

# Confessions in Criminal Investigation and Judicial Trial in Nigeria: The Case for Abolition

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## Abstract

*Confession is one means of establishing the guilt of the accused person in the absence of direct evidence or cogent circumstantial evidence. Confession has been enhanced, developed and perfected by the Nigeria police/ prosecution, relegating the other techniques used in investigation and solving of crimes. Criminal cases presented by the police/ prosecution at trial are most time built around a confession and so the case is defeated once the confession fails to pass the test for admissibility. Voluntariness of a confession is one major hurdle to cross for it to be admissible against an accused person. Reliability of a confession has replaced the voluntariness of a confession in the Nigeria Evidence Act. Cases reveal that coarse and false confessions are cleverly made admissible at trial courts only to be upturned at the appeal. Coarse and false confessions are extracted and obtained by torture. This article expounds that persons whose confessions are obtained by torture are likely to be incarcerated for a crime they know nothing about. This is one danger of relying on confessions as it enhances the continued use of torture. It is showcased that a significant number of exonerated prisoners in the USA were convicted as a result of coarse and false confessions. This article briefly examines other investigative techniques, calls for their adoption in the Nigerian criminal justice system and advocates for the abolition of confessions in criminal trials.*

**Keywords:** Confession, Criminal, Investigation, Judicial, Trials

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## 1. Introduction

Investigation of crimes and prosecution of accused persons is one of the duties of the police. The techniques adopted by advanced police/ law enforcement agency in investigating crimes include the use of forensic science; fingerprinting and DNA (deoxyribonucleic acid) evidence, electronic surveillance, phone taping, pretext phone calls, undercover policing, and so on. Eliciting the confession of a suspect as a means of solving crime is now considered unreliable and obsolete. Confession was regarded as the best evidence of guilt.<sup>1</sup> Macpherson identifies that confession tend to be the center-piece of the prosecution's case,<sup>2</sup> so if it is defeated the case of the prosecution likely falls.

Confessions of suspects are a prominent feature in criminal investigations and judicial trials in Nigeria. Schulz identifies that torture was considered the most effective way to elicit a confession, rather than the truth. Torture was originally known as the *Queen of Proofs*.<sup>3</sup> It is generally identified that in Nigeria torture is employed by the police to extract most confessions.

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<sup>1</sup> E. O. Onoja, 'The Relationship between the Constitutional Right to Silence and Confessions in Nigeria' [2013] (6) *African Journal of Legal Studies*; 190.

<sup>2</sup> M. Macpherson, 'Evolution of Confession Law' 7 (Unpublished Senior Honours Thesis, Liberty University 2020)

<sup>3</sup> W. F. Schulz, 'Torture' in M. Goodhart (ed), *Human Rights Politics and Practice* (New York: Oxford University Press 2009) 300.

Onoja notes that anecdotal evidence suggests that Nigeria police personnel torture accused persons to obtain confessional statements.<sup>4</sup>

Torture is not only confined to severe beatings and infliction of unimaginable physical pains, but also mental and psychological trauma. In the United States (USA) it is identified that subjecting the accused person to long hours of interrogation in a bid to extract a confession is also torture. Long hours of interrogation most likely cause unbearable discomfort and pains on the mind of the accused leading him to give false confessions. In the case of *Ashcraft v. Tennessee*,<sup>5</sup> Ashcraft was taken into custody and interrogated for thirty-six hours for information regarding the murder of his wife. Ashcraft finally cracked after twenty-eight hours and confessed that he knew who killed his wife. Gianelli reports that in *Mincey v. Arizona*,<sup>6</sup> the Court found that Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne.<sup>7</sup> Gianelli further observed that police interrogations, particularly if done in secrecy, most likely produced coerced confessions.<sup>8</sup>

In a research study conducted in Nigeria, most policemen interviewed revealed that in the absence of a viable means of investigation, torture is resorted to.<sup>9</sup> Torture is further employed by the police in furtherance of illegality and to secure a confession to the commission of a fabricated offence. On the 19<sup>th</sup> of December 2019, in Port Harcourt, five automobile mechanic repairers, now known as *the Ikoku five*, were arrested and tortured by the police to make false confessions to the stealing of two vehicles in their possession.<sup>10</sup> The vehicles were not reported to have been stolen, and the owner of one of the vehicles informed the police that he actually gave his car to the suspects for repairs. In the course of the phantom investigation, one of the suspects, Chima Ikwunado, died in police custody as a result of severe torture. The remaining four suspects were charged to the Magistrate Court on the strength of their false confession. They were discharged. In effect, most confessions obtained from suspects are either to solve a crime or to further perpetrate a crime.

A confession is generally required by law to be voluntary made for it to be admissible in evidence. Every Court holds the opinion that confession obtained under duress and torture are inadmissible to sustain a conviction being not voluntary. The United States Court upheld that a defendant lacked free will where confession was obtained from the defendant while under the influence of drugs.<sup>11</sup> In *The State v. Olashehu Salawua*,<sup>12</sup> the Nigerian Court of Appeal invalidated the confessional statement of the respondent relied upon by the prosecution to secure conviction, and set aside the judgment of the trial court. The Supreme Court upheld the decision of the Court of Appeal. The Supreme Court noted that the respondent was presented

<sup>4</sup> (n1) 191.

<sup>5</sup> 322 U.S. 143 (1944).

<sup>6</sup> 437 U.S. 385 (1978).

<sup>7</sup> P. C. Gianelli, 'The Law of Confession – Part 1' [1986] (9) (1) *Public Defender Reporter*; 4 <[https://scholarlycommons.law.case.edu/faculty\\_publications/476](https://scholarlycommons.law.case.edu/faculty_publications/476)> accessed 30 December 2021.

<sup>8</sup> *Ibid*, 420.

