AND

- **FACULTY OF LAW, OLABISI ONABANJO UNIVERSITY, AGO-IWOYE, OGUN STATE, MY ALMA MATER, I'M PROUD OF YOU.**

Table of Authorities

LIST OF STATUTES

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Section 223 and 234 of the Criminal Procedure Act

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Section 36(1) (2) (a) (b) of the 1999 Constitution

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Section 36 (6) (b) of the 1999 Constitution;

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Section 36(6) (c.) of the 1999 Constitution;

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Section 140(3)(c) Evidence Act.

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Section 36 (11) of the 1999 Constitution;

Section 36(10) of the 1999 Constitution;

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Lagos LA/31 c/64-3rd February, 1964

Pg 1-2 of Legal Armoury by Samuel A. Adeniji.

Culled from a sub-title of "Consolidated or Separate Trials" the authors of Vol. 24 of the 2nd Edition of Corpus Juris secundum.

Abbreviations

WRN	Weekly Report of Nigeria
NMLR	Nigerian Monthly Law Report
NWLR	Nigerian Weekly Law Report
SC	Supreme Court Report
CLRN	Criminal Law Report of Nigeria
WACA	West African Court of Appeal
NCC	Nigerian Criminal Cases
NSCQR	Nigerian Supreme Court Quarterly Report
FSC	Federal Supreme Court
CR.APP.	Criminal Appeal
SCNJ	Judgments of Supreme Court of Nigeria
ALL NLR	All Nigerian Law Report
SCNLR	Supreme Court Nigerian Law Report
NRNLR	Northern Region Nigerian Law Report
NLR	Nigerian Law Report
FR	Federal Reporter
U.I.L.R	University of Ife Law Report

WLR	Western Law Report
NCLR	Nigerian Constitutional Law Report
K.B.	King's Bench
NCR	Nigerian Constitutional Report
WNLR	Western Nigerian Law Report
NNLR	Northern Nigerian Law Report
A.C.	Appeal Cases
ALL E.R.	All England Report
NSCC	Nigerian Supreme Court Cases
Q.B.D	Queen's Bench Division
WRNLR	Western Region Nigerian Law Report
ECSLR	East Central State Law Report
ENLR	Eastern Nigerian Law Report
CCHCJ	Certified Copy of High Court Judgment
OYSHC	Oyo State High Court
L.L.R.	Lagos Law Report
QLRN	Quarterly Law Report of Nigeria
L.C.	Locus Classicus
FWLR	Federation Weekly Law Report

Chapter One

Procedure for Instituting Criminal Proceedings

The appropriate venue to institute criminal proceedings depends on the place of the commission of the offence, the applicable law(s) in respect of such offence, and the nature of the offence. Criminal matters may be instituted in the Magistrate Court, High Court, Federal High Court and any other Tribunal(s) which has been empowered under the law to try such criminal offence(s).[1]

Priority shall be given to the Magistrate Court, High Court and Federal High Court in this discourse.

Magistrate Court

It is clear that the procedure for instituting criminal proceedings in the Magistrate Courts is stated in Section 77 of the Criminal Procedure Act, Laws of Federation of Nigeria 2004 and under Section 8, 9, and Appendix A to the Criminal Procedure Code LFN 2004.

The power of the Magistrate Court both under the Criminal Procedure Act and Criminal Procedure Code originate from Section 6(1)(5) (k) of the 1999 Constitution. It provides that:

(Footnotes)

[1] e.g. Robbery and Firearms Tribunal Abeokuta, Ogun State; Adebayo v. A. G. Ogun State (2006) 39 WRN p.84).

(1) "the judicial powers of the Federation shall be vested in the Courts to which this section relates, being Courts established for the federation".

(5)(k) "such other Courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws".

Section 77 of the Criminal Procedure Act provides that "subject to the provisions of any other enactment, criminal proceedings may in accordance with the provision of this Act be instituted.

(a) in Magistrates' Courts, on a complaint whether or not on oath,"

The institution of Criminal Proceedings would commence with the complaint whether on oath or not to the Police who after the apprehension of the suspect coupled with their investigation would arraign the suspect before the Magistrate Court. It is very clear from the provision of Section 77(a) and (b) of the Criminal Procedure Act that the filling of an information or securing the leave of the judge for or before filing charges against an accused person is a procedure applicable only to or in the High Court proceedings. It has no application in the Magistrate Court.

It should be noted also that Criminal Procedure Act is not the alpha and the Omega in respect of the procedure to

follow in instituting Criminal processes in the Magistrate Courts. The procedure may equally be found in any other enactment. This is shown in the Act[2] by the words "subject to the provisions of any other enactment". Such enactment may be from the Act of the National Assembly or from the Laws of various States House of Assembly as the case may be or even via the Constitution.

Under the Criminal Procedure Code, specific procedure is not outlined as in Criminal Procedure Act. But Criminal Procedure Code provides that a Magistrate or Native Court shall be guided in regard to practice and procedure by the provisions of this Criminal Procedure Code other than those provisions which relate only to any Court other than a native Court.[3]

However, the establishment of a Magistrate Court in the northern part of the Federation is governed by Section 8 of the Criminal Procedure Code and its territorial jurisdiction is regulated by Section 9 of the same statute.[4] The power of a Magistrate Court to try a Criminal matter depends on whether the offence is contained in the Penal Code or in any other law and the jurisdiction of the Magistrate Court is contained in Appendix A of the Criminal Procedure Code.

[2] (Section 77 Criminal Procedure Act).
[3] (Section 386, 155 of the Criminal Procedure Code).
[4] (i.e. Criminal Procedure Code).

Therefore, if the law creating an offence is silent on jurisdiction, the Magistrate Court can try such matter provided that the prescribed punishment does not exceed the power conferred on the Magistrate Court. Since it has been held that jurisdiction to try a matter is coterminous with the jurisdiction to punish.[5]

Furthermore, the particulars of instituting Criminal Proceedings in Magistrates' Courts are contained in Section 78 of the Criminal Procedure Act which provides that:

78: Where proceedings are instituted in a Magistrate Court, they may be instituted in either of the following ways:

(a) upon complaint to the Court, whether or not on oath, that an offence has been committed by any person whose presence the Magistrate has power to compel, and an application to such Magistrate, in the manner hereinafter set forth for the issue of either a summons directed to, or a warrant of arrest to apprehend such person, or

(b) by bringing a person arrested without a warrant before the Court upon a charge contained in a Charge Sheet specifying the name and occupation of the person charged, the charge against him and the time and place where the offence is alleged to have been committed. The Charge Sheet shall be signed by the Police Officer in charge of the case.

[5] (Odai v. C.O.P. (1962) NMLR 9; Abba v. COP (1962) NMLR 37; Section 15, 16, 17, 18 of the CPC).

Justice T. A. Aguda in his book[6] opined that "proceedings may be validly instituted under Section 78(b) of the Criminal Procedure Act notwithstanding that the offence alleged to have been committed is one for which the offender may not be arrested without a warrant".

However, the formalities for filing formal or written complaint, and an application to the Magistrate to cause to issue a summons or warrant to compel the attendance of the accused person or to apprehend him only arise or are applicable where the accused person is at large or not in custody. Consequently, where the accused person is already in custody (or in detention) there is no need for any application by the prosecution for the issuance of summon or warrant to compel his attendance. All that is required is for the prosecution to produce or bring him before the Court upon a charge contained in a charge sheet in accordance with the provision of Section 78(b) of the Criminal Procedure Act. There is, also no need to apply for or secure the leave of a Magistrate before the filing of a complaint or a charge (which terms are used synonymously) under the above provision of the Criminal Procedure Act.[7]

[6] "The Criminal Law and Procedure of Southern States of Nigeria" (3rd Edition) at p. 208

[7] See also Section 81 CPA).

In **Enome v. Police**[8], the accused was tried and convicted by Magistrate Court Grade II which has a maximum jurisdiction of one year imprisonment. On being found guilty on the three counts, he was sentenced to three consecutive terms amounting to more than one year. Held: While a Magistrate Grade II may impose consecutive terms, it must not exceed one year.

Maiyaki & ors v. Registrar, Yaba Magistrate Court & ors[9] was based on a complaint by the appellant, the 3rd respondent was charged with attempted murder before a Magistrate Court Grade 1 which has a maximum sentencing jurisdiction of 3 years. The applicant brought an application for an order to transfer the case to the High Court of Lagos State on the ground that since the offence carries a maximum sentence of life imprisonment, a Magistrate Grade 1, lacks jurisdiction over the case. Held: By virtue of Section 18(3) Magistrate Court Law of Lagos and Section 304 (1) Criminal Procedure Law of Lagos State, all Magistrates other than Magistrate Grade III have jurisdiction to try indictable offences subject to the accused electing summary trial. The Magistrate however cannot impose any punishment greater than that specified for his grade.

[8] (1956) NRNLR 38
[9] (1990) 2 NWLR (pt 130) p. 43:

High Court

The procedure for instituting Criminal Proceedings in the High Court is stated under Section 77 of the Criminal Procedure Act. While such procedure is not contained under the Criminal Procedure Code. But the jurisdiction of the High Court to try a matter and pass Sentence Is Noted Under Section 14 of The CRIMINAL PROCEDURE CODE.

The High Court either at the Federal Capital Territory, Abuja or High Court of a State derives its jurisdiction from Sections 257 and 272 of the 1999 Constitution.

Section 257 of the 1999 Constitution which is in *pari materia* with Section 272 of the same Constitution provides that

257 (1): Subject to the provisions of Section 251 and any other provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of the Federal Capital Territory, Abuja shall have jurisdiction to hear and determine any civil proceedings in which the exercise or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

(2) The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of the Federal Capital Territory, Abuja and those which are brought before the High Court of the Federal Capital Territory, Abuja to be dealt with by the Court in the exercise of its appellate or supervisory jurisdiction".

Having taken cognizance of the above provisions of laws, Section 77(b) of the Criminal Procedure Act has to be examined and the rationale for it has to be considered.

Section 77 provides "subject to the provisions of any other enactment, criminal proceedings may in accordance with the provisions of this Act be instituted –

(b) In the High Court -

(i) by information of the Attorney – General of the State in accordance with the provisions of Section 72 of this Act, and

(ii) by information filed in the Court after the accused has been summarily committed for perjury by a judge or Magistrate under the provisions of Part 3 of this Act, and

(iii) by information filed in the Court after the accused has been committed for trial by a Magistrate under the provisions of Part 36 of the Act, and

(i) On complaint whether on oath or not.

The above provisions are very clear, simple and unambiguous. They should therefore be given their simple, natural and ordinary meaning whenever it calls for interpretation in any Court of law or competent Tribunal. The intention of the legislature in making the provisions is also very clear and easily ascertainable. In the case of the High Court, the intention for the filing of an information with proof of evidence and the charge intended or sought to be preferred against the accused person is to allow the suspect to have an advance notice or knowledge of the case of the prosecution against him. It is also to give the Judge before whom the information is filed or who is required to give leave to the prosecution to prefer or file the charge an opportunity to peruse those documents and know whether a *prima facie* offence has been disclosed or made out against the said accused person before granting his leave to the prosecution to file the charges.[10]

Another rationale for the filing of an information and securing the leave of the Judge is to ensure that an innocent person is not victimized, or persecuted rather than prosecuted before the High Court which is a superior Court of record on merely false allegation or act which do not constitute any offence in law.

[10] Egbe v. State (1980) NCR 341; Ikomi v. State (1986) 3 NWLR (Pt 28) 340; Abacha v. State (2002) 32 WRN 1; (2002) 11 NWLR (pt 779) 497 and Ohwovoriole v. FRN (2003) 15 WRN 1; (2003) 2NWLR (pt 803) 176 at 194 – 195, 208.

It is important to note that there may be peculiar circumstances under which criminal proceedings before the High Court itself may be instituted just like in the Magistrate Court on a complaint whether on oath or not in accordance with Section 77 (b) (iv) of the CRIMINAL PROCEDURE ACT. To my mind, I hold the view that the distinction in the procedure for instituting of Criminal Proceedings before the Magistrate Court and the High Court under the provision of Section 77 is deliberate and is intended by the legislature to make the institution or initiation of proceedings in the former Court prompt, simple and less cumbersome.

- Aluko v. D.P.P. [11] The High Court has jurisdiction to try any offence whether triable by a Magistrate or not.

[11] (1963) 1 ANLR 398

Federal High Court

Essentially, there are some criminal offences that cannot be commenced or tried by the Magistrate Court or the High Court either of the Federal Capital Territory, Abuja or of States. That means, only the Federal High Court has exclusive jurisdiction to hear/try such offences. Section 251 of the 1999 Constitution provides for the jurisdiction of the Federal High Court. Section 251 (2) provides "the Federal High Court shall have and exercise jurisdiction and powers in respect of the treason, treasonable felony and allied offences".

Section 251(3) provides "the Federal High Court shall also have and exercise jurisdiction and powers in respect of criminal causès and matters in respect of which jurisdiction is conferred by subsection (1) of this section".

On this note, we are examining the procedure for commencing criminal proceedings in the Federal High Court as prescribed by Section 33 of the Federal High Court Act Laws of Federation of Nigeria 2004 and also whether the procedure for applying for leave to file information provided under the Criminal Procedure Act is applicable at the Federal High Court.

Section 33 of the Federal High Court Act which provides that criminal proceeding before the Federal High Court shall be conducted substantially in accordance with the provisions

of the Criminal Procedure Act expressly makes the application of the said provision of the Criminal Procedure Act or the substantial conduct of criminal proceedings in the Federal High Court subject to the provisions of the section (i.e. Section 33 Federal High Court Act). Thus the application or invocation of the provision of the Criminal Procedure Act in the conduct of Criminal Proceedings is only possible or permissible subject to or in the absence of any provision therefore in Section 33 (1) of the Federal High Court Act (supra). Therefore where a contrary provision is made in the Federal High Court Act different from that in the Criminal Procedure Act, as regard the conduct of criminal proceedings, the former shall prevail.

This is immediately followed by a provision or an exception in subsection 2 of Section 33 Federal High Court Act (supra) which provides that notwithstanding the generality of subsection (1) of the section all criminal causes or matters before the Court shall be tried summarily. This provision is also deliberately inserted or made in Section 33 with the intention by the framers of Federal High Court Act to make the criminal proceedings before the Federal High Court speedier, easier, and less formal or less cumbersome than those in the State High Court where the Criminal Procedure Act is generally applicable.

The provisions of Section 77 and 340 of the Criminal Procedure Act and on the filing of information and securing the leave of the judge to prefer or file charges apply generally to the High Court in all the Southern States except Lagos State where the filing of information before a judge has been abolished by the Criminal Procedure (Amendment) Edict 1987. I am however, unable to agree with some authors who assert that the requirement for leave and the need for the Federal Attorney General to file a criminal information are still prerequisites under the Criminal procedure Act applying to Criminal trials before or in the Federal High Court. My stand is based on the express provision or exception made in subsection (2) of section 33 of the Federal High Court Act (supra) which provides in a mandatory term that criminal matters or causes before the Court shall be tried summarily. It should also be emphasized that the provisions of Section 77 is made only applicable subject to the provision of any other enactment.

Thus where there is another enactment or law as in the case of the Federal High Court Act (in its Section 33(2) or of Lagos State (in its Edict No. 4 of 1979) the application of Section 77 in the Lagos State High Court or the Federal High Court is clearly excluded. The use of the words "shall be tried summarily" used in subsection (2) of Section 33(2) Federal High Court Act also prescribes or enjoins a summary trial of

Criminal cases before the Federal High Court similar to summary proceedings in the Magistrate Court as provided or in Section 277 of the Criminal Procedure Act. Clearly from the wording of the later section, trials on information are excluded or are different from the concept or conduct of a summary trial. The submission of some people to the effect that trials in the Federal High Court should be by way of information is therefore wrong and misconceived.

Consequent to Section 277 of the Criminal Procedure Act especially subsection (a) read along with Section 77(b) (ii) and (iii) of same, trial by information is generally excluded from summary trial proceedings. In the light of the foregoing deductions and with due consideration to Section 33(2) of the Federal High Court Act, where in all Criminal Causes or matters before the Court shall be tried summarily, it follows and as rightly submitted that criminal proceedings cannot be initiated or instituted at the Federal High Court by way of an information under section 77(b) (i), (ii) & (iii).

In effect, criminal proceedings can only be commenced at the Federal High Court in the same manner of initiating criminal proceedings in the Magistrate Court under the summary trial proceedings.

There is an exoneration and further support from Section 2 of the Criminal Procedure Act wherein charge is defined thus:-

"Charge means that statement of offence or statement of offences with which an accused is charged in a summary trial before a Court".

Charge under the Criminal Procedure Act and following the definition, it, confined to a summary trial. The provision of Section 33 (2) of the Federal High Court Act provides as seen (supra) that Federal High Court is a Court of summary criminal jurisdiction. It is therefore regular and within the contemplation of the law that a charge be filed at the Federal High Court as a means of initiating Criminal proceedings in that court.

Oluwatoyin Doherty,[12] in vindicating the view point had this to say: "Criminal proceedings in the Federal High Court are instituted summarily against an accused person. In other words, a charge, as distinct from an information is filed against the accused at the Federal High Court".

In **Mandara v. A. G. Federation**[13], the appellant was tried and convicted by the Federal High Court, Lagos on four counts charge of treasonable felony, incitement to mutiny etc.

[12] The author of the book 'Criminal Procedure in Nigeria Law and Practice' at page 71.
[13] (1984) 4 S.C. 8

He appealed contending that the Court has no jurisdiction over the offences. Held it is not the law that Federal causes or offences should be prosecuted or litigated in Federal Courts; State High Courts can try Federal causes; The Federal High Court has no jurisdiction to try the appellant.[14]

[14] This was the position of the law then when the case was decided but the law has been changed. Please see Section 251 (2) & (3) of the 1999 Constitution

Procedure for the Amendment of a Charge/Information

Frankly speaking, it should be noted that a charge or an information may be altered on the basis of its being imperfect, defective or erroneous. The Court may even permit or direct the framing of a new charge or add to or otherwise alter the original charge.[15] The question is, what is the procedure to follow? This has been answered in **Section 164 of the Criminal Procedure Act.** The intendment of Section 164 of the Criminal Procedure Act is that the procedure thereunder be applied only in situations where there is an actual amendment or alteration of a charge.

Thus, where there is an amendment or alteration of a charge, it is mandatory that the amended or altered charge be read over to the accused and a new plea taken, otherwise any trial based thereon will be a nullity. However, when it is a question of a trial for a lesser offence than that charged, there is no need for a new plea to be taken[16]

It is important to note that section 165 of the Criminal Procedure Act provides that "when a charge is altered by the

[15] Section 162 & 163 of the Criminal Procedure Act and Section 181, 298, Criminal Procedure Code.

[16] Okegbu v. State (1979) 11 S. C. 63; Adeyemi v. State (1989) 1 CLRN p.60, at 65 and 66.

Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon any witness who may have been examined and be re-examined or cross – examine such witness with reference to such alteration".

Since it is provided based on the above section inter alia that the prosecution and the accused shall be allowed to recall or summon any witness who may have been examined or cross examined such witness with reference to such alteration. It is clear that the addition to the phrase "with reference to such alteration" has created a condition which must be met before a recall of such witnesses could be made. The condition so attached is that the examination or cross examination must have reference to the alteration made by the amendment. It follows therefore that it will not be out of place for a trial judge to refuse an application for a recall of witnesses without satisfying the Court that the recall was necessary having regard to the alteration of the charge.[17]

[17] Ndukwe v. State (2005) 1 NCC p. 572 at 577.

Requirements of Application to Profer a Charge/Information

The law governing the proceedings of criminal matters had made it compulsory for the prosecutor to comply with certain mode before a valid criminal proceedings can commence in any High Court. Section 77 (b) of the Criminal Procedure Act and Section 185 of the Criminal Procedure Code are explicit on this stand.

Section 185 of the CRIMINAL PROCEDURE CODE provides "No person shall be tried by the High Court unless:-

(a) he has been committed for trial to the High Court in accordance with the provisions of Chapter XVII; or

(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a judge of the High Court; or

(c) a charge of contempt is preferred against him in accordance with the provisions of Section 314 or Section 315.

Section 77 provides "Subject to the provisions of any other enactment, criminal proceedings may in accordance with the provisions of this Act be instituted –

(b) in the High Court -

(i) by information of the Attorney General of the State in accordance with the provisions of Section 72 of this Act, and

(ii) by information filed in the Court after the accused has been summarily committed for pejury by a Judge or Magistrate under the provisions of Part 3 of this Act, and

(iii) by information filed in the Court after the accused has been committed for trial by a Magistrate under the provisions of Part 36 of this Act, and

(iv) on complaint whether on oath or not.

Based on the above law[18], in an application for leave to prefer a charge, all that the prosecution needs do is to show that there are facts on which to grant the leave. If the resume of the evidence of the witnesses as given by the state satisfy that condition, then leave would be granted. While I think it would be better and perhaps more honourable for the State to supply copies of the statements of the witnesses along with the application for leave to prefer a charge, all that he needs do is to show that there are facts on which to grant leave. If the resume of the evidence of the witnesses as given by him satisfied this condition then the trial can properly proceed.[19]

[18] Section 185 Criminal Procedure Code

[19] State v. Terban (1989) 1 CLRN p.330 @ 337.

In respect of procedure for an application to prefer/ laying an information before the High Court, the Criminal Procedure Act has not set out the clear procedure for laying the information. All that Section 340 (2) (b) and 77(b) of the Criminal Procedure Act provide is for filing an information by direction or with the consent of a judge.[20] The confusion in the Criminal Procedure Act especially in Section 72, 77, 340 of the Criminal Procedure Act particularly with regard to absence of procedure is due to reference in Section 72 to practice in England. The Administration of Justice (Miscellaneous Provisions) Act 1933 of England which should be resorted to is of little relevance in England now due to subsequent legislations and attendant rules.

Since it is the duty of the Attorney-General of the State or the Federation to prosecute any offence as provided in Section 174 and 211 of the 1999 Constitution respectively, it is equally his discretion to charge some offenders and decline to charge others. This power is to be exercised having regard to public interest, interest of justice and the need to prevent abuse of legal process". This power can be exercised only by Attorney General as he holds ministerial responsibility for it, and not collective executive responsibility.

[20] R v. Zik's Press Ltd 12 WACA 2002

Therefore, the procedure whereby a trial on indictable offence will be initiated by an application whether in judge's Chambers or in Open Court, the application is always made *ex-parte*, at the back of the person to be tried, asking for a discretion, not an absolute right. There must be clear particulars and facts to justify the exercise of the discretion. It is not the law, neither is it the justice, to say that once the application is made on information, and all necessary documents are attached, without more, the application to prefer charge must be granted. It is never the practice in England to take filing of an information as an absolute right to have the indictment asked for automatically tried. There must be facts in the proofs of evidence to justify the grant of the application. Otherwise, indictments will always be allowed to be tried where enough particulars are absent in the proofs of evidence. I must not be understood to hold that guilt of the accused must be established before proving the information to file the indictment; far from it. There must be *prima facie* case to be tried and the accused must be sufficiently linked to be in a situation where an explanation is necessary from him at the trial.[21]

The idea to indict through an information is to save time in prosecution by obviating the necessity for a preliminary

[21] Abacha v. State (2002) 11 NSCQR p. 345 @ 364 – 365.

investigation before a Magistrate. The Magistrate after hearing at the preliminary investigation will decide on the evidence before him whether there is a *prima facie* case for the accused to answer and thus commit him for trial in the High Court.

Preliminary investigation by a Magistrate has been deleted from Criminal Procedure Laws of various states. What a Magistrate was to decide under preliminary investigation is whether there was a *prima facie* case for the accused to answer if committed for trial in the High Court.

Procedures and Grounds for Objection or Quashing of an Indictment

Section 167 of the CRIMINAL PROCEDURE ACT provides that "any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read over to the accused and not later". Section 168 of the above Act provides for way by which objections could be cured by verdict.

It must be noted that the Court will not give way too easily to mere formal objections on behalf of accused person(s). Because, such may constitute a great blemish on the judicial process owing to which offenders may escape other than by the manifestation of their innocence.[22]

[22] Kajubo v. State (1988) 1 NWLR (pt 73) 721 @ 738 – 739; Omoteloye v. State (1989) 1 CLRN p.142 @ 157.

It is therefore necessary when the application is made to quash indictment on the information for the trial judge to attend to such an application dispassionately and rule on it. The best way to do this is to read all the depositions made by potential witnesses and accused persons so as to find if there was a *prima facie* case for the accused to answer. In deciding whether a *prima facie* case exists for the accused to answer in an information for indictment, the authorizing judge, or the judge before whom the indictment is placed, must look at the proofs of evidence attached to the information in totality and not to pick words out of context.

On what is a *prima facie* case? *Prima facie* is difficult to define precisely and some vital ingredients are clear. Facts that are clearly revealing a crime and the crime links an accused person may be *prima facie* evidence that the accused has something to explain at the trial. But that is not always the whole that is needed as circumstances must indicate.

It is even very difficult in the face of dearth or precise definition of *prima facie*. The best definition is one proffered in an Indian case of **Sher Singh v. Jitenddranthen**[23] quoted with approval by Supreme Court in **Ajidagba v. Inspector-General of Police**[24] as follows: "What is meant by *prima facie* case? It only means that there is ground for proceeding... But a *prima facie* case is not the same as proof which comes later

[23] (1931) 1 I.R 59 Calc 275.

[24] (1958) 3 FSC 5; Abacha v. State (2002) 11 NSCQR p. 345 @ 368.

when the Court has to find whether the accused is guilty or not guilty, ... and the evidence discloses a *prima facie* case when it is such that if un-contradicted and if believed it will be sufficient to prove the case against the accused".

