

The Recent Raid on the Residence of Some Judicial Officers in Nigeria and Their Arrest: Matters Arising

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“Money, they say, is the root of all evil. The bench is definitely not the place to make money. A corrupt judge is, thus, a great vermin, the greatest curse ever to afflict any nation. No one should go to the Bench to amass wealth, for money corrupts and pollutes not only the channels of justice but also the very stream itself. It is a calamity to have a corrupt Judge. The passing away of a great Advocate does not pose such public danger as the appearance of a corrupt and/or weak Judge on the Bench, for in the latter instance, the public interest is bound to suffer and elegant justice is mocked, debased, depreciated and auctioned. When justice is bought and sold, there is no more hope for society. What our society needs is an honest, trusted and trustworthy judiciary. It is far better to have an intellectually average, but honest judge, than a legal genius who is a rogue. Nothing is as hateful as venal justice, justice that is auctioned, justice that goes to the highest bidder”¹

Abstract

The nation awoke to the deafening sound and news of the unprecedented arrest, search and detention of some judicial officers in Nigeria² courtesy of an alleged ‘sting operation’ conducted by the Department of State Security Service on the wee hours of the night of 8th October 2016 across the country in relation to allegations of corruption. This write-up aims to x-ray the legality and/or otherwise of the actions of law enforcement officers in Nigeria and their powers in relation to searches and arrest based on the extant

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¹ Late Hon. Justice Chukwudifu Oputa (JSC) at a Seminar delivered at the Judicial Service Commission.

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provisions of our laws as it relates to criminal justice administration, particularly with a view to establishing the extent to which such actions conform with the requirements of the rule of law. It is our finding in this work that despite the uproar that trailed the sting operation; the raid on the residence of some judicial officers in Nigeria and their arrest was legal.

1. Who is a Judicial Officer?

The Black's Law Dictionary defines a Judicial Officer as “a Judge or Magistrate”³ while the Constitution⁴ defines a Judicial Officer as:

The holder of the office of the Chief Justice of Nigeria or a Justice of the Supreme Court, the President or Justice of the Court of Appeal, the office of the Chief Judge or a Judge of the Federal High Court, the office of the President of the National Industrial Court, the office of the Chief Judge or Judge of the High Court of the Federal Capital Territory, Abuja, the office of the Chief Judge of a State and Judge of the High Court of a State, a Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja, a President or Judge of the Customary Court of Appeal of the Federal Capital Territory, Abuja, a Grand Kadi or Kadi of the Sharia Court of Appeal of a State, or President or a Judge of the Customary Court of Appeal of a State”. Thus the holder of any of these offices is a Judicial Officer.

2. Immunity of Judicial Officers from Arrest, Searches and Prosecution

By immunity, we mean ‘any exemption from a duty, liability, or service of process, such as an exemption granted to a public

³ Bryan A Garner; *Black's Law Dictionary* (7th Edt.) 1999, p.851.

⁴ Section 318 (1) 1999 Constitution of Federal Republic of Nigeria.

official’⁵. There are several types of immunity which among others includes;

- a) Absolute immunity;
- b) Parliamentary immunity;
- c) Constitutional immunity;
- d) Diplomatic immunity; and judicial immunity.

We are concerned with Judicial Immunity and/or Constitutional Immunity as it applies to judicial officers. Judicial Immunity refers to immunity conferred on judicial officers by the constitution or by any other law. It seeks to protect judges from liability in monetary damages arising from all forms of civil suits arising from the performance of their responsibilities.

Judicial Immunity is a creation of common law derived from the decisions of regular courts of law. Litigants and legal practitioners were discouraged from challenging the decisions of the court by suing the judge directly but were rather encouraged to challenge the decision on appeal. The idea was to secure the independence of the judiciary to a large extent which was approved in the English and United States Courts. Judicial Immunity was first recognised in the United States of America in the case of *Randall v Brigham*⁶ and *Stump v Sparkman*⁷.

The immunity provision contained in the 1999 constitution applies to a person holding the office of President or Vice President, Governor or Deputy Governor only within the period while such a person is the holder of such office⁸. Section 308 provides in extenso;

⁵ Bryan A Garner, *Black’s Law Dictionary* (7th Edt.) 1999, p.752.