<sup>9</sup> I. Chukwuma, 'The Legal Structure of the Police and Human Rights in Nigeria' [1997] 14 *Third World Legal Studies*; 49.

<sup>10</sup> I. Chukwu, 'Death of Chima in Mile 1 E-Crack Squad: Extreme policing, extreme torture, and the mechanic dropped dead' *Business Day* (Nigeria, 2 February 2020) <<https://businessday.ng/life/article/death-of-chima-in-mile1-e-crack-squad-extreme-policing-extreme-torture-and-the-mechanic-dropped-dead/>> accessed 6 March 2020; Damilare, 'Police detains 4 officers who allegedly Killed mechanic in Rivers' *Pulse Nigeria* (4 February 2020) <<https://www.pulse.ng/news/metro/police-detains-4-officers-who-killed-mechanic-in-rivers/63ks1f8>> accessed 5 March 2020.

<sup>11</sup> (n7) 3.

<sup>12</sup> (2011) JELR 49098(SC)

<<http://www.nigerialaw.org/LawReporting/2011/December%202011/16th%20December%202011/The%20State%20v%20Olashehu%20Salawu.pdf>> accessed 30 December 2021.

to the police boss for being responsible for the assassination of SSS men which occurred three days after the respondent was arrested; the evidence of the respondent was unchallenged at the trial within trial; the respondent was tortured; and the police withheld evidence that was favourable to the respondent. The Supreme Court upheld that:

*Exhibit 4, being a product of coercion and torture of the Respondent, is inadmissible. At best, the Appellant failed to discharge its duty to prove that the confessional statement was voluntarily made.*<sup>13</sup>

The Courts have overtime resorted to confessional statements in convicting accused persons in the absence of compelling direct evidence. In *Anthony Omuroyi v The State*,<sup>14</sup> the trial court found the appellant guilty of murder on the strength of confessional statements obtained from the appellant and circumstantial evidence. The appellant contested that the confession was forcefully obtained and he did not make it, as he was forced to sign a confessional statement. The appellant had testified in the trial within trial that he was tortured while in police custody to accept guilt but he did not make a statement and the police wrote down what he didn't say. Upon this testimony the trial court abruptly ended the trial within trial and admitted the confessional statement as required by law. The law is that where an accused denies making a confessional statement the court can admit it. The Court of Appeal agreed with the trial court that the confessional statement obtained from the appellant was freely and voluntarily given. It is observed that the issue of torture inflicted by the police on the appellant was not addressed by the court and there was nothing in the courts record to suggest that the appellant was afforded constitutional protection of the right to silence and to legal counsel. It is therefore likely that without the confessional statement the prosecution may have been unable to secure a conviction.

Further, the testimonies of persons who were not witnesses to the crime and the deceased body which was not found in the appellant's apartment constituted the circumstantial evidence against the appellant. The medical evidence did not determine who caused the injuries that led to the death of the deceased and there was no forensic examination of the alleged crime scene. No one saw the appellant kill the deceased, but for his coerced confessional statement, upon which the court found corroboration in the evidence of witnesses who are relatives to the deceased. Would the Court of Appeal have decided differently in the absence of a confessional statement from the standpoint that this was likely a family gang up? A positive answer to this question is probable. It is noteworthy that the Court of Appeal substituted the murder charge for manslaughter on the (alternative) defence of provocation.

The Nigerian Evidence Act (EA) 2011 actively supports the use of confessional statement in the prosecution of an accused.<sup>15</sup> The EA enjoins the court not to allow a confessional statement to be given in evidence, even though it may be true, except the prosecution proves beyond reasonable doubt that the confession was not obtained by oppression; torture, inhuman or degrading treatment, the use or threat of violence; and circumstances that render the confession unreliable.<sup>16</sup> The EA goes further to state that a confession which is relevant, does not become irrelevant, by reason of a promise of secrecy, a deception practiced on the accused for the purpose of obtaining it, it was obtained when the defendant was drunk, it was obtained by answers to questions which the defendant need not respond, or the defendant was not warned that he is not bound to make a confessional statement.<sup>17</sup>

<sup>13</sup> (n12).

<sup>14</sup> [2014] NGCA 19 <<https://nigerialii.org/ng/judgment/court-appeal/2014/19>> accessed 30 December 2021.

<sup>15</sup> EA 2011, ss. 29(1); 31.

<sup>16</sup> *Ibid*, s. 29(2), (3), (5).

<sup>17</sup> *Ibid*, s. 31.

In the repealed Evidence Act, preceding the present EA 2011, confessions are deemed relevant against the person who makes it, if made voluntarily.<sup>18</sup> There is no such provision in the EA 2011. The absence of a section promoting the voluntariness of a confession creates a controversy whether voluntariness remains the criterion for the admissibility of a confession. It is argued by legal scholars that the EA 2011<sup>19</sup> gives discretionary power to the court to exclude a confessional statement obtained by oppression or in consequence of anything said or done to render the confession unreliable notwithstanding that it may be true, therefore the court has been given an active role in the establishment of the voluntariness of a confession.<sup>20</sup> However, it is observed that the EA 2011<sup>21</sup> negates protection for the voluntariness of a confession and the observance of the Judges Rule once a confession is relevant. How then is a confession made relevant, except it passes the six tests to establish its voluntariness?

Voluntariness of a confession, which had been the bedrock in the admissibility of a confessional statement, may soon be eroded by subsequent judicial decisions. This is likely the position in view of the provision of the Administration of Criminal Justice Act (ACJA) 2015, which makes it obligatory for the police to take the statement of a suspect arrested on the allegation of committing an offence.<sup>22</sup> This provision is accompanied by a weak caveat, which is ‘if the suspect so wishes to make a statement.’ A criminal suspect, by the provision of the ACJA, is bound to make a statement in writing to the police, irrespective of his constitutional right to silence. It is further observed that the constitutional right to silence in Nigeria is not absolute. The right to silence is only available until the suspects consults with a legal practitioner or any other person of his choice.<sup>23</sup> Once such consultation is done the right to silence is extinguished, and the suspect may be coerced to make a statement. As noted above, the EA provides that a confession does not become irrelevant on the grounds that accused was not warned that he is not bound to make a confessional statement.

