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NIGERIAN LAW SCHOOL, LAGOS CAMPUS

AL-HADLI (JUSTICE)

In Honour Of

His Excellency,
Prince Bola Abdul Jabar Ajibola
(SAN,KBE,LL.D,CFR)

- President, World Bank Administrative Tribunal
- President/Founder, Islamic Mission for Africa (IMA)
- President/Founder, African Concern International

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ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE: MAKING A CASE FOR REFORM IN NIGERIA

BY

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INTRODUCTION.

It is trite law in Nigeria that illegally obtained evidence is still admissible. The principle was enunciated in the case of **Musa Sadau & Anor V the State**[1]. This position of law in Nigeria is traceable to the common law position established in the case of **Kuruma V R**[2] (herein otherwise referred to as the rule in kuruma), which also had its root in the statement of **Cramton J** in the case of **R V Leatham** Thus:

> ***"... It matters not how you get it, if you steal it even, it would be admissible in evidence".***[3]

The implication of the foregoing is that once a piece of evidence is relevant, it is admissible and the court is not concerned with how the evidence is obtained. Similarly, this principle of law has statutory backing in the Nigerian Evidence Act (herein referred to as the Act). The rule in Kuruma is the foundation or **S. 6** of Evidence Act and the scope of the rule in its application.[4] Deducible from this section is that admissibility is basically premised on relevancy.

Some evidence are often obtained through searches without warrant, bugging of homes, seizures of material in the home or offices, defective execution of warrant et cetera. The issue then is that the application of the rule Kuruma V R (or Musa Sadau case in Nigeria[5]) is capable of constituting an infraction of the right to privacy of a person. In fact the decision of court in Musa Sadau case is glaringly a deliberate violation by the police of the accused's fundamental right to privacy as entrenched in **section 23** of the then Nigerian Republican Constitution[6].

It shows clearly that the rule in Kuruma and Musa Sadau cases has a constitutional dimension that transcends the gamut of law of evidence, both statutory and common law perspectives.

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1 (1968) LMLR 208

2 (1995) A C 197

3 (1861) 8 Cox cc 498 at 501

4 (1861) 8 Cox cc 498 at 501

5 (1968) NMLR 208

6 Nigerian Republican Constitution 1963. A similar provision is in S.37 of the 1999 constitution.

The aim of this essay is to seek to balance the two interests that emerge in this situation namely, the interest of the state in the protection of crime and administration of justice and that of individual citizen to enjoy his constitutional right to privacy unimpinged by the state and or its law enforcement agents. This researcher shall also try to resolve the conflicts that may arise from the reconciliation of the two interests taking cognizance of the application of the rule in other jurisdictions especially other accusatorial legal systems.

Illegally Obtained Evidence and the Scope Of The Rule in Kuruma V R

As stated earlier on in the introductory part, the hallmark of admissibility of evidence is relevancy. That is to say that whether a piece of evidence is admissible or otherwise is premised on whether the fact to be established by such evidence is relevant to the fact in issue.

The **Stephen's Digest of the Law of Evidence** defines relevance as;

> ***"any two facts which if applied are so related to each other that according to the common course of events are either taken by itself or in a connection with other facts proves or renders probable the present o future existence or non existence of the other"***[7].

Fact in issue on the other hand is defined in **S. 2** of the evidence Act as;

> ***"any fact from which by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows"***[8].

The rule that all relevant evidence is admissible, though subject to some exceptions under **S.6 (A)** of the evidence Act[9], thereby making it possible for courts is initially traceable to the case of **JORDAN v LEWIS**[10] where the court rejected the argument of the accused person that a copy or an original indictment against him required to be produced in a latter proceeding without authority (illegally) and therefore the copy should be rendered inadmissible.

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[7] Stephen's Digest of the Law of Evidence 12th Edition art 1.

[8] S. 2 (1) Evidence Act Cap 112, LFN 1990.

[9] Such as the Hearsay Evidence, Character Evidence, Opinion Evidence and similar facts Evidence.

