SOME ASPECTS OF REFORM IN THE NIGERIAN LAW OF EVIDENCE

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Introduction

The most important aim of law is to regulate the society wherein it is made. Such law must therefore, in order to be efficacious, be relevant and represent the yearnings and aspirations of such a society. Where certain legal rules are too remote or too advanced for a particular society, the situation created will be like putting a square peg in a round hole.

The most unfortunate fact is that while the English Law of Evidence is frequently being reformed and fine-tuned by Judicial decisions and legislative activity, Nigerian Law of evidence has since it was enacted in 1945 remained largely untouched, despite its many problems. The result is that a number of English decisions[1] and enactments[2] on which our provisions are based have been repealed or reserved to resolve difficulties experienced in their operation, while our provisions have remained unchanged.

It is therefore our intention and purpose to highlight some areas of our law of evidence that need to be reformed. These areas are:-

1. Discriminatory Provisions of the Evidence Act against Polygamous Spouse

Section 2(1) of the Evidence Act defines husband and wife in terms of a monogamous marriage. The harm here is clearly brought out by the parochial and naive definition of "wife" and "husband" in the context of the English Prototype of matrimony as a contract between two adults as husband and wife to the exclusion of all others, for better for worse The question that arises is, whether there are no other forms of marriage, especially the polygamous one, with which we are all too familiar in this country? The deliberate neglect of polygamous marriage is unfortunate, and the position should be ratified. Moreover, this neglect of polygamous marriages has unwillingly been reflected in the rules governing the evidence of spouses under section 161 of the Evidence Act which provides, in essence, that if the marriage is a monogamous one then the spouse is neither competent nor compellable, save on the application of the defence, except in certain specified offences stated in section 160(i) of the same Act. In the case of polygamous marriages, the spouse is both competent and compellable. The question here again is why this distinction? The constitutional implication here is that the above provisions discriminate against Islam as a viable and popular offences in the country which recognises limited polygamy. Thus offending against section 35 which guarantees freedom of religion[3] and section 39(1)(b) and (2) which provide for freedom from discrimination on grounds of belonging to a particular community, ethnic group, place of origin, sex, religion and political belief.[4] By the constitutional provision, no disabilities to or restrictions can be placed on a Nigerian citizen.

As long as a spouse of a polygamous marriage is not given an equal opportunity with his colleague of a monogamous marriage in the evidence process which ultimately determines guilt or liability, then so much harm is done to the fair hearing of the case.[5]

It is in this respect that the submission is made that the provisions of the Evidence Act examined above in so far as they are in conflict or inconsistent with the provisions of the constitution are void ab initio.

It is clear from the provisions of section 161 and 2(1) Evidence Act and those of sections 162-163 and 175 of the same Act that they are designed to protect a spouse of a monogamous marriage as opposed to a spouse of a polygamous marriage. The undisputed fact is that Nigeria is predominantly a polygamous society. And if one aim of law is to reflect the social and moral life of a people with a view to promoting justice and fairplay, then the definitive clause of wife and husband under section 2(1) and the provisions of section 161 of the Evidence Act should be expunged or reworded provisions be introduced to accommodate polygamous marriage in Nigeria.

2. Confessions

In view of the numerous problems associated with the rules of admissibility of confessional statements under sections 27(2) and 28 of the Evidence Act — it is obvious that there is a great need for an overhaul of the existing provisions on the subject.[6]

First, the requirement that threats, inducements or promises under section 28 must bear reference to the charge[7] against the accused, is an unnecessary encumbrance to the defence of the accused and provides an avenue for the admission of involuntary confessions.[8] The requirement should certainly be deleted in the application of section 28. It is noteworthy that the Tanzanian Evidence Act,[9] which like ours originated from the Indian Evidence Act does not have this qualification, and is thus free from the burdensome technicality. And one of the best known statements of the rule of exclusion of confessional statements by Parker C.J.[10] also omits it. In fact, Lord Reid[11] took the view that the rule was illogical and unreasonable and capable of leaving the mischief untouched in a great majority of cases.

Second, it is unnecessary as a requirement of section 28 that the vitiating elements under it must proceed from a person in authority, as it does not make a difference to the state of mind of the accused person whether it is a policeman or an efficacious bystander who points a gun at his head. Thus to admit confessions induced by persons not in authority, irrespective of the severity of the threat or other form of duress brought to bear on the accused person will promote nothing but injustice to such accused persons. This dangerous requirement of section 28 has been doubted in some English decisions[12] and its abolition had in fact been recommended,[13] although the rule has since remained functional in very recent decisions.[14]

Finally, the above technical considerations or requirements of section 28 should be completely removed. To replace the provisions of sections 27 and 28, confessions should only be inadmissible if the vitiating element was of a sort likely, in the circumstances existing at the time, to render unreliable or untrustworthy any confession which might be made by the accused in consequence thereof.

This stand is based on the peculiarities of the Nigerian situation[15] and the general trend in many jurisdictions to allow the trustworthiness of a confession to determine its admissibility.[16] Far more consideration ought to be given to the fact that accused persons may be illiterate and completely ignorant of their rights, and they are usually put in crowded police cells and under less than desirable conditions.

