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EVIDENTIAL HURDLES IN THE PROSECUTION OF CRUDE OIL THIEVES IN NIGERIA: LESSONS FROM *MT ANUKET EMERALD v. F.R.N (2017) LPELR-42326(CA)*

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ABSTRACT

In a report published by the famous United Kingdom's Chatham House[3] in 2013, Nigeria's crude oil thieves are systematically upgrading their techniques and expanding their tentacles in one of the fastest growing global black-markets. Hence, the unlawful activities of the bandits are becoming a menace to the crude oil industrial sector of the country. In the same Chatham House report, it was the belief of the authors that, the illicit activities are backed by powerful private entities in Nigeria including "politicians, military officers, militants, oil industry personnel, oil traders, and organized criminal groups."[4] The report further indicated that: "Nigeria offers a strong enabling environment for the large-scale theft of crude oil. Corruption and fraud are rampant in the country's oil sector. A dynamic, overcrowded political economy drives [the] competition for looted resources. Poor governance has encouraged violent opportunism around crude oil and opened doors for organized crime[s]."[5] It is against the backdrop of the Chatham House report that this paper seeks to explore the complex issue of crude oil ricketteering in Nigeria. Also, the paper argues that, the illicit crude oil banditry is being tackled by the Nigerian government though inefficiently. In furtherance of the discourse, the paper attempted to engage, in legal analysis of the recent case of MT Anuket Emerald v. FRN[6] pin-pointing the critical issues of prosecution evidence which drives the cases of illicit crude oil transactions in the country. Despite the widespread nature of the menace, conviction rates are very marginal

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[3] Christina Katsouris and Aaron Sayne. *Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil*. Chatham House United Kingdom, September 2013. Adapted from www.chathamhouse.org/nigeriaoil retrieved 26 November 2017

[4] Ibid

[5] ibid

[6] (2017) LPELR-42326(CA)

compared to the magnitude of the problem. The paper thus, attempts to unravel the nature and consequences of the laxity in the handling of cases of crude oil racketeering with regards to the admissibility of evidence illicitly obtained by the prosecutors.

Keywords: Oil, Gas, Criminality, Evidence, Prosecution, Nigeria

1. INTRODUCTION

From the outset of the exploration and extraction of crude oil in Nigeria, there have been circumstances giving rise to questionable transparency in the oil and gas industries. Recently, bandits and criminal network of gangs are actively engaged in stealing crude oil by thieves that routinely tap into several oil pipelines and vandalise onshore and offshore facilities. The criminals pump the crude oil into small and medium size tankers and barges for export. An estimated 20-30 per cent of the stolen crude oil is locally refined in the secret camps dotted around the creeks and waterways of the Niger Delta. According to Chatham House Report,[7] "Lines between legal and illegal supplies of Nigerian oil can be blurry. The government's system for selling its own oil attracts many shadowy middlemen, creating a confusing, high-risk marketplace. Nigeria's oil industry is also one of the world's least transparent in terms of hydrocarbon flows, sales and associated revenues. Industry watchers and policy-makers often think they know more about oil theft than they actually do."

There are several arms of the law enforcement agencies operating in Nigeria however, the Economic and Financial Crimes Commission (EFCC) and Nigeria Security and Civil Defence Corps (NSCDC) are the most active forces tackling the crude oil bandits with the support of the Nigerian Navy. Despite the efforts of the field operational officers of the law enforcement agencies, the oil criminal underworld in Nigeria is systematically evolving into fundamentally unique groups, responding to both shifts in the global crude oil market and to the on-going pressure that the oil companies are mounting on the Nigerian authorities to tackle the menace. There is the growing concern among critics that the manners and methods of procuring evidence for the prosecution of suspected crude oil thieves are unlawful. There is also the worry over the ways by which the courts are willing to admit unlawfully obtained evidence with regards to crude oil criminal trials.

Between January 2012 and January 2017, an estimated 3,987 suspected crude oil thieves were arrested across 12 States in Southern Nigeria with Lagos recording 45% of the total arrest. However, less than 5% were successfully prosecuted and convicted. Unfortunately, most of the 95% of the suspects could not be charged for lack of concrete evidence, even some of the suspects whose evidence were good enough for prosecution and possible conviction were not charged due to undisclosed circumstances.[8] In view of these concerns, the next segment of this paper shall explore the technicalities of admitting criminal evidence and how the courts exercise discretion thereof.