Thus if the facts, in a deposition whether on oath or not, in preliminary investigation are mere statements attached to an information which do no disclose a *prima facie* case, the indictment must be quashed. The entire proofs of evidence, i.e. statement from relevant persons and perhaps also the suspect must be read and considered. It is now more so when there is no more provision for preliminary investigation by a Magistrate. It is not a mere formality to accept the information without considering the proofs of evidence. To face a trial is not a matter to be treated with levity, a trial somehow infringes on the liberty of the subject, most especially when it involves a serious offence punishable by death or life imprisonment.

The question is, what constitutes a valid objection to an indictment? The list of what constitutes valid objection to an indictment can therefore be summarized as follows:-

(1) If the indictment has been preferred otherwise than in accordance with the provisions of the law.

(2) If it is drafted otherwise than in accordance with the law e.g. if it is insufficiently or incorrectly particularized or if it charges more than one offence in one count/ bad for duplicity.

(3) If it has not been preferred within the time allowed by the law.

(4) If it has not been signed in accordance with the dictates of the law.

(5) If the time limits for the beginning of trials have not been complied with.

(6) If it charges an offence that is unknown to law.

(7) If it charges any offence in respect of which necessary consents to the institution or confirmation of the prosecution have not been obtained.

(8) If it charges an offence in respect of which any relevant limitation period has expired before the commencement of the prosecution.

(9) If it charges the accused of an offence of which he had already been convicted.

(10) If it charges the accused of an offence of which he had already been acquitted.

(11) If it charges the accused of an offence of which he had already been pardoned.

(12) If it charges a person who is immune from prosecution or whose acts at the relevant time are not susceptible to the jurisdiction of the Court either by reason of age or being incapable, in law, of committing the offence charged or;

(13) If it charges a person who has been extradited from abroad with an offence that was not covered by the extradition proceedings.[25]

[25] See R v. Central Criminal Court & Nadir Ex parte Director of Serious Fraud Office, 96 CR APP. R 248 and Fawehinmi v. A. G., Lagos State (No. 1) (1989) 3 NWLR (pt 112) p. 707: Ezeze v. State (2004) 51 WRN p. 135 at 145 – 146.

Chapter Two

Likely Defences in Criminal Offences

Defence of Provocation

Provocation literarily indicates the act of inciting another to do something especially to commit a crime. Or something such as words or actions that affect a person's reason and self-control especially causing the person to commit a crime impulsively.

By and large, the term provocation has been defined by the Supreme Court to denote some acts or series of acts (or utterance) done or said by the deceased to the accused person which would cause any reasonable person and which actually caused in the said accused person, a sudden and temporary loss of self control, rendering him (i.e. the accused) so subject to passion as to make him for a moment not a master of his mind. The definition is however to be considered in the light of the peculiar facts and circumstances of each case. These include inter alia the station in life of the accused person and

the society in which he lives as well as his primitive condition or nature. See **Lado v. State**[26] From the above definition, it is clear that for the defence of provocation to avail the accused person the act or utterance of the deceased must be directly or indirectly uttered against him. In other words, the alleged words of insult said to be uttered by the deceased must have been directed against the accused or said to his hearing before it will be qualified as a provocation under the above definition.

Provocation is governed by **Section 283, 284 and 318 of the Criminal Code and Section 97 of the Penal Code.**

Section 284 of the Criminal Code provides that "a person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault; If he is in fact deprived by the provocation of the power of self control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous harm. Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self control and to induce him to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person

[26] (1999) 9 NWLR (pt 619) 369; R v. Afonja (1955) 15 WACA 26; R v. Adekanmi (1944) 17 NLR 99; R v. Igiri (1948) 12 WACA 377; R v. Akpakpan (1956) SCNLR 3; R v. Duffy (1949) 1 All E.R. 932.

provoked was actually deprived by the provocation of the power of self control and whether any force used is or is not disproportionate to the provocation, are question of fact."

Section 283 Criminal Code provides that: the term "provocation" used with reference to an offence of which an assault is an element, includes, except as hereinafter stated any wrongful act insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation or in the relation of master or servant to deprive him of the power of self control and to induce him to assault the person by whom the act or insult is done or offered. When such an act or insult is done or offered. When such an act or insult is done or offered by one person to another or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault. A lawful act is not provocation to any person for an assault. An act which a person does in consequence of excitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault."

Section 318 Criminal Code provides that "when a person who unlawfully kills another in circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by grave and sudden provocation and before there is time for his passion to cool, he is guilty of manslaughter only".

In the light of the laws quoted above, the ingredients of the defence of provocation are as follows;

(a) The act relied upon by the accused is obviously provocative;

(b) The provocative act deprived the accused of self control; that is, the provocative act is such as to let the accused person actually and reasonably lose self-control.

(c) The provocative act came from the deceased.

(d) The retaliatory act of provocation must be shown to be instantaneous to the act reacted against; and

(e) The force used by the accused in repelling the provocation is not disproportionate in the circumstance.

These ingredient must co-exist to ground a plea of provocation – **Nwede v. State** [27]

27 (1985) 3 NWLR (pt 13) 444, Akalezi v. State (1993) 2 NWLR (pt 273) 1; (1993) 10 LRCN 264; Okonji v. State (1987) 1 NWLR (pt 52) 659 @ 67; (1987) 3 SCNJ 38; Alonge v. State (1971) 1 ALL NLR 47.

It is also the law that what constitute provocation under **Section 221 of the Penal Code** is a question of fact and the law does not tabulate the types of acts that are likely to cause provocation. It is mainly concern with the creation or existence of provocation – **Bassey v. The Queen** [28] the Supreme Court held that where an accused person and his wife planned and killed the deceased after the alleged act of provocation, he could not enjoy or was not entitled to the defence of provocation because he could not be said to have acted in a heat of passion and his temper had already cooled at the time of killing the deceased. Thus a planned act of vengeance cannot be a ground for or amount to provocation under the law – **Babalola John v. Zaria Native Authority**[29] It should be noted that words alone can constitute provocation depending on the position in life and primitiveness of the accused and the society. However, in no way under our law can words said to be uttered to another person who merely reported to the accused be capable of causing provocation on the said accused against the alleged utterer who was not even around at the time of the report of the words said to the accused by the third party. If any loss of self control can occur from the words allegedly uttered by the deceased, the act of the accused should have been directed on the reporter if the accused had acted in the heat of passion and without self control[30]

[28] (1963) 2 SCNLR 183; (1963) 1 ALL NLR 280; In the case of Sunday Udofia v. The State (1984) 12 S. C. 139.

[29] (1959) NRNLR 43 and Ekpenyong v. State (1993) 5 NWLR (pt 295) 513.

[30] Ahmed v. State (1999) 7 NWLR (pt 612) 641; (1999) 5 SCNJ 223; R v. Nwamjoku (1937) 3 WACA 208; R v. Adekanmi 17 NLR 99; Idemudia v. State (1999) 7 NWLR (pt 610) 202; Ukwunnenyi v. State (1989) 4 NWLR (pt 114) 131.

It is also a settled law that a provocative act or utterance offered or reported by one person cannot be a ground or justification for killing a third party (or person) who did not offer the act or was not heard to have uttered the alleged words against the accused person.[31] Furthermore, it is the law that where there is evidence of premeditated intention to kill, it is not consistent with the defence of provocation and such evidence would consequently defeat the defence. Similarly, where there is a desire for vengeance whether justified or otherwise, that will defeat the defence of provocation.[32]

Also, provocation which could reduce what otherwise amounted to murder to manslaughter is a legal concept made up of a number of a co-existing elements. It is of paramount importance in the consideration of this concept that the act is held out as a natural and justifiable reaction of the provoked person and was not done in self-revenge but in ventilation of a natural, sudden and contemporaneous feeling of anger caused by the circumstances of the occasion.

On the other hand, the defence of self-defence provides complete absolution from criminal liability. This is quite unlike the defence of provocation which only operates to reduce the offence of murder to manslaughter[33]

[31] Idemudia v. State (1999) 7 NWLR (pt 610) 202 @ 218; Omenimu v. State (1966) NMLR 356; Ukwunneyi v. State (1989) 4 NWLR (pt 114) 131; (1989) 7 SCNJ 34.

[32] Ekpenyong v. State (Supra); Udofia v. D.P.P. (Supra).

[33] Apugo v. State (2004) 9 FR. P. 186; R.5.

However, taunts and insults could lead to provocation if they are of such a nature that a reasonable man in the heat of passion could strike the taunter with any proportionate weapon that could be available to him.

As **Per Idoko C. J.** Opined in the case of **State v. Hembe**[34] that "the principle of provocation is not drawn from an individual's degree of wrath. It is on the basis of what a reasonable man will do, given the circumstances. Individual's fiendish conduct will not go to determine the view the court will take of the proportionality of the retaliation. An illiterate man knows what it means to take life. If mere taunting and insults could jerk the use of knife or other leather weapons then nobody can be safe, in a country where people use their tongues to insult anyhow, without at times caring for the truth or falsity of what is uttered".

It is an established law that the provocation given to the accused must be from the deceased – **R v. Ebok**[35]

In **The State v. Mathias Ekpo**[36] where the accused on the 22nd of April, 1973 was caught by the deceased in his raffia plantation. In the altercation that ensued, the deceased shot at the accused thigh and the accused retaliated by shooting the deceased by the neck and this subsequently resulted in his

[34] (1989) 1 CLRN p. 236 @ 243

[35] 19 N.L.R. 84 @ 86; R. v. Nwamjoku (1937) 3 WACA 208; Omeninu v. The State (1966) NMLR 356.

[36] (1975) 5 U.I.L.R. (pt 111) p. 350.

death. The court held that the defence of provocation is available to the accused since the mode of retaliation offered by the accused was commensurate with the attack made on him.

Therefore, the defence of provocation presupposes the loss in the accused person of self-control which should in any given case be the motive force behind the retaliation. For a defence of provocation to avail the accused person, he must have been deprived by the provocation of the power of self control and he must have acted upon it on the sudden and before there is time for his passion to cool[37]

Even though the accused set up the defence of provocation, no amount of provocation can excuse homicide or render it excusable except by virtue of section 318 of the Criminal Code. For the killing of another to be excused in the sense that it is reduced to manslaughter, the person seeking to evoke the defence of provocation must satisfy the Court on the following elements namely:

(a). That he killed the deceased in the heat of the passion caused by sudden provocation and;

(b) That at the time of killing the heat of passion had not cooled[38]

[37] See Brett and McLean's the Criminal Law Procedure of the Six Sourthern States of Nigeria 2nd Edition by C. O. Madurikan p. 692; para. 1806.

[38] Ihuebeka v. State (2000) 2 SCNQR (pt 1) p.186 R.8.

It must however be borne in mind that it is not every slight provocation even by striking of blow that will justify the accused person to retaliate with a weapon, such as a matchet or gun, that is lethal and likely to cause death. Provocation given to the person provoked must be commensurate to the offence committed. Since the law presumes that a man intends the natural and probable consequences of his acts. And the test to be applied in this circumstances is the objective test namely, the test of what a reasonable man would contemplate as the probable result of his acts[39]

[39] Garba v. The State (2000) 2 SCNQR (pt 1) p. 402.

Defence of Self Defence

In defence of life, goods or possessions, a man may justify laying hands upon another who wrongfully seeks to deprive him of them, provided that he does not use more force than is necessary for the purpose. A mere apprehension of danger of goods or person will not suffice [40]

Self defence literally connotes the right to defend one's body, actions, rights against an attacker(s).

Section 32 and 286 – 288 of the Criminal Code are relevant to this topic. S. 32 of the Criminal Code provides that: "A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances –

(1) in execution of the law

(2) in obedience of the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful;

(3) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence;

(4) when he does or omits to do the act in order to save himself from immediate death or grievous harm threatened to be inflicted upon him by some

[40] The State v. John Umuru (1968) NMLR 15.

person actually present and in a position to execute the threats; and believing himself to be unable otherwise to escape the carrying of the threats made to him. Whether an order is or is not manifestly unlawful is a question of law.

But this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which grievous harm to the person of another, or an intention to cause such an harm, is an element, not to a person who has by entering into an unlawful assistance or conspiracy rendered himself liable to have such threats made to him.

Section 286 Criminal Code when a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault:

Provided that the defence used is not intended and is not such as is likely, to cause death or grievous harm.

If the nature of the assault is such as to cause reasonable apprehension of death or grievous harm, and the person using force by way of defence believes, on reasonable grounds that he cannot otherwise preserve the person defended from death or grievous harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such

force may cause death or grievous harm". It has been held also that the deceased was the aggressor and that the appellant/ accused acted in self defence. The accused must be shown to have used more force than was necessary to defend himself. The protection afforded by these provisions, therefore, fully availed him, even if we had held that it was his fist blow that had killed the deceased. The editors **Brett and Mc Lean's The Criminal Law and Procedure of the Six Southern State of Nigeria** commented on self defence in a situation where, as we have here, there has been a fight between the deceased and the accused. In paragraph 1860 they had this to say: "Killing by fighting (i.e. in quarrel and not in the course of resistance to a lawful arrest or other lawful use of force) may be either murder, manslaughter or homicide in self defence according to the circumstance... such a killing... will be murder unless it is justified or excused by law, or under such provocation as to reduce the offence to manslaughter...

In paragraph 1869 the editors quoted the following passage from the judgment of **Lindley, J.** In **R. v. Knock**[41] If a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight and defends himself solely to avoid fighting. Then

[41] (1877) 14 Cox C.C.I

supposing a man attacks, and I defend myself, not intending or desiring to fight, but fighting – in one sense – to defend myself and I knock him down, and thereby unintentionally kill him, that killing is accidental". But the defence of self defence in my view is different. Before the defence as available; It must be shown by the person relying upon it that he reasonably believed that there was no other way of saving himself from death or grievous bodily harm other than by using such force as he did and that he tried to disengage from the event which led to the application of such force. For an accused to avail himself of the defence of self-defence, he must show by evidence that he took reasonable steps to disengage from the fight or make some physical withdrawal. But the issue of disengagement depends on the peculiar circumstances of each case.[42]

Where it is established that an accused was the aggressor in the act that led to the death of the deceased, the defence of self defence would not avail him[43]

The effect of **Section 59, 60, 62, and 65 of the Penal Code** is that one may kill if one must, to repel a grave assault on personal liberty, honour, or life and limb and it is not an offence when the killing is done within the limits laid down in

[42] Nkemji v. State (2005) 3 FR p.95 @ 112.
[43] State v. Hembe (1989) 1 CLRN p. 236 @ 241

Section 62 of the Penal Code of doing no more harm than is necessary – **Abadallabe v. Bornu Native Authority.** [44]

It should be noted that a person acting in self defence is at all material time, master of his own passion and he acts only to prevent himself from being destroyed. And since the Court will not allow a defence no matter how improbable or stupid to go uninvestigated once it raises a reasonable doubt in the case of the prosecution.[45] In order to establish the defence of self-defence, the evidence must show or tend to show that the accused believed on reasonable ground that he could not otherwise preserve himself from death or grievous bodily harm than by using such force as he did – **See Queen v. Reuben Enyi Jimobu**[46]

When an issue of self-defence arises, the failure of the accused to retreat when it was possible and safe for him to do so is simply a factor to be taken into account in deciding whether it was necessary for the accused to use force and whether the force used by him was reasonable. [47]

[44] (1963) 1 ALL NLR. 154.
[45] Opeyermi v. The State (1985) 2 NWLR (pt 5) 101 @ 102 – 103.
[46] (1961) 1 ALL NLR p.627.
[47] R. v. Walfer Innes 55 CAR p.551.

No Case Submission

It is instructive to state it here that in **R v. Coker & ors**[48] **Hubbard J.** put it clearly that a submission that there is no case to answer means that there is no evidence on which the Court would convict even if the Court believed the evidence given by the prosecution.[49]

Section 241 of the Criminal Procedure Act governs no case submission. It provides "after the case for the prosecution is concluded, the accused or the legal practitioner representing him, If any, shall be entitled to address the Court at the commencement or conclusion of his case, as he thinks fit, and if no witnesses have been called for the defence, other than the accused himself or witnesses solely as to the character of the accused and no document is put in as evidence for the defence the person appearing for the prosecution shall not be entitled to address the Court a second time but if in opening the case for the accused has in addressing the Court introduced new matter without supporting it by evidence the Court, in its discretion, may allow the person appearing for the prosecution to reply".

A submission that there is no case to answer means that there is no evidence on which the Court could convict even if

[48] 20 NLR 62.

[49] Tongo v. C.O.P. (2007) 30 NSCQR (pt1) Pg 180 @ 192 - 194

the Court believed the evidence given; the submission should be limited to that and the Court should not be addressed on the credibility of the witnesses or the weight of the evidence if they are accomplices **R v. Coker**[50]

It is also proper to call to mind the Practice Direction of Lord Parker, Lord Justice of England in (1962) 1 WLR 227. No case submission may be upheld where:

(1) There was no evidence to prove an essential elements of the alleged offence, and

(2) The evidence adduced has been so discredited as a result of cross examination.

(3) The evidence is so manifestly unreliable that no reasonable Tribunal can convict on evidence so far led, there is a case for the accused to answer[51] when an accused rests his case on no case submission, the effect is that he banks his case completely on the evidence adduced by the prosecution. To my mind, he takes a risk as he must stand or fail upon such evidence adduced by the prosecution. At times, it can be perilous to take a risk. If a judge or Tribunal rules against a submission of no case to answer, he does not by virtue of that fact shift the onus of proof from the prosecution to the accused[52]

[50] (1952) 20 N.L.R. 62.

[51] Igabele v. State (2005) 1NCC p.59,

[52] Daboh & ors v. State (1977) 5. S.C. 171 @ 214.

It has been said that apart from the three conditions stated above, a Tribunal/Court should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating Tribunal/Court (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable Tribunal might convict. If a reasonable Tribunal might convict on the evidence so far laid before it, there is a case to answer.[53]

If a submission is wrongfully overruled and evidence is given thereafter which warrants a conviction, the position on the Nigerian authorities is that the conviction will not be upset on appeal.[54] Later, in the case of **R v. Asaba and others**[55] the Federal Supreme Court held where a submission had been overruled but states later that if a submission is wrongly overruled an appeal against a subsequent conviction would succeed.

It should be noted that if submission is upheld the proper verdict is one of acquittal[56] if the judge holds that there is a case to answer, his observation should be confined to the ruling

[53] Practice Direction (1957) 1 W.L.R. 750; 41 Cr. App. R. 142; (1962) 1 W.L.R. 227).
[54] (R v. Ajani (1936) 3 WACA 3; Eregre v. Police (1954) 14 WACA 453).
[55] (1961) 1 ALL NLR 673
[56] (R v. Olagunju (1961) 1 ALL N.L.R. 21)

and it is as a rule desirable that there should be no observations on the facts of the case at that stage at all.[57]

A submission of no case means that even if the prosecution witnesses are believed yet their evidence does not establish the offence charged. In a submission of no case, counsel for the defence cannot address the Court on the credibility of witnesses. And where counsel rests on his no case submission the trial Court is obliged to consider the prosecution's case carefully; decides on the credibility of the prosecution's witness and the weight to be attached to their evidence. Therefore, resting on a no case submission is a perfectly legally acceptable stratagem but when the prosecution's case calls for some explanations which only the accused person can give and such accused decides to rest on a no case submission then the trial court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation on what the accused might have said had he testified.

[57] (R v. Ekanem (1950) 13 WACA 108).

Defence of Justification, Excuse and Compulsion

Justification literarily connotes an acceptable reason(s) for doing something. Justification is a defence to commission of a crime. It is a defence both under Criminal Code Act and Penal Code. In discussing this defence, one is tempted to ask, does a person have justification or excuse or can he be compelled to commit a crime? The answer to this question is answered by both Criminal Code and Penal Code. Since in criminal law, the prosecution has the burden of proving the case against an accused person beyond all reasonable doubt, all the facts in a particular case and the Court has duty to consider all the defences possible or available to the accused on the facts even though they appear to be stupid, improbable or unfounded.[58]

To consider the defence of justification, recourse shall be made to **Section 32 of the Criminal Code** and **Sections 45 – 47 of the Penal Code.**

Section 32 of the Criminal Code provides as follows:

"A person is not criminally responsible for an act under any of the following circumstances.

[58] Abara v. State (1981) 2 NCLR 110; Ekpenyong v. The State (1993) 5 NWLR (pt 295) 513; Udofia v. D.P.P Digest of Supreme Court Cases Vol. 10, p.348; Nwauzoke v. The State (1988) 1 NWLR (pr 72) 529; Rex v. Bio (1945) 11 WACA 46 @ 48; Asanya v. State (1991) 3 NWLR (pt 180) 422 @ 451; Ogunleye v. The State (1991) 3 NWLR (pt 177) 1).

(1) In execution of the law

(2) In obedience to the order of a competent authority which he is bound by law to obey, unless the law is manifestly unlawful.

(3) When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him or to another person in his presence;

(4) When he does or omits to do the act in order to save himself from

immediate death or grievous harms threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution:

But this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which grievous harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him. Whether an order is or is not manifestly unlawful is a question of law.

It is sacrosanct to reveal that section 32 of the Criminal Code affords a complete defence to a criminal charge in cases

in which it is applicable. For example, subsection 1 would protect the hangman who carried out judicial execution; otherwise the section does not apply to a charge of murder **Alagba v. The State**[59] nor a person who has joined a society of which one of the object is murder - **R v. Obodo**[60] Subsection 2 gives a limited protection in all circumstances to members of the military and police forces; in case of riot they have the further protection of Section 280 of the Criminal Code which extends even to act(s) causing death or grievous harm. Unlawful violence in paragraph 3 does not appear to include the consequences of negligence, and it is submitted that section 26, and not this section, would apply in relation to acts done to accord danger from, for example, a motor vehicle negligently driven. Paragraph 4 expressly refers to a threats made by another person, and the use of the word "unlawful" in paragraph 3 implies a human agency so that neither paragraph would apply to acts done to avoid danger arising from natural causes e.g. from a mad dog or a fire. In a such case, it would appear that section 26 might apply.

Under **Section 33 (2)(a)-(c) of the 1999 constitution** it is lawful for a person to take life in a circumstances as are permitted by the law if such an act is reasonably necessary.

[59] (1950) 19 NLR 129
[60] (1958) 4 F.S.C.1.

A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably necessary;

(a) For the defence of any person from unlawful violence or for the defence of property.

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or

(c) for the purpose of suppressing a riot, insurrection or mutiny.

Section 45-47 of the Penal Code states as follow;

Section 45 Nothing is an offence which is done by any person who is justified by law or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it.

Section 46 Nothing is an offence which is done by a person when acting judicially as a court of justice or as a member of a court of justice in the exercise of any power which is or which in good faith he believes to be given to him by law.

Section 47 says: Nothing which is done in pursuance of or which is warranted by the judgment or order of a court of justice, if done while such judgment or order remains in force, is an offence, notwithstanding that the court may have no

jurisdiction to pass such judgment or order provided the person doing the act in good faith believes that the court had such jurisdiction.

So also Section 33 of the Criminal Code explains defence of compulsion which provides: "A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband. But the wife of a Christian marriage is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do and which is done or omitted to be done in his presence, except in case of an act or omission which would constitute an offence punishable with death, or an offence of which grievous harm to the person of another, or an intention to cause such harm, is an element in which case, the presence of her husband is immaterial.

This section affords a defence to the wife personally, but does not alter the nature of her act or omission, and the husband may be convicted in respect of it under section 7 of the Criminal Code.[61] Christian marriage mentioned in section33 above is defined in section 1 of the Criminal Code to mean "a marriage which is recorgnized by the law of the place where it

[61] R v. Bourne (1952)36 Cr. App.R.125.

is contracted as the voluntary union for life of one man and one woman to the exclusion of all others.

Generally speaking, from the above quoted provisions of the two codes, one is left in no doubt that there are similarities between the defences being discussed and some other defences like mistake of fact, by husband or wife and necessity. The defences under consideration are open to military and police officers, to court judges, officials and to individuals in cases of assault and like offences and particularly married women acting under the influence of their husbands.

It is appropriate at this juncture to cite the case of **R v. Obodo & 4 others,**[62] in support of the contention that an accused person who belongs to a secret society and whose aim is to kill others cannot take cover that he was compelled to act in obedience to his society's orders, which naturally, are unlawful. The first appellant murdered a woman in the presence of other appellants and others who were members of the secret society known as the Odozi Obodo Society whose object was to kill thieves and others.

Ademola C.J.F. held at page 3 as follows: "we think it necessary to emphasise that if a person joins a society of which one of the objects is murder, and is present and acquiescent

[62] (1959) 4 F.S.C. 1.

when a murder is carried out in pursuance of the objects of the society, it is no defence to say that he did not commit the murder with his own hand, or even that he refused, a command to do so, unless the circumstance of his refusal were such as to indicate a complete and final repudiation of the society, which none of the present applicants, can claim to have made. Even if it is true that some of them only joined the society and were present at the murder because they were threatened with death if they refused, section 32 of the Criminal Code makes it clear that this is no defence in law to a charge of murder"

Thus the essential element required for the defence of justification under section 45 of the Penal Code is that the accused must act in good faith and must exercise due enquiry on his belief before his action can or will be justified.[63]

In this regard although an honest and reasonable mistake of fact may be excusable under the defence of justification, a mistake of law is not so excusable. In any case as in the case of witchcraft, the standard of living or the position in life of the accused person as well as the manner of life of the community have to be considered by the court.[64]

However, the standard of test for the justification of the act of the accused person under section 45 should be an objective one like that of the provocation.

[63] See the comment in the Annotated copy of the Penal Code at page 241 thereof.
[64] (Lado v. The State (1999) 9 NWLR (pt 619) 369 @ 381; Rex v. Adamu (1944) 10 WACA 161; Akalezi v. The State (1993) 2NWLR (pt273) p.1; (1993) 10 LRCN 264; Ubani v. The State (2001) FWLR (pt 44) 483; (2001) 7 NWLR (pt713) 587 and Ekpenyong v. The State (1993) 5NWLR (pt 295) pg 513).