⁶ 74 U.S (7 Wall) 523, 19 L.Ed. 285 (1868) 74; See *Bradley v Fisher* 80 U.S. (13 Wall.) 335, 20 L. Ed. 646 (1871).

⁷ 435 U.S 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

⁸ Section 308 (3) 1999 Constitution of Federal Republic of Nigeria as amended.

(1) Notwithstanding anything to the contrary in this constitution, but subject to subsection (2) of this section-

- (a) No Civil or Criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
- (b) A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) No process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

- (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
- (3) This section applies to a person holding the office of President or Vice President, Governor or Deputy Governor; and the reference in this section to “period of office” is a reference to the period during which the person holding such office is required to perform the functions of the office.

The immunity provision pursuant to section 308 (3) of the 1999 Constitution of the Federal Republic of Nigeria exempts the holders of such office as listed in the subsection from civil or criminal proceedings against them. The section automatically stays any civil or criminal proceedings pending against the holders of such office mentioned in the subsection prior to their

assumption of office⁹. The immunity of the aforesaid office holders however, does not extend to criminal investigation for an alleged offence. We submit that even the officers covered by section 308 of the Constitution can be investigated on allegation of a criminal offence. In *Gani Fawehinmi v Inspector General of Police*¹⁰ the Supreme Court held:

That a person protected under section 308 of the 1999 Constitution, going by its provisions, can be investigated by the Police for an alleged crime or offence, is in my view, beyond dispute. To hold otherwise is to create a monstrous situation whose manifestation may not be fully appreciated until illustrated...The evidence may be useful for impeachment purposes if the House of Assembly may have need of it. It may no doubt be used for prosecution of the said incumbent Governor after he has left office. But to do nothing under the pretext that a Governor cannot be investigated is a disservice to the society.

Thus, the constitutional immunity envisaged by the Constitution does not extend to the holder of any judicial office whatsoever. By the Literal Rule of interpretation enunciated in the case of *Abioye v Yakubu*¹¹ combined with the legal maxim *expressio unius est exclusio alterius*¹², Judicial officers in Nigeria do not enjoy constitutional immunity. Hon. Justice Ogbuagu JSC (as he then was) in *Ehuwa v O.S.I.E.C*¹³ opined as follows:

⁹ See *Col. Oluwole Rotimi v Macgregor* (1974) NSCC 542; *Bola Tinubu v I.M.B Securities Ltd* (2001) 16 NWLR (Pt. 740) 670; *Media Technique Nig. Ltd. v Lam Adeshina* (2004) 44 WRN 19.

¹⁰ (2002) 23 WRN 1 S.C.

¹¹ (1991) 5 NWLR (Pt. 190) 130.

¹² See *Ehuwa v O.S.I.E.C* (2006) 10 NWLR (Pt.1012) 544 S.C; *C.P.C v I.N.E.C* (2012)1 N.W.L.R (Pt.1280)106 at 125

¹³ *Supra*

It is now firmly established that in the construction of a statutory provision, where a statute mentions specific things or persons, the intention is that those not mentioned are not intended to be included...

The implication of the above statement is that aside from the four public officers expressly mentioned in section 308 of the 1999 Constitution, every other person including judicial officers (Chief Justice of Nigeria inclusive) does not enjoy any special protection from criminal investigations and prosecutions during the subsistence of their tenure. We therefore submit that immunity cannot be inferred. It must be specifically conferred or granted by law.

It is however noteworthy to state that by virtue of section 6 of the Constitution¹⁴ judges and/or judicial officers are vested with judicial powers of the Federal Republic of Nigeria and such powers are exercisable by them without fear or favour. Hon. Justice Oputa (of blessed memory) opined that:¹⁵

The court exists to do justice to all manner of men without fear or favour, affection or ill will towards anybody, and distinction or discrimination as to class or social status;... to do justice to the rich as well as to the small and seemingly inconsequential man.

In the exercise of these judicial powers, judges are seen as demigods and clothed with celestial powers and are therefore perceived to be beyond arrest. The relevant law that established each of our courts provides that judges shall not be held liable for any act or omission carried out in the course of discharging their functions. Judges are immune from civil proceedings on account of negligence, omissions, slips, mistakes or errors made in the

¹⁴ 1999 Constitution of Federal Republic of Nigeria as amended.