[10] **(1728) 14 East 306**

The rule gained further grounding in the case of **ELIAS V PASMORE**[11] where the court, in an obvious show of how unjust the rule may be to an accused person, held that an action for damages for trespass would not lie against the policeman who seized documents not covered by a search warrant where they were used in a subsequent criminal trial. The historiography of the rule went on until **Lord Goddard**[12] modified the rule into the modern day dictum that illegally obtained evidence is admissible.

The foregoing rule gained acceptance in Nigeria as established in the case of **Musa Sadau & Anor V State**[13]. The appellant in this case was alleged to have been involved in a racket by which vehicle licenses and similar forms were printed at the Government press without authority and sold for money illegally. The police armed with a search warrant searched the house of the appellant while he was away and removed some incriminating materials, which were tendered in evidence during the trial.

The appellant contended that the incriminating materials were planted in his house by the police officers who conducted the search. He argued that the search was illegal to the extent of its non-compliance with the provisions of **78 (1) of the criminal procedure code of Northern Nigeria,**[14] and consequently the incriminating material should be rendered inadmissible. The Supreme Court rejected this argument and held that the evidence derived from the illegal search was admissible.

Given the fact and circumstance of this case it is obvious that the evidence is not reliable (as it leaves the possibility of the police having deliberately planted incriminating object in the appellant's house in his absence, yet the supreme court faced with the absence of any local authority fell back on the ratio in the case of **KURUMA V R** and admitted the incriminating material in evidence).

Apart from evidence obtained via illegal searches as espoused above, the rule has variously been applied to evidence obtained through an illegal blood test thereby leading to self incrimination as in **the case of Ireland (No 1).** [15]

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[11] **(1934) 2 KB 164**

[12] **KURUMA V R (1955) A. C. 203**

[13] **(1968) N M L R 208**

[14] ***Section 78 (1) of the code required such searches to be conducted in the presence of two respectable inhabitants of the neighbourhood to be summoned by the person to whom the search warrant is addressed*** **(1970) I W L R 90**

[15] ***Murphy (1965) N. I. L. R 138***

It has also been applied to evidence obtained through the use of **agents provocateurs;**[16] eavesdropping as in **the case of Stewart;**[17] taking the accused finger prints without telling him he might refuse to give them[18] etc cetera.

Arguments For and Against the Rule in Kuruma

Admitting evidence illegally obtained is an inclusionary rule while disallowing same on grounds of illegality and injustice is an exclusionary rule. It is common feature of the controversy on this point of law that the supporter of inclusionary rule tend to highlight the merits of the rule while the antagonist who are otherwise the supporters of exclusionary rule tend to highlight the demerits of the rule in **KURUMA case.**

Professor Lafav[19] is one of the scholars in support of inclusionary rule. From his argument, the following points are highlighted:

1. The rule that illegally obtained evidence is admissible is to enable the police to some extent control crime.
2. The complaisant members of the public who gamble and by alcohol and drugs illegally will be deterred by raids and searches.
3. The harassment is cheap and effective.
4. Public pressure demands that the police undertake some harsh action to enforce the law.

Other arguments are:

1. Criminals are not restricted to their choice of weapons, neither should the police be.
2. Trivial police blunders should not lead to exclusion of evidence for doing so destroys respect for the law by letting the guilty go free on technicalities.
3. Exclusion of the evidence amounts to the sacrifice of reliable evidence for the sake of deterring the police from misconduct, thus favouring only the guilty and causing two wrongs to occur instead of only one.

The argument for excluding illegally obtained evidence is represented by the dictum of **Justice Clark in the case of PEOPLE V CAHAN** thus:

> ***"The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a Government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence".***[20]

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[19] **Lafave, "Improving Police Performance through the exclusionary rule" ML.R 391**

[20] **People V Cahan 367 U. S. 643 at 659**

To the proponents of exclusionary rule, it is not necessarily true that the exclusionary rule protects only the guilt, it deterrent effect ensures that in future both the guilty and innocent persons will be protected from illegal investigation. Furthermore, it is not necessarily true that illegally obtained evidence is reliable.