In the case of **Abubakar Dan Shalla v. The State**[65] The facts of this case is on or about the 14th of July 1999, a rumour was spread within the neighbouring villages of Randali and Kardi of Birnin Kebbi Local Government Area of Kebbi State to the effect that one Abdullahi Alhaji Umaru of Randali village has insulted or defamed the Holy Prophet Mohammed. The appellants who are of Kardi village on hearing the rumour left for Randali in search of the said Abdullahi Alhaji Umaru. Although they could not arrest him at Randali, they eventually caught him at Kardi village, he was taken to the outskirts of the village, and held or kept under the custody of the 4th and 5th appellants at a place near the graveyard. The 1st,2nd, 3rd,and 6th appellants then went to the village head at Kardi and informed him that the person said to have insulted or deformed the Holy Prophet had been caught in his village and the appropriate punishment to be meted out to him under Sharia was death. The appellants therefore asked for his sanction to kill the said Abdullahi Alhaji Umaru. The village head failed to give them any answer or reply and the 1st, 2nd, and 6th appellants left and went back to the grave-yard where Umaru was being held by the other appellants.

On getting back to the graveyard, the 3rd appellants brought out an Islamic text book called Risala and read from it

[65] (2004) 35 W. R. N. 43.

that the punishment of any person who insults or defamed the Holy Prophet was death. There upon, the 5th appellant strucked the deceased by the neck with his matchet. When Umaru fell on the ground from the matchet blow, the 1st appellant brought out a sharp knife and slaughtered him. When the deceased was dead, they all dispersed leaving his corpse at the scene. The corpse was later removed by the police. After due investigation, the appellants were arrested. In their statements to the police, exhibits "E" to "K" the appellants confessed to the killing of the deceased together because they heard the rumour that he had insulted or blasphemed the Holy Prophet.

At the High Court of Kebbi State, the appellants were charged with criminal conspiracy, abatement and culpable homicide punishment with death contrary to Section 85, 97 and 221 act of Penal Code. The appellants pleaded not guilty. At the trial, the prosecution called eight witnesses and tendered some exhibits. The appellants however rested their case on the evidence adduced by the prosecution and elected not to give/ call any evidence in their defence. Their counsel during the trial did not raise or prove any defence for them. In his address, their counsel only raised the defence of justification under sharia rather than under the Penal Code. At the conclusion of trial, court found the appellants guilty as charged and sentenced all of them to death. Dissatisfied, the appellants appealed to

the Court of Appeal, His Lordship **Adamu JCA at p. 68-69** of the report " it will be very clear that the appellants with their shallow knowledge of Sharia or Islamic law and calling themselves muslim brothers, have in ignorance or deliberately disregards of the rules of judgment and procedure under the said Sharia as contained in the text of Risala, arrogated to themselves the function and role of a Court of law or a Khadi and wrongly (without any prove or evidence) or based on rumor or hearsay, convicted, sentenced and inflicted or carried out the execution of the supposed punishment. They can not claim that to be the way of life of their community because they were not supported by both the village head and Utaz Mamman. Although, the prosecution did not call the Utaz as a witness, it is however clear, that he gave them the advice in the presence of some of the witnesses (e.g. P.W 2) but they refused to heed and even went to the extent of describing him as an infidel or a non-Muslim for giving such an advice. There is also no legal justification in the action taken by the appellants in killing the deceased for his supposed offence. Islamic religion is not a primitive religion that allows its adherent to take the law into their hands and to commit jungle justice. Instead there is a judicial system in Islam which hears and determines cases including the trial of criminal offence against the religion or against a fellow Muslim brother should be taken to the Court

(either a Sharia or a peculiar common law Court) for adjudication it is only when a person is convicted and sentenced by a Court of law that he will be liable to a punishment which will be carried out by appropriate authority (i.e. the prison). Although, it is true that there is the provision in Risala which prescribes the punishment of death on any Muslim who insults the Holy Prophet such punishment can only be imposed by the appropriate authority (i.e. the Court) rather than by any member of the society whether a Muslim or otherwise.

Per Oputa J.S.C. in Atano v. A.G. (Bendel) [66] said "it will thus be to the advantage of all in making submission of no case because counsel knows exactly that he is attacking sufficiency of the evidence or veracity of the witnesses. It is also necessary to indicate whether counsel wants to rest on his submission. Such initial foreknowledge will surely limit the scope of the submission and prevent any long ruling on an equally long submission of no case".

[66] (1988) 2NWLR (pt 75) p.206 @231

Resting on the Case of the Prosecution

It is trite law that a party or a litigant has a right to choose whether to adduce evidence in support of his case or not and Court has no power to interfere with the exercise of that right. Similarly, an accused person or a subject, has a right to choose whether to file a defence to the charge/information(s) against him or not. I think, once that choice is made and that choice was acted upon by both parties in the suit and by the Court, the party that made the choice cannot turn round afterwards and seek to be allowed time within which to file a defence and call evidence in order to repair his damaged case. If the Court indulges parties in this way, there will be no end to litigation.

The practice or rule of resting on the case of the prosecution, that is, in effect submitting that the respondent as plaintiff failed to make out a *prima facie* case and by electing, in consequence, not to call evidence in support of their own case. The legal position in such a case is, of course, that the appellants are bound by the evidence called in support of the case for the respondent qua plaintiff/the accused, and the case must be dealt with on the evidence as it stands **per Lord Greene M. R. in Laurie v. Raglan Building Co. Ltd**[67]

[67] (1942) 1 K.B. 152 @ 156.

This is a defence which is available to the accused person or the defendant(s). This indicates that it is available both in civil or criminal cases. The practice in such cases is for the learned trial judges to refuse to rule on the submission unless counsel for the defendant/accused person makes it clear that he is going to call no evidence. Where a defendant rests his case on the plaintiff's or accused person's, he is in effect submitting that the plaintiff has failed to make a *prima facie* case and electing in consequence, not to call evidence in support of his own case. A defence counsel who announces that he is resting his case on that of the prosecutor/the plaintiff must be understood to be saying either:

(a) that the plaintiff has not made out any case for the defendant to answer or

(b) that the defendant has a complete answer in law to the plaintiff's case.

Once counsel makes this announcement and addresses the Court on it, he must stand by the submission[68]

Per Oputa J.S.C. in Alli and anor v. The State[69] said "it is always a gamble to rest the defence on the case of the prosecution where the issue is such that even if all the prosecution witnesses are believed, yet the offence charged

[68] Tandor v. C.F.A.O. of Accra (1944) 10 WACA 186.

[69] (1988) 1NWLR (pt 68) p.3

has not been proved it may be permissible to rest on the case of the prosecution. But counsel will be taking a big risk where the issues of fact will have to be decided in favour of an accused person before his case on that of the prosecution will be highly prejudicial".

On His Lordship's part, **Craig JSC at page 13 of the case** stated that it means no more than the accused person did not wish to explain any fact or rebut any allegation made against him. Indeed the situation is like or akin to a counsel for an accused person, making a no case submission and relying or resting on it completely". The risk involved in taking such a stance, is the type eloquently highlighted, by the Privy Council in the case of **The Queen v. Shampal Snigh**[70] and considered by the Supreme Court, in the case of **Nwede v. The state.**[71] Resting the defence on the case of the prosecution is a defence and the defence is that the case as charged had not been proved by the prosecution – **Edet Akpan v. The State.**[72]

[70] (1962) 2 NWLR 233 @ 243-245
[71] (1985) 3NWLR (pt444) @ 455
[72] (1986) 3NWLR (pt 27) p. 225.

Defence of Alibi

The defence of alibi connotes that at the time the crime or alleged crime was committed, the accused was somewhere else; not at the place the crime was committed or allegedly committed.[73] In other words, it is the case of the accused that he was not at the scene of crime or *locus criminis* at the material time when the crime was committed or allegedly to have been committed. And so, the accused said that he can not by any stretch of imagination be said to have committed the crime as it is humanly impossible for him to be in two places at the same time and moment.

In the words of **Per Oputa JSC in the case of Okosi v. State**[74] his Lordship expressed his view as follows; "Alibi is the commonest of all defences **R v. Liddle,**[75] **Hewart R.C.J,** it does not require ingenuity but ordinary common sense to conceive that a person charged might say – I was not at the scene and at the time the alleged offence was committed. I was somewhere else, therefore I was not the one who committed the offence. This is what Alibi means".

Therefore, if an accused raises unequivocally the issue of Alibi ,that is to say that he is somewhere else other than the *locus delicti* at the time of the commission of the offence for which he is charged and gives some facts and circumstances

[73] (Adio v. State (1986) 3 NWLR (pt84) 548; Adekunle v. State (1989) 5 NWLR (pt123) 505.
[74] (1989) 1 CLRN p.29, @48 paras B-G.
[75] (1930) 21 Cr. App. R. 3 at p. 13.

of his whereabouts, the prosecution must investigate that Alibi to verify its truthfulness or otherwise. No burden is placed on the accused to prove his Alibi once he has giving the particulars of his whereabouts clearly, he must give some lead that will reasonably lead the prosecution in their investigation – **Yanor v. The State.**[76] But the accused should not merely state that he was not at the locus delicti without giving any lead, for by failing to give particulars of his whereabouts, the prosecution will have no lead to their investigation – **Ozulonye and ors v. The State.**[77]

The failure of the prosecution to investigate the facts and circumstances given by an accused person of his whereabouts render the alibi unrebutted and it may vitiate the proof beyond reasonable doubt against the accused raising the alibi. The police, however are not expected to go on a wild goose chase, in order to investigate an Alibi. Any accused setting up Alibi as a defence is duty bound to give to the police, at the earliest opportunity, some tangible and useful information relating to the place he was, and the person with whom he also was – **Gashi v. The State**[78]

The prosecution has a duty to investigate an accused person's Alibi but only when such Alibi is set up at the earliest

[76] (1965) 1 ALL NLR 193.

[77] (1981) NCR 38 at 50and 51.

[78] (1965) N. M. L. R. 333, Nnunukwe v. The State(2004) 12 FR p. 48 at 64; Odili v. The state (1977) 454 S.C.I; Onafowokan v. The state (1987) 3 NWLR (pt 61) 538; Bozim v. The state (1985) 3 NWLR (pt8) 62; Okosi v. The state (1989) 1NWLR (pt 100)@ 65.

opportunity during the investigation preferably in the accused person's statement to the police. An Alibi raised for the first time from the witness box cannot be considered as a serious defence. At best it is an after-thought. The positive evidence of the prosecution witnesses will out-weigh this weak and belated Alibi. However incredible an Alibi may be, it should not be disregarded by the Court unless there is overwhelming evidence to rebut it, for example, having regard to the failure of the accused person to supply particulars of his whereabouts or where there is direct and positive evidence of participation.[79]

Although there are occasions in which a failure to check an Alibi may cast doubt on the reliability of the case for the prosecution, in such a case if the accused can be identified by eye-witness(es) at the scene of the crime such doubt does not arise **Ntam v. State**[80]

The defence of the Alibi crumbles the moment the prosecution gives superior evidence than that of the accused, by fixing permanently the accused person not only at the scene of crime but also in the commission of the crime, in a way that if a photograph was taken at the time, or it will clearly show or depict him in romance with the crime he is charged with. It is however the law that failure of the prosecution to investigate the facts and circumstances given by an accused person of his

[79] (Nwosisi v. State (1976) 6.S.C.109; Odidika v. State (1977) 2 S.C.21 and Njovens v. State (1975) 5 S.C.17.
[80] (1968) NMLR 86.

whereabouts renders the Alibi unrebutted and it may vitiate the proof beyond reasonable doubt against the accused raising the Alibi- **Okosi v. The State**[81] But the position will be different if the prosecution has more convincing or stronger evidence as to the guilt of the accused person. Although the proof of the guilt of the accused is on the prosecution and so too the investigation of the defence of Alibi, the onus lies on the accused to discharge the evidential burden that he was in fact not at the scene of the crime at the time the offence was committed and that he was somewhere else. It should be noted that where an accused person raises a defence that his Alibi was not investigated, he can still be convicted as charged if there is stronger and credible evidence before the Court which falsifies his Alibi.[82]

In the case of **Suberu Bello and ors v. Commissioner of Police,**[83] the Court held that it is obvious from the reasons given by the trial Magistrate in his ruling for discharging the three accused persons that the trial Magistrate in fact discharged the three accused person's before hearing their defence of Alibi. I know of no rule of law that where an accused person makes a statement to the police that he was not present at a particular time where he was alleged to have committed an

[81] (1989) 1 NWLR(pt100) 642.
[82] Okosun v. A.G. Bendel State (1985) 3NWLR (pt12) 283.
[83] (1959) W.N.L.R. p.124.

offence and the police makes investigations and are of the opinion that the statement of the accused is correct, the Court would discharge the accused without hearing the defence of Alibi. I say this because irrespective of what investigations the police might make touching the whereabouts of the accused, the evidence must be proved in Court and witnesses called to support that defence examined and cross-examined. It may well happen that proper handling of the witnesses under cross-examination will break down the defence of Alibi.

Defence of Insanity

Insanity connotes any mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from having criminal or civil responsibility.[84] Insanity is a legal term not a medical standard. Lawyer calls a severe mental disorder an insanity while people in medical profession refers to it as mental disorder, mental illness or of psychosis or neurosis.

However, insanity is not merely a departure from the normal but is a fairly advanced degree of disorder of the mind. What the law decides is which persons who are medically insane are legally irresponsible – **Lasisi Saliu v. The State**[85] The defence of insanity is governed by Section 27 and 28 of the Criminal Code which provides;

Section 27: Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question until the contrary is proved.

Section 28: A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission, he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or of capacity to know that he ought not to do the act or make the omission.

[84] (Black's Law Dictionary, Eight Edition at pg 810).
[85] (1984) 10 S.C.111 @116.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefits of the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusion to believe to exist.

Meanwhile, the rule as to insanity as a defence to criminal responsibility at common law was stated in the **M'Naughten's case**[86] and can be summarized as follows:

(a) Every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved.

(b) To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from decease of the mind, as not to know the nature and quality of act he was doing, or if he did know it, that he did not know he was doing what was wrong.

[86] (1843) 4St.Tr(N.5.) 847

(c) If a person commits an offence under insane delusion, and is not in other respect insane, he must be considered in the same situation as to responsibility as if the facts with respects to which the delusion exist were real.

In order to establish insanity and to overcome the presumption that every man is sane and accountable for his actions, the defence must prove first, that the prisoner accused was, at the relevant time, suffering either from mental diseases or natural infirmity and secondly that the mental disease or from natural infirmity was such that, at the relevant time, the prisoner or accused was as a result deprived of capacity –

(a) to understand what he was doing; or

(b) to control his actions;

(c) to know that he ought not to do the act or make the omission[87]

"Natural mental infirmity" means a defect in mental power neither produced by his own default nor the result of disease of the mind.[88] It is analogous to mental defectiveness.

Under the Penal Code, **Section 51** provides; "Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law".

[87] R v. Thamu (1953) 14WACA 372

[88] R v. Tabigen (1960) 5 F.S.C.8, R v. Omoni (1949) 12WACA 511.

It could be inferred convincingly that the wordings of both the Criminal Code and the Penal Code that although there is similarity in what both provide for, at the same time the provisions in the Criminal Code are much stronger. In my view, the provisions of the Penal Code are simple and easy to understand compare with the provisions of the Criminal Code.

Till now, there has been a long line of authorities on what constitute insanity and how the defence can be put forward by an accused person. It must be stated however that in proving his (the accused person) insane condition the accused person is not under an obligation to establish his case beyond reasonable doubt - **Dagayya v. State**[89] All he has to do is to bring forward enough evidence on the balance of probability in support of the defence – **R v. Nasamu**[90] It is pertinent to state that it is not only the accused that can raise issue of insanity, both the Court and the prosecution can also raise it.[91] It all depends on the facts of each case. For example, the appearance and conduct in Court may justify this action. It is settled law that whether the accused was sane or not in the legal sense at the time he committed the offence for which he is charged is a question of facts to be decided by the trial Judge as the case may be - **Orok v. The State.**[92]

[89] (2005) 1NCC 532.
[90] (1940) 6 WACA 71.
[91] Section 223 and 234 of the Criminal Procedure Act
[92] (1989) 1 CLRN p.163 @ 172; Saliu v. State (1984) 10 S.C.111 @126.

The obligation is placed on the Court by Section 223(1) of the Criminal Procedure Act to inquire into the fitness of an accused person to stand trial. There must be sufficient reason or evidence for the trial Judge or Magistrate to suspect that the accused is of unsound mind and incapable of making his defence - **Eledan v. The State**[93]

The Supreme Court held in **R v. Obodo**[94] as follows: that it is settled law that whether the accused person was sane or insane in the legal sense at the time when the act was committed is a question of fact to be determined by the Court – **Rex v. Wangara**[95] and not by a medical man however eminent – **R v. Riveth**[96] and is dependent upon the precious and contemporaneous act of the party[97]

However, the burden of proof on an accused person who put forward the defence of insanity is discharged on the balance of probability.[98]

In addition, by virtue of Section 140(2) of the Evidence Act, the burden of proof placed on an accused person is deemed to be discharged if the Court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances in fact existed.

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93 (1972) 8-9S.C. 223

94 (1959) 4 F.S.C.1.

95 10 WACA 236; Waltor v. R (1978) 66Cr. App. R.25

96 34 Cr. App. R. 87

97 Rex v. Ashigufuwo 12 WACA 389.

98 R v. Nasamu 6 WACA 74; R v. Ashigifuwo 12 WACA 389; Echem v. R. 14 WACA 158; and Okunnu v. State (1977) 3 S.C. 151.

Absence of motive is not itself sufficient ground from which to infer insanity but may be relevant where there is independent evidence of insanity.[99] It means that where there is evidence of insanity, the absence of motive may be relevant to prove insanity[100] It should be noted simultaneously that evidence of insanity of ancestors or blood relations is admissible to prove insanity, although medical evidence is not essential[101] or despite the testimony of a medical expert, it is the judge's responsibility to determine whether accused was insane or not at the time of the offence[102] Also, evidence that an accused belongs to a class of persons who are impulsive and dangerous when annoyed is not sufficient to support a finding that he is of unsound mind and consequently in-capable of making his defence[103]

99 R v. Biu (1964) N.N.L.R. 45
100 R v. Inyang (1946) 12 WACA 5.
101 R v. Inyang (Supra).
102 Attorney - General Western Nigeria v. Upetire (1964) N.M.L.R. 25.
103 Zaria Native Authority v. Bakori (1964) N.N.L.R.25.

Defence of Accident

This literarily means an unintended and unforeseen injurious occurrence that is, something that does not occur in the usual course of events or that could not be reasonably anticipated. It equally means an unforeseen and injurious occurrence not attributable to mistake, negligence, neglect, or misconduct. It is similar to an event which takes places without one's foresight or expectation. In attempting to accommodate the layman's understanding of the term " accident" Courts have broadly defined the word to mean an occurrence which unforeseen, unexpected, extraordinary either by virtue of the fact that it occurred at all, or because of the extent of the damage. An accident can be either a sudden happening or a slowly evolving process like the percolation of harmful substances through the ground. Qualification of a particular accident as an accident seems to depend on two criteria, (1). The degree of forseability and (2). The state of the mind of the actor in intending or not intending the result.[104]

There are three categories of accident which are;

(1) Culpable Accident which is an accident due to negligence. A culpable accident, unlike an unavoidable accident, is no defense expect in those few cases in which wrongful intent is the exclusive and necessary basis for liability.

[104] John F. Dobbyn, Insurance Law in a Nutshell 128 (3d ed. 1996).

(2) Unavoidable Accident means an accident that cannot be avoided because it is produced by an irresistible physical cause that cannot be prevented by human skill or reasonable foresight. Example include accidents resulting from lighting or storms, perils of the sea, inundations or earthquakes, or sudden illness or death. Unavoidable accident has been considered as a means of avoiding both civil and criminal liability. Unavoidable accident which according to **P.H. Winfield,**[105] described not to mean a catastrophe which could not have been avoided by any precaution what-ever, but such as could not have been avoided by a reasonable man at the moment at which it occurred, and it is common knowledge that a reasonable man is not credited with perfection of judgment.

But according to **Prosser and Keeton on the Law of Torts at 162**[106] described an unavoidable accident as an occurrence which was not intended and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions. That is, an accident is considered unavoidable or inevitable at law if it was not proximately caused by the negligence of any party to the action or to the accident.

[105] A Textbook of the Law of Tort at 43 (5th Edition 1950).

[106] (5th Edition 1984)

Beside the above expression, **Section 24 of the Criminal Code and Section 48 of the Penal Code,** Section 24 of the Criminal Code provides. "subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an events which occurs by accident. Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or form an intention, is immaterial as far as regards criminal responsibility".

Section 48 of the Penal Code provides that "Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in a lawful manner by lawful means and with proper care and caution".

In the opinion of the author of **Stephen's Digest of the Criminal Law** "an effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought,

under the circumstances in which it is done to take reasonable precaution against it.[107]

In other words in law, for an event to qualify as an accident, such event must be the result of an unwilled act, an event which occurs without the fault of the person alleged to have caused it or an event totally unexpected in the ordinary cause of events **Adelumola v. The State**[108] for example, where a person discharges a fire arm unintentionally and without attendant criminal malice or negligence, he will be exempted from criminal responsibility both for the firing and for its consequences.[109]

It is now settled, that an accused person cannot take refuge on a defense of accident for a deliberate act even if he did not intend the eventual result.[110] the test of the plea or defense of accident, is always that if the act even though unlawful, is not such that would, from the view of a reasonable man cause death or grievous bodily harm though death resulted therefore, the person charged, can only at most be convicted of manslaughter[111]

[107] (Warner v. Metropolitan Police Commissioner (1969) 2A.C. 256' (1968) 2 All E.R. 356; 52Cr. App. R. 373, H.L.

[108] (1988) (NWLR (Pt 73) 683 at 692

[109] Iromantu v. State (1964) ALL NLR. 311.

[110] Oghor v. the state (1990) 3NWLR (pt 139) a) 502.C.A.

[111] Thomas v. The State (1994) 4 SCNJ (pt 1) 102 @ 109; (1994) 4NWLR (pt 337) 129.

Per Wali JSC in the case of Thomas V. the state[112] held that "it needs be stressed, that the act leading to the accident, must be a lawful act done in a lawful manner. Thus, for an event to qualify as accident under section 24 of the Criminal Code ..... it must be a surprise to the ordinary man of prudence, that is, a surprise to all sober and reasonable people. The test is always objective"[113]

It must always be borne in mind, that section 24 of the Criminal Code does not deal with an "act" but an "event" and the event within the meaning of this Section, is what apparently follows from an act.[114]

In the case of **C.O.P. v. Orobor**[115] the Court held that "a Court can not ordinarily infer negligence or dangerous driving from the mere fact that an accident happened as there is no rule that if an accident occurs and death results therefrom, the driver is guilty of manslaughter unless the prosecution is able to explain the accidents wherefrom the guilt of the accused would be shown to the satisfaction of the Court. Consequently, the onus is on the prosecution to show that the accidents from which death resulted was due to the negligence of the accused[116]

[112] (Supra)

[113] Adelumola v. The State (1988) INWLR (pt 73) 683 @ 692 – 693 ; (1988) 38 SCNJ 68; Aliu Bello &13 ors v. A.G. of Oyo-State (1986) 5NWLR (Pt) pg 82.

[114] Audu Umaru v. The state (1990) 3NWLR (pt 138) 363 @870 C.A; Daniels v. The State (1991) 8NWLR (pt212) 715 C.A; Chukwu v. The State (1992) 1NWLR (pt217) 255; (1992) 1SCNJ57

[115] (1989) 1CLRN (p.219);

[116] R. v. Tatimu 20 N.L.R. 60 @61

Inevitable accident could equally be relied upon as the meaning was given earlier. This was relied upon in the case of **C. & C. Construction Co. and anr v. Okhai**[117] But certain things have to be proved. The Supreme Court in the above case held "strictly speaking, if a defendant denies negligence, he may give evidence of inevitable accident although he has not specifically pleaded it. **Per Devlin J. in Southport Corporation v. Esso Petroleum Company Limited**[118] **(1956).** The better practice however, is for the defendant who intends to rely on inevitable accident as a defence, to plead such defence specifically and to give all necessary particulars relied on. He should plead that the said accident or matters complained of arose from inevitable accident and notwithstanding the exercise of all reasonable care and skill by the defendant, he was unable to avoid the same. This is followed by full particulars of the facts and matters relied on as constituting inevitable accident.[119] Pleading inevitable accident is one thing but proof thereof is a different matter. The onus is on the party who raises that defence to lead evidence to substantiate same".

But, in the case of accidental discharge which is always relied on by the police anytime a death resulted from their

[117] (2003) 16 NSCQR p.328.
[118] A.C. 218 at 231.
[119] See Bullen and Leak and Jacobs, Precedents of Pleadings 13th Edition pg 1318.

act(s) or omission(s). That is why, the Court of Appeal in the case of **Uzomba v. The State**[120] lamented that "it has become common knowledge and in fact a frightened dimension is now being experienced by the Nigerian citizenry at the police penchant for shooting at innocent people with guns bought with tax payers money. They are meant to protects the citizens but, alas they now use them to terrorize, to maim and to wantonly kill the people they are meant to protect".

His Lordship of blessed memory **I.C. Pats-Acholomu JCA (as he then was)** held further that "the worn out hackneyed phrase, "accidental discharge" has become so common in our criminal jurisprudence that many a policeman has been acquitted and discharged on the use of accidental discharge. It would appear that it is only in this country that the citizenry experiences accidental discharge".