¹⁵ Oputa, C.A. *The Law and the twin Pillars of Justice*, (Owerri), 1981, p. 67. (publisher)

course of discharging their duties. Litigants who are justifiably dissatisfied with the decisions of judges cannot institute actions in court against them, even if the judge is blatantly biased against them, as such actions are not justiciable. He can only appeal as of right or with leave to a higher court for redress.¹⁶

4. The Role of National Judicial Council in the Discipline of Judicial Officers in Nigeria

The National Judicial Council is one of the institutions established by the Nigerian Constitution¹⁷ and its powers are as enunciated in paragraph 21 of the Third Schedule to the Constitution which includes the responsibility to investigate, discipline erring judicial Officers for misconduct, and recommend appropriate sanctions thereof. Furthermore, the Constitution provides for the independence of the National Judicial Council from interference and control from any other authority or persons when exercising its disciplinary powers over judicial officers¹⁸. It is submitted that in appropriate cases, such conduct if established after due investigation, may be subject to the sledge hammer of National Judicial Council falling on the erring Judicial Officer.

The inevitable question therefore, in view of the above, is whether it is mandatory for law enforcement agencies to obtain consent and/or approval of the National Judicial Council before exercising their power of investigation, arrest and prosecution of judicial officers alleged to have committed judicial corruption. It is submitted that the National Judicial Council is not a Court of law, neither is it a law enforcement agency with respect to,

¹⁶ See Sections 241 & 242 of the 1999 Constitution of the Federal Republic of Nigeria as amended.

¹⁷ See Section 153 (1) 1999 Constitution as amended.

¹⁸ See Section 158 (1) 1999 Constitution as amended.

investigation of crime¹⁹ and therefore, where in the course of carrying out its mandate it is faced with a situation where an alleged judicial misconduct by a judicial officer amounts to a crime (judicial corruption), it is humbly submitted that the body should recuse itself and allow the regular agencies and Courts of law to exercise their powers as its mandate does not extend to the investigation of judicial crimes.

Our position is further fortified by the case of *Attorney-General of Bendel State v Attorney-General of the Federation*²⁰ where it was held that a constitutional provision should not be interpreted in such a way that the interpretation will defeat its purpose. We therefore submit that there is nothing in paragraph 21 of the Third Schedule to the Constitution which limits the powers of law enforcement agencies in Nigeria to investigate arrest and search any judicial officer who is alleged to have committed a crime.

7. Immunity of Judicial Officers from Investigations

It has been established in this work that judicial office holders do not enjoy constitutional immunity by virtue of the provisions of section 308 of the 1999 Constitution unlike certain Executive office holders who enjoy the benefits of the section. It is also an elementary principle of law that the immunity granted to the Executive office holders by the constitution in relation to civil and criminal proceedings does not extend to or prohibit criminal investigation of an alleged offence. In *Gani Fawehinmi v Inspector General of Police*²¹ the Supreme Court held that

¹⁹ See generally sections 6, 36(1), 153 (1) (i) and (2), paragraph 20 and 21 of the 3rd Schedule to the 1999 Constitution as amended on the status of the National Judicial Council; see *Nwaogwugwu v President Federal Republic of Nigeria* (2007) All FWLR (Pt.358)1327 at 1356 Paras D-F.

²⁰ (1981) 10 S.C 1.

²¹ (2002) 23 WRN 1.

although public officers covered by the immunity clause cannot be arrested or prosecuted, they are not excluded from investigation for corruption and other criminal offences. In the same judgment, Uwaifo JSC (as he then was) opined:

The evidence may be useful for impeachment purposes if the House of Assembly may have need of it. It may no doubt be used for prosecution of the said incumbent Governor after he has left office. But to do nothing under pretext that a Governor cannot be investigated is a disservice to the society.

In a nutshell, it is posited that since the public officers clothed with the iron shield of section 308 of the 1999 constitution are not precluded from criminal investigations, it will be unthinkable to imagine that judicial officers cannot be subjected to criminal investigations on allegation of their having committed a criminal offence or acts of judicial corruption without the approval of National Judicial Council. In order to thoroughly deal with allegations of corruption, judicial officers are subject to investigations like every other citizen, and eventual prosecution if the commission of an offence is established.