3. Evidence of Accomplices

The provisions of section 177(1) of the Evidence Act appear clear enough, but for cases like Odofin Bello v. State [17] where the Supreme Court erroneously held that the evidence of an accomplice required corroboration even after the statutory warning. However the Supreme Court in subsequent decisions[18] has clearly stated that the correct interpretation of the subsection is that the evidence of the accomplice once believed by the court should only require the statutory warning (no corroboration is required) for a conviction to be based on it.

On the other hand subsection 2 of section 177 Evidence Act introduces a new category of witness namely, the co-accused with neither prior warning nor introduction; and without any attempt at clarification. The matter is compounded when it is realized that despite being a co-accused and being jointly tried for the offence the co-accused is still not be regarded as an accomplice. Not surprisingly the section has given rise to many conflicting interpretations.[19]

First, we wonder why evidence of an accomplice whose only distinguishing feature is that he is representing himself (but who in the process implicates a co-accused person) should be accepted without the warning required for his counterpart under section 177(1), let alone corroboration.

The rationale for the cautious treatment of the evidence of accomplices is the temptation of such persons to depart from the truth, to curry favour from the prosecution or to reduce their own involvement in the crime and amplify the involvement of others.[20] There is no doubt that the accomplice under section 177(2) is in such a position.

The evidence of the accomplice under section 177(2), it is submitted therefore, should be treated in the same way as that of the accomplice under section 177(1).

4. Corroboration for Evidence of Prosecutrix

Corroboration of prosecutrix evidence is not an express requirement of the law of rape in Nigeria. However, following the common law trend, our courts have evolved the rule of practice of warning themselves on the dangers of convicting upon the uncorroborated evidence of the prosecutrix.[21] Furthermore, as Aguda[22] observes, inspite of the express wordings of section 213 of the Evidence Act, the courts do not regard a complaint ad corroboration for the purpose of any rule of law or practice requiring it.

The difficulties inherent in providing corroboration in rape cases (and in general, all sexual offences) are obvious. More often than not, these offences take place in private and it is unlikely that there will be any other human witnesses apart from the parties themselves. Hence, it is necessary to corroborate the victim's testimony with circumstantial evidence such as her state of condition soon after the incident. However, it has often been shown that such evidence should not be over-emphasised, for there is sufficient evidence that the victim's first reaction to the assault is to clean up (even before reporting) as though such could help wipe off the memory or wipe off some of the perceived filth of the incident.[23]

If the victim's state of condition or physical injury provide corroboration, we need then, to ask, "how far do we expect the victim to go in resisting her assailant?" Should she risk physical injury so she can show the world that truly she did not consent. Once again, we will find that the reluctance shown in believing the prosecutrix's story is related to many of the misogynist views as well as myths on rape. It is thought that the woman who has succumbed to sexual delights outside the socially acceptable limits of marriage would sooner allege rape to absolve herself of guilt.

Here, we encounter a contradiction. Rape stands out as one of the offences with low reporting rate and this is not because the offence is rarely committed but it is more because the rape victim is also a stigmatised party,[24] and one wonders how it can be said that she would be only too keen to allege rape.[25] It is appropriate that the rule of practice requiring corroboration be abandoned. It is doubtful that the accused person is going to be more jeopardised after such dispensing of the rule, any more than he would in defending himself against charges of other offences. If we believe that rape is as heinous as we often suggest, women should be encouraged to report these offences against them in order to help the law catch up with its perpetrators and protect society.

As we have seen the offence of rape is founded in the presence or absence of consent to sexual intercourse. Somehow it has been argued that inextricably tied to this issue of whether there was consent or not to the act complained of is the sexual history of the victim. Strange this may be but the view has received support for so long as section 210 of the Evidence Act allows evidence to be given of previous sexual dealings of the prosecutrix with other persons as well as the accused. One wonders how the fact that the prosecutrix gave consent to having sex with the accused on a previous occasion has any relevance to or how it can help determine whether she gave consent on the alleged occasion.

If the prosecutrix has had the hard task of showing absence of consent by giving evidence of the circumstances, it is only fair and proper that the accused should rely also on evidence of circumstance that prevailed at the time of the act without recourse to extraneous circumstances.

It is here reiterated that the right of the woman to determine her sexual experiences should remain solely hers and should not be used as indicative of her truthfulness or general willingness to consent. Consent should relate to the actual offence alleged and on trial. Worst of all, the same section of the Evidence Act allows that evidence be given that the prosecutrix is of general immoral character, it being considered that such woman would most likely have consented. If she is likely to have consented, one wonders why she is also likely to lie about consent later. If she is commonly known to be "sexually loose" than she has nothing to gain (worse still when the law does not yet recognise any compensation for rape victims.) On the contrary it would seem more easy to contend that a person of "good reputation" might be more likely to lie, for, if consent be shown, reputation is lost.[26]

Anyhow, why should the fact that a person has chosen to be a prostitute entitle her to less legal protection and cause her to have her character impugned. To be a prostitute does not mean one is a liar.[27] May the prostitute not be entitled to the right to choose with whom to engage even in her acts of sexual prostitution?[28] The solution here is not to prefer the British[29] half-way-house measure of allowing section 210 of the Evidence Act - type of evidence to be given only with leave of the trial judge. Such provision should be done away with absolutely and is not an impossibility as efforts in other jurisdictions have proven the success of rape cases even disallowing such evidence.