No matter how our Court(s) frown at the defence of accident, with due respect to them it is still a defence to a suspect or an accused person(s).

[120] (2005) 1NCC p. 406 @ 410-411.

Defence of Automatism

Automatism literarily connotes an action or conduct occurring without will, purpose or reasoned intention, such as sleepwalking. It is equally defined as a behavior carried out in a state of unconsciousness or mental dissociation without full awareness. Automatism may be asserted as a defense to negate the requisite mental state of voluntariness for commission of a crime. It has been described as the state of a person who, though capable of action, is not conscious of his or her action(s).

The question is, how far is automatism a defense? It has been described as involuntary action performed in a state of unconsciousness not amounting to insanity. Theoretically, the defense is that no act in the legal sense took place at all the plea is that there was no volition or psychic awareness.[121]

The defense of automatism has its root in Section 24 of the Criminal Code which provides that; "subject to the express provisions of this code relating to negligent acts or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident. Unless the intention to cause a particular result is expressly declared to be an element of an offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial. Unless otherwise expressly declared, the motive by

[121] Black's Law Dictionary: Deluxe Eighth Edition: By Bryan A. Garner Editor in Chief.

which a person is induced to do or omit to do an act, or to form an intention, is immaterial as far as regards criminal responsibility".

According to **Mr Honourable Justice Akinola Aguda** in his book titled "The Criminal Law and Procedure of the Southern States of Nigeria" opined that "... the effect of this section is that it is no defence to a charge of stealing a loaf of bread that a man was destitute and had no other way of feeding his family nor can murder be justified by a desire to save the person murdered from suffering. Equally, a lawful act does not become criminal merely because it is done with a view to injuring some other person. For an exemption to the rule that motive is immaterial".

There is a countable number of Nigerian authority on this concept of automatism. So, where an accused person relies on automatism as a defence a proper foundation by way of medical or scientific evidence must be laid in order to displace the presumption of mental capacity. Where the accused person fell asleep while driving and struck and kill someone standing next to a stationary lorry, he has no defence under Section 24 of the Criminal Code as he must have realized that he was fatigued and about to fall asleep, having been driving continuously for certain numbers of hours. One such lapse, however, does not constitute that degree of recklessness and utter disregard for the safety of others as would amount to manslaughter.[122]

[122] R v. Anthony Elomba (1/95 c/62- 18./3/63-Ibadan).

Also, in the case of **R.V. Harmer**[123] where while driving the accused person was involved in a collision which resulted in the death of a passenger. He was indicted on three counts with manslaughter, negligent and dangerous driving. The collision, occurred because the accused person suffered a sudden attack of epilepsy and lost control of his car. Held not guilty because his action at the time of the collision was purely automatism.

[123] (Lagos LA/31 c/64-3rd February, 1964)

Defence of Innocence

Innocence connotes guiltlessness, blamelessness, irreproachability, unimpeachability, clean hands, inculpability or absence of guilt from a particular offence.

There are two categories of innocence namely:

1). Actual innocence which means the absence of facts that are prerequisites for the sentence given to an accused.

2). Legal innocence which connotes the absence of one or more procedure or legal basis to support the sentence given to the accused.

Naturally, the position of our law in consonance with Section 36 (5) of the 1999 constitution is that "every person who is charge with a criminal offence shall be presumed to be innocent until he is proved guilt. Provided that nothing in this section shall invalidate any law imposes upon any such person the burden of proving particular facts".

The rationale for this provision is that it is better for one hundred accused persons to go free, than for one innocent person to be punished for an offence he did not commit or had no hand in its committal. The beauty of our Nigeria criminal justice system is the presumption of the innocence of a person charged with a criminal offence unless proved guilty by credible evidence which must be proved beyond reasonable doubt. And similarly, where a *prima facie* case is made out against an accused

person by the prosecution the law provides that he be given every chance to defend the charge made out against him. These include the right to recall and cross-examine any prosecution witness(es) that testified in the case against him, the right to testify and tender any exhibits or documents he considers necessary in his defence and the right to call any defence witnesses. See sections 161, 162 and 163 of the Criminal Procedure Code applicable.

Since an accused person has a fundamental right of presumption of innocence under the constitution the burden is on the prosecution to prove the guilt of an accused beyond reasonable doubt and any slightest doubt raised by the accused in his favour, which will then lead to the accused person's discharge and acquittal.[124]

It should be noted that an accused person is not under an obligation to prove his innocence but the prosecution is under an obligation to prove its guilt. [125]

The due observance of the strict rules of criminal procedure is the only safeguard against wrongful conviction. Liberty or any other rights of the subject cannot be toiled with, those rights are invaluable. Consequently, the Courts must be on their guard to ensure that no departure that will deprive a man of his life, liberty or any other right(S) is allowed. It is not

[124] Stephen v. State (1986) 5NWLR (pt 46) page. 978; Alonge v. I.S.P. (1959) SCNLR 516; Okagbue v. C.O.P. (1965) NMLR 232, Obue V. State (1976) 2.S.C. 141; Aigbapion v. State (2000) 7NWLR (pt 666) Pg 686.

[125] The State v. Raufu Nosiru (1975) 5.UIL.R.(pt 111) p.356.

a favour done by the Court, it is the requirement of the constitution that the innocence of the accused be presumed until he is proved guilty[126] Part of the right of innocence the suspect has is the right to remain silent throughout the trial, leaving the burden of proof of his guilt beyond reasonable doubt, to the prosecution.[127] The suspect/ accused may not utter a word. He is not bound to say anything. It is his constitutional right to remain silent, the duty is on the prosecution to prove the charge against him[128] afterward, an accused person, is not a compellable witness.[129]

However, if an accused person asserts that the prosecution has failed to prove his guilt beyond reasonable doubt before conviction, it is now settled that it is so and it is the duty of the Court to uphold the right of innocence of the suspect or the accused person after examining the assertion against the whole background of the case and in particular against the evidence leading to the guilt of the accused.[130]

More importantly, where an accused person opts not to testify and rests his case on that of the prosecution, and the prosecution, has, by credible evidence of its witness or witness, or proved its case, beyond reasonable doubt, then, he (the accused) cannot turn round, to complain that the Court did not consider his defence of innocence – **Adekunle v. State**[131].

126 Per Olatawura J.S.C. in Kada v. State (1991) 8NWLR (pt 181)p.621 631.
127 Utteh & ors v. The State (1992) 3 NWLR (pt 138) 301.
128 Uche Williams V. the State (1992) 10SCNJ 74@ 80.
129 Singh V. The State (1988), NSCC 852; (1988) 5.S.C.N.J.58.
130 Otaki v. The State (1986) ALL NLR (pt371) @ 378; Edet Offiong Ekpe v. The state (1994) 12 SCNJ 131 @ 1325.
131 (2006) 26NSCQR (pt 11) P. 1367.

There is no doubt that it is an established principle of criminal law that, an honest and reasonable belief in the existence of circumstances which if true, would make the act for which the accused is charged an innocent act, has always been held to be a good defence. This is because of the state of his or her mind at the time of the commission or omission of the act which must not only be honest but must also be reasonable in the circumstances.[132]

In a case concerning a charge of demanding money with intent to steal where the defence of innocent possession is made, evidence of similar facts in a previous offence are admissible in rebuttal of that defence.[133]

It should be noted after all, that a person who pleads guilty to an offence cannot still be presumed to be innocent of committing that offence. The presumption of innocence is gone and the Court should convict him accordingly. It is submitted that the provision of the second arm of Section 187 (2) of the Criminal Procedure Code which states that "such examination shall if possible be taking in the presence of the accused if not so taken the record thereof shall be read over to the accused before the trial" be expunged and the practice be abrogated in the Southern States. It is an unnecessary English Common Law tradition which is not consistent with Section 36(5) of the 1999 Constitution.

[132] R v. Tolson (1889)23 QBD 168 @ 181; State v. Olatunji (2005) INCC p. 478.

[133] Popoola v. Commissioner of Police (1959) W.R.N.L.R. P.11

Defence of Intoxication

Intoxication literarily connotes a diminished ability to act with full mental and physical capabilities because of alcohol or drug consumption; drunkenness. There are categories of intoxication which are;

1) Voluntary intoxication which means a willing ingestion of alcohol or drugs to the point of impairment done with the knowledge that one's physical and mental capabilities would be impaired. Voluntary intoxication is not a defence to a general intent crime, but may be admitted to refute the existence of a particular state of mind for a specific intent- crime. This is also called or termed culpable intoxication or self-induced intoxication.

2) Involuntary intoxication. It means the ingestion of alcohol or drugs against one's will or without one's knowledge. Involuntary intoxication is an affirmative defence to a criminal or negligence charge/ information against an accused person.

3) Pathological intoxication: it means an extremely exaggerated response to an intoxicant. This may be treated as involuntary intoxication if it is unforeseeable.

4) Public intoxication: this means the appearance of a person who is under the influence of drugs or alcohol in a place open to the general public. In most American

jurisdiction, public intoxication is considered a misdemeanor, and in some states; alcoholism is a defence if the offender agrees to attend a treatment program.

The defence of intoxication is governed by Section 29 of the Criminal Code and section 44 and 52 of the Penal Code. Section 29 of the Criminal Code provides;

1) Save as provided in this section; intoxication shall not constitute a defence to any criminal charge.

2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know what he was doing and-

   a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

   b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act/omission.

3) Where the defence under the preceding subsection is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) section 229 and 230 of the criminal procedure Act shall apply.

4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise in the absence of which he would not be guilt of the offence.

5) For the purposes of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs.

Section 44 of the Penal Code provides "a person who does an act in a state of intoxication is presumed to have the same knowledge as he would have had if he had not been intoxicated". And Section 52 provides that "nothing is an offence which is done by a person who, at the time of doing it, is by reason of intoxication caused by something administered to him without his knowledge or against his will, incapable of knowing the nature of the act, or that he is doing, what is either wrong or contrary to law".

It should be noted that in Nigeria only involuntary intoxication affords a valid ground for complete exculpation provided that it renders the accused unable to know what he was doing or unable to appreciate the wrong-fullness of his act. This is most applicable to section 29 of the Criminal Code.

It is submitted that codes[134] provisions dealing with involuntary intoxication are wanting in two respect Viz;

[134] Penal Code and Criminal Codes

1) The Criminal Code does not recognize intoxication by mistake; and

2) That the provisions of the Criminal Code shows clear cut provisions governing intoxication compared with the provisions under the penal code.

It is equally noted that intoxication affects intent **R v. Chutuwa**[135] where there was some evidence of intoxication it was an error for the judge not to consider whether intoxication had negatived any intention to kill, particularly where the circumstances negatived a preconceived intent and a murder conviction will be reduced to manslaughter.[136]

Also, where an act is an offence only if done with a particular intent, intoxication will be a defence if it is shown that by reason of his intoxication the accused person was incapable of forming any specific intention. Such evidence should be taken into consideration with the other facts proved in order to determine whether or not the drunken man had the particular intention. Evidence falling short of a proved incapacity to form the intent necessary to constitute the crime does not rebut the presumption that a man intends the natural consequences of his acts.[137]

[135] (1954) 14 WACA 590; R v. Owarey (1939) 5 WACA 66.
[136] R v. Mensah (1952) 14 WACA 174.
[137] R v. Owarey (1939) 5 WACA 66.

Intoxication is not a good defence under Criminal Code, section 29 unless by reason, thereof, the person charged did not know such act was wrong or did not know what he was doing and the person charged was by reason of intoxication insane, temporarily or otherwise at the time.[138]

[138] R v. Owarey (Supra)

Defence of Delusion

Delusion literarily means false belief or impression. It equally mean a false opinion or belief especially one that may be a symptom of madness.

The defence of delusion is governed by Section 28 of the Criminal Code which provides:

"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or naturally mental infirmity as to deprive him of capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission.

A person whose mind, at the time of his doing or omitting to do an act, is affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist".

The applicable provision is the second paragraph of this section and the rule laid down is similar to the rules laid down in **M'Naughten's case (Supra).** For delusion to be a defence, it must affect the knowledge of the claimer of it.[139]

[139] R. v. Thamu (1953) 14 WACA 372.

The West African Court of Appeal held in the case of **R v. Omoni**[140] that even though the defendant was at the time of the act affected by a delusion on a specific matter; he is not entitled to the benefits of the defence of insanity where he fails to prove the following:

(1) that he was at the relevant time suffering either from mental disease or from natural infirmity, the later meaning a defect in mental power neither produced by his own default nor the result of disease of the mind; and (2) that the mental disease or the natural mental infirmity deprived him of capacity;

a) to understand what he was doing; or

b) to control his actions; or

c) to know that he ought not to do the act or make the omission.

It should be noted however, that while insanity encompasses delusion, delusion does not encompass insanity. Where a defence of insanity exists, a defence of delusion cannot arise for consideration. It is subsumed. According to Section 28 of the Criminal Code, defence of delusion arises only where a defence of insanity is not available to the accused. There is no doubt that the basic cause of insanity and delusion is a disease of the mind and hence, the two defences have been properly treated and dealt with in the same action. But the degree of illness of the mind in insanity is definitely more

[140] (1949) 12WACA 511

severe than the degree of illness in delusion. The loss of capacity in insanity need not attend the state of delusion.[141]

The Court held in the case of **Iwuanyanwu v. The State**[142] that, assuming that what the defendant believed as a result of his delusion was the real state of things, the second paragraph of Section 28 of the Criminal Code did not exonerate him, for the whole purpose of his murderous attack was to prevent his own death in the future by Juju, and he was not acting in self defence at the moment that he killed.

[141] Yusuf v. State (1988) 4 NWLR (pt 86) p. 100 @ 112.
[142] (1964) 1 ALL NLR p. 413.

Defence of Non Est Factum

The doctrine of *non est factum* is a latin word which connotes "it is not his deed". It is always a denial of the execution of an instrument (document) sued on. There are three types of doctrine of *non est factum viz;*

1) General non est factum which means a broad, non-specific denial that an instrument was executed or executed properly.
2) Special non est factum is a pleading that specifies the grounds on which an instrument's execution is invalid or non binding – Also termed particular non est factum.
3) Verified non est factum is a sworn denial that puts the validity of the instrument as well as the signature in question.

This has been a prominent defence in contractual transaction in many legal proceedings.

This defence can be made use in both civil and Criminal actions/matters in any law Court or Tribunal. It is an age-long common law doctrine which is applicable in Nigeria. Though there is no specific provision of the Criminal Code or Penal Code that establish it but this reason cannot stop its application in any legal proceedings because our judicial systems machinery particularly the superior Court of records in Nigerian has taken judicial notice of it.

This doctrine is always used against the execution of a document(s) or party who seeks to tender or use it against another party in a legal proceedings be it civil or in criminal proceedings.

Therefore, once the execution or non-execution of a document forms the bedrock of any proceedings be it civil or criminal, the truth of the fact that it is not the defendant or the accused deed can be raised. The Court in the case of **Nwangbomu v. State**[143] held that a plea of *non est factum* in relation to a confessional statement is a matter of fact to be determined by the judge at the conclusion of the trial. Be it noted that it is trite that when a document is sought to be tendered and is objected to by the Counsel, what counsel objection does at that stage is no more than a submission on the admissibility of the statement. Thus, as the issue of *non est factum* is a matter of fact, the challenge of such a statement is more properly done when the accused or any other witness of his impugns the statement as not being that of the accused from the witness box.

...Therefore, that as counsel is not competent to give evidence from the bar and the challenge of a confessional statement on grounds of *non est factum* is a matter of fact, the

[143] (1994) 2 NWLR (pt 327) p. 380 at 399 – 400

challenge is appropriately made when the accused as witness denies the making of such a statement.

Moreso, it is noteworthy to stress that the terms "retraction" and "resile from" have been used interchangeably in most decisions with the plea of *non est factum*. This is misleading since a statement must first be shown to have been made before it can be said to have been retracted by its maker for, where the very making of the statement is in issue, the retraction cannot arise at that stage. It is in this wise that I agree that where an accused person sets up a defence of *non est factum* in relation to a confessional statement what he has done is not a retraction but a denial of the making of the statement.[144]

It should be noted that the plea of *non est factum* could not be available to a person whose mistake is really one as to the legal effect of a document, whether that was his own mistake or his advisers.[145]

These are the conditions to be fulfilled before the defence of *non est factum* could be relied upon be it in civil or criminal case(s). viz;

[144] Aiguobarueghian v. State (2004) 17 NSCQR (pg 442 @ 470.
[145] Ajaka Omonode v. Chief M. C. O. Ibru & 14 ors (1976) 6 U.I.L.R (pt 1) p.94.

Defence of Mistake of Facts

Mistake itself means an error, a misconception; misunderstanding; an erroneous belief but mistake of fact is a misconception of something that actually exist. A mistake of fact equally means a mistake about a fact that is material to an offence or transaction. It is a material to an offence or transaction. It is a defence asserting that an accused/a suspect acted from an innocent misunderstanding of fact rather than from a criminal purpose.

Mistake of fact is governed by **Section 25 of the Criminal Code and Section 45 of the Penal Code.**

Section 25 of the Criminal Code provides, a person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject".

From the provision above, the following must be satisfied before a man can be free from punishment:

a) the act must be honest and reasonable
b) the act must also be mistaken
c) there must be honest and reasonable but mistaken belief.

Section 45 of the Penal Code provides that "nothing is an offence which is done by any person who is justified by law, or who by reason of a mistaken of fact and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it."

It is the law that a belief in witchcraft even though honest and reasonable (judged by the general beliefs of the ordinary members of the community) cannot excuse a crime. In the case of **Mohammedu Gadam v. R**[146] the accused wife had a miscarriage and was mortally ill. This, the accused bonafide attributed to her having been witched by two women. He went and struck one of the women on the head with a bone-handled in the belief, which he bonafide held that striking the woman would destroy the spell. She died of the blows. In the West African Court of Appeal, **Foster-Sutton P.** said "I have no doubt that a belief in witchcraft, such as the accused obviously has, is shared by the ordinary members of the community. It would, however, in my opinion be a dangerous precedent to recognize that because a superstition which may lead to such a terrible result as disclosed by the facts in this case, is generally prevalent among a community, it is therefore reasonable. The Court must, I think, regard the holding of such beliefs as unreasonable..."[147]

[146] (1954) 14 WACA 442

[147] Maawole Konkomba v. R (1952) 14 WACA 236; Arum v. The State (1980) 1 NCR 84 and 89; R. v. Udo Eka Ebong (1947) 12 WACA 139.

It is essential to note that a belief held in reckless disregard of assurances which a man ought in the circumstances to be able to rely on is not an honest and reasonable belief. [148]

[148] Akinsulire Basoyin v. Attorney General, Western Nigeria (1966) N.M.L.R. 287.

Defence of Immaturity

This connotes a state or condition of being under legal age. That is the categories of such personalities/children protected by law to be immature are not capable of doing wrong/crime – ***doli incapax.***

As said above, there are categories of people under the law who had been presumed not to have what it takes to commit a crime. To certain extent such presumption is either rebuttable or irrebuttable. Therefore, a presumption is said to be rebuttable if an inference can be drawn from certain facts that establish a *prima facie* case, which may be overcome by the introduction of contrary evidence[149] And a presumption is said to be irrebuttable when such presumption cannot be overcome by any additional evidence or argument – **Black Law Dictionary (supra).** Such irrebutable evidence is also called absolute presumption, mandatory presumption or presumption juris et de jure.

However, the defence of immaturity is governed by **Section 39 of the Criminal Code and Section 50 of the Penal Code.**

Section 30 of the Criminal Code provides that "a person under the age of seven years is not criminally responsible for any act or omission. A person under the age of twelve years is not criminally responsible for an act or omission, unless

[149] Black's Law Dictionary Deluxe Eighty Edition by Bryan A. Garner, Editor in Chief.

it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

In the same vein, **Section 50 of the Penal Code** provides that "no act is an offence which is done –

a) by a child under seven years of age; or

b) by a child above seven years of age but under twelve years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act"

In assessing the two provisions, one would undoubtedly arrive at a conclusion that the two provisions are similar except the provision of the Criminal Code which laid emphasis on "incapable of having carnal knowledge" which by and large, the Penal Code is silent about.

It is crystal clear from the two provisions of the law that a person under the age of seven years cannot be criminally responsible for commission of any crime. And this makes this presumption irrebuttable one.

But person after the age of seven years to twelve years are presumed also not to be criminally responsible but this can be repudiated by adducing evidence to the contrary. The presumption here is called rebuttable presumption.

Apart from the above provisions of the law, there are provisions of other laws also which protect the interest of a child. Such laws are **Section 368 and 209 of the Criminal Procedure Act, Criminal Procedure Code, and the Children and Young Persons Act.**

Therefore, the onus of proof that a person under the age of 12 years had the capacity to know that he ought not to do the act or make the omission rests on the person alleging it.[150]

It should be noted appropriately that the material time/ date for the purpose of determining the age is between the birth date of the person in question and the date on which the offence was committed.

The rationale for this defence is to allow mental incapacity in young persons while committing offence(s) since these people can easily be lured into the act(s) by elderly person(s) for their own selfish ends.

[150] The State v. Nwabueze (1980) 1 NCR 41; B. v. R. (1955) 44 Cr. App. R. 1.

Immunity

Section 308 of the 1999 Constitution and other statutes shield some categories of people from liability, essentially most of those people are public officers. So where the public officer or authority sought to be sued has immunity from liability under law, then legal action will not succeed against them within that stipulated period. As a general rule, those who have immunity from liability include:

a) The President, Vice-President, Governors and Deputy-Governors Under the Constitution, precisely, Section 308 of the 1999 Constitution, the above mentioned people have immunity in their personal capacity from liability in respect of suits brought against them in their personal capacity during their term of office.[151] **See Olabisi Onabanjo V. Concord Press of Nig. Ltd.**[152]

b) Judges: Under the principle of Judicial immunity, judges are not liable for acts done in their judicial capacity.[153]

c) Public bodies: Statutory authority may be granted by a statute which may exclude a public body or agency from liability or limit the liability of the public body.[154]

[151] 20 NLR 62.

[152] (1981) 2NCLR 399 HC, Keyamo V. LSHA (2000) 12 NWLR (pt 680) pg 196 C. A. Tinubu V. IMB Securities Plc. (2001) 16NWLR (pt 740) pg 670 SC. Abacha V. Fawehinmi (2000) 6NWLR (pt 600) p. 228 SC, Fawehinmi V. I. G. P. (2002) 7NWLR (pt 767) p. 606 SC.

[153] (1951) 21 NLR 19, Egbe V. Adefarasin (1985) 1NWLR (pt 3) 549 SC. Minister V. Lamb (1882 – 83) 11QBD 588, Okeke V. Baba (2000) 3NWLR (pt 650) p. 644.

[154] See Allen V. Gulf Oil Co. Ltd. (1981) 1ALL ER 353.

d) Diplomats: Under the principle of Diplomatic immunity, diplomats are immune to legal process and legal liability in their host country.[155]

Furthermore, during the term of office of the above mentioned officers, any suit which seek to make them liable in their personal capacity cannot be brought nor continued against them. (i.e. the Court will lack jurisdiction to entertain the same). Where one was pending before they assume office, it has to be adjourned *sine die*. Alternatively, the parties may settle the matter amicably.

However, they are not immune from the following:

i) Impeachment proceedings
ii) Election petitions and
iii) Actions brought against them in their private capacity, concerning their office and functions. Therefore, they can always be sued in their private capacity, usually by suing the Attorney General. Whenever an action is to be brought against the state, the Attorney General may be sued as representing the state. Sometimes the relevant public officer is sued in the name of their office or sued the Attorney General and the relevant public officer jointly.

[155] See Diplomatic Immunities and Privileges Act, Cap. 99 LFN, 1990, Dickinson V. Del Solar (1930) 1KB 376, Noah V. His Excellency, The British High Commissioner to Nigeria (1980) 1ALL NLR 208.

iv) Public officers: Under the Public Officers Protection Act and Laws of the various states, the liability of a public officer, if any, is limited to three months and thereafter they are immuned from liability for all time for any wrong they may have committed in the course of their employment or duty as a public officer or civil servant.[156] Also in **Tinubu V. I. M. B. Securities Plc**[157] where the appeal by the 3rd defendant (Governor. Tinubu of Lagos State) against the ruling of the High Court came before the Court of Appeal, Lagos Division, learned counsel to the respondent applied to the Court seeking the adjournment of the appeal sine die until the Appellant, Mr. Bola Tinubu vacated office as Governor of Lagos State. The Appellant opposed the application. After argument of counsel, the Court of Appeal granted the application. Appellant has brought this appeal against the ruling of the Court of Appeal. The Court, **per Karibi-Whyte JSC** held that the literal construction of Section 308(1)(a) is that no actions, civil or criminal can be brought or continued against any of the persons stated in Section 308(3). Such a person cannot be arrested or imprisoned during tenure either in pursuance of the process of any Court or otherwise – Section 308(1)(b). No process of any Court requiring or compelling the

[156] See Egbe V. Adefarasin (1985) 1NWLR (pt 3) p. 549 SC.
[157] (2001) 8NSCQR pg 1,

appearance of a person to whom the Section applies, shall be applied for or issued."

On when can the Governor be sued during his tenure. **S. M. A. Belgore JSC** opined that: *"the only permissible proceedings is when such a person holding any of the aforementioned offices is sued in his official capacity i.e. President or Vice-President, or as Governor or Deputy Governor and only when he is a nominal party."*

Also is **Fawehinmi V. I. G. P.**[158], the appellant filed an originating summons against the respondents/cross appellants on the 7th October, 1999 at the Federal High Court Lagos, where he sought an order of Mandamus against the respondents to investigate criminal allegations which he made against Governor Bola Ahmed Tinubu of Lagos State. The trial Court dismissed the summons on 14th Dec., 1999 upon a preliminary objection based on the ground of immunity enjoyed by the Governor by virtue of Section 308 of the 1999 Constitution. The Appellant appealed to the Court of Appeal, which held that;

Section 308 of the 1999 Constitution does not preclude investigation of person holding office under the Section.