6. Immunity of Judicial Officers from Civil and Criminal Prosecution in Nigeria

Pursuant to section 308 of the 1999 Constitution of the Federal Republic of Nigeria, it is fundamentally instructive to note that the said public officers conferred with immunity from civil and criminal proceedings may be sued in a nominal capacity in criminal proceedings where they are sued only as nominal party.²² In *Federal Republic of Nigeria v Dariye*²³ the Court of Appeal

²² Section 308 (2) 1999 Constitution of the Federal Republic of Nigeria.

²³ (2011) 13 NWLR (Pt. 1265) 521.

dismissed Criminal charges against Dariye (the then incumbent Governor of Plateau State) on the ground that he was charged as a principal party. The court held according to Tur JCA that:

Learned counsel to the Appellant ought to have seen the impracticability, futility and absurdity of instituting criminal proceedings against Chief Joshua Chibi Dariye either as the Governor of Plateau State or in his name since he is not a nominal party under section 308 (2) of the constitution but the principal offender alleged to have conspired with the other co-accused persons to commit the offence.

Judicial officers enjoy judicial immunity from litigants in relation to civil proceedings arising from negligence, omissions, slips, mistakes or errors made in the course of discharging their duties. The implication of this is that litigants who are not satisfied with the judgment of a court cannot proceed directly against the judge to recover damages, but they are directed to challenge the decision in an appellate court. However, this immunity is in abeyance where the judicial officer is sued in his personal capacity as a citizen and not in his capacity as a judicial officer in relation to actions or inactions relating to proceedings in court. If the gate is opened for litigants to institute an action against a judge for a judicial act, it would lead to an avalanche of malicious and unmeritorious actions which would inevitably collapse the judicial system and lead to harassment of judges²⁴.

Furthermore, the judicial immunity does not extend to investigation and prosecution for the commission of a criminal offence or an act of judicial corruption. Given that the beneficiaries of section 308 of the constitution are not immune from criminal investigation, then as a matter of inexorable

²⁴ See the Oklahoma U.S Court decision in *Marley v Wright*, 137 F.R.D 359 (W.D. Okla. 1991).

inference, it follows without more that our judges can be investigated on allegations of commission of any offence and/or judicial corruption, and prosecuted in the law courts where necessary. In order to thoroughly deal with allegations of corruption, judicial officers are subject to investigations like every other citizen, and eventual prosecution if the commission of an offence is established.

8. Immunity of Judicial Officers in Nigeria from Arrest by Law Enforcement Agents/Agencies

Unequivocally, judicial officers in Nigeria can be arrested upon reasonable suspicion of their having committed a criminal offence or for purposes of preventing their commission of a criminal offence.²⁵ The implication is that any law enforcement officer in Nigeria whether or not members of the Nigerian Police Force have the power to arrest any person who in their view is reasonably suspected to have committed an offence or about to commit an offence. This power extends to the arrest of the alleged suspect for purposes of prevention and detection of crime.²⁶ A judicial officer for all intents and purposes is a private citizen or a private person and accordingly, may be arrested on allegation or suspicion of having committed an offence with or without warrant of arrest.

Our position is buttressed by the provisions of section 18 of the Administration of Criminal Justice Act²⁷ which in a nutshell provides that an alleged suspect may be arrested with or without warrant upon a reasonable suspicion of his having committed an offence against a law in Nigeria, or against the law of any other country. We submit that judicial officers in Nigeria do not enjoy immunity from arrest as they are not covered under section 308 of the 1999 Constitution as amended.

²⁵ Section 35 (1) (c) 1999 Constitution of the Federal Republic of Nigeria.

²⁶ Section 4 Police Act, Cap P19 Laws of the Federation of Nigeria, 2004.

²⁷ Section 18 Administration of Criminal Justice Act, 2015.