The International Covenant on Civil and Political Rights (ICCPR) 1966 provides that in determination of any criminal charge against any person, such person shall not be compelled to testify against himself or confess guilt.<sup>24</sup> This provision is known as the *Miranda* rights under the Fifth Amendment of the USA Constitution. The Fifth Amendment provides *inter-alia* that no person shall be compelled in any criminal case to be a witness against himself. In *Miranda v. Arizona*,<sup>25</sup> the United States Supreme Court held that when a person is taken into custody or deprived of his freedom he must be warned prior to any questioning of his right to remain silent, that anything he says can be used against him in a court of law, and informed of his right to an attorney. The Court further held that the ‘self incrimination clause’ was applicable to interrogations at a police station. The Court found that custodial setting contains “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”<sup>26</sup> In effect, the twin right to remain silent and not to make a confession is one basic human right that a suspect becomes entitled to once arrested and taken into custody.

The absence of a provision for the voluntariness of a confessional statement in the EA 2011 is most likely unsafe for the Nigerian criminal justice system. The police or any other law enforcement agency may construe that a confessional statement no longer needs to be voluntary.

<sup>18</sup> EA, Cap E14, LFN 2004, s. 27(2).

<sup>19</sup> (n15) s. 29 (3).

<sup>20</sup> T. I. Nnabugwu, ‘Confession in Nigeria Evidence Act 2011’ (22 June 2012) <<http://titusnnabugwu.blogspot.com/?m=1>> accessed on 15 January 2022.

<sup>21</sup> (n15) EA 2011, s. 31.

<sup>22</sup> ACJA 2015, s. 17(1).

<sup>23</sup> CFRN 1999, s. 35(2).

<sup>24</sup> ICCPR 1966, art. 14 (3) (g).

<sup>25</sup> 384 U.S. 436 (1966).

<sup>26</sup> *Ibid*, 467.

It is observed that torture is frequently used by the police to extract confessional statements for purposes of prosecuting cases against accused persons in court.<sup>27</sup> The sweeping away of the voluntariness of confessions in the EA 2011, most likely enhances the continued use of torture. This article advocates for the abolition of confessions in the investigation process in view of the tendency to rely more on it and the drive to obtain it at all cost. It recommends that confessions may only be permitted in open court before a judicial officer, after the suspect has duly consulted with his legal representative. An examination of the relationship between confession and torture is undertaken in this article with a view of exposing the dangers of relying on confessions seemingly having the attributes of voluntariness.

## 2. The Purpose of a Confession

Slough defines a confession as an acknowledgement in express terms by a party in a criminal case of his guilt.<sup>28</sup> The learned scholar further states that a confession implies an admission of every essential element necessary to establish the crime with which the defendant is charged. Another definition of confession by Wigmore being an acknowledgement in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it,<sup>29</sup> is cited by the learned scholar. Udosen further defines a confession to mean a free and voluntary admission of guilt of a crime by an accused person, and could also mean an out of court statement voluntarily made to the police by a suspect acknowledging that he committed or participated in the crime.<sup>30</sup> The EA 2011 defines a confession as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.<sup>31</sup> A combination of these definitions portrays that a statement by an accused person admitting facts which altogether constitute proof of the commission of an offence is a confession and a confession is further an acknowledgement of guilt by the maker. The Nigerian Supreme Court, per Rhodes-Vivour JSC, puts it more simply that 'a confession is a voluntary admission by a person of his participation in a crime'.<sup>32</sup> Confessions are inextricably linked with voluntariness.<sup>33</sup> The US Supreme Court in *Culombe v. Connecticut*<sup>34</sup> held that the ultimate test for a confession is voluntariness. The Court stated as follows:

*Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self determination critically impaired, the use of his confession offends due process.*<sup>35</sup>

Nigerian courts are enjoined to certify that a confession is free, voluntary, properly taken, and passed the prerequisite tests.<sup>36</sup> The tests are in form of six questions a court must ask itself in determining the weight to be attached to a confession. The Nigerian Supreme Court in *Friday Uzim v The State*<sup>37</sup> listed the six questions as follows:

1. Is there anything outside the confession, which shows that it may be true?

<sup>27</sup> L. K. Peekate, 'Curbing Extra-judicial Killings and Excessive Use of Force in Nigeria: Implications for Human Rights' [2021] (8) (2) *Port Harcourt Journal of Business Law*; 114.

<sup>28</sup> M. C. Slough, Confessions and Admissions, [1959] (28) *Fordham Law Review*; 96.

<sup>29</sup> *Ibid*, 97.

<sup>30</sup> J. I. Udosen, 'Confessional Statements and their Admissibility in Criminal Trial' [2017] (1) *AJLC*; 102.

<sup>31</sup> (n15) s. 28.

<sup>32</sup> *The State v. Jimoh Salawu* [2011] 10 SCM 76; 105.

<sup>33</sup> (n2) 8.

<sup>34</sup> 367 U.S. 568 (1961).

<sup>35</sup> (n7).

<sup>36</sup> *Friday Uzim v. The State* [2019] LER, SC.877/2015.

<sup>37</sup> *Ibid*.

2. Is it corroborated in anyway?
3. Are the relevant statements of fact made in it most likely to be true as far as they can be tested?
4. Did the accused have an opportunity to commit the offence?
5. Is the confession possible?
6. Is the confession consistent with other facts, which have been ascertained and established?