That in the circumstances of the case no order of mandamus would be made compelling the respondents to investigate the allegations against the Governor of Lagos State and

That the appellant had locus standi to institute the action.

[158] (2002) 10NSCQR (pt 11) pg 825

The appellant further appealed to the Supreme Court, so also the respondents cross appealed. The Supreme Court **per Kalgo JSC** at pages 873 – 874 held that it must be clearly understood that there is a distinction here between "proceedings" and "investigation" leading to the proceedings ... It appears to me clearly therefore that the holders of the offices mentioned in Section 308(3) of the 1999 Constitution can be investigated but only to the extent that they should not be questioned, arrested or detained or asked to make any statement in connection with such investigation. I think the main purpose of Section 308 of the 1999 Constitution is to allow an incumbent President, Vice President, Governor or Deputy Governor mentioned in that Section a completely free hand and minds, in the performance of his or her duties and responsibilities whilst in office, so that no encumbrances may be placed in his or her way in execution or performance of the public duties/responsibilities assigned to the office which he or she holds under the Constitution. But this is not intended to grant him or her, an immunity forever from full criminal investigation or any criminal proceedings in respect of any offence allegedly committed by him or her during the tenure of office." **Wali JSC** concurred in his judicial reasoning when he held "notwithstanding the interpretation of Section 308 of the 1999 Constitution, it must not be assumed that a blanket

authority is given to the police to question the officers mentioned in Section 308(3) while in office no matter how strong such evidence might be against him. Such evidence must be kept in the cooler until such time an officer vacates the office."

Also, Section 31 of the Criminal Code protects the Judicial Officers and that is why - In the case of **Egbe V. Adefarasin**[159] in that case, the Supreme Court held: in favour of the defendant/respondent judge, that at common law, persons exercising judicial functions are immuned from all civil liability whatsoever for anything done in their judicial capacity. This common law rule has been enacted into statute law, for instance in Section 88(1) of the High Court Law of Lagos State Cap. 60, 1994 which provides: "No judge shall be liable for any act done by him or ordered by him to be done in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to do, or order to be done the act in question. Therefore, the Court will lack jurisdiction to entertain any complaints or actions brought against the officers mentioned above pending the time of sojourn in offices.

[159] (1987) 1NWLR (pt 3) pg 549 SC.

Defence of Husband and Wife

By and large, it is a rule that neither the husband nor the wife can incur criminal responsibility for doing any act in respect of each other's property. Though, this is a general rule, there are exceptions to it which shall be discussed soon. The governing provision of the law is **Section 36 of the Criminal Code** which provides that "when a husband and wife of a Christian marriage are living together, neither of them incurs any criminal responsibilities for doing or omitting to do any act with respect to the property of the other, except in the case of an act or omission of which an intention to injure or defraud some other person is an element, and except in the case of an act done by either of them when leaving or deserting, or when about to leave or desert the other. Subject to the foregoing provisions, a husband and wife are, each of them criminally responsible for any act done by him or her with respect to the property of the other, which would be an offence if they were not husband and wife. But in the case of a Christian marriage neither of them can institute criminal proceedings against the other while they are living together. In this section the term "property" used with respect to a wife means her separate property."

However, the above provision of the law lay emphasis on two important words which are "Christian Marriage" and "Property".

The husband and wife mentioned in the above Section (supra) relates only to those spouse who contracted their marriage under the Marriage Act and Matrimonial Causes Act (i.e. Christian Marriage). And Christian Marriage is defined under the interpretation Section of the Criminal Code. **Section 1(1)** defines Christian Marriage as a marriage which is recognized by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others.

The word "property" in the same vein is defined under this particular section (1) (1) Criminal Code which includes everything, animate or inanimate, capable of being the subject of ownership.

Therefore, it is to be noted that this rule/defence only applies to offence against property. Thus, a husband could not be charged with willfully setting fire to his wife's house – **R. v. Carton**[160] But a husband can be guilty of assaulting his wife however minor the assault.[161]

It is pertinent to note that the husband and wife must be living together at the time of the alleged offence. It was held in the English case of **R v. Creamer (1919)** that they are still living together even if the husband is away fighting in a war, and the wife is living with a lover. Perhaps the best view is to hold that a husband and wife are living together in the eyes of the law until they are legally separated.

[160] (1913) Q.W.N. 18.

[161] Alawusa v. Odusote (1941) 7 WACA 140.

The exceptions to this defence are viz;

1) The defence will not avail when the act is committed by a spouse who is leaving or deserting, or when about to leave, or desert, the other.
2) In the case of an act or omission of which an intention to injure or defraud some other person is an element, e.g. if a wife secretly, and without telling her husband kept some of her husband's properties intending that when he discovers the loss he will make a claim on the insurance company.

Defence of Mere Presence

The defence of mere presence connotes an ordinary state or fact of being in a particular place and time. Essentially, for a person to be a party to an offence as explained in **Section 7 – 10 of the Criminal Code** such a person must have actually does the act or make the omission which constitute the offence or does or omits to do any act for the purpose of enabling or aiding another person to commit the offence or any person who counsels or procures any other person to commit the offence or aids another person in committing the offence.

Furthermore, the fact that someone was at the scene of the commission of a crime or merely present without doing anything more than that is not sufficient to make him party to the commission of such an offence. A party to an offence must do more than mere presence. He must have aided, counseled procured or done any other thing(s) which would warrant for the prosecution of the suspect. The fact that he does nothing to prevent the crime or he did not call the attention of the Police Officer(s) to the commission of the crime is not sufficient to make him a party to such offence.

Legally speaking, it is the responsibility of the prosecution to prove that the suspect or the accused person was not merely present but that he did something to encourage, aid, abet or

procure the commission of the crime for which he has been charged either alone or along with the people in which group he was arrested either at the time of the commission of the offence or immediately thereafter.

Though, it is a trite law, in the case of **R v. Allan**[162] that every person who is in a crowd and who is to be associated with such a crowd in the commission of a crime must have been actually or constructively present and must have an intent to encourage, procure, aid or facilitate the commission of that crime.

Frankly speaking, there has not been much cases on this defence. But here are the available ones.

In the case of **Millar v. State**[163] where the appellant, a British National was on the 3rd day of October 2002 arraigned before the High Court of Lagos State Criminal Division on a charge of murder. It was alleged that on or about the 12th day of April, 2002 at No. 19B Dakar Road, Apapa, Lagos, murdered a lady by name Miss. Anne Marie Compton Gale, an Australian national, thereby committing an offence contrary to and punishable under section 319 of the Criminal Code, Cap 32, Laws of Lagos State 1994. The appellant pleaded not guilty to the charge and the prosecution called a total of eight witnesses while the appellant testified in his own defence and called three

[162] (1965) 1 Q.B. 130
[163] (2005) 16 W.R.N p.31

witnesses. The deceased, who was a lover and business partner of the appellant, in her early forties, was known to be suffering from a kind of psychotic disorder called "manic depression" whenever she fell into depression, she would keep indoors for days and would want nobody to see her in the bedroom which she shared with the appellant, who was at the material time nursing some blisters on the soles of his feet which developed into sores and was emitting a putrid smell, the appellant being a diagnosed diabetic. As a result of the foul odur, appellant had to relocate to another bedroom in the house, part of which house also doubles as an office apartment for the company operated by the appellant and the deceased. The deceased was thus left alone to stay in the bedroom which she used to share with the appellant – the master bedroom.

The deceased was one day found dead and following the autopsy report, the appellant was charged for murder primarily because he was the only one living with the deceased in the house and was alleged to be the only one with access to the master bedroom then occupied by the deceased. At the conclusion of trial the appellant was found guilty and sentenced by the learned trial judge to death by hanging. The appellant was dissatisfied with the decision of the lower Court and appealed to the Court of Appeal. The Court of Appeal unanimously allowed the appeal and held that "it is an established

principle of law that it is unsafe and improper to convict and accused person merely because he was present when an alleged offence or crime was committed without more.[164]

In the same vein, the case of **R v. Akpunonu and Sunday**[165] where the appellant, one Nwanglasi Sunday and her husband were convicted for the murder of a newly born child. The evidence led at the trial showed that the child was buried alive by his father in the presence of the mother who is the second appellant in this case. Apart from her mere presence, she did nothing to aid the father, that is the first appellant either counseled or procured him to bury the male child of the family. The Court held that the second appellant ought not to have been convicted because in the opinion of the Court, the verdict could not be supported having regard to the evidence since there was nothing to bring her within the provisions of **Section 7 of the Criminal Code.** She was accordingly discharged and acquitted.

Also the case of **Yaw Azumah & Kwame Keholo v. The King**[166] **13** where the counsel to the appellant alleged that a prosecution witness was an accomplice in the case for which the appellant stood trial, because the witness was present when the crime was being committed and did not run away or report the matter to the Police. The Court at page 88 of the report said as follows:

[164] See Yinusa v. State (1978) 1 NCAR 109.
[165] (1942) 8 WACA 107
[166] WACA 87, 88

"On the question of mere presence which is all that has been proved, I would refer to the case of **Rex v. Gray** in which the Lord Chief Justice said – It is not necessary that a man, to be guilty of murder should actually have taken part in a physical act in connection with the crime. If he has participated in the crime; that is to say if he has a confederate; he is guilty although he has no hand in striking the fatal blow. Equally, it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. For a man to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence".

Finally, in the case of **Enweonye & 2 others v. The Queen**[167] the three appellants were convicted of murder. There was no conclusive identification of the body of the deceased, but it was proved that the first and second appellants attacked the deceased and his brother, and that after the deceased was shot by the first appellant and his brother by the second appellant both fell into a river, and the first and second appellants retrieved their bodies and took them ashore and into the bush. The deceased has never been seen or heard of since. A body which could not be identified was exhumed some time later in the bush. It was found buried with another body, identified as that

[167] (1955) 15 WACA 1

of his brother. The trial judge found both appellants guilty of murder and held on the evidence that it had been established that the deceased had been killed by the first appellant actively aided by the second appellant. The trial judge also convicted the third appellant for murder under section 7 (c.) of the Criminal Code in that he aided in committing the offence. Counsel appearing for the crown did not support this conviction. The three of them appealed against their conviction but the appeal of two of them was dismissed. With regard to the third appellant whom the judge found to be present on the bank of the Ibu – River and did nothing else, the Court held that in order to bring a person within Section 7 (c.) of the Criminal Code, there must be clear evidence that either prior to, or at the time of the commission of the act, the appellant had done something to facilitate the commission of the offence. The Court was not satisfied that the appellant was sufficiently High in rank in their community to have either influenced or encouraged the act. In fact it was further found that the appellant was not sufficiently near the place where the act was committed apart from being on the bank of the river.

Offence Not Known to Law

It is clear beyond any modicum of doubt that for any person to be alleged for the commission of any offence, such offence must be spelt out in a written law. This is the object of the 1999 Constitution of the Federal Republic of Nigeria.

Section 36(8) and (12) of the 1999 Constitution provides:

36 (8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

36 (12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law to an act of the National Assembly or a law of a State, any subsidiary legislation or instrument under the provision of a law.

It is hereby clear that under section 36(8) and (12) (supra) that for a person to be held guilty of any act or omission the following conditions must be fulfilled.

a) Such act or omission must at the time it took place, constitutes an offence.

b) The penalty for such offence must be proportionate to the offence committed in accordance with the law in force at the time of the commission of such offence.

c) The offence alleged of must be defined and the penalty therefore must be prescribed in a written law.

d) The written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

Furthermore, it must be noted by virtue of the provision at the beginning of section 36 (12) (supra) i.e. "subject as otherwise provided by this constitution". This means the Constitution itself can state contrary to the four elements stated above. So it should be noted that it is not for the Tribunal or Court to conclude that an Act is unlawful when the law itself did not say so.

In the case of **Olieh v. Federal Republic of Nigeria**[168] in this case one of the issues for consideration is whether the appellants can be convicted for conspiracy to boost an account when such offence is unknown in our laws. The Court of Appeal through his Lordship per **Jean Omokri JCA @ p.24** held that "the provision did not create any offence, it only has the Tribunal jurisdiction to try other offences relating to the business or operation of a bank under any enactment. The

[168] (2004) 11FR p.1.

expression "other offences" means other offences defined in a written law. The provision admits that the Tribunal can not try lest there be gap and convict any person for any offence not known to law or not provided for in any enactment. This is in consonance with the clear and unambiguous provision of section 33(12) of the 1979 Constitution which was in operation when the appellants were tried and convicted by the Tribunal. As there is no offence shown to law as "falsely boosting an account", there can not be any conspiracy to commit such. It is clear that one can not conspire to commit an offence which is not known to law or which is non- existent".

However, as **Niki Tobi JSC held in FRN v. Ifegwu**[169] that "I too do not think that section 166 of the Criminal Procedure Act is applicable because the section presupposes a situation where an offence known to law is preferred. Naturally, where no offence known to law or a non- existent offence is preferred Section166 of the Criminal Procedure Act can not be invoked to cure any error or omission arising from unknown or non- existent offence. In the result it is my decision that the conviction of the appellants for the phantom offence of "falsely boosting an account" by the Tribunal is a flagrant violation of the clear and unambiguous provisions of Section 33 (8) & (12) of the 1979 Constitution. Nobody can be convicted of any

[169] (2003) 15NWLR (pt842) p.113. @ 215 of the report

offence except that created under a written law and to convict any person under a non- existing offence unknown to law is unconstitutional, null and void"

It follows therefore that once charges are unknown to law, the Court or Tribunal has no jurisdiction to try the accused person and the judgment, conviction and sentence should be set aside where a Court has no jurisdiction to adjudicate on a matter, the proceedings of the Court and the ultimate adjudication will amount to a nullity, no matter its correctness and no matter how well decided. The defeat is extrinsic to the adjudication.

In the case of **Okoro v. Police**[170] where it was held that the accused person has been arraigned on a non-existent charge and the trial was void.

In conclusion, the case of **Inspector General of Police v. Gbadamosi**[171] is also instructive. The appellants in this case was convicted at a Magistrate Court of offences contrary to the "Criminal Act". Under section 151(3) of the Criminal Procedure Act Cap. 43, the written law and the section of the written law against which an offence is said to have been committed is required to have been set out in charge. The Court held that there is no law known as the Criminal Act. The preferment of a charge under a non- existent law is as fundamental an error as charging such a person under a law that had been repealed. The whole trial is a nullity." [172]

[170] (1953) 14 WACA 370

[171] (Lagos-LD/47 CA4/2/65)

[172] See The Queen v. Tuke (1961) ALL N.L.R.258; The Queen v. Bukar (1961) ALL N.L.R. 646.

Defence of Honest Claim of Right

The defence of honest claim of right is one of the prominent defences under the Nigerian Criminal Law. It is well established under the Criminal Code. **Section 23 of the Criminal Codes** provides that "a person is not criminally responsible, as for an offence relating to a property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud".

It is crystal clear from the above section that this section is mainly a protection to offence relating to property. This is the reason why his Lordship, **Oputa J. (as he then was)** in the case of **Umekesiobi U. Ufele & ors v. Commissioner of Police**[173] held that "by Section 23 of the Criminal Code a person is not criminally responsible as for an offence relating to property etc". It is therefore clear that for this defence to be invoked the offence for which the person is accused must be an offence relating to property and the act alleged to constitute the offence must be an "act done or omitted to be done by him with respect to any property". Without attempting any detail or exhaustive survey, offence relating to property will definitely include stealing under section 390, obtaining by false pretences under section 419, demanding with menaces under section 406 and malicious damage under section 451 of the Criminal Code".

[173] 3ECSLR 42 at p.43-44

Therefore, I submit humbly that a defence of bonafide claim of right is the claim in good faith by the suspect that the property involved was believed to be his own. But the question is how can a man take possession or demand possession of a property by merely believing that it is his own unless he is entitled to immediate possession of it? **Section 441 of the Criminal Code** strengthens the fact that an act which causes injury to property and which would otherwise be lawful is unlawful if done with intent to defraud any person.

Therefore, from the provision of Section 23 of the Criminal Code, two things are obvious and which are:

(b) the claim must be without an intention to defraud; and

(c) it must be honest.

And in "The Nigerian Criminal Code Companion by Justice E. O. Fakayode p. 227, para. 1222, an intention to defraud has been described as intention;

(1) to cause unjustified economic, financial or pecuniary loss to another; or

(2) to deprive another of some property by deceit;

(3) to induce a man to act to his injury by deceit.

What this connotes is that an intention to defraud will not exist if an accused person demand some properties from another person even with a threat of injury if his demand is not met as long as there is an honest assertion of what he claims to be a lawful claim even though the claim may be completely unfounded in law or in fact.

It should be noted that a person has a claim of right where he honestly asserts what he believes to be a lawful claim. It is plain that if a man has in truth the right to take goods then his taking of them in assertion of the right cannot be a felony. But the question whether an accused person has an honest belief in the existence of his right to take the goods in the manner and circumstances in which he did take them is a question of fact for the consideration of the Court and in each case a matter of evidence. Also as long as the accused honestly believed that he had the right to take the goods, the defence is available to him notwithstanding that he had no right to property in them nor any right to take them. In order words, the defence under section 23 of the Criminal Code avails where an accused person is acting under a right which in fact exists or where he is acting under a supposed right even though such a right may be unfounded either in fact or in law – **Chital Nguta & ors v. Commissioner of Police**[174]

To assert an honest claim of right in respect of a particular property, the element of honest claim of right is bone fide or good faith. And this is why **Dosumu J.** in the case of **George Xanthopoulos v. Commissioner of Police**[175] held that where the defence to an action for malicious damage is that the acts complained of were done in exercise

[174] (1962) 6 ENLR 68.
[175] (1979) 10-12 CCHCJ 206

of a claim of right, it will fail unless the prisoner can show that he acted in bona fide exercise of a supposed right and did no more damage than would reasonably have supposed to be necessary for its assertion".

However, Section 23 of the Criminal Code will not avail an accused person merely on proof that his act or omission was in respect of or with respect to property if it is not also established that the offence for which he stands charged pursuant to the said act or omission is also an offence relating to property. It is then that the test of good faith negating fraud can apply.[176]

Another angle to this defence is the reasonableness of the claim. In the case of **Oyewo v. The State**[177] where the Court held: "in the first instance, Section 23 of the Criminal Code which set out the defence of bona fide claim of right to a criminal liability does not require that the claim shall be a reasonable one, though the question whether a claim is reasonable or not may have a bearing on the question whether or not it is honestly held provided the claim is honestly held, it would appear that the section affords a defence to anyone who is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law and fact... Except the claim is shown to be fraudulent even if unfounded in law and

[176] Oputa C. J, (as he then was) in Sylvester Odife & ors v. Commissioner of Police (1973) 3 ECSLR (pt 11) 822.
[177] (1978) 4 OYSHC (pt 1) p.75

fact, it is an absolute defence to a criminal charge. It is gravingly erroneous for the trial Magistrate to hold that the claim of right must be reasonable. The reasonableness would not only come into play when considering its honesty and of which no finding was made..."

Though, in respect of a defence of a bonafide claim of right, it is settled law that such a claim might be unreasonable but what is essential was the honest belief of the accused that he is entitled to the possession of the property, said to have been stolen by him[178]

Meanwhile, Section 23 of the Criminal Code only protects a person with a claim (whether real or fancy) to property who does a criminal act in relation to the property in the honest belief that he has a right to assert his claim of ownership in a manner which turns out to constitute the offence complained of. In other words, the law protects the ignorance of the accused as to the proper manner to pursue his claim of ownership. The test of this defence is subjective, it means that the Court has to look at the accused before it, consider its standing, education or experience in life to determine whether he could have honestly made a mistake as to the choice of a method to assert his claim as to the ownership of the property. [179]

[178] Adegoju v. Lemone and ors (1959) WRNLR138; R v. Bernhard (1938) 26 Cr. App. R. p. 137.

[179] Stephen Nwakire v. Commissioner of Police (1991) 1 NWLR (pt 167) @ 345.

However in the case of **R v. Skivington**[180] Where it was held that a claim of right to the property was a defence to a charge of robbery and that the defendant need not show that he believed that he was entitled to take the property in the way that he did.

The Court when deciding on a claim of right as a defence to charges involving unlawful assembly and riot should really look as a whole on what the accused did in relation to the right he honestly asserted in determining his criminal liability.[181]

[180] (1967) 1All E.R. 483; 51 Cr. App. R. 167.

[181] Ibeziako v. State (1989) 1 CLRN p. 123; Nwosu v. State (2004) 10 FR p.99; G. Ejike v. Inspector General of Police (1961) E. N. L. R. p.7; Igbuku Udu v. Inspector General of Police (1964) NMLR p.116; Fashions Iroaghan v. Commissioner of Police (1964) NMLR. 48; I.G.P. v. Emeozo (1957) W. R. N. L. R. 213.

Autrefois Acquit or Discharge

Section 36(9) of the 1999 constitution *provides that no person who shows that he has been tried by any Court of competent Jurisdiction or a Tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior Court. The elements of this provisions are:*

(1) The person must have been previously charged for a criminal offence.

(2) Such charge must be before Court of a competent Jurisdiction or a Tribunal.

(3) Such person must have been either convicted or acquitted.

Immediately the above conditions are met, such person shall not again be tried for a criminal offence having the same ingredients. But the exception to this rule is that a superior Court of record can order a person who had been tried for the same criminal offence to be tried again. The superior Courts of record refer to here are those Court mentioned in **Section 6(5) of the 1999 Constitution.**

Also **section 181 of the Criminal Procedure Act** provides that "in addition to the provisions of section 171 a person who has once been tried by a Court of competent

Jurisdiction for an offence and acquitted or convicted of such offence shall not, while such acquittal or conviction remains in force, be liable to be tried again for the same offence nor on the same facts for any other offences for which a different charge from the one made against him might have been made before the Court by which he was acquitted or convicted under the provisions of subsection of section 161 or for which he might have been convicted under subsection 2 thereof".

Section 181(1) states: without prejudice to section 171, a person charged with an offence (in this section referred to as "the offence charged") shall not be liable to be tried therefore if it is shown;

(a) that he has previously been convicted or acquitted of the same offence by a competent Court or,

(b) that he has previously been convicted or acquitted by a competent Court on a charge on which he might have been convicted of the offence charged; or

(c) that he has previously been convicted or acquitted by a competent Court of an offence other than the offence charged, being an offence of which, apart from this section, he might be convicted by virtue of being charged with the offence charged.

(2) Nothing in sub-section(1) above shall prejudice the operation of any law given power to any Court, on an

appeal, to set aside a verdict or finding of any other Court and order a re-trial".

However, it could be seen that the provisions of section181 of the Criminal Procedure Act is completely in consonance with section 36(9) of the 1999 constitution.

In the same vein **Section 221(1) of the Criminal Procedure Act** provides that "any accused person against whom a charge or information is filed may plead-

(1) that he has been previously convicted or acquitted, as the case may be, of the same offence; or

(2) if either of such pleas is pleaded in any case and denied to be true infact, the Court shall try whether such plea is true in fact or not.

(3) If the Court holds that the fact alleged by the accused do not prove the plea, or if it finds that it is false infact, the accused shall be required to plea to the charge or information.

(4) Nothing in this section shall prevent a person from pleading that by virtue of some other provision of law he is not liable to be prosecuted or tried for any offence with which he is charged".

It is also observed that the words of section 181 are "shall not be liable to be tried again for the same offence".[182] From this it follows that it is for the accused to raise a plea in bar if he so desires. This act does not require the formality of

[182] R v. Usuman Pategi (1957) NRNLR 47.

a written plea or a replication. It was pointed out in the case of **Edu v. Police**[183] that the wording of Section 221(1)(a) would not cover all cases mentioned in Section 181 but the Court held that the procedure laid down in Section 221 should be followed in all cases arising under Section 181, hence the Lagos State amendments.

The plea of autrefois acquit ought to be made before the accused pleads to the charge itself. In the case of **Edu v. Police**[184] the accused pleaded to the general issue, and it was only during the examination of evidence that counsel submitted that the accused could not be tried upon the charge, having been previously acquitted to another charge based upon the same fact. The West African Court of Appeal held that the wording indicates that it must be the accused himself who should plead this in bar, and Section 221 contemplates that it must be pleaded before pleading not guilty to the charge.[185]

The Court held in the case of **I.G.P v. Marke**[186] that where a charge against defendant has been dismissed on the merits of the case he cannot be tried for the same charge again. A discharge of defendant prior to his putting his defence but after the prosecution has closed his case is discharge on the merits.[187]

[183] R v. Usuman Pategi (1957) NRNLR 47.
[184] (1952)14 WACA 163
[185] (1952) 14 WACA 163.
[186] Nwali v. I.G.P (1955) 1 E.N.L.R.1; R v. Nta (1946) 12 WACA 54 I.G.P. v. Johnson (1959) L.L.R. 55; R v. Jinadu (1948) 12 WACA 368.
[187] (1957) 2.F.S.C pg 5.

It should be noted that when there is evidence which suggests that accused has been previously acquitted or convicted, discharge of the same offence or any other offence upon the same facts, the Court has a duty to enquire into the matter to ascertain whether it is a proper case for the exercise of its discretion to allow him to withdraw its general plea; and on being satisfied that it is a proper case for a plea of *autrefois acquit* (or convict) or discharge to be heard or determined, a Court is not require to wait until an application to withdraw the general plea is made.[188]

Therefore, once an accused person has been discharged and acquitted by a Court of competent jurisdiction of an offence charged against him he cannot, in law, be prosecuted for the same offence again.