Application Of The Rule In Kuruma In Other Jurisdictions

Just as is the case in Nigeria, the rule in Kuruma has been deeply entrenched and strictly observed in Jurisdiction like England, Scotland and Ireland. In America, the general attitude of judges is to premise the application of the rule on the **Fourth** and **Fifth Amendment** of the United States Constitution which prohibits unreasonable search, seizure and arbitrary arrests. Consequently, the practice has been to exclude illegally obtained evidence. This principle was firmly established in the case of **WEEKS V UNITED STATES**[21] where **Mr. Justice Day** while ruling in favour of the appellant stated the reason for the exclusion of evidence obtained in violation of the Fourth Amendment as follows:

> ***"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment ..... is of no value, and so far as those thus placed disconcerned, might as well be stricken from the constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifices of those great principles established by years of endeavour and suffering which have resulted in their embodiment in the fundamental law of the land.***[22]

The exclusionary rule encapsulated in the foregoing statement was initially said to be applicable only to Federal courts.[23] The somewhat controversial position of the law finally of the law finally became laid to rest in the case of **Mapp V Ohio**[24] where the supreme court overruled its ruling in **Wolf case** and held that the exclusionary rule became applicable both in Federal and State courts.

The position of the law in **Canada** in illegally obtained evidence is that it is constitutionally and generally excluded. The test has been that of **"conduct that shocks the community"** as was succinctly put by **Justice Lamer** in the case of **Rothman V The Queen** thus:

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[21] **(1914) 232 U.S. 393**

[22] **Supra.**

[23] **Wolf V Colorado, (1949) 338 U. S.**

[24] **(Can. 1981) 12 D. L. R. 3d 578**

"The judge, in determining whether under the circumstances the use of statement in proceedings would bring the administration of justice into disrepute should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect of the proceedings. It must be borne in mine that the investigation of criminals is not a game to be governed by the Marques of Queens bury mines..... That a police officer pretends to be a lock up Chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be duty legal aid lawyer eliciting in that way incriminating statements from suspect or accused, injecting Pentothal into a diabetic suspect pretending it is his daily short of insulin and using his statement in evidence would also shock the community, but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would as in this case pretending to be a truck driver to secure the conviction of a trafficker; in fact what would shock the community would be preventing the police from resorting to such a trick. [25]

Other factors that are considered are the relative seriousness of criminal charge and the seriousness of the constitutional violation[26].

The approach in India, just as the common law approach laid down **KURUMA V R,**[27] is that admissibility is premised on Relevancy and once and evidence is relevant, it would always be admitted regardless of the illegal source of such evidence.[28]

Australian approach is that of 'Public Policy' test. Factors such as seriousness of the crime and the seriousness of the breach are considered. The court in the case of **Burning V Cross**[29] succinctly put the position as follows:

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[25] **Ibid, at pp 621 - 622**

[26] **Rothman V The Queen (Can. 1981) 12 D. L. R 578**

[27] **Supra**

[28] **Pooran Mal V Director of Inspection (1974) SC 348**

[29] **Gerald Dworkin, privacy and the law, 1978, P, 114]**

"Whereas such unlawfulness or such unfairness appears, the judge has discretion reject the evidence..... In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences, on the other hand is the public interest in the protection of individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair may be obtained at too high price. Hence the Judicial discretion.[30]

Reconciling The Right Of Privacy With The Rule In Kuruma V R

There usually arises an infraction of a person's privacy in the course of obtaining evidence for use in court by the police, hence the conflict of individual interest (Right of Privacy) on one hand and the interest of the state in obtaining evidence for use in court, regardless of the illegality that might have been perpetrated in the course of obtaining same (known as the rule in Kuruma).

Right of privacy has been described as the right to be let alone to live one's own life with the minimum degree of interference. It includes the right of the individual to lead his own life protected against:
(a) interference with private, family and home life; (b) interference with his physical or mental integrity or his moral and intellectual freedom; (c) attacks on his honour and reputation (d) being placed in a false light; (e) the disclosure of irrelevant embarrassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, prying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence.[31]

Right of Privacy is Statutorily recognized in such countries as America,[32] China,[33] Libya,[34] Turkey,[35] Japan,[36] Russia,[37] Nigeria[38] et cetera but it is not so recognized in jurisdictions like England, India, Scotland and New Zealand.