Confessions are meant to be voluntarily given and not obtained. The Nigerian Supreme Court emphasized that the word “obtain” connotes a demand and statements made by accused person on demand from police officers cannot be said to have been voluntarily made.<sup>38</sup> A suspect is expected of his own free will to acknowledge that he committed the offence or participated in its’ commission. Free and voluntary acknowledgement and admission of guilt spurs from the need of the accused to unburden his mind or purge himself on moral grounds, not minding the consequences of punishment from the law. It is rare for a person to confess to a crime being aware that his freedom will be taken away (permanently) or he will be subjected to face capital punishment. Confessions are most times made by persons who are remorseful of their action or inaction.

*The law regard confessions as the best evidence of guilt. A confessional statement freely made is regarded as the strongest form of evidence, presumably because it proceeds from the mind of a person burden by guilt who desires to make a clean breast of the weight of the guilt.*<sup>39</sup>

Practical reality attests that the police/ prosecution are always armed with confessional statement of almost every accused standing trial. Udosen identifies that the confession of an accused person is perhaps the best evidence in the hands of the prosecutor.<sup>40</sup> In effect the police/ prosecution are unlikely to secure the conviction of an accused person without the confessional statement. The confessional statement becomes a *sine qua non* in criminal proceedings and must be obtained by any means necessary. Undoubtedly, with this approach, it is difficult to see how the voluntariness of any confession is secured. This approach is further strengthened by ACJA 2015 which subjects the accused to make a statement upon being taken into custody.<sup>41</sup> The accused person is rarely informed of his constitutional right to silent, but rather cautioned before he makes the statement.

The Nigerian Supreme Court has stressed that the words of caution is an inducement to speak to the police, for the accused cannot be expected to keep mute after the caution.<sup>42</sup> The apex court further maintained that when a person is placed under arrest, it is not the duty of the police to obtain evidence in the form of a statement from him. The duty of the police is to take or record the statement of the accused, if he makes any. The Supreme Court emphasized that:

*The police have no authority to obtain a statement from [the accused], having told him he is not obliged to say anything. The judges rules, though rules of practice, are designed to leave it open to the arrested person to say nothing and to prevent police officers from trying to get the arrested person to say anything.*<sup>43</sup>

In effect, the police procedure of ‘obtaining’ a statement from every likely accused person jeopardises the voluntariness of a confession. It can therefore be safely deduced that confessions obtained in like manner are either coerced or false. Coerced and false confessions are obtained either for purposes of furthering illegality or to further perpetrate a crime. In the *Salawua’s case* the respondent was coerce to confess to an assassination which took place three days after he

<sup>38</sup> (n12).

<sup>39</sup> (n1) 193.

<sup>40</sup> (n30) 106.

<sup>41</sup> (n22).

<sup>42</sup> (n12).

<sup>43</sup> (n12).

was arrested.<sup>44</sup> There was evidence that he was tortured by the police, which made him spent two months in the hospital. Also in the case of *the Ikoku five*, five men were tortured to confess to a crime that never happened.<sup>45</sup> One of the five died from the torture. In this regard it is submitted that the disadvantages of a confession far outweigh any advantages it may offer.

It is considered that from the angle of law enforcement the police rely on confessions to bring about a quick end to the investigation of a crime. The police are burdened by criminal cases still opened for investigation. The public further rely on the police to solve crimes speedily so as to deter other would be criminals. There are many cases of unresolved crimes around the world. However, it needs to be mentioned that crimes can be resolved by other means, other than obtaining a confession. The case of the hotel female serial killer in Port Harcourt was solved with the aid of CCTV camera, which captured him leaving a hotel, and the photo was thereafter circulated on social media.<sup>46</sup> The prosecution secured conviction of the serial killer on the strength of cogent circumstantial evidence and his confession to the latest murder. However, the police failed to tie him to the other murders, probably due to failure to employ other techniques in investigating the numerous murders.

### 3. Confession and Torture

In the matter of the now popular *Ikoku five*, five automobile mechanic repairers were arrested and tortured by the police to make confessional statement to a crime that never happened. One of the suspects, Chima Ikwunado, died as a result of the torture. The remaining four suspects were charge to the Magistrate Court on the strength of the false confession obtained. In the *Salawua's case* the Supreme Court found that the respondent was tortured and subjected to inhuman treatment as a result of which he spent two months in the hospital. Further, in *Effiong Edet George v. State*,<sup>47</sup> the Court of Appeal found that the appellant was tortured for several days but resisted. The appellant finally gave in and made the confessional statement when he witnessed the killing of six other suspects, shot to death by the Police. The Court of Appeal invalidated the confessional statement, reversed the decision of trial court and quashed the appellant's conviction for murder.

These cases portray the dangers associated with the continued use of confessions in the criminal justice system. The use of torture in obtaining confessions, impairing the health of suspects, unlawful killing of suspects, unlawful detention, and conviction of accused persons on false confessional statements, are some of the dangers inherent in sustaining confessions as a technique in solving crime. The procedure employed by the Nigeria police in obtaining confessional statements involves coercion, torture and violence, threat of murder or violence, and the gross abuse of fundamental rights. Criminal suspects under international human rights instruments and the Nigerian Constitution have a right to silence, legal counsel, and a right against self-incrimination.<sup>48</sup>

Torture and confession work hand in hand. Torture is defined by the United Nations Convention Against Torture (UN CAT) 1984, as the deliberate and calculated infliction of pain, at the instigation of or consent of a public officer, for purposes of obtaining information or confession.<sup>49</sup> Torture is considered the most effective way to elicit a confession, rather than the

<sup>44</sup> (n12).

<sup>45</sup> (n10).