Flatman v. Light[189] **Halsted v. Clark**[190] **R v. Connelly**[191] **Connelly v. D.P.P**[192] **R v. Shipton Ex parte D.P.P**[193] **Edu v. Comm. of Police**[194] **Nwabi v. I.G.P**[195] **R v. Ita**[196] **R v. Jinadu**[197] **I.G. v. Marke**[198] **Haruna v. Ashiru**[199]

[188] Inspector General of Police v. Ighoroji (1957) N.R.N.L.R.182; Chief Conservator of Forests v. Moses Obanor (1958) W.R.N.L.R.43.
[189] (1946) 2 A.E.R. 368
[190] (1944) 1 A.E.R. 270
[191] (1963) 3 A.E.R 510
[192] (1964) 2 A.E.R. 401
[193] (1957) 1 A.E.R. 206
[194] (1959) 4 F.S.C. 175
[195] (1955) 1 F.N.L.R. 1
[196] (1946) 12 WACA 54
[197] 12 WACA 368
[198] (1957) 2 F.S.C. 5
[199] (1999) 7 NWLR (pt 612) 579.

The discharge of an accused at a preliminary inquiry is not acquittal and cannot give rise to a plea of autrefois acquit[200] A plea of autrefois convict is a bar to the trial of an accused for an offence for which he has earlier been convicted. **Ogenyi v. I.G.**[201] **I.G. v. Igbhoroji**[202] **R v. Euwa**[203] **Chief Conservator of Forests v. Obanor**[204] **Connelly v. D.P.P.**[205] **Haruna v. Ashiru**[206]

The principle, at common law, is that a person must not be put twice in peril for the same offence[207]

Whether an order of retrial in the same case amounts to double jeopardy; principle of nemo debet bis vaxaris pro unem eadem causa – that a man cannot be put in double jeopardy in the same cause has been laid to rest in the case of **Goni v. State,**[208] the Court held "putting a man into double jeopardy in the same case means a trial in a new and independent case where a man has been tried once. It does not mean that a man may not be tried twice in the same case. A second or another trial in the same case is only a continuation of the jeopardy which began with the trial. That is not putting a man ... into double jeopardy. The question that arises is, whether the order of retrial in the circumstances of this case is a new and

[200] I.G. v. Johnson (1959) L.L.R. 55.
[201] (1957) NRNLR 140
[202] (1957) NRNLR 182
[203] (1943) 9 WACA 194
[204] (1958) WACA 43
[205] (1964) 2 All E.R. 401; (1964) A.C. 1254.
[206] (1999) 7 NWLR (pt 612) 579.
[207] R v. Hooge 6 NLR 56; R v. Yusa (1940) 6 WACA 204.
[208] (1996) 7 NWLR (pt 458) p.11, @ 112

independent trial where one has been tried once. In which case, the appellant would be put in double jeopardy which is not allowed by law".[209] where Idigbe J.S.C. of blessed memory said:- "It is my view, that subsection 9 of Section 33 of the 1979 Constitution (now Section 36(9) of the 1999 Constitution), clearly anticipated, that in the cause of a "trial" of an accused person from Court to Court for one and the same Criminal offence, a Court Higher than the last of the intermediate Courts; may order a retrial notwithstanding that in the process of trial from one Court to the other, one of the intermediate Courts, may have made an order, and in those circumstances, there is in my view still be one trial and not another or second trial". That was Idigbe JSC expounding the maxim *"Nemo Debet Bis Vaxaris Pro Unem Eadem Cause"*.

I am equally fortified in the above view by a passage in the judgment of a very eminent Judge, Holmes J. in the case of **Kepner v. United State**[210] in which Holmes J. observed: "It is more pertinent to observe that it seems to me that logically and rationally, a man cannot be said to be in more than once in jeopardy on the same case, however often he may be tried. The jeopardy is one continuing jeopardy. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man has already been tried once. But there is no rule, that a man may not be tried twice in

[209] Rabiu v. State (1981) 2 NCLR 293 @ 354 – 355
[210] (1903) 195 U.S. @ 130 also 24 Supreme Court Report 799 @ 806 – 807

the same case ... If a statute should give the right to take exceptions (exceptions for error in trial i.e. a right of appeal) to the government. I believe it will be impossible to maintain that the prisoner would be protected by the constitution, from being tried again... for the reasons which I have stated, a second trial in the same case must be regarded as only a continuation of the jeopardy which began with the trial below"

I humbly submit with the application of the principle enunciated by Idigbe J.S.C. in **Nabiu Rafiu v. The State**[211], I am in complete agreement with the views expressed in those cases, that an order of retrial is not putting the appellant/the accused person in double jeopardy. A second trial in the same case is and must be regarded as only a continuation of the same jeopardy which began with the trial. An order of retrial in the circumstances is in accordance with the dictates of the law.

The following five conditions must co-exist before an order of retrial can be made by an Appeal Court, to wit;

(a) that there has been such an error in law or irregularity in procedure, which neither renders the trial a nullity nor makes it possible for the Appeal Court to say that there has been no miscarriage of justice;

(b) that apart from the error of law or irregularity in procedure, the evidence taken as a whole discloses a substantial case against the appellant.

[211] (Supra) and Holmes J. in Kepner v. United States (supra

(c) that there are no special circumstances as would render it oppressive to put the appellant on trial a second time;

(d) that the offence for which the appellant has been convicted was not merely trivial; and

(e) that to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it[212]

[212] Akinfe v. State (1988) 3 NWLR (pt 85) 729.

Defence of Pardon (Amnesty)

Pardon, according to the **Black's Law Dictionary,**[213] is an act or instance of officially nullifying punishment or other legal consequences of a crime. A pardon is usually granted by the Chief Executive of a Government. The President in some jurisdiction has the sole power to issue pardon for federal offences and State Governors have the powers to issue pardons for State crimes – Also termed Executive pardon.

The term pardon is first found in early French Law and derived from the latin word **Perdonare** ("to grant freely") suggesting a gift bestowed by the sovereign. It has thus come to be associated with a somewhat personal concession by a Head of State to the perpetrator of an offence, in mitigation or remission of the full punishment that he has merited.

There are four classifications of pardon viz;

(1) Absolute pardon: This is a pardon that releases the wrongdoer from punishment and restores the offender's civil rights without qualification. It is also termed full pardon/ unconditional pardon.

(2) Conditional pardon: This is a pardon that does not become effective until the wrongdoer satisfies a prerequisites or that will be revoked upon the occurrence of some specified act.

[213] Deluxe Eighth Edition by Bryan A. Garner, Editor in Chief

(3) Faultless pardon: This is a pardon granted because of the act for which the person was convicted was not a crime.

(4) General pardon: This is synonymous to amnesty which is a pardon extended by the government to a group or class of person's usually for a political offence; or the act of a sovereign power officially forgiving certain classes of person's who are subject to trial but have not yet been convicted.

Therefore, the legal backing for this defence is found in **Section 36(10) of the 1999 Constitution** which provides that "no person who shows that he has been pardoned for a criminal offence shall again be tried for that offence."

This presupposes that **Section 221(1) (b) of the Criminal Procedure Act** is subject to section 36(10) of the 1999 Constitution.

Section 221(1) (b) (supra) provides that "any accused person against whom a charge or information is filed may plead –

(b) that he has obtained a pardon for his offence.

In addition to the above, if the accused had satisfied the Court on the ground of pardon, the Court should equally reciprocate the gesture of law having listened to the prosecution. The order the Court should give, would be the one to discharge the accused and any other order the Court may deem fit in the circumstances of the case in question.

Want of Prosecution/Want of Diligent Prosecution

Want of prosecution or want of diligent prosecution is a failure of a litigant or prosecution in Criminal case(s) to pursue the case.

Diligence is primarily one of the watchword of legal profession. So anybody who belongs to this noble profession is implored to imbibe the culture for there is no royal road to winning of cases than diligence and industry. The law and the Court expect certain degree of diligence from the Barrister when handling a suit before it. And for that diligence to be actively displayed every steps which are mandatory or discretionary to be taken in pursuing such brief should be taken expeditely and expediently which include filing of relevant documents, payment of filing fees, putting the other side on notice about the impending action against them in Court, bringing his witnesses to Court properly, display of legal prudence, candour and decorum in the temple of justice and such other prerequisites honourably expecting from any members of the bar.

Therefore, when a suit is not pursued and prosecuted with expected diligence such suit may get thrown out from Court (i.e. to be struck out). The litigant can still come back to

the Court when the needed, expected momentum and diligence had been gathered. The Court expressed its mind in the case of **Ogundoyin & ors V. Adeyemi**[214] when it said, "it needs be emphasized, however that the fact that the order dismissing the appeal of the appellant will be set aside is not tantamount to a decision by this Court that the appellants have conducted their appeal in the Court below with due diligence ..."

This may happen in different spheres of handling a matter. It may be due to an inordinate and inexcusable delay which has resulted in prejudice to the defendant the accused person or in other non-challant ways.

In order for an application to dismiss a suit for want of prosecution to succeed the defendant must show:

(ii) That there has been an inordinate delay by the plaintiff; what is an inordinate delay must depend on the facts of each particular case;

(iii) That this inordinate delay is inexcusable; as a rule, until a credible excuse is made out, the natural inference is that it is inexcusable.

[214] (2001) 7NSCQR pg 378 at 398

(iv) That the defendant is likely to be seriously prejudiced by the delay, as a rule, the longer the delay, the greater the likelihood of serious prejudice. This, however, must not be taken as saying that the application will not succeed even if the defendant is unable to show that he will be seriously prejudiced provided conditions (i) and (ii) exist:[215].

In considering whether to dismiss an action where it has been established that the plaintiff or the prosecutor has been guilty of inordinate and inexcusable delay which is likely to prejudice the fair trial of the action, the Court has a discretion and is bound to consider all the circumstances. The fact that the trial of action is imminent and the claim is not statute-barred, so that the plaintiff or prosecutor would still be free to bring a second action on the claim if the first is dismissed, would be relevant and Highly important considerations and the Court would be slow to strike out an action in such circumstances[216]

Now, if there has been an inordinate delay which is due to the negligence of his counsel, while the plaintiff is personally blameless it may be unjust to deprive him of the chance of prosecuting his claim[217]. Where the fault was that of Solicitor's

[215] See Pryer V. Smith (1977) I.W.L.R 425; (1977) 1 All E.R 218.
[216] Dutton V. Spink Breeching (Sales) Ltd & ors (1977) 1 All E.R 287 CA. see also Austin Securities Ltd V. Northgate and English Stores Ltd (1969) 2 All E.R. 753, & 756; Birkett V. James (1977) 3 WLR 38; (1977) 2 All E.R. 801.
[217] See Abiegbe & ors V. Udhremu Ugbodume & ors (1973) 1 SC 133.

clerk, the fact that the plaintiff may have an effective remedy against his Solicitor for professional negligence is not a relevant consideration in deciding whether to dismiss an action for want of prosecution:[218]

[218] Martin V. Turner (1970) 1 All E.R. 256: (1970) 1 WLR 82; Parton V. Allsop (1971) 3 All E.R. 370.

Chapter Three

Grounds for faulting Criminal Proceedings

When the Verdit is Unwarranted, Unreasonable and cannot be Supported Having Regard to the Evidence.

The ground of appeal that a decision is contrary to the weight of evidence is not a proper one in a criminal case. The proper ground of appeal should be that the –verdict or decision is altogether unwarranted, unreasonable and cannot be supported having regard to the weight of evidence.[219]

However, this ground of appeal signifies that the judgment of the trial Court cannot be supported by evidence adduced by the successful party, or the trial judge either wrongly accepted evidence or the inference his lordship drew or conclusion he reached based on the accepted evidence cannot be justified and is unwarranted and unreasonable.

Though it is a trite law, that the appraisal of evidence as well as ascription of probative value is the primary duty of a

[219] Chino Adi v. the Queen (1955) 15 WACA p6; Jacob Aremu v. Inspector General of Police (1965) 1 All NLR 217; (1965) N.M.L.R. 327; Iboko v. Commissioner of Police (E.N) (1965) NMLR.384; Wattab v. Inspector General of Police (1956) WRN LR 24.

trial Court and where the issue turns on credibility of witness, the opinion of the Court must be respected.[220] But it is now settled law, that, where a trial Court makes a finding of fact by analyzing and appraising all the evidence led and came to the conclusion to prefer one version against the other, an appellate Court is not permitted to reverse the finding merely because it would have reached a different conclusion, if it were dealing with the matter as a Court of first instance. An appellate Court such as the Court of Appeal or any other Court empowered in that capacity can only come to conclusion that there is a miscarriage of justice and that injustice has been caused to the party who lost the case, if the trial Court could be faulted in the exercise of its judicial function of evaluating the evidence and attacking probative value thereto, including issue of credibility of witnesses. The evaluation of evidence is the primary responsibility of the trial Court, and appellate Court will only interfere with a finding of fact made by a trial judge where such finding is not supported by evidence led before the trial judge.

It is pertinent to note that it is not every error or mistake that will result in an appeal against a judgment in a suit being allowed. It is only where the error is substantial in that it has occasioned a miscarriage of justice that an appellate Court is

[220] See Millar v. State (2005) 16 WRN 31@ 24; Adamu v. State (1991) NWLR (pt 187) 530 @538.

bound to interfere. Where a trial Court makes a finding of fact in respect of any issue and there is sufficient evidence in support thereof; then unless these findings are found to be perverse or are not supported by evidence or were reached as a result of a wrong approach to the evidence or as a result of a wrong application of a principle of substantive law or procedure, an appellate Court even if disposed to come to a different conclusion upon the printed evidence cannot reverse the finding.[221]

Now the question is, how should the appellate Court react to a particular decision which is unwarranted, unreasonable and cannot be supported having regard to the evidence? An appellate Court in its primary role in considering the judgment of the trial Court on appeal would have sought to find out:

(1) The evidence before the trial Court;

(2) Whether it has accepted or rejected any evidence upon the correct perception and approach;

(3) Whether it correctly made the assessment of the value on it;

(4) Whether it used the imaginary scale of justice to weigh the evidence on both sides; and

(5) Whether the proof beyond reasonable doubt has been properly and adequately discharged by the prosecutor and vice versa.

[221] See Mogaji v. Odofin (1978) 4 S.C.91: Onajobi v. Olanipekun (1985) 4SC (pt2) 156; Ukejianya v. Uchendu (1950) 13 WACA5, Anyanwu v. Anyanwu (1992) 5NWLR (pt 242386; Ike v. Ugboaja (1993) 6 NWLR (pt 301) 539; Chiwendu v. Mbamali (1980) 3- 4 S.C. 31; Abimbola v. Abatan (2001) 9NWLR (pt 717) 66.

(6) Whether there was a certainty which is an essential element of proof in criminal liability. [222]

Manifestly such a ground of appeal must endeavour to show either that the trial judge wrongly accepted evidence which he should not legally have accepted or that the decision or inference drawn from the evidence so accepted are unjustified.[223]

In the case of **Lasisi Idowu v. Ajiboye**[224] both counsel agreed (on appeal) that the Magistrate Court's record of proceedings did not reflect accurately the purport of evidence and the legal submission made in Court. The Court held that failure of the Magistrate to make an accurate note of the oral evidence and legal submissions of the counsel would result in coming to an unjust decision. That the judgment of the trial Court is hereby set aside and the suit should be heard *de novo* before a different Magistrate.

Similarly, in the case of **Commissioner of Police v. Gloer**[225] where the accused person was charged with the offence of larceny, receiving and being in unlawful possession of stolen property contrary to Section 390, 427 and 430 of the Criminal Code and he was convicted of being an accessory. It was held that the evidence was insufficient to support a conviction and must be quashed by reason of its vagueness in that the offence of which the accused was convicted was not clearly stated.

[222] See Uyo v. A-G. Bendel State (1986)INWLR (pt 17) 418.
[223] Ogbodu v. Adelugba (1971) 1 ALL NLR 69 at 71..
[224] (1975) 5 U.I.L.R. (pt 111) p.314.
[225] (1923) 4 N.M.L.R. 122

Trial without a Complaint

It has become a law that for a case to proceed there must be a complaint before the Court, and to proceed with a case without a complainant renders the trial null and void. See **Duru v. Gumel N.A.** [226] It is the complaint that culminates into the facts of a particular matter. In the case of **I.G.P. v. Nwabaju**[227] It was held that the trial of the accused could not proceed because the complainant was not ready and the prosecutor would not proceed without the complainant. Also in the case of **Joseph Idowu Adunkoko v. Ilorin Native Authority**[228] the appellant in this case was convicted before a provincial Court (in Northern Nigeria) of publishing a false statement intended to harm the reputation of the Emir. The proceeding were initiated by a first information report signed by a Native Authority Police Officer. The Court held that the first information Report was not empowered to take cognizance of the offence. It was held further that section 379 of the Criminal Procedure Code did not save the proceedings since the words "not empowered by law" in that section cannot be taken as covering a case in which there is no complaint as required by law. The trial was therefore declared a nullity.

Conclusively, it is also contrary to natural justice that a person should be convicted or punished for an offence in respect of which there is no complaint or charge.[229]

[226] (1957) NRNLR p. 151.
[227] (1959) 3 E.N.L.R. 32.
[228] (1964) N.N.L.R. 84.
[229] See Dzakpe v. Tiv Native Authority (1958) N.R.N.L.R. 135.

Failure to Inform the Suspect of his Right to Election

Owing to **Section 304 (2) & (3) of the Criminal Procedure Act** which provides as follows:-

(2) if a Magistrate at any time during the hearing of charge for such an indictable offence as aforesaid against a person who is an adult becomes satisfied that it is expedient to deal with the case summarily, the Magistrate shall thereupon, for the purpose of proceedings under this section, cause the charge to be reduced into writing; if this had not been already done and read to the accused and shall address to him a question to the following effect-

"Do you desire to be tried by a judge of the High Court or with a jury, as the case may be, or do you consent to the case being dealt with summarily by this Court?"

With a statement, if the Magistrate thinks such a statement desirable of the meaning of the case being dealt with summarily and of the sitting of the High Court at which he is likely to be tried if committed for trial. And, if the accused consents to be tried summarily shall forthwith ask him the following question-

"Do you plead guilty or not guilty?"

(3) If the Magistrate shall not inform the accused of his right to be tried by a judge of the High Court or with a jury as the case may be, the trial shall be null and void *ab initio* unless the accused consents at any time before being called upon to make his defence to be tried summarily by a Magistrate in which case the trial shall proceed as if the accused has consented to being tried summarily by a Magistrate before the Magistrate proceeded to hear evidence in the case".

It is important to note that the above provision only apply to the proceedings in the Magistrate Court where summary trial is to take place. And it should be noted also that this provision applies only to an indictable offence i.e. an offence:

(a) which on conviction may be punished by a term of imprisonment exceeding two years, or

(b) which on conviction may be punished by imposition of a fine

exceeding four hundred naira, not being an offence declared by the Law creating it to be punishable on summary conviction – **Section 2 of the Criminal Procedure Act.**

Therefore, it has been held and concluded that the Court must ask the suspect whether he/she elects to be tried summarily before it or in the High Court where the consent of the accused to the trial by the Magistrate of a charge for an indictable offence proceeds to hear evidence nor before the accused is called upon to make his defence the trial is a nullity.[230] And also, where the Magistrate did not inform accused of his right to be tried before the High Court, since accused never expressly consented to being tried by the Magistrate, the trial would be null and void *ab initio*.[231]

Finally, the provisions of Criminal Procedure Act, Section 304 (2) and (3) are mandatory and consequently the omission to record the plea of the accused would be fatal to the proceedings; those proceedings are null and void.[232]

[230] C.O.P. v. John Olapade & ors (1959) W.N.L.R. 41:
[231] R. v. Yekun (1938) 4 WACA 11.
[232] Olonye v. I.G.P. (1955-56) W.R.N.L.R.P.1.

Denial of Fear Hearing

By virtue of the provisions of Section 36 (I) of the 1999 constitution which provides that in the determination of a person's civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other Tribunal established by law and constituted in such a manner as to secure its independence and impartiality.

It is settled law that the above provision entrenches the common law concept of natural justice with its twin pillars, namely:-

(i) that a man shall not be condemned unheard or what is commonly known as *Audi alteram patem*, and

(ii) that a man shall not be a judge in his own cause or *nemo judex in causa sua*

The section confers on every citizen of this great nation, who has any grievance, the right of access to the Courts and leaves the doors of the Courts open to any person with the desire to ventilate his grievances and compels the Court that will determine the rights of such person to accord the person a fair hearing.[233]

[233] See Kenon v. Tekan (2001) 14NWLR (pt 732) 12; Deduwa v. Okorodudu (1976) 9-10SC 328; Mohammed v. Kano N.A. (1908) 1 ALL NLR 424.

It is the person who alleges any breach of the rules of fair hearing that has the burden of proof of same. Such person has to establish how his civil rights and obligations have been adversely affected by the alleged breach.[234] it is equally a settled law that whether a trial or proceedings had been fair or not depends on the facts and circumstances of each case.

The question at this juncture is, what are the rights available to an accused person or what constitutes a fair hearing to an accused person?

An accused person would be said to have been given a fair hearing if any of the following is present before, during and after his trial

(1) Right to be heard by an independent and impartial body.[235]

(2) Right to be informed about the nature of the crime committed in the language that he understands[236]

(3) Right to adequate time and facilities for the preparation of his defence.[237]

(4) Where the accused person does not understand the language used at the trial, he is entitled to the assistance of an interpreter without payment[238]

[234] Bill Construction Ltd v. Imani Ltd (2006) 28 NSCQR p. 1@ 10.

[235] Section 36(1) (2) (a) (b) of the 1999 Constitution, Garba & ors v. University of Mardugauri (1986) INWLR (pt 18) 550; R. v. University of Cambridge (1723) S. 128.

[236] Section 36 (6) (a) of the 1999 Constitution; Nwachukwu v. The State (1985) 2 NWLR p. 27; Maja v. The State (1980) 1 NCR 70.

[237] Section 36 (6) (b) of the 1999 Constitution; Udo v. the State (1988) 3 NWLR 316; Shemfe V. C.O.P. (1965) 1 All v. IGP (1961) 1ALL NLR 432; Omega v. The State (1964) 1 ALL NLR 379.

[238] Section 36 (6) (c) of the 1999 Constitution; Ajayi and or v. Zaria N.A. (1963) 1 All NLR169; Gwonto v. The State (1983) 3 S.C.; Section 241 CPC and Section 199 CPA.

(5) Right to defend himself in person or by legal practitioner of his own choice[239]

(6) Right to examine prosecution witnesses.[240]

(7) Rights to be presumed innocent until he is proved guilty.[241]

(8) Offence charged for must be known to law.[242]

(9) Right to silence[243]

(10) Right against double jeopardy[244]

(11) There must be publicity of trial[245]

The above requirements are very consequential to be observed in criminal trial and where the Court fails in observing any of them there will be denial of fair hearing. So, a hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing[246]

The principles of natural justice are a part of the pillars that support the concept of the rule of law. They are indispensable

239 Section 36(6) (c.) of the 1999 Constitution; Ariori v. Elemo (1983) SCNLR p.1; R. v. Uzodinma (1982) 1NLR27.

240 Section 36(6) (d) of the 1999 Constitution; Idirisu v. The State (1968) NMLR 88; Tulu v. Bauchi N.A. (1965) NMLR P. 343; Onafowokan v. The State (1987) 7 SCNJ 233; Adeaje v. The state (1979) 6-9 S.C.19; Ali and ors v. State (1988) 1SCNJ 17;

241 Section 36(5) of the 1999 Constitution; Uzo v. The Police (1972) S.C. 37; Okoro v. The State (1988) NWLR (pt 74) 255; Egu v. The State (1988) 2 NWLR (pt 78) 602: Section 140(3)(c) Evidence Act.

242 Section 36(8) and (12) of the 1999 Constitution; Aoko v. Fagbemi (1963) 1All NLR 400; A.G.F. v. Dr Clement Isong (1986) 1 QLRN 86

243 Section 36 (11) of the 1999 Constitution; Sugh v. The State (1988) 2 NWLR 475:

244 Section 36(10) of the 1999 Constitution; Nafiu Rabiu v. The State (1980) 2 NCR 17; Section 221 of the Criminal Procedure Act.

245 Section 36(4) of the 1999 Constitution; Abarshi v. Commissioner of Police (2005) 1 NCC p. 545 @ 552-553.

246 Otapo v. Summonu (2006) 2.L.C. p.255 @ 287; Ex parte Olakunrin (1985)1 NWLR 652 @668.

part of the process of adjudication in any civilized society. And it must be noted that the test of fairness in an appeal proceedings must of necessity differ from the test of fairness in proceedings at the Court of first instance. While in the Court of first instance, the true test of a fair hearing is the impression of a reasonable person who was present at the trial, whether from his observation, justice has been done in the case. The true test of fair hearing in the Court of Appeal is whether having regards to the rules of Court and the law, justice has been done to the parties[247]

Therefore, what the Court is enjoined by the provisions of section 36 of the 1999 Constitution to do, is to create a conducive atmosphere for the parties to exercise their right to fair hearing, by holding the scales of justice fairly but firmly without fear or favour, affection or ill will. Having provided the required atmosphere the duty on the Court stops there. It then, becomes the choice of the party seeking to enforce his civil rights and obligations to utilize the opportunity so created. He cannot be compelled to do so. Where he decides to present his case in an acceptable mode and as required by the rules and substantive law, he would be heard. On the other hand, where he chooses not to present his case, he cannot later be heard to complain that he was not heard[248]

Conclusively, a breach of right of fair hearing results in the nullity of the proceedings[249]

[247] Otapo v. Summonu (supra) @ 288.
[248] Bill Construction Ltd v. Imani Ltd (2006) 28 NSCQR p.1 @ 12.
[249] Adeosun v. Babalola (1972) 5. S.C 292; Mobil Oil v. Coker (1975) 3 S.C. 175.