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[30] **Ibid at 75**

[31] **Gerald Dworking, privacy and the law, 1978, p.11**

[32] **The fourth Amendment to the American constitution.**

[33] **Article 12 of the constitution of the Republic**

[34] ***Articles 19 and 20 of Libya Constitution***

[35] **Article 15, Section 2 of Turkey Constitution.**

[36] **Article 35 of Japan Constitution.**

[37] **Article 12B of Russia Constitution**

[38] **Section 37 of Constitution of the Federal Republic of Nigeria (Decree No. 24, 1999)**

The case of Nigeria is of particular interest as the right to privacy therein is not absolute. A close examination of both sections 37 and 45 of 1999 constitution will reveal this assertion. Section 37 of the constitution provides:

> *"The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected"*

Section 45 on the other hand provides;

> *"Nothing in sections 37, 38, 40 and 41 of this constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defense, public safely, public order, public morality or public health, or (b) for the purpose of protecting the rights and freedom of other persons"*

This section is a clear and unambiguous derogation from the rights guaranteed by the sections stated therein. Nevertheless, in spite of the derogation, the right of privacy to the extent it is guaranteed in section 37 is a sacred one which ought to be maximally protected in the interest of not only the individual concerned but also of public order, morality and health. In Nigeria, this right of privacy has always been breached with impunity by the law enforcement agencies who in their bid to successfully prosecute a suspect take the laws into their hands, conducting illegal searches and seizures, bumping into people's home (privacy) without restraint.

Under Nigerian law, the combined effect of S.36 and S.46 (1) of 1999 constitution is to the effect that a person can apply to court to stop threatened acts, past and present,[39] thereby constituting a remedy for the breach of right of privacy. Remedy could also be obtained through the common law writs[40] which can be brought alongside an application under S.46 (1).[41] The problem, however, is how effective are the civil remedies available to an aggrieved person whose right of privacy has been breached by an illegal search? An accused person who has been convicted via illegally obtained evidence will consequently find it arduous or impossible to proceed in civil suit against the officer who infracted his right of privacy even when the aggrieved person is able to proceed and he wins, the poor officer is unable to pay thereby rendering such as action fruitless. The alternative remedy resides in criminal action against an officer for a crime committed in the process of conducting a search, but the practical problem is the usual reluctance of the Attorney-General to prosecute a law officer.

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[39] **Federal Ministry of Internal Affairs V. Shugaba Darman (1982) 3 NCCLR 915**

[40] **Agbakoba V Director, SSS (1994) 6 NWLR Pt. 47**

[41] **Asemola V Yesufu (1982) NCLR 419**

The foregoing problems have made the United States of America, for instance, to resort to the use of exclusionary rule as an effective remedy for the infraction of right of privacy with the implication that evidence illegally obtained will be excluded in a court proceeding. This position was established by court in the case of **People V Cahan** thus:

> *"The conclusion is inescapable that but one remedy exists to deter violations of search and seizures clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the constitution will do him no good".*[42]

On the other hand, the Judicial attitude in Nigeria as demonstrated in the case of **Musa Sadau V The State**[43] leaves much to be desired. Police officers invaded the appellant house and conducted a search in breach of the law that requires such a search to be conducted in the presence of two respectable inhabitants of the neighborhood to be summoned by the person to whom the search warrant is addressed.[44] The non-reliability of evidence so obtained illegally lies in the fact that the evidence could have been deliberately planted by the officers in the absence of the appellant with a view to incriminating him. Consequently the court in that case should have-exercised the judicial discretion of exclusion of exclusion in favour of the accused.