<sup>46</sup> BBC News, 'Gracious David-West: Nigerian Serial Killer Sentenced to Death in Port Harcourt' (Nigeria, 9 October 2020) < <https://www.bbc.com/news/world-africa> > accessed 29 January 2022.

<sup>47</sup> [2009] 1 NWLR (Part 1122) 325.

<sup>48</sup> ICCPR 1966, art. 14 (3) (g); CFRN 1999, s. 35(2).

<sup>49</sup> UN CAT 1984, art. 1.

truth.<sup>50</sup> Torture amounts to a practice of inhuman and degrading treatment. It is one of the worst forms of human rights violations.

It is noted above that law enforcement officers resort to torture as a means of conducting investigation of a crime or in furtherance of an illegal purpose. Torture is used by police officers to extract confessional statements for purposes of prosecuting cases against accused persons in court. Sadly, most victims of torture are either killed or seriously impaired physically and psychologically.

The EA 2011 permits the use of confessional statements in prosecuting an accused.<sup>51</sup> The EA provides that once the prosecution proves that confession is relevant to the matter in issue and it was not obtained by oppression it is admissible against the accused (the maker).<sup>52</sup> Oppression is listed by the EA to include torture, inhuman or degrading treatment, and the use of threat of violence.<sup>53</sup> However, the cases reveal that the police/ prosecution have overtime being able to cleverly convince trial courts that confessions were obtained without oppression, whereupon the confessional statements are admitted in evidence and resorted to in convicting the accused. The cases of *The State v Olashehu Salawua*, and *Effiong Edet George v. State*, examined above, are glaring examples where the appellate courts found that the confessional statements admitted by the trial courts were extracted by torture. The reports of human rights agencies indicate that Nigeria police rely more on torture and confession in criminal investigations. Amnesty International documented that torture is entrenched in the Nigerian criminal justice system.<sup>54</sup>

*The National Human Rights Commission (NHRC) 2007 report, which acknowledged that torture is used as official means of investigation of offences by the police, indicated that most cases in court are prosecuted based on confessions obtained under circumstances of torture from accused persons. NHRC further documented an elaborate system of torture and maintained that every major Nigeria police station has torture chambers and an officer known as O/C (officer in charge) Torture. In 2007, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded that torture is widespread in police custody in Nigeria, and it is an intrinsic part of how the police operate within the country.*<sup>55</sup>

The international human rights instruments prohibit torture and provide that a person shall not be subjected to torture, inhuman and degrading treatment.<sup>56</sup> The UN Code of Conduct for Law Enforcement Officials 1979 provides that no law enforcement official may inflict, instigate or tolerate any act of torture.<sup>57</sup> The UN CAT 1984 mandates State Parties to criminalize torture in their criminal codes and make it punishable with penalties taking into account their grave nature.<sup>58</sup> Torture is illegal under Nigeria's Constitution,<sup>59</sup> but it is not criminalized under her Criminal and Penal Code. Amnesty International noted that Nigerian authorities and police claim that they have addressed the issue of torture, but that is not true. The police have failed to end the use of torture and the Nigerian government has allowed police officers to torture with

<sup>50</sup> (n3).

<sup>51</sup> (n15).

<sup>52</sup> (n15) s. 29(1), (2), (3).

<sup>53</sup> (n15) s. 29(5).

<sup>54</sup> Amnesty International, 'Killing At Will: Extrajudicial Executions and Other Unlawful Killings by the Police in Nigeria' (London: Amnesty International Publication 2009) 18.

<sup>55</sup> (n54)

<sup>56</sup> UDHR 1948, art 5; ICCPR 1966, art 7; ACHPR 1981, art 5.

<sup>57</sup> UN Code of Conduct for Law Enforcement Officials 1979, art 5.

<sup>58</sup> UN CAT 1984, art 4.

<sup>59</sup> (n23) s. 34(1) (a).

impunity. It is conceded, as documented by Chukwuma, that in the absence of a viable means of investigation, Nigeria police resort to torture.<sup>60</sup>

#### 4. Obtaining a Confession

A person is arrested and taken into custody upon suspicion of his/her involvement in a crime. The suspect is informed by the investigating police officer (IPO) of his right not to say anything, however, if he wishes to say or make a statement, it may be used against him in court. This is the IPO cautioning the suspect and this procedure is in tune with the Judges Rule. The law further mandates the police to allow the suspect to be represented by legal counsel during interrogation. Adherence to this simple procedure ensures the voluntariness of any confession that may be obtained. However, it is presumed that suspects may not want to own up to their involvement in a crime once represented by legal counsel and may choose to remain silent during questioning.

In practice, the IPO caution the suspect and still demand answers to questions put to the suspect. The suspect risk being kept in custody in the event he decides to keep mute. The police get agitated once a suspect is represented by legal counsel and tries to exclude the counsel during the interrogation process. In the absence of a viable means of investigation, and the belief in guilt prior to conviction, the suspect is tortured to obtain a confession. The Supreme Court, per N. S. Ngwuta JSC, in *Salawua's case* identified that:

*The Respondent was arrested in Lagos and taken to Ilorin on allegation of assassination of SSS men. He was told if he cooperated by making a confessional statement he would not be taken to Abuja. He was eventually taken to Abuja and presented to the Police boss as the assassin. The police boss ordered them out when the policemen who brought him admitted that the assassination took place three days after he was arrested. He was taken back to Abuja and subjected to inhuman treatment as a result of which he spent two months in the hospital. He named the officers at whose hands he suffered torture and humiliation.*<sup>61</sup>

The above reported facts connote and represent basically the manner in which confession is obtained by the Nigeria police. Confessions are mostly obtained by torture, and more particularly, torture is employed in furtherance of an illegal purpose or to obtain a false confession for a non-existent crime. The trial courts have a duty to admit only voluntary confessions, but the police have been clever to make coerce and false confessions seem voluntary and scale through the test of admissibility. One of those clever tactics entails taking the suspect with his confessional statement to a superior police officer for adoption or denial. This practice has even been approved by the courts. However, the courts have not considered whether this practice does not negate one of the pillars of natural justice *nemo iudex in causa sua*; no one should be a judge in his own cause. It is the same police that seek to validate the confessional statement that approves same through her superior police officer. Should it not be that a legal officer from the institution of an un-bias umpire validates the confessional statement?