8. Department of State Security Service, Whether a Law Enforcement Agency or Not?

The Department of State Security Services otherwise known as DSS is a creation of Statute, the National Securities Agencies Decree²⁸ and Decree 1 of 1999. It was hitherto a Special Unit in the Nigerian Police Force directly under the control of the Inspector General of Police, which later metamorphosed into the Nigerian Security Organisation in 1976.²⁹

We seek to discuss here, albeit, in a nutshell, whether the investigations, searches and the arrest of the judicial office holders conducted by the Agency are within the core mandate of the Department of State Security Service and by extension, whether it is considered to be a Law Enforcement Agency for the purpose of arresting the Judicial Officers and conducting the search of their residential premises. Under the National Security Agencies Decree No.19 of 1986, the powers of the DSS are as contained in section 3 of the Decree which provides as follows;

- (3) The State Security Service shall be charged with responsibilities for-
 - (a) The prevention and detection within Nigeria of any crime against the internal security of Nigeria;
 - (b) The protection and preservation of all non-military classified matters concerning the internal security of Nigeria; and
 - (c) Such other responsibilities affecting internal security within Nigeria as the National Assembly or the President, as the case may be, may deem necessary.

²⁸ The National Security Agencies Decree No 19, 1986.

²⁹ See Decree No 16, 1976.

In 1999, the Military Head of State, relying on Section 3 (c) of the 1986 Decree which empowered the President to enlarge the powers of the State Security Service, and in exercise of such powers as President, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, by virtue of Instrument No. 1 of 1999, vested on the Agency such additional powers which includes; *'The prevention, detection, and investigation of economic crime of national security dimension, among other things'.*(emphasis added).

It is submitted that by the enlargement of the powers of the State Security Service, and based on the pivotal role of judicial officers in nation building, a corrupt judicial officer is not only a threat to the Course of justice but by extension, a threat to the security of the nation. A corrupt judicial officer is worse than an armed robber because he makes binding decisions upon which societal harmonious co-existence depends. Where a judicial Officer is alleged to have compromised the Ethics of his calling as a result of inducement by corrupt political office holders and thereby churns out a perverse judgment and/or decision, which ultimately perpetuates injustice in the society, we submit that such is an economic crime of a national security dimension.

Again, on whether the Officers of the Department of State Security Service can be regarded as law enforcement officers, we submit that the definition of “Officers” according to the Police Act and Administration of Criminal Justice Act are instructive. Section 2 of the Police Act³⁰ defines a Police Officer as “*any member of the Force*” while the Administration of Criminal Justice Act³¹ defines a Police Officer as “*the Nigerian Police established by the Constitution or where the context so admits, shall include any officer of any law enforcement agency established by an Act of the National Assembly*”. It is submitted that the combined reading of

³⁰ Cap P19 Laws of the Federation of Nigeria 2004

³¹ Administration of Criminal Justice Act 2015

the above provisions irresistibly points to the fact that the Department of State Security Service is a law enforcement Agency and, accordingly, Officers working therein are law enforcement officers and by extension, Police Officers for the purpose of effecting the arrest and conducting the searches under discussion.

9. Time of Arrest under the Administration of Criminal Justice Act

Having established the fact that Judicial Officers are not immune from arrest by law enforcement agents, we will now proceed to consider the legality of the arrest of the said judicial officers in their homes at about 1.00am or so soon thereafter as alleged on the said day.

The relevant law for this purpose is the Police Act³² and the Administration of Criminal Justice Act³³. The Police Act is silent on the time an arrest may be effected. However, section 43 (2) of the Administration of Criminal Justice Act³⁴ provides unequivocally thus;

A warrant of arrest may be executed by any Police officer *at any time* and in any place in any State other than within the actual court room in which a court is sitting. (Emphasis added).

We submit that based on the above provision; there is nothing illegal, unlawful or unconstitutional about the arrest of the judicial officers in their homes at the time they were arrested by the law enforcement officers. We are not unmindful of the fact that unnecessary noise has been made about the time within which the arrest was conducted even by legal practitioners, without recourse to the position of the law on the issue. Perhaps the

³² Section 4 Police Act, Cap P19 Laws of the Federation of Nigeria, 2004.

³³ Administration of Criminal Justice Act 2015.

³⁴ *Ibid.*

proponents of the contrary view relied on the provisions of Administration of Criminal Justice Law, Lagos³⁵ and Criminal Procedure Act (Laws) of the Southern States³⁶.