5. Corroboration for Evidence of Children in Sexual Offences

Section 178(5) of the Evidence Act requires corroboration for the sworn evidence of a child-victim or complainant in a charge of defilement (or any of the sexual offences listed in section 178(5). We have examined indepth the consequences of the law or practice of requiring corroboration for sexual offences when we considered above evidence of prosecutrix. The same argument could be extended to this area to call for an abrogation of section 178(5). Where this is done the problem that arose in the case of State v. Osanyade[30] namely, one of the "defective" pieces of evidence - each requiring some superior piece of evidence to improve its lot[31] would not have arisen. In the above case, a child-complainant in a charge of defilement had given sworn evidence against the accused. Her sister (also a child) who saw her being defiled gave unsworn evidence. The sworn evidence of the victim needed corroboration not only as a matter of judicial practice but also as a matter of law the offence being a section 178(5) type. Such a piece of evidence on its own is of no value for purposes of convicting the accused. The unsworn evidence of her sister on the other hand also require corroboration as a matter of law under section 182(3) of the Evidence Act. thus her own evidence to could not stand on its own for purposes of conviction. Therefore the situation was one of two defective pieces of evidence. Accordingly, the court held that evidence which requires to be corroborated cannot be corroborated by another evidence which also requires corroboration.

6. Treatment of the Sworn and the Unsworn Evidence of a child

The Evidence Act makes provision for corroboration of evidence of children in section 182.

Unfortunately, the child being the focus here has not been defined anywhere in the Evidence Act. It can be safely said that in the context of the Evidence Act, the circumstances of the birth of the child, in the sense of its being legitimate, legitimated or adopted are irrelevant; the main consideration being the time or to be precise, the date of its birth to determine if it is a child in the context of the Evidence Act. Therefore it becomes necessary to examine other laws and decided which, if any of these other laws could be of assistance.[32] For example, the Children and Young Persons Laws of Ondo State[33] defines a child as a person under the age of fourteen years, whilst the Children and Young Persons Laws of Northern Nigeria[34] defines a child as a person who has not yet attained the age of fourteen years. On the other hand, the Penal Code Law[35] defines a child as a person under the age of twelve years. It is submitted that none of the above state Laws could be resorted to in providing the definition for the obvious reason that "evidence" is now on the constitutional exclusive legislative list. The same argument would still apply even in proceedings as regards residual matters, if there is need to define a "chid" for the purpose of determining its competency to testify or for any purpose under the law of evidence. It is however submitted that it will provide for consistency if the definition of a "child" contain in section 2 of the Children and Young Persons Act[36] as a person under the age of fourteen years is adopted to the exclusion of any other cognate legislation. The Act being a federal enactment dealing with children and young persons, the approach would appear to be unquestionable constitutionally, at least. Moreover, it would seem not objectionable to resort to a cognate legislation where there is a gap in a particular statute.

Having dealt with the definition of a child for the purpose of evidence, we now examine the rules on the treatment to be given to evidence of children in order to ensure that they are as clear and comprehensive as possible.

By virtue of section 182 of the Evidence Act, the evidence of a child i.e. a person under the age of fourteen years — is admissible even though not on oath if the child understands the duty of speaking the truth, possesses sufficient intelligence to justify the reception of its evidence, and the evidence is corroborated by some material evidence in support thereof.

Unfortunately, section 182 of the Act only makes provisions for the treatment of unsworn evidence, and nothing is said about the treatment to be given to the sworn evidence of a child and also whether such sworn evidence can satisfy the requirement of "some material evidence" in order to corroborate the unsworn evidence of another child.

If a child gives its evidence on oath the law does not require corroboration but by judicial practice the court looks for corroboration.[37] Recently, the Supreme Court of Nigeria held that as a matter of judicial practice, it is desirable and not mandatory to warn of the danger of convicting an accused on the sworn evidence of a child without corroboration although a failure to do so will not necessarily result in an acquittal if the court is satisfied that there has been no miscarriage of justice.[39]

It is suggested that it would be in the interest of justice if the requirement of warning as to the danger of convicting is made obligatory rather than directory as suggested by the Supreme Court in Shazali v. The State.[40] Afterall the purpose of corroboration is not only to show that the story of the child witness is true but also to convince the tribunal that it is reasonably safe to act upon it. Therefore no precaution is too much in a criminal proceeding.

Until the decision of the House of Lords in D.P.P. v. Hester,[41] the view was taken that where the evidence of a child requires corroboration, it cannot be corroborated by the evidence of another child whether sworn or unsworn evidence which in turn requires corroboration.[42] However, in D.P.P. v. Hester,[43] the House of Lords, held that there was no reason why the unsworn evidence of a child cannot be corroborated by the sworn evidence of another child since what is required by section 38(2) equivalent to section 182(3) Evidence Act is that the unsworn evidence must be corroborated "by some other material evidence in support thereof". This means that where the sworn evidence of a child is admitted otherwise than by virtue of section 182(1) of our Evidence Act it could therefore corroborate the unsworn evidence of another child.

Further, the House held that it logically follows that mutual corroboration is possible in such a situation.