Onoja makes a case for the adoption of video recording of confessions and police interrogation to minimize police abuse and torture.<sup>62</sup> He observes that electronic recording of confessions has been adopted by the USA, England and Wales. The learned scholar had earlier submitted that the police are known to control and manipulate the suspect using intimidation and suggestion to implant the details of the offence in his mind, so that the suspect can relay it back accurately

<sup>60</sup> (n9).

<sup>61</sup> (n12).

<sup>62</sup> (n1) 209.

in his confession.<sup>63</sup> A scene in John Grisham's 'The Innocent Man' explains this practice in details. A suspect is mentally tortured and drained for hours, he accepts to make a confession on the basis of a dream he earlier had, the dream is converted into reality, and then the video recording, which was initially off, is turned on for the reception of the 'obtained confession'.<sup>64</sup> In effect, video evidence is likely not a reliable means that ensures that a confession is obtained by fair means. Further, it is highly probable that in this era of computer technology, video evidence can be cleverly doctored, blinding the court to its authenticity.

Macpherson maintains that a confession tends to be the centre-piece of a prosecutor's case, so once it is elicited, it is hard to overcome.<sup>65</sup> Nigeria trial courts have proved this statement to be true, as involuntary confessions are readily admitted, only to get invalidated by the appellate courts. Apart from obtaining a confession, the Nigeria police are yet to fully embrace and employ advanced techniques of investigating crimes.

It is the duty of the police/ prosecution to prove the guilt of the accused beyond reasonable doubt. If at the end of trial, there is a reasonable doubt as to the involvement of the accused in the offence, he is entitled to a discharge. Proof beyond reasonable doubt ought to be achieved by following due process of the law and not by fabrication of evidence. Where the police/ prosecution employ fraudulent means in securing conviction, this is persecution. Obtaining a false confession by whatever means and using same in prosecuting and securing a conviction against a defendant is persecution. This is not justice, as justice in a criminal trial entails relying on true and reliable evidence in convicting the accused. Macpherson citing Strang notes that:

*If there is more to criminal justice than truth-seeking alone, then to avoid defeat of the additional goals of dignity and integrity, we have to reject even the accurate confession if involuntarily obtained.*<sup>66</sup>

## 5. Investigation/ Prosecution without Confession

It is the decision of the Nigerian Supreme Court that the prosecution may prove its case against an accused person in several ways; by direct evidence, by circumstantial evidence, and/ or by the confession of the accused.<sup>67</sup> Direct evidence could mean evidence of a fact which is directly in issue, or it could also mean evidence which flows from the personal knowledge of the witness. In the first sense direct evidence emanates from the oral evidence of a witness and is used in contradistinction to circumstantial evidence.<sup>68</sup> For instance, in a charge for arson, evidence given in court by an eye witness who saw the accused person commit the arson is classified as direct evidence. In the second sense, a witness testifies to facts within his personal knowledge. In this second sense direct evidence is used in contradistinction to hearsay evidence.<sup>69</sup> The EA 2011 provides that oral evidence must be direct; the evidence of a witness who sees the incident, the evidence of a witness who heard the conversation or report, the evidence of the witness who perceived a fact which can be perceive, and the evidence of a witness who holds the opinion on the fact sought to be prove.<sup>70</sup>

In the absence of direct evidence, the prosecution can prove its case against the accused by circumstantial evidence. The most widely accepted definition of circumstantial evidence was made by Lord Hewart in *R V Taylor*<sup>71</sup> where he defined it as "Evidence of surrounding

<sup>63</sup> (n1) 203.

<sup>64</sup> J. Grisham, *The Innocent Man* (New York: Bantam Dell 2007) 107 – 114.

<sup>65</sup> (n2) 7.

<sup>66</sup> (n2) 42.

<sup>67</sup> *Okuiemute v State* [2016] 15 NWLR (pt 1535) 297.

<sup>68</sup> Z. Adango, *Handbook on Law of Evidence Applicable in Customary Courts in Nigeria* (Lagos: Sibon Books Ltd. 2016) 83.

<sup>69</sup> *Ibid.*

<sup>70</sup> E. A. 2011, s. 126.

<sup>71</sup> (1921) Criminal Appeal Cases 20, 21.

circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics.”<sup>72</sup> This definition was cited with approval by the Nigerian Supreme Court in the case of *Ujiofor v State*.<sup>73</sup> It is the decision of the Nigerian Supreme Court in the cases of *Nasiru v. the State*<sup>74</sup> and *Ujiofor v. State*,<sup>75</sup> that circumstantial evidence is admissible in judicial proceedings by virtue of the EA.<sup>76</sup> The EA 2011,<sup>77</sup> which provision is similar to the section of the repealed EA upon which the Supreme Court based its decision, provides that a court may presume the existence of any fact which it thinks likely to have happened, regard being heard to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. In this vein a court can rely on circumstantial evidence and draw reasonable inferences or conclusion from those circumstances proved in evidence where direct evidence is lacking.<sup>78</sup> However, in drawing such conclusion or inferences, a court is required to exercise great caution so that an innocent person is not unjustly implicated or convicted.<sup>79</sup> The law is settled that for circumstantial evidence to form the basis of a conviction, the circumstantial evidence must be positive, cogent, unambiguous, compelling, direct and more fundamentally the evidence when analyzed must lead irresistibly to the conclusion that the accused person and no other person else committed the offence.<sup>80</sup>

In the *State v Jimoh Salawu*<sup>81</sup> the Nigerian Supreme Court found that the evidence of PW2 qualifies as strong circumstantial evidence pointing irresistibly and conclusively at the accused person as the perpetrator of the gruesome murder. The Court most importantly held that the “circumstantial evidence, standing alone and without the confessional statements of the accused person, is strong enough to sustain the conviction of the accused/ Respondent.”<sup>82</sup> In other words the Police/ prosecution can adequately secure the conviction of an accused person without relying on his/her confessional statements.