[7] Christina Katsouris and Aaron Sayne. *Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil*. Chatham House United Kingdom, September 2013. Adapted from www.chathamhouse.org/nigeriaoil retrieved 26 November 2017

[8] Information compiled from Nigeria Security and Civil Defence Corps (NSCDC); Nigeria Police Forces, Zone 6 Police Records, and http://www.legaloil.com Retrieved 10 November 2017

2. THE RULES GOVERNING PROSECUTION EVIDENCE

The broad principle governing the law of evidence is that all evidence, which is appropriately relevant to the key issue before the court is admissible. Therefore, any evidence that is immaterial or incompetent and insignificant must be excluded.[9] The law of evidence stipulates the evidence may be admitted at a trial, and under what circumstances such admissible testimonials may be admitted. Thus, prior to being admitted, evidence must pass two key tests, namely: Relevance[10] and not fall under the exclusionary doctrines. Relevance depends on reasoning.[11] "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof… evidence which makes the matter which requires proof more or less probable."[12] On the other hand, where evidence satisfies the first hurdle that, if it is legally relevant, it can still be excluded if it falls within the category of the prevailing Law's exclusionary rules of evidence.[13] The whole essence of accepting evidence is for the purpose of proving the facts in issue.[14] Dissimilar from relevance, admissibility is not connected with the probative value of evidence.[15] In *Rauf Adesoji Aregbesola & 2 ORS v. Olagunsoye Oyinlola & 2 ORS,*[16]the court said: "In other words, even where a witness is branded as illegal, the same will not apply to the evidence given by such a witness no matter the source of the evidence which is immaterial."

Admissibility mainly involves the determination as to whether the law of evidence allows the relevant evidence of a certain kind to be accepted and acknowledged by the court of competent jurisdiction. Therefore, the problem of admissibility is one of law, and can be determined by the *lex fori*, that is, the law of the country in which the legal action is brought.[17] Also, in the course of trial the presiding judge has the discretion to exclude an evidence despite that evidence qualifying for admission and satisfying the criteria of the rule of evidence. For example, in *R v List* [18] Roskill J said that:

> "A trial judge always has an overriding duty in every case to secure a fair trial and, if in any case he comes to the conclusion that, even though certain evidence is strictly admissible, yet its prejudicial effect once admitted is such as to make it virtually impossible for a dispassionate view of the crucial facts of the case to be thereafter

[9] Phil Huxley '*Law of Evidence'*, Blackstone's LLB Texts, London: Blackstone Press, (1998) p. 2
[10] *Oshunride v. Akande (1996) 6 NWLR (Pt. 455) 383, (1996) 6 SCNJ 193 at 199 - 200;* and in *Torti v. Chief Chris Ukpabi & Ors (1984) 1 S.C. 370 at 412 - 143, (1984) ANLR 185 at 195*
[11] G. D. Nokes '*An Introduction to Evidence'*, 4th Edition, London: Sweet & Maxwell, (1967) p. 82
[12] per Lord Simon of Glaisdale in *DPP v Kilbourne*) [1973] AC 729, at p. 756
[13] Roderick Munday '*Evidence*', London: Butterworths Press, (2001) p.10
[14] Peter Murphy ' *Evidence*', 6th Edition, London: Blackstone Press, (1997) p.18
[15] ibid, p.18
[16] (2011) 1 WRN 1 at 61 ratio 33
[17] ibid
[18] [1965] 3 All ER 710

> taken by the jury, then the trial judge, in my judgement, should exclude that evidence."

In criminal trials the burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt. The law enforcement personnel in striving to accrue evidence of abundant bulk to reach a conviction have in some occasions espoused indecorous approaches or strategies, and they even oblige crime.[19] Prior to the 21st century, English Courts were particularly concerned with the relevance of the evidence rather than how the law enforcement officials procured it.[20] For example, in *R v Leatham,*[21] Crompton J stated that: "It matters not how you get it if you steal it even, it would be admissible in evidence." Also, in *Brannan v. Peek,*[22] Lord Goddard CJ disagreed with the common law practice that allows the law enforcement officers to commit criminal acts in the course of gathering evidence. However, such disapproval has not changed the practices. In *Mealey* [23] Lord Widgery CJ, said: "No-one who read Lord Goddard CJ's words about the dislike for such [evidence in] this country should think that the attitude of the courts towards *agents provocateurs* is different in principle from what it was then." It is pertinent to note that, the crucial concern of the common law is the relevance[24] of the evidence. Some judges in the courts of England and Wales have expressed mixed feelings regarding unlawfully procured evidence. For instance, Lord Widgery's *obiter* in *Jeffrey v Black,*[25] is reproduced as follows:

> "But, if the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair or, in other respects, they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial. I cannot stress the point too strongly that this is a very exceptional situation and the simple, unvarnished fact that evidence was obtained by the police officers who had gone in without bothering to get a search warrant is not enough to justify the justices in exercising their discretion to keep the evidence out."[26]

[19] Larry Mead, '*Police conduct in the obtaining of evidence. Application of the codes of practice, and judicial discretion in the determining of admissibility of such evidence'* being a paper presented at the 14th BILETA Conference, College of Ripon & York St. John, York, England, March 29-30th 1999.