It is conceded that the reasoning of the court in Hester's case was commendable - and should be recommended to Nigerian courts. Nevertheless we are unable to agree that the principle of mutual corroboration enunciated therein can be imported into Nigerian Law via section 5(a) Evidence Act. This is because, all that the House of Lords did in Hester's case was to interpret section 38(2) of the English Children and Young Persons Act of 1933 which is exactly the same as our section 182(3). To say that our Evidence is silent on the issue cannot therefore with respect[44] be correct. The Act is not silent, the provisions are merely waiting to be properly interpreted. It is therefore suggested that the courts in Nigeria may wish to interpret section 182(3) of the Evidence Act in a way that will reflect our idiosyncracies and level of education.

Furthermore, the House of Lords, held in D.P.P. v. Kilbourne[45] that the sworn evidence of another child could corroborate the sworn evidence of another child since both evidence are received otherwise than by virtue of section 38(1) of the English Act of 1933 - identical with our section 182(1).

In Okoyomon v. The State[46] the Nigerian Supreme Court had adopted the decisions of the House of Lords in those two cases even though the issue in Okoyomon's case was not whether mutual corroborations were possible but whether the trial court erred in not carrying out the preliminary test to determine the competence of the child/witness. Rather than deal with this problem, the court held that the evidence of the child/witness had been corroborated.

In concluding this part we therefore propose that the position under Nigerian Law should be clearly articulated as suggested below namely:- That sworn evidence can corroborate sworn evidence; That unsworn evidence cannot corroborate unsworn evidence; and that sworn evidence can corroborate unsworn evidence (and vice versa) where the offence is not one of those listed under section 178(5) and does not otherwise require corroboration as a matter of law: and that unsworn evidence cannot corroborate sworn evidence (and vice versa) where the offence is one of those listed under section 178(5) or requires corroboration as a matter of law.

7. Burden of Proof in Criminal Cases

Generally, the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution under section 137(2) of the Evidence Act, as every man is presumed to be innocent under section 33(5) of the 1979 Nigerian Constitution, until the contrary is proved. That onus of proving the guilt beyond reasonable doubt under section 137(1) of the Evidence Act never changes; it always rests on the prosecution.47 If the prosecution fails to prove the offences as charged the accused should be discharged and acquitted even without a word of defence from him.[48] The accused has the right to remain silent, even where his silence is clearly inconsistent with his innocence. Although the court is entitled to comment on his silence, the court cannot however infer guilt from his silence.

The foregoing are some of the protections afforded accused persons charged with offences under the accusatorial system of administration of Criminal Justice. Little wonder that a call was made to Commonwealth African Countries on the need to examine the suitability or otherwise of the presumption of innocence and burden of proof in criminal cases, in the light of the prevailing socio-economic circumstances of these countries.

The provision of section 6(3) of Decree No. 3 of 1984, indirectly answered the call by providing that: "the onus of providing at any trial that there was no enrichment contrary to the provisions of section one of this Decree shall lie upon the public officer or the person concerned."

The provision of the above Decree, unlike the accusatorial system, aims at making the trial of persons charged under the Decree inquisitorial, thus avoiding the over-protection afforded accused persons under the accusatorial system. It is therefore not surprising that the provisions of Decree No. 3 of 1984 and its likes, which approve the inquisitorial approach have been criticised as violating the cardinal principles of criminal law and justice, namely: that it is the duty of the prosecution to establish the guilt of accused persons beyond reasonable doubt.

A nation plagued by official corruption, white-collar crimes, abuse of office, inflated contracts, embezzlement of public funds, large scale banking and insurance frauds, illegal currency manipulations and smuggling, deserves a more result oriented legislation which seeks to combat the commission of these offences and ensure the economic survival of the nation. It is therefore submitted that, the provision of the Decree treated above, which puts the burden of proving non-commission of offences on accused persons is suitable for us, and should be seen as reflecting the prevailing socio-economic realities of the nation.[49]

It is our view that for certain economic offences especially those involving political office holders, and public officers - the burden of proof of innocence should be placed on the accused persons. This is necessary in order to deter other potential offenders and inculcate a sense of accountability in public and political office holders. If the provisions of section 137 of the Evidence Act are strictly adhered to in the premise, it will undoubtedly confer undue protection on offenders and expose the administration of Criminal Justice to ridicule in cases involving white-collar and economic crimes or corrupt practices by public officers and political office holders. Experience has equally shown that the investigative machinery of the law enforcement can hardly detect the highly sophisticated mode employed by offenders in committing and concealing these offences. Even where the offences are detected, offenders succeeded in regarding their freedom via bribery and other corrupt practices.

8. Major Pitfall and Lack of Clarity of Several Clauses in Section 90

In need of reform are several clauses in section 90 of the Evidence Act. In particular the requirements under section 90(1)(a)(ii). This aspect of the section has been a cause for considerable confusion. The section envisages a situation where the maker of the document is not the originator of the information but has a duty to record the sort of information which the originator supplies him:- Crucial to the satisfaction of requirement of this subsection is that "information must have been supplied to the maker of the document". The confusion that may result in the section due to its lack of clarity and the problem of who the "maker" of the document is was demonstrated in the Nigerian case of Martins v. Armals Transport.[50] In this case, an action for negligence was filed resulting from a collision. One of the plaintiff's witnesses was a policeman who sought to show the point of impact of the colliding vehicles, as pointed out to him by eye-witnesses, on sketch of the accident drawn by him. The court held that the plan could not be admitted - as the point of impact was not within the personal knowledge of the policeman - (section 90(1)(a)(ii)).