The danger of relying on confessions in prosecuting criminal cases has been exposed by DNA evidence in the USA. DNA evidence exonerated nearly 30% wrongful conviction, which was the result of false confession. In 2019, of the 362 wrongful convictions uncovered by the Innocence Project, 100 were found to be the result of false confession.<sup>83</sup> A false confession is an admission of guilt followed by a factual description of a crime that the individual confessing did not actually commit.<sup>84</sup> Macpherson reports that in 2015, American Psychological Association submitted three amicus briefs stating that reform is needed in confession evidence because of its counter intuitiveness, difficulty of assessment, and that psychological experts are needed at trial.<sup>85</sup> It is herein submitted that in view of other cogent techniques in solving crime, abolishing or limiting the use of confessional statements should now be the mindset of the law/policy makers. The judiciary should discourage reliance on confessional statements, as it blinds law enforcement officers from pursuing and making use of other investigative techniques. It is identified in the opening paragraph of this article that there are various

<sup>72</sup> (n68) 86.

<sup>73</sup> [2001] 9 NWLR (pt.718) 371, 390.

<sup>74</sup> [1999] 1 SCNJ 83, 94; [1999] 2 NWLR (pt.589) 87, 98.

<sup>75</sup> (n64) *Ujiofor v State*.

<sup>76</sup> (n17) EA, Cap E14, LFN 2004, s. 149.

<sup>77</sup> E. A. 2011, s. 167.

<sup>78</sup> *Udedibia v State* [1976] 11 SC 133, 138, 139; *Adjie v State* [1980] ANLR 39, 49.

<sup>79</sup> *Ekpo v State* [2003] 17 NWLR (pt.849) 312, 408; *Amala v State* [2004] 12 NWLR (pt.888) 520, 555, 556.

<sup>80</sup> (n63) *Ujiofor v State*.

<sup>81</sup> [2011] 10 SCM 76, 98.

<sup>82</sup> *Ibid*.

<sup>83</sup> (n2) 6.

<sup>84</sup> (n2) 8.

<sup>85</sup> (n2) 18.

techniques that could be resorted to in successfully solving a crime. There is the forensic science, which is not limited to fingerprinting and DNA testing; electronic surveillance, phone taping, undercover policing, among others. In the absence of direct evidence these techniques have solved crimes with the accuracy of mathematics, and exonerated persons wrongly convicted.

A brief examination of the above mentioned techniques in criminal investigation are herein undertaken. Fingerprint evidence, which was previously the gold in criminal investigation, is the first point of call. Fingerprinting as a possible means of identification was probably first mentioned by Henry Faulds in a letter, published in the 1880 British scientific journal 'Nature'.<sup>86</sup> Sir William Herschel in response noted that he had been using thumb impressions to identify illiterate prisoners and workers. Sir Francis Galton undertook the first complete scientific appraisal of fingerprinting. In 1891, Sir Edward Henry, Inspector General of the Bengal police, adopted fingerprinting as the routine procedure for registering the identity of criminals. This process proved useful to criminal investigation. Sir Edward Henry thereafter introduced fingerprinting into Britain in 1901. On 13<sup>th</sup> September 1902, Henry Jackson became the first person in Britain to be convicted by fingerprint identification/ evidence. However, finger printing as a means of identification is documented to have originated in ancient Egypt.<sup>87</sup> It is notable that fingerprints are usually left behind by culprits at the crime scene, usually on abandoned murder weapons, broken windows, doors, escape routes/ entrances, and so on. Fingerprint identification involves lifting the fingerprints left behind at a crime scene, by specially designed scientific procedure, and matching same with those of suspects or fingerprints of persons already in the data base, so as to identify the culprits behind the commission of an offence. Almost every adult Nigerian that has the BVN (Bank Verification Number), NIN (National Identification Number), and participated in voters' registration, has their fingerprints in a federal government or bank data base. In the event of the need to match a fingerprint left behind by a culprit in order to solve a crime, the police may access the data base and get the required fingerprint match, where there are no available suspects. The reliability of fingerprint evidence is that no two persons can have the same fingerprint. This is the same with DNA evidence as each individual has a unique DNA profile (except for identical twins, who share the same genetic code).

DNA evidence was first developed by British scientist Alec Jeffrey in 1985.<sup>88</sup> In 1986, DNA testing solved a double homicide in England and linked the suspect to other previously unsolved rapes and murders within the area. In 1987, DNA evidence was used for the first time in convicting a Florida rapist in the United States. Apart from criminal investigations, DNA testing is also now used to exonerate wrongly convicted persons. DNA evidence collected from a crime scene can be linked to a suspect or can eliminate a suspect from suspicion.<sup>89</sup> At the close of 2019, the Innocence Project reported that more than 250 people were exonerated through post-conviction DNA testing in the United States.<sup>90</sup>

DNA is a helical double stranded nucleic acid that is crucial for containing the genetic information for cell growth, division, and function.<sup>91</sup> It is present in virtually every cell in the body. A person gets his/her DNA from both parents. It is transmitted down to generations,

<sup>86</sup> R. Jones, 'Fingerprinting and CSI Techniques Used on the Jack the Ripper Murders' <[www.jack-the-ripper.org](http://www.jack-the-ripper.org)> accessed 3 January 2022.