Curiously the provisions of section 27 (2) of Administration of Criminal Justice Law and section 28 (2) Criminal Procedure Act are *impari materia* with section 43 (2) of Administration of Criminal Justice Act. Thus any argument to the contrary is unmeritorious and unsupported by our criminal jurisprudence.

8. Time within Which to Conduct a Search under the Administration of Criminal Justice Act, 2015

The issuance and execution of search warrant is regulated by law. The Administration of Criminal Justice Act³⁷ regulates the issuance and execution of search warrant in the Federal Capital Territory, and any such warrant issued in Federal Capital Territory to be executed outside the Federal Capital Territory. Section 148 provides as follows:

A search warrant may be issued and executed at any time on any day, including a Sunday and a public holiday.

It is submitted that time and day within which a search warrant may be executed under the regime of the Administration of Criminal Justice Act is not a barrier to the execution of the warrant. It is within the discretion of the executing officers to elect at what time it will be convenient for them to execute the warrant in order to achieve maximum result. The officers executing the warrant are empowered to use reasonable force to gain ingress and

³⁵ See Section 27 (2) Administration of Criminal Justice Law, Lagos 2011.

³⁶ See Section 28 (2) Criminal Procedure Act.

³⁷ Administration of Criminal Justice Act 2015; See also section 108 (1) Administration of Criminal Justice Law 2011.

egress into the premises or the place sought to be searched where access is being denied³⁸. It was reported that during the arrest and search conducted in the premises of the Judges, that the doors to some of the rooms were forced open or pulled down by the officers. We submit that if access to these rooms were indeed denied, then the officers were justified to use reasonable force to gain access in accordance with section 149 (2) of Administration of Criminal Justice Act, 2015.

10. Procedure for Execution of a Search Warrant under the Administration of Criminal Justice Act, 2015

The procedure for the execution of Search Warrant under the Administration of Criminal Justice Act is as provided in section 149 (4) which stipulates as follows:

A search under this part shall, except the Court or Justice of the Peace owing to the nature of the case otherwise directs, be made in the presence of two witnesses and the person to whom the search warrant is addressed may also provide a witness within the neighbourhood”.

In a nutshell, we submit that the conditions precedent for the execution of search warrant under the Administration of Criminal Justice Act are that:

- i. It must be executed in the presence of the occupant;
- ii. It must be executed in the presence of two witnesses;
- iii. The occupant if he wishes is allowed to provide a witness from the neighbourhood.

We submit that in the circumstances of the scenario under consideration, it was not reported whether or not the above conditions were complied with by the Officers of the Department

³⁸ See sections 149 (2) and 12 of Administration of Criminal Justice Act 2015.

of State Security Service while searching the residence of the Judicial Officers. Assuming without conceding that the warrant was executed without due compliance with the conditions stated above, the search becomes illegal but the consequences of the illegality will attach to the officers executing the warrant.³⁹

Any evidence obtained as a result of the illegal search remains admissible in the court of law subject to the discretion of the Judge.

Furthermore, it is submitted that inherent in the section under consideration is the power of the issuing authority to direct the executing officers to ignore the conditions stated in the sub-section while executing the warrant based on the circumstances of each case. Where such directives are given, then the execution in the manner directed by the issuing authority becomes legal and in conformity with the law.

11. Admissibility of Evidence Obtained by the Search Conducted by the Officers of Department of State Security Service

In the course of a search, it is not uncommon that the Officers executing the search may not be armed with a search warrant. It is also possible that though the Officers are armed with search warrant, yet they proceeded to obtain material objects not listed in the warrant. Where the scenarios above are the case, such pieces of evidence are referred to as illegally obtained evidence. The question we seek to answer is whether such illegally obtained evidence will be admissible in trial. The admissibility of evidence in Nigeria is regulated by the Evidence Act⁴⁰ and case laws. The position of the law based on the old Evidence Act, English case

³⁹ See *Elias v Pasmore* (1934) 2 KB 164.