Further, the court took the view that if the plaintiff had shown that the eye-witnesses who gave the information to the policeman could come within the exceptions in section 90(1)(b) which provides for situations where the maker need not be called as a witness e.g., where he is dead, unfit by reason of his mental or bodily condition, beyond the seas, then the plan would have been admissible.

The court was obviously right as far as the fact that the document could not be admissible under section 90(1)(a)(i) was concerned. However the court could have considered the evidence under section 90(1)(a)(ii) - since this was a case where "information was supplied" by persons who had personal knowledge. The alternative approach which the court took - i.e. suggesting that the suppliers of the information (eye-witnesses) could have been shown to come within the exceptions in section 90)1)(b), was definitely erroneous. This is because the exceptions only avail the maker of the document (in this case the policeman) who is absent from court, not those who supplied him the information.

Similarly, in Barkway v. Southwales transport[51] the court ran into difficulty over the question whether a transcript made by a court reporter in the course of court proceedings was admissible under the section. The English Court of Appeal held, distinguishing Edmonds v. Edmonds[52] that the evidence was not admissible as information given in court by the witness could not be said to be "information supplied to" the reporter.

Lord Asquith then delivered his oft-quoted dictum "if a man dictates a letter giving information to the person to whom he is writing: it is an abuse of language to say he is engaged in supplying information to his shorthand typist".

Cowen and carter53 commenting on this decision, rightly submitted that it unduly narrowed the scope of the section. While conceding that there was a difference between supplying information to a commissioner in Edmond's s case and supplying it to a court reporter, the learned writers argued that "it would have involved little strain on the language of the subsection if the reporter had been treated as a servant and part of the machinery of the court, so that information supplied to him was regarded as information supplied to the court".

It is submitted that the major pitfall in the subsection is the fact that it does not contemplate mechanical intermediaries e.g., court reporters; secretaries, between the supplier of information and the maker of the document. It is this lapse that accounts for the inconsistency in judicial interpretations of the subsection.

It is suggested that to avoid these problems, adequate provisions should be made to accommodate the roles of mechanical intermediaries e.g., typists, court reporters, secretaries etc. While emphasising the point that it is the person who ultimately takes responsibility for the record, to whom the courts should look in finding the maker of the document.

Another problematic aspect of section 90(1)(a)(ii) of the Act is the meaning of the expression "continuous record". The case most frequently cited in explaining the provisions of this subsection is Ioanu v. Dematriou[54] - which seems to have merely rejected the document in question in the case as not being a continuous record without any clear reasons stated. The court merely offered that, the mere existence of a file containing one or more documents of a similar nature dealing with the same or kindred matter does not necessarily make the contents of the file a continuous record.[55]

However, it may be argued that implicit in the above dictum is the suggestion that at least one of the characteristics of a continuous record or a part of a continuous record is that such a document should be contained with or contain similar or kindred matters.

Further it has been suggested that a continuous record should be one whose contents are written as a matter of routine by the maker[56] the fact that they are recorded routinely is an important consideration on the question of their reliability.

If these are the characteristics of the continuous record, and if indeed the rationale for insisting on "continuous records" is to ensure reliability of the document - then it is submitted that this can be achieved by simply requiring that the "record" be made by a person who has a duty to do so. The qualification "continuous" can only serve to further complicate the already loaded requirements of the subsection. Hence it should be dropped. Not surprisingly the English Evidence Act[57] of 1968 which replaced the 1938 Act dropped this qualification and the section now merely says "record".

Commenting on the expression "record" in the Civil Evidence Act Cross[58] says:- "that although there is no definition of record in the Act, all that is required is that there should be a document containing information supplied to its maker directly or indirectly by one or more persons".

The use of the word "record" thus considerably reduces the difficulty of interpreting and applying the subsection.

whether the scope of section 90 of the Evidence Act should be broadened to cover criminal cases is another matter worth considering. In other words is this documentary exception to the hearsay rule safe for use in criminal trials?

It is typical of the great reluctance to tamper with rules of hearsay in criminal cases that the documentary exception to the hearsay rule was first tested in civil cases. Lord Maughan[59] admits that the reason why the 1938 Act was confined to civil cases was to forestall opposition by some ultra-conservative lawyers to its extension to criminal trials.[60]

The lack of opportunity for cross-examination is a more cogent reservation about the limitation; but it is true that the section have thrown elaborate precautions around the admission of hearsay evidence, and availability for cross-examination is therefore the rule rather than the exception.[61] Further, since trial by jury is no longer in operation in Nigeria, there is no fear of juries being misled by unreliable evidence.

It is therefore submitted that the extension of section 90 to cover criminal cases is overdue.[62] The English Criminal Evidence Act of 1965 was a step in that direction, and since the Act was enacted there has been little to indicate that its decision to introduce the legislation was regretted.

9. **Definition of "Public Document"**

The word "Public" could be understood to mean an "act" or "acts" done by public officers or simply a fact which is open to members of the public.[63]

Wigmore[64] had in fact complained about the ambiguity of the word and warned that, "the principle may result in different rules according to the sense in which the word "public" is interpreted.