Lack of Jurisdiction

Jurisdiction means the way which the Court will exercise the power to hear and determine the issue which fall within its jurisdiction or as to the circumstances in which it will grant a particular kind of relief which it has jurisdiction to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances[250]

Jurisdiction defines the powers of Courts to inquire into facts, apply the law, make a decision and declare judgment[251]

It is the law which confers the Court with jurisdiction, and not the parties before it. That means parties had no right and cannot confer jurisdiction which the Court is not invested by law[252]

The laws regulating the commission of an offence and the penalties thereof in Nigeria ranges from Criminal Code Act, Penal Code, Money-Laundering Act, Economic and Financial Crime Commission Act, Independent Corrupts Practices and other Related Offences Commission Act and other Acts/Laws in conjunction with the 1999 Constitution. It has therefore become a law that a Court of law cannot exercise power(s) than that which it has under the applicable law(s) governing such offence(s) and where any Court tried an offence it has no power to try or give a penalty beyond what it could give under the law such act/exercise shall be declared ultra vire and devoid of jurisdiction.

[250] Ogun State v. Coker (2003) 11FR p. 263 – 264.
[251] Pg 1-2 of Legal Armoury by Samuel A. Adeniji.
[252] Engineering Enterprise v. Attorney – General (1985) NMLR (pt 1) pg 17 @ 22.

It is also settled that jurisdiction can be raised at any stage of the proceedings up to the final determination of an appeal by the Highest Court of the land. This is because it is an issue which goes to the root of the matter so as to sustain or nullify the order or decision already made. It is equally settled that the Judge/Court can also raise it *suo motu* at any stage.[253] When a Courts lacks jurisdiction it lacks the necessary competence to try the case and that a defect in competence is fatal as to proceedings are null and void *ab initio*.

However, it is well settled in several decided cases that a Court has jurisdiction to entertain a case if:

(1) it is properly constituted as regard number and qualification of members of the bench and no member is disqualified for one reason or another.

(2) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction and;

(3) The case comes before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.[254]

Therefore, where an appellate Court declares a criminal trial a nullity for procedural irregularity the Court is not bound to discharge the accused but may order a fresh trial. A criminal trial may be a nullity on one of the following grounds:

[253] Ogigie & ors v. A. I. Obiyan (1997) 10 SCNJ p.1 at 16; Obikoya v. Registrar of Companies & anor (1975) 4 SC 31.

[254] Akeredolu v. Aminu (2004) 1 FR p.161, @ 173 – 174, Achimugu v. C.O.P. (1989) 1 CLRN p. 308 @ 311-312.

(a) when the very foundation of the trial, that is the charge or information may be null and void; or

(b) the trial Court may have no jurisdiction to try the offences; or

(c) the trial may be rendered a nullity because of some serious error or blunder committed by the judge or Tribunal in the course of the trial.[255] The Court has held that where a Court tried an offender for an offence which it is not empowered to try the defect in the proceedings is not cured by Section 379 (c.) of the Criminal Procedure Code which provides that proceedings are not to be set aside merely on the ground that the Court has taken cognizance of an offence of which it is not empowered to take cognizance. On the contrary by Section 380(h) of the Criminal Procedure Code, the proceedings are void.[256]

In the case of **Safiyyatu Hussaini Tudu v. A. G. Sokoto State**[257] where the accused was convicted for an offence which did not constitute an offence at the time of its commission. The Sharia Court of Appeal, Sokoto Division, Sokoto State held "with due respect to the submission before

[255] Adeoye v. State (1999) 6 NWLR (pt 605) 74; Cassidy v. F.R.N (2004) 8 FR p.88 @ 113; Anthony Okobi v. The State (1985) NMLR (pt 1) p. 50-51, Ratio 8-14; Regina v. Diyaolu (1955-56) W.R.N.L.R. 30; Chanver Aba & anr v. C.O.P. (1962) N.N.L.R. 37.

[256] James Gboruko & anr v. C.O.P. (1962) N.N.L.R. 17; A. Y. Odiai v. C.O.P. (1962) N.N.L.R. 9; R v. Iyara (1941) 7 WACA 30.

[257] (2003) 6 FR p.106 @ 141-143

us that even if the appellant Safiyyatu committed the said offence, it was committed before the law establishing Sharia Court was promulgated... It is mandatory on us to agree that Upper Sharia Court Gwadabawa lacks jurisdiction to pass judgment of stoning to death even if the offence has been found on her because when the offence was committed it was committed before the promulgation of the law of stoning at that time. And we found that this condition of Shari'a is laid down in the 1999 Constitution of the Federal Republic of Nigeria, Section 36(12), it was under this provision that the said laws were promulgated in the year 2000."

Non-Compliance with Mandatory Statutory Provisions

It is trite that any offender should be subject to the law of the place where he offends – ***Debet quis juri subjacere ubi delinquit.*** This portends that for any person to be alleged of the commission of any offence(s), one of the ingredients of the law is that, such offence must be known to law of the land where the offence is allegedly committed. Proceeding to the prosecution of the offender for the offence committed, there are procedures which had been laid down in law for the players in this game of Criminal proceeding to comply with at each step of the proceedings. Such steps commence from the period of issuing a warrant of arrest, apprehending the suspect, conduct of the investigation, taking of evidence, arraignment, plea taking, bail process, trial proper etc.

Any of the above steps should be taken in strict compliance with the appropriate laws like the Constitution, Criminal Procedure Act and Code, Criminal Code Act, Penal Code and any other law(s) in that respect.

These steps constitute the condition precedent to the invocation of Court's jurisdiction in criminal adjudication. Condition precedent provides for certain steps to be taken before the prosecutor is entitled to charge a suspect to Court of competent jurisdiction.

The steps mentioned above are mandatory statutory provisions and not discretionary part of such mandatory provisions are those steps contained in Section 36 of the 1999 Constitution which ranges from right to legal practitioner of one's choice or right of the accused/suspect to defend himself, right to silence, right to be presumed innocent until the suspect has been proved guilty etc.[258]

However, when it comes to bringing of charge(s) or laying of information against the suspect, the procedure had been specified in the law and they are always mandatory[259] Also taking of plea of the suspect is mandatory[260]

Moreso, when the procedure for proper arrangement of an accused person is not followed, which is mandatory also and not discretionary, is fatal to the proceedings[261]

It should not be forgotten that apart from the above provisions there are still others in our criminal laws and criminal procedure laws. Also, it should be noted that the onus is on the accused person, having asserted that the prosecution either that it was wrong or not duly and completely comply with the laid down procedure, to show what ought to be done or how it has been laid down under the law to be done[262]

[258] Akpojotor v. C.O.P. (1989) 1 CLRN p.258 @ 265 – 266.
[259] Okosun v. State (1979) 3-4 S.C. 36
[260] Salami Olonje & ors v. I.G.P. (1955 – 56) WRNLR 1; Adeyemi v. State (1989) 1 CLRN p.60 @ 65-66: Duval v. C.O.P. 12 WACA 215; Elumelu v. Police (1957) NRNLR 17.
[261] Kajubo v. State (1988) 1 NWLR (pt 73) 721 @ 736-737.
[262] Fawehinmi v. State (1989) 1 CLRN p.292, at 304; R v. Ijoma (1960) W.N.L.R. 130

I, therefore hold a strong view that non-compliance with the mandatory statutory provisions in instituting criminal proceedings would rob the Court of its jurisdiction[263]

These do not call for a discretion on the part of the Court. It must be said that any non-compliance with statutory provisions which is mandatory renders the proceedings void[264]

The resultant effect is that any proceedings conducted remains a nullity – as it is trite law that a defect in competence is not intrinsic but extrinsic to the adjudication[265]

Where the entire proceedings adopted by a trial Court has been declared a nullity by the appellate Court, which in effect means that the appellant has never been tried, the relevant consequential order having taken the evidence, the gravity of the offence and the interest of justice into consideration, will be one of fresh trial[266]

The circumstances in which a trial may be declared null and void and which determine the attitude of the appeal Court in either exercising its discretion to grant or refuse an order of re-trial are:-

[263] Zuru v. Naval Staff (2004) 7 FR p. 106 @ 116.
[264] Maidawa v. First bank of Nigeria Plc & ors (1997) 4 NWLR (pt 500) 497 507; Achineku v. Ishagba (1988) 4 NWLR (pt 89) 411; Amadi v. N.N.P.C (2000) 10 NWLR (pt 674) 76 @ 97; Ifezue v. Mbadugha (1984) All N.L.R. 256 @ 272.
[265] Nworie v. A.G. Ogun State (2004) 4 FR p. 159 @ 175 – 176.
[266] Omoteloye v. State (1989) 1 CLRN p. 142 @ 157; Kajubo v. State (supra).

(a) whether the foundation at the trial, charge or information is incurably bad;

(b) the jurisdiction of the trial Court;

(c) whether the trial Court has committed some fundamental error or blunder in the conduct of the trial which may render the whole trial a nullity[267] Furthermore, on the guiding principles which has been laid down in the locus classicus in **Yesufu Abudundu & ors v. The Queen**[268]

The Court held that for order of retrial to be ordered the following has to be observed;

(a) that there has been an error in law or an irregularity in procedure of such a character, that, on the one hand the trial was not rendered a nullity and on the other hand the appellate Court was unable to say that there has been no miscarriage of justice.

(b) that leaving aside the error or irregularity, the evidence taken as a whole discloses substantial case against the appellant.

[267] Okoro v. Police 14 WACA 370; The Queen v. Azu Owoh & ors (1962) 1 All NLR (pt 4) 659; Onu Okafor v. The State (1976) 5 S.C. 13; R v. Shodipo 12 WACA 374; Alphonsus Oruche v. C.O.P. (1963) 1 All NLR 262, 266. Arisah & anr v. Police 12 WACA 297; Adisa v. A.G. Western Nigeria (1966) NMLR 144; Nwafor Okegbu v. The State (1979) 11 S.C. 1; Zenvinula & 2 others v. Rex 12 WACA 68; Sele v. Eyorokoromo & another v. The State (1979) 6-9 S.C. 3, 11; Queen v. Ogunremi (1961) All NLR 467.

[268] (1959) 4 FSC 70 73 – 74.

(c) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time.

(d) that the offence or offences of which the appellant was convicted or the consequences to the appellant or any other person of the conviction or acquittal of the appellant are not merely trivial.

(e) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it[269]

[269] Nworie v. A.G. Ogun State (2004) 4 FR p.159, @ 172;

Failure to Prove Beyond Reasonable Doubt

It is a common ground that in all criminal prosecution, it is the duty of the prosecution to prove his case beyond reasonable doubt. It is not essential to prove the case with absolute certainty but the ingredients of the offence charged must be proved as required by law and to the satisfaction of the Court. To proof beyond reasonable doubt is a prescription of the law.[270]

What constitute "proof beyond reasonable doubt"? Proof beyond reasonable doubt connotes that there is no doubt as to the accused's guilt[271]

It also connotes such proof as precludes every reasonable hypothesis except that which it tends to support. Certainly, it is not a proof beyond shadow of doubt[272]

The term or phrase "proof beyond reasonable doubt" stems out of a compelling presumption of innocence inherent in our adversary system of criminal justice. To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including the administration of justice[273]

[270] Section 138 – 142 of the Evidence Act.

[271] ILGPC Ltd Okunade (2005) 1 WRN p. 131 @ 143.

[272] Dimlong v. Dimlong & ors (1998) 2 NWLR (pt 538) 381; Oladele v. The Nigeria Army (2004) 36 WRN p.68 @ 77.

[273] Bakare v. The State (1987) 3 S.C. 1 @ 32.

To proof a charge beyond reasonable doubt does not depend on the number of witnesses called by the prosecution at the trial but on the quality of evidence so produced. Consequently if the evidence is strong against an accused person as to leave only a remote possibility in his favour which can be dismissed with the sentence; of course it is possible but not in the least probable, the case is proved beyond reasonable doubt. Therefore, certainty is an essential element of proof in criminal liability[274]

Proof beyond reasonable doubt is the policy of our law. The policy derives from the fact that human justice has its limitations. It is not given to human justice to see and know, as the great eternal knows, the thoughts and actions of all men. Human justice has to depend on evidence and inferences.

For example it is settled law that for the prosecution to discharge the burden of proof placed on it by law in a charge of causing death by dangerous driving under the provisions of Sections 4 and 5 (1) of the Federal Highway decree No. 4 1971, it must establish by evidence, the following ingredients of the offences:

(a) That the accused person's manner of driving was reckless or dangerous.

[274] Uyo v. A.G. Bendel State (1986) 1 NWLR (pt 17) p. 418.

(b) That the dangerous driving was the substantial cause of death of the deceased; and

(c) That the accident occurred on a Federal Highway.

All these ingredients in the above offence has to be proved beyond reasonable doubt and if this burden/onus is not discharged, it is hereby fatal to the prosecution's case.

What are the methods of proving guilt? Three methods to prove the guilt of an accused person are:-

(a) by confession;

(b) Circumstantial evidence;

(c) The evidence of eye-witnesses[275] Therefore, suspicion or speculation however, strong does not constitute proof of a criminal offence[276]

So, since the onus in a criminal offence is always on the prosecution to prove beyond reasonable doubt the guilt of the accused and failure so to do, will automatically lead to the discharged of the accused person[277]

It would also automatically entitle the accused to an acquittal of the charge against him[278]

[275] Emeka v. The State (2001) 7 NSCQR p. 582 @ 592 – 593; Igabele v. State (2006) 25 NSCQR p. 321; R.8.

[276] Nsofor v. State (2004) 20 NSCQR p. 74 @ 96-97.

[277] Onubogu v. State (1974) 9 S.C. 1; Stephen v. State (1986) 5 NWLR. (pt 46) 978.

[278] Kobari v. State (1989) 1 CLRN p.174 @ 179; Giremabe v. Bornu N. A. (1961) 1 All NLR 469; Omonuju v. The State (1976) 5 S.C. 1; Onyenankeya v. The State (1964) NMLR 34; Lori v. The State (1980) 8-11 S.C. 81

Failure to resolve "Doubt" in favour of the Accused

It should be remembered that the law requires the guilt of an accused person to be proved beyond reasonable doubt; and that if there is any lingering doubt, the accused person must be given the benefit of that doubt. If such benefit of doubt is not given when it should be given, the appellate Court can turn down the judgment of such Court below[279]

Since absolute certainty is impossible in any human adventure including the administration of criminal justice. Proof beyond reasonable doubt will therefore not admit of plausible and fanciful possibilities as to use this to defeat the end of justice. It merely admits of a high degree of cogency consistent and equally high degree of probability[280]

Therefore, under Nigerian Criminal Justice, since an accused has a fundamental right of presumption of innocence under the constitution the burden is on the prosecution to prove the guilt of an accused beyond reasonable doubt and any slightest doubt raised by the accused shall lead the Court to resolve the doubt in favour of the accused, which will then lead to his discharge and acquittal[281]

[279] Abeke Onafowokan v. State (2006) 2 I.C p. 25, @ 36.

[280] Bakare v. The State (1987) 1 NWLR (pt 52) 579 @ 587/588.

[281] Okoroji v. State (2004) 11 FR p.87; @ 113; Stephen v. State (1986) 5 NWLR (pt 46) p. 978; Alonge v. I.S.P. (1959) SCNLR 516; Okagbue v. C.O.P. (1965) NMLR 232; Obue v. State (1976) 2 S.C. 141; Aigbapion v. State (2000) 7 NWLR (pt 666) p.686.

Also, where there are contradiction in the evidence of the prosecution, and the contradictions go materially to the charge, the benefit of the doubt which will surely result from such material contradictions must be given to the accused person, in which case, he should be discharged[282]

Furthermore, in order to hold an accused criminally responsible, especially in murder cases, the chain of causation must not be broken. Once there is a broken link in the chain of causation, that broken link must be resolved in favour of the accused as it affects the *actus reus* of the offence, in other words, where the injury which caused the death is not the proximate, legal or direct cause of the death of the deceased, the benefit of doubt must be given to the accused. Where there is more than one possible cause of death, the benefit of doubt must be given to the accused because the available evidence in such a situation does not pin the accused down to the death of the deceased. This is because there is an intervening or supervening cause[283]

Therefore, failure to resolve such doubt in favour of the accused person where it exists will be considered at the appellate Court – **Abeke Onafowokan v. State (supra).**

[282] Ikemson v. Sate (1989) 1 CLRN p. 1@ 12; Onubogu v. The State (1974) 9 S.C. 1; Stephen v. The State (1986) 5 NWLR (pt 46) 978; R v. Sawyer 91937) 3 WACA 155; Ogbewe v. Inspector General of Police (1958) WRNLR 17.

[283] Aiguobarueghian v. State (2004) 17 NSCQR p. 442 @ 481 – 48; Oforlete v. The State (2000) 3 NSCQR p. 243 @ 263, 265.

Proper Venue

It is proper to know that parties can not consent or collude to vest Court of law with jurisdiction or wave constitutional provisions, therefore any prospective prosecutor should know exactly which Court should a particular charge/ information be laid. The issue here is whether the accused/ suspect should be prosecuted in the State High Court, Magistrate Court, Federal High Court or a Tribunal. This can be known from the appropriate law governing such offence.

For example, there are offences that can not be tried at the High Court though it is a Court of Co-ordinate/concurrent jurisdiction with the Federal High Court, but only the Federal High Court has an exclusive jurisdiction over such matters e.g. treason, treasonable felony and allied offences[284]

However, where the police/ State prosecutes an offence in wrong Court or Tribunal that matter is bound to be struck out as Court will lack jurisdiction to prosecute/entertain such matter[285]

The Court held in the case of **R v. Shodipo**[286] that unless the preliminary inquiry and trial upon the offence of fraudulent false account are conducted by a Magistrate of the district in which the offence was committed the proceedings are a nullity.

[284] Reginal v. Diyaolu (1955-56) W.R.N.L.R.30.
[285] Section 251(2) of the 1999 Constitution.
[286] (1948) 12 WACA 374

Uncertainty

Certainty is an essential and sacrosanct element of proof in criminal liability[287]

When a judgment is given by the trial Court on the basis of uncertainty such judgment will be reversed on appeal. In the case of **Egbe v. R**[288] a conviction was quashed because the record left the supreme Court uncertain as to the considerations which affected the Judge's mind when he came to weigh the effect of the evidence.

Also, the Court has declared that a conviction was bad because of uncertainty as to which of two entirely different possible sets of facts the Judge relied upon in convicting appellants[289]

Again, in the case of **Ejuren v. Commissioner of Police**[290] where at the trial, witnesses gave two conflicting versions of an essential fact and the Court did not make any specific finding on the fact, the Supreme Court, as an appellate Court can not choose.[291]

[287] Uyo v. A.G. Bendel State (1986) 1 NWLR (pt17) p.418; Millar v. State (2005) 16 WRN p.31 @35.
[288] (1950) 13WACA 105
[289] R v. Abia (1936) 3 WACA40
[290] (1961) All N.L.R 478
[291] R v. Godwin Anyiam (1961) All N.L.R p.46.

Failure to Call Vital and Material Witnesses

It is the law in criminal case that the prosecution is bound to call all material witnesses before the Court, even though they give inconsistent accounts/ testimonies in order that the whole of the facts may be before the Court and came to the conclusion that it did not alter the general rule of law whereby witnesses who support the case for prosecution are called by the prosecution, and witnesses who support the case for the defence are called by the defence. Therefore it is the duty of the prosecutor/ State to call all relevant witnesses[292] in discharging onus of proof (i.e. proof beyond reasonable doubt).

The prosecutor should usually place all witnesses whose name appeared on the back of the information in the witness box even if it does not propose to examine them and offer them as witnesses to the accused person[293]

Since it is not the prosecutors duty to resolve conflict of evidence from apparently credible witnesses: that is, the function of the Court at the trial. It is now settled that counsel for the prosecution has a discretion and need not call a host of witnesses – all he need do is to call sufficient number of witnesses to establish his case[294] He (the prosecution counsel)

[292] R. v. T.U. Essien (1938) 4 WACA 112

[293] R v. Chigeri (1937) 3 WACA201; R v. Kelfalla (1958) 5WACA 157 The Queen v. Suberu Balogun (1958) W.R.N.L.R.65.

[294] Samuel Adaje v. State (1979) 6-9 S.C.18 @ 28.

need not call even an eye- witness if he has a reasonable belief that such a witness would not speak the truth[295]

Therefore a conviction is liable to be quashed if a witness whose evidence must have been conclusive, vital and material one way or the other is not called[296]

In the case of **R v. Enema**[297] the Court held that failure by the crown to produce at the trial a material witness named by the accused person in the commitment proceedings as a witness whom he wished to call was held fatal to the conviction. Where the name of a person is not on the back of the information of the prosecution witness, the crown needs not call him as a witness. Even if the prosecutor accedes to the request of the defence to do so it is not illegal for the Judge to treat such evidence as evidence for the defence.

Conclusively, where the vital and material witness(es) are not called, the Court nevertheless has a duty to consider how the evidence of the witness not called would have affected the case for the prosecution. If indeed the witness was not in a position to give evidence at all, e.g. if he was unconscious, then the Court would still have to consider the evidence in favour of the accused[298]

[295] R v. Yeboah (1954) 14 WACA 484; R v. Twumasi – Ankra (1955) 14 WACA 673.
[296] R v. Kuree (1941) 7 WACA 175.
[297] (1941) 7 WACA 134
[298] The State v. Jerome (1980) 1 NCR. 228.

Substantial Contradiction or Inconsistencies in the Evidence of the Witness(es)

Literarily, the word "Contradiction" connotes saying the opposite of a something, challenge, counter, be at variance with, while the word inconsistency means incompatible; out of place, contrary; at variance; in opposition; in conflict etc.

From the above definitions, we can infer that those words can be used interchangeably. So concentration would be placed on the word contradiction in this discourse.

The word contradiction comes from two Latin words contra, which means opposite and dicere, which means to say. Therefore, contradiction means to speak or affirm the contrary. Hence in the law of evidence, a piece of evidence is contradictory to another when it asserts or affirms the opposite of what the other asserts and not necessarily when there are some minor discrepancies. In other words, contradiction between two pieces of evidence goes rather to the essentiality of something being or not being at the same time. Whereas minor discrepancies depend rather on the person's astuteness and capacity for observing meticulous details.

Therefore, it is the law firmly settled in a number of decided authorities[299] that it is the duty of a Court, to deal, consider and pronounce on all material issues properly before

[299] See The State v. Ajie (2000) 11NWLR (pt 679) 434; Bamaiyi v. State (2001) 8NWLR (pt 715) p.270 @ 285

it[300] The material issue or evidence in questions could be placed before the Court by the Counsel or witnesses in such case(s). Where there are contradictions in the evidence of a witness or witnesses, the trial judge, must make a finding relating to the contradictions. Though, an accused person telling lies is of no effect[301] but where the testimony of the prosecution witnesses are inconsistent, this goes down to the credibility of such witnesses. The character of witness for habitual veracity is an essential ingredient in his credibility. For it is said, that for a man who is capable of uttering a deliberate falsehood, is in most cases, capable of doing so under the solemn sanction of an oath. If, therefore, it appears that he has formally said or written the contrary of that which he has now sworn, his evidence should not have much weight with a Court and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility.

So, where there are contradictions in the evidence of a witness(es) and where the trial judge failed to make a finding in relation to the contradictions, it may vitiate a conviction **Atiji v. The State[302] – per Nasir, JSC (as he then was) Belgore JSC (as he then was).** There is no doubt and this is also settled, that where there are material discrepancies in the testimony of the prosecution witnesses, it is not possible to hold that the evidence for the prosecution, is overwhelming[303]

[300] Chief Okotie-Eboh v. Chief Manager & 2 ors (2004) 12 SCNJ 139 @ 161; (2004) 20 NSCQR 214.
[301] See Okeper v. The State (1971) 1 All NLR 105
[302] (1976) 2 S.C. 79 @ 83-94
[303] Opayemi v. The State (1985) 2 NWLR (pt 5) p. 101.

It is now settled, that where such variance, contradictions, or inconsistency appears or exists, the witness shall be treated as unreliable[304]

In a string of decided authorities it is now firmly established that contradictions, to be fatal, the prosecution's case must go to the substance of the case and not to be a minor nature. It is settled, that if every contradiction however trivial to the overwhelming evidence before the Court, will vitiate a trial, nearly all prosecutions will fail. That human faculty, may miss some vital details due to lapse of time and error in narration in order of sequence.

In the case of **Sele v. The State[305] per Belgore JSC (as he then was),** it was held that if the contradictions do not touch on a material point or substance of the case, it will not vitiate once the evidence is clear and it is believed or preferred by the trial Court. It is also settled that it is not in all cases where there are discrepancies or contradictions in the prosecution's case, that an accused person, will be entitled to an acquittal. That is only when the discrepancies or contradictions are on material point(s) in the prosecution's case, which creates some doubt, that the accused person is entitled to benefit therefrom[306] Such contradictions also on evidence

[304] Asuguo William v. The State (1975) 9-11 S.C. 139; Adere v. The State (1975) 9-11 S.C. 115; Stephen v. The State (1986) 5 NWLR (pt -) 975 @ 1000 Oladejo v. The State (1987) 3 NWLR (pt..) 419; @ 427-428.

[305] (1993) 1 SCNJ p.15 @ 22-23

[306] See Wankey v. The State (1993) 6 SCNJ 152 @ 161.

of witnesses for the prosecution to affect conviction, they must be sufficient to raise doubt as to the guilt of the accused[307]

In a criminal appeal, for the ground of appeal complaining of contradiction in the evidence of witnesses to be successful, the appellant must show not only the existence of those contradictions but must also show further that the trial judge did not advert to and consider the effects of those contradictions. The contradictions must also be shown to amount to substantial disparagement of the witness or witnesses concerned, making it dangerous or likely to result in a miscarriage of justice to rely on the evidence of the witness or witnesses.