<sup>87</sup> O. Ajayi, *Crime Scene and Forensic Investigation: Basics of Tunnel Vision on Interrogation Process* (Lagos: Malt House Press Ltd 2018) 74.

<sup>88</sup> <<https://www.findlaw.com>> accessed 12 February 2022.

<sup>89</sup> National Commission on the Future of DNA Evidence, NIJ and OVC, 'Understanding DNA Evidence: A Guide for Victim Service Provider' <<https://www.ojp.gov/pdffiles1/nij/bc000657.pdf>> accessed 12 February 2022.

<sup>90</sup> (n88).

<sup>91</sup> <<https://www.biologyonline.com/dictionary>> accessed 17 February 2022.

relative between siblings/ very close family ties, but unique to a particular individual. For purposes of this article, DNA is more appropriately defined as a long molecule that contains each person's unique genetic code.<sup>92</sup> A sufficient amount of DNA may be found in virtually any type of biological evidence such as blood samples, bodily fluids, hair, skin cells, and so on, left at the crime scene. DNA evidence is considered more than 99 percent accurate, though not full proof. Scientists have strongly established that there is only a one in one billion chance that the DNA of two individuals will match. Errors in DNA evidence are specifically linked to mix-up of samples in the lab or contamination of samples. Properly collected DNA can be compared with known samples to place a suspect at the scene of the crime.<sup>93</sup>

Another investigative technique is the Pretext phone call, which is likely a subsidiary of phone tapping. Pretext phone calls are commonly used in the investigation of rape cases.<sup>94</sup> It is a designed phone call conversation between the victim and the suspect, initiated by the victim under the supervision of law enforcement officers. The suspect is unaware that the call is being recorded. The purpose of a pretext phone call is to elicit incriminating statements from the suspect. Statements obtained from a pretext call may adequately link the suspect to the commission of the crime and be used in evidence against the suspect.

Under cover policing is another vital technique in criminal investigation. The evidence obtained from undercover operations are most likely direct, reliably, and cogent. Of recent, the Nigerian news was abuzz with the declaration of a suspended high ranking police officer, DCP Abba Kyari, wanted in connection with international drug trafficking by the National Drug Law Enforcement Agency (NDLEA).<sup>95</sup> The evidence gathered against the said suspended officer was as a result of undercover operations by officers of the NDLEA.

## Conclusion

Evidence abound that torture is employed by Nigeria police officers in furtherance of an illegal purpose and in particular to obtain a confession for the prosecution of an accused person. Torture has seemingly been prohibited under international laws and by the Nigerian Constitution, but torture is not criminalized in Nigeria. Torture gives birth to coerced and false confessions, presented to the courts, and relied upon by the prosecution to secure conviction against an accused. The cases show that the courts have been unable to adequately secure the voluntariness of confessions presented at trial.

A confession ought to be voluntary. The standards for voluntariness of a confession includes that it is produced freely, in the absence of external, intentional, and illegitimate action on the part of the State official.<sup>96</sup> The EA 2011 has eroded the voluntariness of a confession for its admissibility in Nigerian courts. Reliability of the confession obtained, determined by the presence or absence of oppressive circumstances is now the criteria for the admissibility of a confessional statement in Nigeria. In effect, a confession not freely given can be received by a Nigerian court and relied upon to convict the defendant.

<sup>92</sup> <<https://medicalnewstoday.com/articles/319818>> accessed 17 February 2022.

<sup>93</sup> (n89).

<sup>94</sup> H. M. Steinberg, 'Police Investigation Tactics' <[hmmichaelsteinberg.com](http://hmmichaelsteinberg.com)> or <[www.google.com](http://www.google.com)> accessed 3 January 2022.

<sup>95</sup> A. Oluwafemi, 'NDLEA Declares DCP Abba Kyari Wanted Over Links With International Drug Cartel' *The Cable News* (Nigeria, 14 February 2022) <<https://www.thecable.ng/breaking-ndlea-declares-dcp-abba-kyari-wanted-over-links-with-international-drug-cartel/amp>> accessed 16 February 2022; F. Olorok, 'NDLEA Declares DCP Abba Kyari Wanted Over Drug Links' *The Punch Newspaper* (Nigeria, 14 February 2022) <<https://www.google.com/amp/s/punchng.com/breaking-ndlea-declares-dcp-abba-kyari-wanted-over-drug-links/%3famp?espv=1>> accessed 16 February 2022; D. Erezi, 'NDLEA Declares Abba Kyari Member of International Drug Cartel' *Guardian Newspaper* (Nigeria, 14 February 2022) <<https://guardian.ng/news/ndlea-declares-abba-kyari-wanted-for-pushing-illicit-drugs/>> accessed 16 February 2022.

<sup>96</sup> (n2) 19.

Well aware of the coercive nature of Nigeria Police personnel during interrogative sessions, with the capacity to cleverly cover up involuntary confessions or even doctor confession, it becomes imperative to call for the abolition of confessions in police investigations. The use of confession in investigation diminishes the investigative capacity of the police. Conversely, the adoption of other processes of investigation will enhance the investigative capacity of the police.

The prosecution is expected to present credible and reliable evidence against an accused person in order to secure a conviction. A confessional statement is not the only means or evidence to secure the conviction of an accused. The courts have expressed that direct and circumstantial evidence can secure conviction. Application of the other reliable techniques of investigation can accurately supply the much needed direct or circumstantial evidence in the prosecution and conviction of a suspect. In this vein it is advocated that the presentation of confessional statement by the police/ prosecution before the court should be abolished. The accused can of his own free will, after due consultation with legal counsel, decide to make a confession in open court.