A true definition of "Public document" under Nigerian Law must therefore unravel the sense in which the legislature intended the public to be understood in the Evidence Act.

The provisions of section 108 perhaps indicate the direction of the act on this issue. "The acts or record of the acts of the sovereign, etc...", no mention whatsoever is made of the right of inspection. The "official" nature of such documents seems to be the primary focus.

Section 110 which mentions the right of inspection appears to be concerned not with stating a requirement or characteristic of public documents but the procedure for obtaining a certified true copy of a public document by anyone who has a right to inspect the document.

Section 112 on the other hand readily buttresses the suspicion that "public" in the Nigerian Evidence Act is to mean "official" as opposed to "open to public inspection". The documents listed in section 112 are documents of an "official" kind - i.e. emanating from or by the authority of government functionaires; public officers; and the legislature.

It is therefore submitted that under Nigerian Law the expression public document should be more accurately classified as "official document" to avoid the misconception arising from the use of the word public' Also the requirement that a document to be regarded as a public document must be open to public inspection is not a valid feature of our law. In other words documents under Nigerian Law should not be required to satisfy the tests laid down at common law in order to be regarded as public documents.

10. Section 5(a) Evidence Act

The provision of section 5(a) is one of the clumsily worded in the Act. The section provides that: "Nothing in this Act shall prejudice the admissibility of any Evidence which would apart from the provisions of the Act be admissible....".

The correct interpretation of this section has generated much controversy amongst learned writers[65] on Nigerian Law of Evidence. One of the disputed issue is whether common law rules of Evidence can be imported once the Nigerian Evidence Act is silent. The question of course is, when can the Act be said to be silent? Is it silent only when there are no provisions whatsoever on a particular subject or can the Act be said to be silent when there are provisions on a subject matter but those provisions do not cover a particular feature or issue on that subject? The Supreme Court in R. v. Itule[66] appeared to have adopted this latter meaning of 'silence' when despite six separate provisions on admissibility of confessions, the Supreme Court still arrived at the conclusion that the Evidence Act was silent and thus resorted to the common law.

Similarly, Professor Adesanya advocated[67] using section 5(a) to import the rule in D.P.P. v. Hester on corroboration of Evidence of children despite the fact that the decision of the House of Lords in that case was merely based on the interpretation of a provision which is identical to our section 182(3). The learned writer premises his contention inter alia on the fact that the case of Hester states an inclusionary principle and inclusionary common law rules are admissible by virtue of section 5(a) when the Evidence Act is silent on such rules. With due respect to say that our Evidence Act is silent on the issue cannot be correct. The Evidence Act is not silent, the provisions of section 182 are merely waiting to be properly interpreted. We are therefore unable to agree that the principle of mutual corroboration enunciated in Hester's case can be imported into Nigerian Law via section 5(a).

Perhaps the only likely implication of the section in which there is no dispute is that it can be used to bring in rules of Evidence contained in other local statutes.

From the foregoing, there is little doubt that this section is ripe for review. The section promotes frequent and unnecessary resort to the common law, even where the Evidence Act has provisions which cover the same point.[68] Besides, other jurisdictions, notably India, Kenya and

Tanzania which operate similar Evidence Acts[69] have managed to do without this provision.

It is suggested that section 5(a) ought to be made clearer in its implications. There is nothing wrong with the section stating clearly that rules of Evidence in any other local statute as well as common law rules of Evidence in any other local statute as well as common law rules of Evidence are admissible where the Evidence Act has no provisions whatsoever on the particular subject matter.

11. Scope of the Provisions of Sections 7,8,10 and 12.

The sections are so widely stated and so all embracing that overlapping and inconsistencies occur frequently. For example, section 7 provides that:-

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

Section 10 also provides that:-

> "Facts necessary to explain or introduces a fact in issue or relevant fact or which support or rebut an inference suggested by a fact in issue or relevant fact; or which establish the identity of any thing or person whose identity is relevant or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose".

A careful reading of both sections will show that any fact admitted under section 7 will almost invariably be admissible under section 10. A fact which is relevant only because it is so connected with the fact in issue as to form part of the same transaction will of course be admissible as a fact which 'Explains' (section 10) the fact in issue or one which supports or 'rebuts' an inference suggested by a fact in issue.

This view is buttressed by the fact that section 7 does not expect such facts to occur simultaneously with the facts in issue, even though it requires that the facts form part of the same transaction. This appears to be the import of section 10. Not surprisingly the Court of Appeal in Atanda v. State [70] applied section 10 as though it were the equivalent of Res Gestae under the Common Law - despite the fact that all textwriters on Nigerian Law of evidence regard section 7 as the equivalent of the common law doctrine.[71]

Section 8 also appears to cover the scope of section 7 of the Act[72] and may, like section 10 even go beyond section 7. Even where facts cannot be admissible as being evidence of occasion, cause or effect they can hardly escape the omnibus clause "state of things" under section 8. An even more interesting observation is that section 10 may also, if liberally interpreted completely subsume section 8. Surely facts which are the "occasion, cause" the opportunity for the occurrence of the fact in issue (section 8), are also admissible as facts which may "explain" (if not introduce) the fact in issue.