In addition to the above, the appellant must equally assert that the inconsistency is material and that the trial judge failed to advert to the inconsistency in his judgment[308]

Thus, for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to the case, it must be fundamental to the main issues before the Court[309]

There is no doubt and this is also settled, that where two or more witnesses, testify in a Criminal prosecution, and the testimony of such witnesses, is contradictory and

[307] Ogoala v. State (1991) 2 NWLR (pt 175) 509 @ 525; Iko v. State (2005) 1 NCC p. 499 @ 509; Nwosis v. State (1976) 6 S.C. 109; Ejigbodero v. State (1978) 9 – 10 S.C. 81; Atano v. A.G. Bendel State (1988) 2 NWLR (pt 75) 201; Ayo Gabriel v. State (1989) 5 NWLR (pt 122) 457 @ 468 – 469.

[308] Ejoba v. State (1989) 1 CLRN p. 194 @ 203; Queen v. Abdullahi Isa (1961) 1 ALL NLR (pt 4) 668; Enahoro v. The Queen (1965) 1 ANLR 121 @ 149 – 150; Akinsule v. The State (1972) 5 S.C. @ 72; Eugene Ibe v. The State (1992) 6 SCNJ (pt 11) 172 @ 177.

[309] Effia v. The State (1999) 6 SCNJ 92 @ 98.

irreconcilable, it would be illogical to accept and believe the evidence of such witnesses[310]

Furthermore, where a witness has made a statement before trial which is inconsistent with the evidence he gives in Court, provided that no cogent reasons are given for such inconsistency, a trial judge should regard such evidence as unreliable[311] Where no explanation has been furnished for any inconsistencies in the evidence of witnesses called by the prosecution, it is not for the Court to pick and choose which witness to believe and which to disbelieve among such witnesses. It cannot accredit one witness and discredit the other in such circumstances[312]

Even where inconsistencies in the testimony of two prosecution witnesses can be explained. It is not the function of a trial Judge to provide the explanation[313]

The Court will then hold that the evidence of the prosecution fell short of the required standard of proof for a criminal case and the prosecution has thereby failed to establish his case against the accused person(s) beyond reasonable doubt. Where one witness called by the prosecution in a criminal case

[310] Onugbogu v. The State (1974) 9. S.C. 1 @ 20; (1974) 4 ECSLR 403; Nasumu v. The State (1979) 6 S.C. 153; @ 159; Nwosu . The State (1986) 2 NWLR (pr 35) pg 6 @ 8; Orepekan & 7 ors; In Re: Amadi & 2ors v. The State (1993) 11 SCNJ 68 @ 78.

[311] Williams v. State (1975) 5 ECSLR 576; Onubogu v. State (1974) 9 S.C. 1 at 18.

[312] Muka v. State (1976) 9-10 S.C. 305 @ 325.

[313] Onubogu v. State (1974) 9 S.C. 1.

contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation, such as showing that the witness is hostile, before it can ask the Court to reject his testimony and accept that of the other witness or witnesses[314]

[314] Onubogu v. State (1974) 9 S.C.1.

Where the Accused Persons are Separately Charged but Jointly Tried

It is trite that where accused persons are tried together some cannot be convicted before the others make their defence; the trial must persist as a joint trial to the end and there must be only one decision and that after hearing the entire case[315]

Therefore, where accused persons are separately charged, they cannot be tried together. If they are so tried, the joint trial would be a nullity **Arisah v. C.O.P.** [316] In this case the accused persons were arraigned on six counts charge of conspiracy and stealing items of diverse kinds valued =N=20,592.86 and also a sum of =N=30,707.09 belonging to the Hill-Top Industries (925) Limited. The 1st and 2nd accused persons were subsequently struck out of the information and proceedings continued against the 3rd accused alone. At the close of the prosecution's case and after submissions by defence counsel, the learned trial judge observed that if the trial had proceeded against the three accused person's jointly, there would have been no connection between the interests of the 1st and 2nd accused persons on the one hand and the interests of the 3rd accused on the other hand due to the manner in which they were separately charged. His Lordship Fawehinmi J. heavily relied on the case of **Arisah v. C.O.P.** [317] in discharging and acquitting the accused person.

[315] Obi v. C.O.P. (1950) 19 N.L.R. 79.
[316] 12 WACA 297
[317] (supra)

It must be noted that there is no such thing as a consolidation of cases in a criminal trial. Except in the case of an information, offence(s) separately committed cannot be tried together[318]

Whereas, it is not a rule of law that there should be separate trials where the defence of an accused person amounts to an attack on his co-accused, but that would have been a matter which the Court would have taken into consideration had the accused asked for a separate trial[319] Section 155 of the Criminal Procedure Act which entrenches this defence is a procedural policy of convenience for it is better to charge all accused persons in respects of counts against them (in circumstances which are envisaged and permissible under Section 15 of the Criminal Procedure Act), in one indictment and have a single trial rather than have separate indictments for a joint trial.

I beg to submit that the decision in the case of **Obi v. C.O.P**[320] has been amended by the decision of the Supreme Court in the case of **State v. Onyeukwu**[321] where his Lordship, **S. O. Uwaifo JSC** held that "...I think when there has been a joint trial of separate indictments without objection, *prima facie,*

[318] R v. Williams (1943) 9 WACA 204.

[319] Joseph Olayioye v. C.O.P. (1964) N.N.L.R. 7.

[320] (supra)

[321] (2004) 19 NSCQR p.231, @ 253-254

it is an irregularity not a nullity. Section 168 of the Criminal Procedure Act makes that conclusion inevitable and defensible in this country, so long as no miscarriage of justice has been shown to trial. After all, since joint trial is permitted by Section 155 of the CRIMINAL PROCEDURE ACT, joint trial of separate indictments raises only a technicality which does not border on jurisdiction. If it has been a jurisdictional issue, it would have been a legal contradiction to permit a waiver or acquiescence of its violation..."

From the above decision, it could be reliably inferred that for a joint trial of a separate indictment to nullify a conviction or declared the proceedings void the following ought to have been done:-

(1) There must have be an objection against such procedure before the Court below if not, eventually non-observance of it, would be a mere irregularity.

(2) Such joint trial of separate indictment must have occasioned a miscarriage of justice"

(3) The appellant must show how he has been adversely affected by the method adopted by the trial Court.

According to **I. C. Pats – Acholonu, JSC (as he then was) at p.266 – 268** said "from English procedural point of view, joint trials must be based on joint charge. It is trite law

that our criminal procedural law to a great extent mirrors what is obtainable in English Courts. Where such a joint trial of separate charges does not show a miscarriage of justice, prudence and judicial progressivism should affect the minds of the Court to be elastic in the consideration of the matter and I dare say a liberal attitude be shown to such issue under consideration"

Consolidation of indictments or information against accused with indictments or information against others, or of separate indictments or information against accused, cannot be objected to for the first time on appeal. Likewise, accused cannot complain on appeal that he was unduely prejudiced by being tried with a co-defendant, in the absence of a timely request for a severance and in the absence of a showing to the trial Court as to how he would be prejudiced by a joint trial, accused cannot complain on appeal of the denial by the trial Court of a severance. Even where a motion of severance was made, accused, if he intended to rely on the motion, should have called it to the attention of the trial Court before the trial started and asked the Court to rule on it. Conversely, where accused raised no objection thereto, and was unable to show wherein he was harmed thereby, he cannot complain of an order granting a severance as to a co-defendant[322]

[322] (culled from a sub-title of "Consolidated or Separate Trials" the authors of Vol. 24 of the 2nd Edition of Corpus Juris secundum).

On the other hand Section 168 of the Criminal Procedure Act states: "No judgment shall be stayed or reversed on the ground of any objection which if stated after the charge was read over to the accused or during the progress of the trial might have been amended by the Court"

Although in the case of **D.P.P. v. Crane**[323] it was held that no Court has the jurisdiction to try persons separately charged or under separate indictment jointly, it seems to me that with such a stand where there is no manifest injustice and where equally too neither the prosecution nor the accused raised an objection at the earliest opportunity. The Supreme Court should lower the tempo of such a hard stance and temporize the method adopted as a mere aberration in the procedural law and show more robust understanding in determining any complaint arising from there.

[323] (1921) 2 A.C. 321

Lack of Corroborative Evidence where Necessary

Corroboration in my understanding simply means "confirming or giving support to" either a person, statement or faith". The nature of evidence that would constitute corroborative evidence must be independent testimony which affects the accused by connecting or contending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirm in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is class of offences for which corroboration is required by statute.

It therefore follows, in my view, to ask what is the purpose of corroborative evidence? In **D.P.P. v. Hester**[324] Lord Morris said, "the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible, and

[324] (1972) 57 Cr. A. R. 212 @ 229

corroborative evidence will only fill its role if it itself is completely credible evidence".

The above statements put together would appear to mean that while corroborative evidence must be independent and capable of implicating the accused in relation to the offence charged it must be credible and must go to confirm and support that evidence which is sufficient, satisfactory and credible whether the case is one in which is required by statute or by rule of practice.

However, I now come to consider the class of Criminal cases in which corroboration is required to prove the guilt of the accused. It is common ground that in all cases where the law provides that corroboration is necessary, a conviction of an accused can only be valid when there is such corroborative evidence. That is the case where statutory corroboration is required. But there are other cases in which though there is no statutory requirement for corroboration, yet as a matter of practice, corroboration though not essential, is almost always required before conviction. The latter is mostly in cases of complaints in sexual offences, accomplices or where children give evidence on oath.

Any witness in any of these categories would conveniently be regarded as "suspect" witness and that is why the law requires that if any conviction is to be based on their

evidence, the judge must warn himself of the danger of convicting on the uncorroborated evidence of such witness – **Lord Diplock in D.P.P v. Hester**[325].

The danger sought to be obviated by the common law rule in each of these categories of witnesses is that the story told by the witness may be in-accurate for reasons not applicable to other competent witnesses; whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy as in the case of children and some complainants in cases of sexual offences. What is looked for under the common law rule is confirmation from other source that the "suspect witness" is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged.

Corroborative evidence is such evidence that goes to support or strengthen the assertions of the complainant. There is no statutory provision in this country that makes such corroboration mandatory. It has, however been considered expedient that, as a matter of practice, the Courts should be very slow to convict on the uncorroborated evidence of the complainant[326]

[325] (supra)

[326] Ibeakanma v. Queeen (1963) 2 SCNLR 191 at 194 – 195.

On the issue of the warning, it is settled that no particular form of words need be used by the Court but the judge must use simple and plain language that will, without doubt, convey that there is a danger in convicting on the complainant's evidence alone. The Court, bearing that warning well in mind must look at the particular facts of the case and if, having given full weight to the warning that it is dangerous to convict, should come to the conclusion that in the particular case the complainant is, without any doubt, speaking the truth, then the fact that there is no corroboration is discarded and the Court is entitled to convict the accused accordingly. Even where there is such a warning but matters are suggested by the trial Court as being corroborative of the relevant evidence which are not in fact so, the conviction in a proper case, may be quashed on appeal[327] It is long settled that a statement of a co-accused cannot be used as evidence against the fellow accused without any corroboration[328]

[327] R v. Philips 18 Cr. App. Rep. 115; R v. Whitehead (1927) 1 K.B. 99; 21 Cr. App Rep 23; R v. Henry Ross 18 Cr. App. Rep. 141; R v. Keeling 28 Cr. App. Rep. 121; Iko v. State (2005) 1 NCC p.499 @ 527.

[328] State v. Onyeukwu (2004) 19 NSCQR pg 231, @ 268.

Failure to Serve Hearing Notice

Under our adversary system of jurisprudence, to hear a case without one of the parties having been served with the necessary process except in proper *ex parte* proceedings would render a trial a nullity. Where service of a process is required, failure to serve it is a fundamental vice. Accordingly, service of a process as in criminal matter, process like information/ charge sheet, proof of evidence, hearing notice etc. in proceedings other than in *ex parte* proceedings is vital to the assumption of jurisdiction and also to the root of proper conception of recognized procedure in Criminal adjudication.

Therefore, where service of hearing notice or notice of trial is called for or a statutory provision, any proceedings conducted without due issuance of it is rendered null and void. Where proceedings are conducted when no notice of trial is served on a party who should have been necessarily served the whole proceedings are rendered void[329]

As the service of hearing notice is pertinent in civil matters so also it is essential in criminal matter and the effect of such is in *pari materia*.

Section 347 – 349 of the Criminal Procedure Act make the service of notice of trial compulsory for the Court.

[329] Auto Import Export v. Adeyabo (2003) 7 WRN pg 1: (2003) FWLR (pt 140) 1686; Nasco Mgt Serv. Ltd v. A. N. Amaku Transport Ltd (2003) 2 NWLR (pt 804) 290; Wema Bank (Nig.) Ltd v. Odulaja (2000) 3 WRN. (2003) 3 WRN pg 10; (2000) 7 NWLR (pt 663) 1:N.S.Co. Ltd v. Mojec Int'l Ltd (2005) 17 WRN pg 71 @ 88 – 89.

347: The registrar or his deputy, or any other person directed by the Court, shall endorse on, or annex to, every copy delivered to their Sheriff or proper officer, for service thereof, a notice of trial, which notice shall specify the particular sessions at which the party is to be tried on the said information and shall be in the following form, or as near thereto as may be—

A. B. Take notice that you will be tried on the information whereof, this is a true copy, at the sessions to be held at ..... on the ..... day of ....., 20..... 348: The registrar or other proper officer shall deliver, or cause to be delivered, to the Sheriff or proper officer serving the information, a copy thereof, with the notice of trial endorsed on the same or annexed thereto, and if there are more parties charged than one, then as many copies as there are parties, together with a similar notice for service on each witness bound to attend the trial.

349 (1): The Sheriff or other proper officer aforesaid shall, as soon as may be after having received a copy of the information and notice of trial, and three days at least before the day specified therein for trial, or within such lesser time as the Court may for good cause order, by himself or his deputy or other officer, deliver to the party charged the said copy and notice and explain to him the nature thereof and when the said party is not in

custody or shall have been admitted to bail and cannot readily be found he shall leave a copy of the said information and notice of trial with someone of his household for him at his dwelling – house, or with someone of his bail, for him, and if no such can be found, shall affix the said copy and notice to the outer or principal door of the dwelling – house of the party charged or of any of his bail.

Provided that nothing herein contained shall prevent any person in custody or awaiting trial at the opening of or during any sessions, from being tried thereafter, if he shall have been served with a copy of the information and notice of trial and not less than three days before the date on which he is to be tried.

Provided further that such last mentioned period of three days may be reduced to shorter period if such person shall express his assent thereto and no special objection be made thereto on the part of the State.

(2) The Sheriff or other proper officer shall in like manner deliver to each witness the said notice of trial".

The above section is designed for the protection of an accused person and must be complied with strictly; unless the High Court for good cause orders otherwise. An accused person shall receive at least three days notice of his trial; otherwise a conviction will be set aside as having resulted from a miscarriage of justice[330]

[330] Uzukwu v. The Queen (1963) 1 All N.L.R p. 277.

Undue delay may lead to setting aside a Conviction

Whether or not an undue delay may lead to the denial of justice in a particular case would depend on the nature of the case, that is, the complexity of the case; whether serious issues of the credibility of witnesses depending on their demeanor is involved and the actual length of the delay. The Court cannot however rule out a proper occasion in which long delay may lead to setting aside a conviction. That is what in common cliché is described as "justice delayed is justice denied". Ready instances are where the vital witnesses for the accused died in the course of the long delay or where the judge's impression of the witnesses becomes unreliable in crucial situation.

However, I do not think delay in concluding a trial is sufficient per se for setting the conviction based on it aside[331]

Also Section 294(1) of the 1999 Constitution of Nigeria required all Courts of record in Nigeria to deliver the judgments of the Court within ninety days of after taking address from the counsel in the case.

Where the Court fails/delays in meeting up, can this lead to the setting aside of such conviction? The application of this section is subject to a proof that the delay in delivering the judgment has occasioned miscarriage of justice. It is certain

[331] Sambo v. State (1989) 1 CLRN p.75 @ 81.

that the provision of the law recognizes a plausible cause for the delay and the trial will not only for the sake of a delay be rendered a nullity[332] It is only when no cogent reason for the delay is given that the delay amounts to a miscarriage of justice which renders the judgment a nullity[333] The consequence of the delay within the contemplation of Section 294 of the 1999 Constitution of the Federal Republic of Nigeria is whether it will occasion miscarriage of justice. It has been tritely held that for failure to deliver judgment within three months from the date of the conclusion of evidence and final addresses to amount to miscarriage of justice; it is not enough to merely show that the evidence adduced was not properly evaluated by the learned trial judge. The appellant must instead show that the facts were not properly remembered, summarized or perceived by the learned trial judge in the seemingly vexed judgment[334]

It is true, in civil matter or action, even in England, there are quite a lot which a Plaintiff can do to expedite the trial. Under various provisions of the rules, he can easily get the judge to make an order to set down the case for trial expeditiously. On a summons for directions which must be taken out within a certain period after the closing of pleadings, the court must fix a period of days within which the plaintiff is to set down the action for trial. There are also provisions for

[332] See Egwu v. Egwu (1995) 5 NWLR (pt 396 – 496) at 505.

[333] Agbaisi v. Elukorefe (1997) 4NWLR (pt 502) @ 650; Aro & ors v. Babayemi & ors (2003) 8 FR p.70 @ 83.

[334] Walter v. Skyll Nig. Ltd (2001) 3 NWLR (pr 101) pg 438 @ 474; Lawal & ors v. Senior Magistrate & anr (2003) 10 FR p. 160, @ 173.

short case list for action in the Queen's Bench Divisions not expected to take more than 2 hours summary judgement for actions where it is believe that the defendant has no defence to the action. Also, Judges more regularly make orders for accelerated hearings on the application for interlocutory injunctions. Commercial cases are also tried in the commercial list in Queen's Bench Division for reasons of expedition. These cases may be tried only, or mainly on documents, on points of claim or defence ordered in place of pleadings. The sum total of all these is that, cases and matters are disposed off more expeditiously and delays are a matter of months and can be avoided by a plaintiff.

In Nigeria, the situation is different. Lists are very long and the machinery for the disposal of cases is less expeditious; litigants are at the mercy of the courts, in that, except in cases of which accelerated hearing is granted for very special reasons, cases must take their turn in the case list. In the midst of such systematic causes of delay, the concept of inordinate delay for which the plaintiff can take the blame is different. Importantly, it cannot be looked at solely from the length of time since the case was filed. Nor can the court rightly put the whole blame on the plaintiff. Both the defendant, the court itself and the machinery for administration of justice all contribute to the delay in hearing the cases.

Failure to take Plea of the Accused Person

An accused person's plea is his formal response of "guilt or not guilty" to a criminal charge and it is part of the arraignment.

Section 215 – 218 Criminal Procedure Act and Section 187 – 189 of the Criminal Procedure Code entrench the accused person to make his/her plea. It is a mandatory aspect of our criminal litigation[335]

Consequently the omission to record the plea is fatal to the proceedings, those proceedings are null and void[336] The accused must plead himself[337] If a plea is made by counsel then the subsequent trial may be declared a nullity and a new trial ordered[338]

Where in a Criminal appeal, it is proved that a proper plea was not taken in the trial Court, such a case will be remitted back to the lower Court for a proper plea to be taken unless there is a special circumstance why the case should not be sent back. One of such special circumstance is where the appellant has served part of the term of imprisonment[339]

[335] Salami Olonje & ors v. I.G.P. (1955 – 56) W.R.N.L.R. 1;
[336] Nworie v. A. G. Ogun State (2004) 4 FR p. 159; @ 171 – 172.
[337] R v. Heyes (1951) 1 K.B. 29;
[338] R v. Boyle (1954) 2 Q. B. 292.
[339] Ndukwe v. C.O.P. (1975) 5 E.C.S.L.R.I; Attama v. C.O.P (1989) 1 CLRN p.274 @ 280.

Trial of the Accused Person in Absentia

Section 210 of the Criminal Procedure Act provides that "every accused person shall, subject to the provisions of Section 100 and subsection 2 of Section 223 of this Act be present in Court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable".

It is not part of our criminal jurisprudence to try a defendant/accused person in absentia. The above section of the Criminal Procedure Act requires the accused to be present throughout his trial except in two cases provided for in Section 100 and 223 of the Criminal Procedure Act. There are similar provisions in the state laws. The accused must be present in Court to hear all allegations of crime against him and the evidence in support. He (the accused) must be accorded with the opportunity to examine the prosecution witnesses and vice versa.

To try an accused person for an offence in his absence is novel under our substantive criminal and adjectival laws. The only known exceptions of trials of an accused in absentia are first where the appellant misconducts himself at the trial; second, under Section 100 of the said Act where the penalty to

be imposed on a person by the Magistrate does not exceed =N=100 or six months imprisonment or both fine and imprisonment and the accused personal attendance at hearing is dispensed with by the Court, and third, under Section 223 (1) and (2) of the Criminal Procedure Act where the accused is of unsound mind.

Therefore, section 210 of the Criminal Procedure Act being mandatory, a breach of it renders the trial a nullity.

In **Evorokoromo v. The State**[340] the Supreme Court recognized the circumstances under which a trial may be a nullity. Bello JSC (as he then was) delivering the judgment of the Court observed:

"It is pertinent, however, to point out that a trial, may be a nullity on one of the following grounds. Firstly, that the very foundation of the trial, that is the charge or information, may be null and void; secondly, the trial Court may have no jurisdiction to try the offence; and thirdly, the trial may be rendered a nullity because of some serious error or blunder committed by the Judge in the course of the trial".

Henceforth, trial of an accused person in absentia falls under the third category above. The trial of an accused person in absentia in the trial Court was a nullity. Because the learned trial judge ought to have taken judicial notice of it that in criminal

[340] (1979) 6-9 S.C. 3, @ 9; (1979) NSCC.61 @ 65

cases/trials an accused must be present throughout his trial under normal circumstances especially when evidence of witnesses is being taken. It has been held in many decided cases that even the absence of a counsel in Criminal trials should as far as possible be avoided talk less of the accused person[341]

In this type of case at hand, the consequential order the Court could make might be order of retrial where the original trial was a nullity or decline to order a retrial. The Supreme Court dealt exhaustively with this issue in **Eyorokoromo v. The State**[342] there Bello J.S.C. after a discussion on the historical development of the power of the appellate Court to order a retrial where the original trial was a nullity, and a review of past cases where Court had either declined to order a retrial or has ordered one; discerned the principles as follows:

(1) that a retrial may not generally be granted where there is no valid charge or information and

(2) that in the class of cases where, in the course of trial, the trial judge committed an error which rendered the trial null, retrial will be ordered unless there is merit in the case. Thereby, the principles laid down in **Yesufu Abodundu & ors v. The Queen**[343]

[341] Benjamin Shemfe v. C.O.P. (1962) NRNLR 87; Mary v. Kingston 32 Cr. App. R. 183; G. Hired Zor v. The King (1944) A. C. 149.

[342] (supra)

[343] 4 FSC 70; (1959) SCNLR 162.

Want of Evidence

Section 19 of the Criminal Procedure Act provides that "when any person has been taken into custody without a warrant, for an offence other than an offence punishable with death, the officer in charge of the Police Station or other place for the reception of arrested persons to which such person is brought shall, if after the inquiry is completed he is satisfied that there is no sufficient reason to believe that the person has committed any offence, forthwith release such person".

It has become the law that once there is no credible evidence linking the accused person with the offence charged against him and no prima facie case has been established justifying the proceedings of the criminal trial against him such accused person should be discharged[344] In the **Ikomi v. State**[345] the Court clearly said that no citizen should be put to the rigours of trial, in a criminal proceedings, unless the available evidence points, *prima facie*, to his complicity in the commission of a crime.

This is borne out of the fact that suspicion however well placed does not amount to *prima facie* evidence, Courts of law deal with evidence and not guesses[346]

That is, there must be a *prima facie* case established from the proof of evidence warranting the arraignment of the accused person for the offence charged in the first place.

[344] Ohwovoriole SAN v. FRN & ors (2003) 13 NSCQR pg 1 @ 15.
[345] (1986) 3 NWLR (pt 28) 340 @ 358
[346] Abacha v. The State (2002) 7 SCNJ 1 @ 35.

Misjoinder of Offences

This is governed by Section 156 of the Criminal Procedure Act which provides that "for every distinct offence with which any person is accused, there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in Sections 157 to 161".

The above provision indicates that an accused person should be tried separately or independent with exception of those offences under Sections 157 – 161 of the Criminal Procedure Act.

In **R v. Bekun**[347] the Court held that the violation of a statutory provision precluding the joinder of charges must, of itself vitiate a conviction and in **R v. Achre**[348] it was said that such a misjoinder would make a trial a nullity.

So, the provision above being a mandatory statutory provision cannot be jettisoned.

[347] (1941) 7 WACA 10
[348] (1947) 12 WACA 209

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About the book

In my view, this is a beautiful and commendable work. From the first to the last page, one could observe some evidence of assiduous research and industry. It is a book all must be proud to have in their libraries - private or public. I therefore commend the book as an important tool for researchers, professors, Legal Practitioners, Judges and all others who are interested in the development of criminal justice.

HON. JUSTICE L. O. ARASI (rtd)

One interesting aspect of the book is the choice of the chapters and the sub-topics which carefully combined the basics of the Principles of Criminal Law and Criminal Procedure as they relate to trials before the Magistrate Court, High Court and Federal High Court in Nigeria.

Also for the above reasons, the book presents a holistic picture of Criminal Law and Procedure for law Students and Practitioners of Law in such a way that the scenario of a Criminal Trial would be real in their imaginations.

HON. JUSTICE M. A. OWOADE (JCA)

LIFEGATE PUBLISHING CO LTD
5, Dalay way, Soka Area,
Lagos/Ibadan Expressway, Ibadan.
08036082370, 08053221401