⁴⁰ Evidence Act 2011

laws and Nigerian case laws was that evidence illegally obtained is admissible provided it is relevant, irrespective of how it is obtained⁴¹. This position was well illustrated in the Nigerian case of *Musa Sadua & Anor. v State*⁴² which relied on some English cases⁴³ to hold that even if such pieces of evidence are stolen, provided it is relevant it is admissible.⁴⁴

The position of the law as regards the admissibility of illegally obtained evidence in Nigeria is now regulated by section 14 and 15 of the Evidence Act 2011 as amended⁴⁵. It is now within the discretion of the court to admit such evidence as the court has the power to consider the desirability and undesirability of admitting the evidence sought to be tendered⁴⁶.

Thus where the desirability of admitting the evidence is outweighed by the undesirability of admitting it, the court will not admit such evidence. The Nigerian position is the exact position adopted by the Scottish Courts⁴⁷. It is submitted that section 14 and 15 of the Evidence Act seeks to underscore the importance of the protection of the fundamental rights of citizens as enshrined in sections 34, 35 and 37 of the Constitution⁴⁸.

We submit that the discretion vested on the Courts must be exercised judicially and judiciously. We are however concerned with the facts that the law makers failed and/or neglected to state the standard the Courts should maintain in the exercise of the

⁴¹ See Agaba J.A. *Practical approach to Criminal Litigation in Nigeria*. 3rd edn. (Abuja: Bloom Legal Temple, 2015). P.260.

⁴² (1968) NMLR 208.

⁴³ *Kuruma v R* (1955) 1 All E.R 236; *R v Letham*, 8 Cox Crim. Cases 501; *Jones v Owens* (1870) Q.B 34 J.P 759 at 760.

⁴⁴ *Elias v Pasmore* [1934] 2 K.B. 164. 103 L.J.K.B. 223.

⁴⁵ Supra note 41 at P. 262-263.

⁴⁶ See Afolayan A.F. *Criminal Litigation in Nigeria*. 3rd edn. (Enugu: Chenglo Law Publication Ltd, 2016), P.73.

⁴⁷ See *Lawrie v Muir*, [1950] S.L.T. 37. at 39-40 (Ct. Just. 1949); *H.M. Advocate v M'Guigan*, [1936-40] J.C. 16, at 18.

⁴⁸ 1999 Constitution of the Federal Republic of Nigeria as amended.

discretion. The factors the court will take into account in the exercise of its discretion whether or not to admit the illegally obtained evidence are as enunciated in section 15 of the Evidence Act.

Unlike the fruit of the poisonous tree position in the United States of America which is based on the 4th amendment to the United States Constitution, illegally obtained evidence is inadmissible irrespective of its relevancy to the proceedings⁴⁹. The position here covers both documentary evidence and oral evidence obtained as a result of illegally obtained evidence⁵⁰.

Therefore, it will be absolutely incorrect to opine that the evidence recovered from the houses of the judicial office holders will not be admissible in court because it was illegally obtained. On the other hand, assuming without conceding that the officers were not in possession of a search warrant at the time of the alleged search, but produced same within a reasonable time thereafter, the search will be legal all the same and the evidence obtained therefrom admissible.

12. Conclusion

We have espoused the law in relation to the propriety or otherwise of the arrest of judicial office holders in Nigeria and the search conducted on their residence and have come to the conclusion that the alleged arrest and search, contrary to popular sentiments, are legal. To this extent, we submit that the evidence recovered during the course of the search is admissible in court subject to the discretion of the court in order to strike a balance between effective law enforcement and adequate protection of individual

⁴⁹ *Brewer v Williams* 97 S.Ct. 1232 (1977). See also *Silverthorne Lumber Co. v United States*, 251 U.S. 385 (1920). 2 *Wong Sun v United States*, 371 U.S. 471 (1963).

⁵⁰ See G.L Peiris “The admissibility of evidence obtained illegally: A comparative analysis” *Ottawa Law Review* Vol. 13:2. P.315-317.

rights. The execution of the warrant of arrest and search warrant by officers of the Department of State Security Services are *ipso facto*, in order, as they are law enforcement officers, coupled with the fact that judicial corruption is an aspect of economic crime. The immunity provision of the 1999 Nigerian Constitution does not confer immunity on the judicial office holders from being arrested and searched upon allegation or complaint of their having committed or reasonably suspected to have committed a criminal offence.