In that case, one would have expected the court to give due consideration to section 23 in the interest of justice after all judges are bound by judicial oath to defend and guard the constitution. [45] The Nigerian constitution is modeled after the American system, but unlike the American judges whose attitude stems from their obligation to preserve and protect the American constitution as sworn to by them, the attitude of their Nigerian counterparts in these areas of the law shows a reluctance to uphold our constitution. There is no express provision in the Fourth Amendment of American constitution excluding illegally obtained evidence, yet their judges rely on same for excluding evidence from illegal search. Nigerian judges' attitude should be no less than it is in America. After all it has been stated that

> *"....it is a less evil that some criminals should escape than that the government should play an ignoble part".*[46]

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[42] **People V Cahan (1955) 367 U.S. 643**

[43] **Supra**

[44] **S. 78 (1) of the Criminal Procedure Code (applicable in the Northern Nigeria)**

[45] **39. See the Sixth Schedule of 1963 and 1999 Constitution of the Federal Republic of Nigeria.**

[46] **Olmstead V US (1928) 277 US 438.**

Observations, Recommendations and Conclusion

It is pertinent at this juncture to observe that there are two principal interests revolving around this issue. First is the interest of the state to secure evidence bearing on the commission of a crime and necessary to enable justice to be done. Second is the interest of the citizen to be protected from illegal invasion of his constitutionally guaranteed privacy. Neither of these two interest could hold sway absolutely and neither of the two could a judicial system premised on justice afford to jettison. The two rather conflicting interests ought to be carefully balanced in resolving the question of whether illegally obtained evidence is admissible or otherwise.

In doing this, I think the approach already adopted in Canada is commendable. Under the Canada constitution, evidence shall be excluded if it is established that having regard to all the circumstance the admission of it in the proceeding would bring the administration of justice into disrepute.[47]

It is also recommended that in resolving the issue of admissibility of illegally obtained evidence a court needs to ask itself some few questions. Namely: whether the constitutional violation is a serious one; whether the violating act is deliberate or carried out in good faith; whether the offence committed is a grievous one a simple offence; whether there is any other investigation technique that could have been resorted to; and whether there are alternative and effective remedies available to the accused if the illegally obtained evidence is admitted. In respect of the first question, where an officer armed with a search warrant meant for another suspect on incriminating evidence, such evidence should not be excluded on mere technical ground. But where the police without search warrant enters a suspect house in his absence as was done in **Musa Sadau** case the reliability is in doubt and such evidence should be excluded.

On the second question, while a deliberate violation of the law should attract exclusion of evidence, the rule of inclusion should apply where the suspect is at home but falls to heed the request of officers armed with warrant to open his door consequent upon which the police officers break into the house.

On investigating technique, if the court finds that inspite of the availability of alternative methods, the policemen used the particular technique culminating in constitutional violation; such evidence obtained should be excluded.

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[47] **S. 24 of the 1982 constitution of Canada**On nature of the offence, where the offence

committed via the incriminating evidence is a grievous one, the courts should not be disposed to excluding such evidence since it will be in the interest of the public that such heinous crimes are curbed but in case of sample offences, illegally obtained evidence in violation of the constitutional rights of the accused should be rejected.

Also where there are alternative and effective civil remedies opened to the suspect for infringing on his right, the incriminating evidence may not be excluded but where it would be practically impossible for the suspect to pursue other remedies, exclusion of the illegally obtained evidence is the appropriate remedy for the accused. In the words of **Chief Justice Traynor** in the American case of **People V Cahan**

> ***"We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of Police officers with the attendant result that the courts under the lord rules have been constantly required to participants in and in effect condone the lawless activities of law enforcement officer".***[48]

By adhering to the foregoing the reputation of our judiciary as the last hope litigants yearning for justice would have been preserved.

Lastly it is hereby strongly suggested that **Section 6** of the **Nigerian Evidence Act** being[49] the statutory provision in Nigeria dealing with exclusionary rule, should be amended and enlarged to incorporate the recommendations in this essay so as to establish a statutory ground and guidance for the courts exercise of discretion to either admit or exclude an illegally obtained evidence.

[48] **See people V Cahan (Supra)**

[49] **Cap 112, LFN, 1990.**