Not only will section 10 conveniently admit all facts admissible under section 8, the section will in addition still make admissible evidence of Time, Place; relation of parties by whom any such fact was transacted etc.

Section 12 on the other hand appears to be saying no more than that facts will be considered relevant if they are consistent or inconsistent with the existence or non-existence of the fact in issue. This in our view is almost identical with the previous of section 10 which make admissible "facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue.

It is therefore submitted that from the foregoing the scope of the provisions of section 7, 8 and 12 have already been covered by section 10 and that section 10 can therefore conveniently replace them.

12. **Amendment of Section 68(4)**

Section 68(4) of the Evidence Act provides that:-

> "Whenever evidence of bad character is relevant, evidence of previous conviction is also relevant.

Since the subsection does not restrict admissible previous convictions to those similar to the charge with which the accused is faced, it appears that the section supports the R. v. Winfield[73] position, according to which the accused's character is indivisible with the result that a witness called to speak to the chastity of someone charged with an indecent assault upon a woman may be questioned about the accused's previous convictions for stealing. In our opinion such a reasoning is contrary to common sense and most unfair to the accused. In most cases such evidence lacks any probative value and worse still carries with it a high risk of prejudice.

It is our view that previous convictions should be admissible in rebuttal; but it, is essential to get rid of the effect of the decision in R. v. Winfield.

We therefore suggest an amended provision worded thus:-

> "Whenever evidence of bad character is relevant, evidence of provisions conviction will also be relevant provided such previous conviction have a high

probative value".

nclusion

[aving concerned ourselves with making a brief statement of the sting law and offered some suggestions for the course of its future velopment, it is our hope that this write-up will make our Law of idence a far worthier instrument of justice than it is.

NOTES AND REFERENCES

Section 219 of the Evidence Act is based on the House of Lords decision in Conway v. Rimmer (1968) 1 A.E.LR.878. This decision was overruled by the House of Lords in Duncan v. Camel Laird (1942) A.C. 624.

Section 159 of the Evidence Act is based on section 1 of the Criminal Evidence Act 1898 of England - section 90 of the Evidence Act is based on section 1 of the English Evidence Act, 1938.

Section 35 of the 1979 Nigerian Constitution.

Of the same Nigerian Constitution, 1979.

Section 33 of the 1979 Nigerian Constitution provides for right to fair hearing.

This suggestion is based on the problems first, with regards to other forms of duress (e.g., the application of physical violence, torture, etc.) and how they can be accommodated; second, with regards to the cumulative nature of the elements of section 28. All the elements of the section must be present in order to vitiate a confession - See R. v. Ebong (1947)12 WACA 1. The problem is compounded by the fact that some of these elements simply defy precise definition. Sarkar on Evidence at p. 221 writing on the Indian Evidence Act of 1872 on which ours is largely based, laments the impossibility of laying down any rules as to. what constitutes inducement, threat or promise, and concludes that the admissibility or rejection of a confession rests solely on the discretion of the Judge. See the conflicting decisions in R. v. Thompson (1893) 2 Q.B.12. Furthermore, the word voluntary used in section 27(2) has not been defined in the Evidence Act.

Why should these elements need to bear reference to the charge? and when can these elements be said to bear reference to the charge?

See R. v. Joyce (1957) Cr. App. R.19; also see R.v. Middleton (1974) Q.B.191. In the Nigerian cases of Queen v. Ajia (1960) W.N.L.R. 196 at 198, Charles, J., described the rule as a "nineteenth century hersay" and proceeded to demonstrate the dangerous fallacy in the application of that qualification - ibid at p. 199.

Section 29 Tanzania Act is the equivalent of our section 28.

In Ibrahim v. King (1914) A.C. 599.

In Customs and Excise v. Harz (1967)1 A.E.LR. 177.

See Winn, L.J., in R. v. Richards (1967)5 1 Cr. Ap. R.266 at 269; R.v. Northern (1968) 52 Cr. Ap. R.97 at 108; and Dockinanan v.R. (1968)2 A.E.L.R.346- Viscount Dilhorne.

See Aremu, "Voluntariness of confession" in, Nigerian Law Journal, (1977)-80 p. 33.

R. v. Iseguilla (1975) 1 A.E.L.R.77: R. v. Rennie (182)1 A.E.LR. 385.

For instance, in R. v. Ebong (1947)12 WACA. 139 the court overlooked the subjective nature of fear and in particular the fear of juju by the illiterate and superstitious villager, and proceeded on the premise that the purport of the requirement of section 28 is to regard threats of a metaphysical nature as not capable of vitiating a confession. The fact remains that the court was unable to come to terms with the villager's fear of the supernatural power.

The Law Reform Commission of Canada's Report on Evidence (1975)15-16; The Law Reform Commission of Canada - Report on Evidence (No. 2 of 1975) 69, which closely resembles section 149 of the Victorian Evidence Act (1958); Similar provisions are also contained in section 20 of New Zealand Act 1908 - and in its final form as substituted by section 3 of the Evidence Amendment Act of 1950 - are all essentially concerned with excluding confessions on the basis of unfairness and testimonial untrustworthiness; as opposed to purely technical considerations.

(1967) N.M.L.R.1.

Mailayi v. State (1963) 1 ANLR 116; State v. Osanyade (1971) U.I.L.R.1.

Queen v. As (1961) 1 ANLR 673; Police v. Audu (1943) 17 NLR 38; Badmos v. Police (1948) 12 WACA 361; Agaegbu v. I.G.P. (1956)WRNLR 1.

See Heydon: "Corroboration of accomplices" (1973) CLR 264 at 265; see also Amar v. R. (1931) ALL India Law Reports 406, cited by Sarkar on Evidence 12th edn. p. 12229.

Sunmonu v. Police (1957) WRNLR 23.

Aguda, Criminal Law and Procedure of the Southern States of Nigeria, paragraphy 1780.

Carol Smart: "Women Crime and Criminology" (1976) p. 121.
See Akomolafe, T.C. "The Rape Victim:- Man's trial, Woman's Tribulation, Twice Traumatized" being a paper delivered at the Faculty of Law, Lagos State Univ., Seminar series (1987).
J.A. Scutt, "Reforming the law of Rape:- The Michigan Example", The Australian Law Journal, vol. 50, December 1976, p. 615.
J.A. Scutt, supra.
See Carol Smart, chapter 4, op.cit.
Section 2, Sexual Offences (Amendment) Act 1976.
Michigan State Sexual Offices Act 1974.
(1971) U.I.L.R.1.
More often than not these offences take place in private and it is not likely that there will be any other human witness(es) apart from the victim and the accused.
The extent to which other local legislation could be resorted in to in providing a definition for the word "child in the Evidence" Act was considered by the Supreme Court through Nnaemeka - Agu, J.S.C., in Okon v. State, (1988)1 NWLR 172 at 181-182 (Part 69).
Laws of 1978.
Cap. 21 of 1963 - section 2, Law of Northern Nigeria.
Laws of Northern Nigeria Cap. 89.
of 1958 Law of the Federation.
Omosimbe v. C.O.P. (1959) WNLR 209.
Rex v. Lobi (1947)12 WACA 476.
Per Agbaje, J.S.C., in Shazali v. State (1988)5 NWLR (Part 93) 164 at 175.
Ibid, at p. 175 per Agbaje, J.S. C. see also Akpan v. State (1967) NMLR 185 at 187-188.
(1972) 3 W.L.R. 910.
R. v. Manser (1934) 25 C.A.R. 18; Jos N.A. Police v. Gani, (1968) N.W.LR.8.
Op.cit. see endnote 41.
Adesanya, S.A., "Corroboration of the Evidence of Children." (1977) Juridical Review; University of Nigeria.
(1973)2 W.L.R. 254
(1972)1 N.M.L.R. 292
Woolmington v. D.P.P. (1935) A.C. 462.
Ibiziako v. Police (1963)1 ALL N.L.R. 61; Kano N.A. v. Obiora, (1959)4 F.S.C. 226.
See Ladan, M.T., "Military Regimes and Administration of Criminal Justice", in Law in Society Journal, A.B.U. Zaria, (1992)1 A.B.U. LSJ, August 1992, p. 48.
(1970)1 A.N.L.R. 27.
(1949)1 KB 54

(1947) p. page 69.

The Interpretation of the Evidence Act (1938)12 M.L.R. 145 at 154.

(1952) A.C. 84.

Ibid, at p. 92.

Noakes:- Introduction to Evidence 4th edn., p. 345, see also Simpson v. Lever (1963)1 Q.B. 517 - a policeman's Notebook has been held to be continuous record.

Section 4

On Evidence.

He introduced the Act of 1938 as a private member's bill in the House of Lords.

17 Canadian Bar Review (1937). p. 450.

See Cowen and Carter:- Essays on the Law of Evidence, p.11.

The situation which arese in England before the Criminal Evidence Act of 1965 in the decisions of the Courts in Andrews v. Cordiner (1947) K.B. 655 and Lilley v. Petit (1946) KB 401 may arise easily in Nigeria. In almost identical facts evidence was admitted in the former case (because it is a civil case) and not in the latter (a criminal case). See also the comments of Wright (1942)20 Canadian Bar Review 1978.

See the point of dispute between Aguda's view in Law and Practice rolating to Evidence in Nigeria, p. 204 - and the Common Law position adopted by the Court in State v. Mbagwu (1972)2 ECSLR 462.

On Evidence, p. 515 para. 1631.

Aguda, Law and Practice relating to Evidence in Nigeria, p. 6; Nwadialor, Modern Nigerian Law of Evidence, p. 8; Osinbajo, Y. "The Common Law, Evidence Act and the interpretation of section 5(a) in Essays in Honour of Judge Elias, ed. Omotola, J.A.

(1961) 1 A.N.L.R. 462.

Supra - endnote 44.

Adesanya, Supra-on corroboration of Evidence of Children.

The Kenyan and Tanzanian Acts largely originated from the Indian Evidence Act to which the Nigerian Act also largely owes its origin.

(1977).

Compare R. v. Bedingfield (1879) 14 Cox CC 341; R. v. Bangweyeku (1943)9 WACA 195 with Atanda v. State.

See Rudd, The Nigerian Law of Evidence, p. 75.

(1939) 27 Cr. App. R. 139.