[20] ibid

[21] (1861) 8 Cox CC 498 at p. 501

[22] [1948] 1 K.B. 68 at 72

[23] (1974) 60 Cr. App. R. 59

[24] In *Kuruma, Son of Kamiu v The Queen [1955] AC 197, [1954] UKPC 43, [1955] 2 WLR 223, [1955] Crim LR 339, (1955) 119 JP 157, [1955] Crim LR 69, [1955] 1 All ER 236*, the court held inter alia: "In their Lordships opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is admissible the court is not concerned with how the evidence was obtained."

[25] (1978) QB 490

[26] ibid

Sadly, the prospective possibility of such carefulness at common law is undoubtedly narrow. Nevertheless, it cannot be exaggerated that it has long been acknowledged that trial judges relishes the wide-ranging preference to order the rejection of strictly admissible evidence if they consider such evidence to have detrimental effect which exceeds the probative values.[27] To settle the issue, the British House of Lords in *R v Sang,*[28] unanimously held that:

> "A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. Save with regard to admissions and confession generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an *agent provocateur (per* Lord Diplock)."

The aforementioned decision of the House of Lords in *Sang* has since generated a lot of controversy. Some legal scholars have argued that the test as to whether to admit or reject evidence is that of "fairness," even though the House of Lords failed to provide the conceptual definition of "fairness". The only explanation of what constitutes fairness was unsatisfactorily provided by Lord Scarman in *Sang* as follows: "The principle of fairness, though concerned exclusively with the use of evidence at trial, is not susceptible to categorisation or classification, and is wide enough … to embrace the way in which after the crime, evidence has been obtained from the accused."[29]

This position of the common law seems to evolve to sustain the administration of justice that could otherwise be thwarted where the relevant evidence would be inadmissible. Nevertheless, there are no rules in the contemporary law which forbids the admissibility of improperly obtained evidence. Consistently, the courts have reiterated that, "the test for the admissibility of evidence is relevance: relevant evidence, even if illegally obtained is admissible."[30] However, in rare circumstances, the courts do consider the question of reasonableness with regards to admissibility of evidence obtained from circuitous policing as in the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation,*[31] where it was stated *inter alia*: "Where a court makes a decision on a question of admissibility and fairness; on appeal such a decision would only be reversed if reasonableness has been excluded." In essence, it suffice to infer that, improperly obtained evidence is admissible to the extent of the reasonable man standard being applied by the presiding judge. Where the trial judge fails

[27] *Christie* [1914] AC 545, cited in Roderick Munday. *Evidence*, London: Butterworths Press, (2001) p. 31
[28] [1980]AC 402
[29] ibid
[30] Hugh McKay and Nicola Shaw, '*Whatever Means Necessary'*, http://www.taxbar.com/artic/10.htm retrieved 19 November 2017
[31] [1948]1 KB 223

to exercise a satisfactory degree of reasonableness, it could add flesh to the course of appeal against any sentence handed down to the accused person, for example, in *R v Busby,*[32] the accused person was prosecuted and convicted with offences of burglary and handling stolen goods. At the trail, the prosecutors argued that he (the accused person) made implicating remarks in his written statement at the police station. The two investigating police officers that interrogated the accused person were cross-examined at the trial and were confronted on allegation, that had threatened a prospective witness thereby prevented the witness from giving evidence favourable to the accused person. The police officers denied. The witness was then subpoenaed to testify as to the alleged police threat. The prosecution counsel vehemently objected on the grounds that the witness had a related collateral issue with the police. The court upheld the objection. On appeal, the matter was listed as one of the issues for determination. The Court of Appeal held explained that, it is often problematic to differentiate when questions related to facts, which are collateral, and to facts, which are relevant to the issue. Though, it admitted that, the trial judge had erred by refusing the witness to give evidence in the case. Accordingly, the Court of Appeal said:

> "If true, it would have shown that the police were prepared to go to improper lengths in order to secure the accused's conviction. It was the accused's case that the statement to him had been fabricated, a suggestion which could not be accepted by the jury unless they thought that the officers concerned were prepared to go to improper lengths to secure a conviction."[33]

3. JUDICIAL CONTROL OF IMPROPERLY OBTAINED EVIDENCE IN NIGERIA AND THE UNITED KINGDOM

Prior to 2011, the rules of evidence which the courts in Nigeria were depending upon were based on the English common law principles of admissibility.[34] The common law principles have been codified in the Evidence Act, (EA) 2011. Section 14 obliges the Courts, the predilection to admit or disregard improperly obtained evidence as follows:

> "Evidence obtained (a) improperly or in contravention of a law; or (b) in consequence of an impropriety or of a contravention of a law; shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained."

[32] (1981) 75 Cr App Rep 79
[33] Ibid, per Eveleigh LJ
[34] *Igbinovia v State (1981) 2 SC 5, 15-16*

Section 15 EA provides the basic yardsticks by which the courts should apply in considering whether to exclude or admit evidence that falls within the scope of Section 14 EA. Accordingly, the provision of section 15 states: "For the purposes of section 14, the matters that the court shall take into account include: (a) the probative value of the evidence; (b) the importance of the evidence in the proceeding; (c) the nature of the relevant offence. cause of action or defence and the nature of the subject-matter of the proceeding; (d) the gravity of the impropriety or contravention; (e) whether the impropriety or contravention was deliberate or reckless; (f) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and (g) the difficulty if any, of obtaining the evidence without impropriety or contravention of law." Similarly, in the United Kingdom, the discretion as to whether to admit or exclude evidence has been codified in several legislation, including section 25 and section 26 of the Criminal Justice Act 1988. Also, due to the huge volume of criticisms of the common law principles laid down in *Sang,* the Police and Criminal Evidence Act (PACE) 1984 was enacted. Section 78 of PACE 1984 provide as follows:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

PACE 1984 implicitly retains the common law principles which were laid down in Sang in that, section 82 (3) of PACE 1984 provides that: "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put, or otherwise) at its discretion." This was made clearer by Lord Taylor CJ in *R* v *Nadir,*[35] where he said: "… if a judge considers evidence the Crown wish to lead would have an adverse effect on the fairness of the trial, he can exclude it under section 78 of the Police and Criminal Evidence Act 1984, he also has a general discretion to exclude evidence which was preserved by s 82(3) of the 1984 Act, which would allow the judge to exclude evidence he considers more prejudicial than probative. Conversely, in *R* v *Khan,*[36] Lord Taylor attempted to restrict the possible germaneness of the common law in the contextual lining of PACE 1984. The learned judge said: "Since, on any view, the discretion conferred on the judge by section 78 is at least as wide as that identified in *R* v *Sang.* It is only necessary to consider the question of the exercise of discretion under section 78 which is what the judge did." Since the enactment of PACE 1984, not much has changed. This was made clear by Watkins LJ in *R* v *Mason,*[37] where he suggested that section 78 of PACE 1984 "does no more than to re-state the power

[35] [1993] 4 All ER 513, at 517
[36] [1994] 4 All ER 426
[37] [1987] 3 All ER 481 at p 484

which judges had at common law before the 1984 Act was passed". Equally, in *R* v *Samuel,* [38] the English Court of Appeal stressed that the trial judge ought to have used his discretion under section 78 to exclude the evidence in view of the adverse effect on the fairness of the trial. This simply reinforced the fact that section 78 is compelling and should be interpreted as having autonomous effect. Stone[39] explained that, there are three foremost elements which persist in the decisions under section 78 of PACE 1984, namely: "bad faith on the part of the police; impropriety, often in the form of breaches of PACE or its Codes of Practice; and, the effect of such impropriety on the outcome of the case."

It suffice to say that, an example of bad faith, that could lead to exclusion of evidence, is where the presenter of such evidence is intentionally dishonest.[40] In *R* v *Mason,*[41] the defendant was imprisoned for arson. It transpired that the Police earlier informed him and his lawyers that his fingerprints were found at the scene of the crime. Due to this misleading and fraudulent information, the defendant was made to confess. In truth, the police never found his fingerprints. *Mason* appealed on the ground that he was deceived by the police hence, his confession should have been excluded in accordance with section 78 PACE.[42] The court of appeal held that the trial judge had discretion to exclude evidence under section 78 PACE. The court went further to explain as follows:

> "Regardless of whether the admissibility of a confession falls to be considered under s 76(2)[PACE 1984], a trial judge has a discretion to deal with the admissibility of a confession under section 78 which, in our opinion, does no more … to re-state the power which judges had at common law before the Act of 1984 was passed. That power gave a trial judge a discretion whether solely in the interests of the fairness of a trial, he would permit the prosecution to introduce admissible evidence sought to be relied upon, especially that of a confession or an admission… it is obvious from the undisputed evidence that the police practiced a deceit not only upon the appellant, which is bad enough, but upon the solicitor whose duty it was to advise him. In effect, they hoodwinked both solicitors and client. That was a most reprehensible thing to do… we think never again to hear of deceit, such as this, being practiced upon an accused person and, more particularly, possibly on a solicitor whose duty it is to advise him unfettered by false information from the police."[43]

[38] [1988] 2 All ER 135
[39] Richard Stone (1995) '*Exclusion of Evidence under Section 78 of the Police and Criminal Evidence Act: Practice and Principles*' Journal of Current Legal Issues in association with Blackstone Press Ltd.
[40] Richard Stone (1985) ibid
[41] ibid
[42] Edward Philips '*Briefcase: Law of Evidence'* 2nd Edition, London: Cavendish Press, (2000) p.132
[43] Ibid, per Watkins LJ

The implication of the case of *Mason* is that the fraudulent conduct of the police falls within the scope of "bad faith" and the confessional evidence should have not been admitted.[44] Nonetheless, it is not every bogus act of the law enforcement officers that can amount to bad faith to justify exclusion.[45] For example, in *R* v *Christou,*[46] the defendants facing charges of burglary and dealing in stolen goods. In order to secure gather reasonable evidence, the police created a fake shop in which they (the police) were buying and selling jewellery. In the fake shop, the police installed secret cameras that recorded the trades. The defendants sold the stolen items to the shop and were seen on cameras.

During trial, the defendants contended that the video evidence should be excluded under section 78, PACE 1984 since evidence was obtained by fraud. The court of Appeal disagreed with the defendants. It stated that: "… the trick was not applied to the appellants; they voluntarily applied themselves to the trick. It is not every trick, which results in unfairness."[47] Also in *R v Smurthwaite*[48] and in *R v Gill* [49] the defendants were charged with soliciting murder. In each of the cases, it was a disguised police officer that was soliciting. The issue for determination was whether the evidence of soliciting to murder obtained by the disguised police officer, were admissible. The defendants argued that the evidence ought to have been excluded in accordance with section 78 PACE. On appeal, the court was of the view that, evidence obtained through undercover operations by the police were admissible in that, excluding such evidence would have adverse effect on the fairness of the trials.[50] Nonetheless, section 66 of PACE stipulates the acceptable Codes of Practice of adequate and proper conduct expected of the police in respect of the procurement of evidence. However, it is not automatic that, a breach of the code will inevitably sway the court to decline the evidence on that, the court has discretion to admit or refuse it.[51] This implies that, even where the police is not acting in bad faith, but obtained evidence through improper procedure, the entire transaction will be of consideration by the court in exercising discretion under section 78 PACE. Police impropriety could be in the form of breach of the procedures laid down in criminal and civil law. It could also be a failure to adopt the techniques laid down in the PACE, including the relevant codes concerning arrest, detention, search of premises, interrogation and identity parades.[52] The simple element that evidence was acquired through impropriety should not, however, inevitably cause it to be excluded.[53] Where a breach of code of practice is alleged to have occurred, it should be of sizable and considerable magnitude to form the basis for exclusion.[54] In view of the foregoing, it is important to evaluate nature of criminal activities involving crude oil; the evidential components of the arrest and prosecution of crude oil thieves in Nigeria and, to critically explore the legal hurdles faced by the prosecuting authorities in Nigeria.

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[44] Richard Stone.'*Exclusion of Evidence under Section 78 of the Police and Criminal Evidence Act: Practice and Principles*' Journal of Current Legal Issues in association with Blackstone Press Ltd, 1995.

[45] ibid

[46] [1992] 3 WLR 228

[47] Per Lord Taylor, cited in Edward Philips, '*Law of Evidence: Briefcase'*, 2nd Edition, London: Cavendish Publishing Ltd, (2000), pp. 4-5

[48] [1994] 98 Cr App R 437

[49] [1994] 1 All ER 898

[50] Lord Taylor explained that, "It is not possible to give more general guidance as to how a trial judge should exercise his discretion under section 78 in this field, since each case must be decided on its own facts." The

4. THE NATURE AND MODES OF STEALING CRUDE OIL IN NIGERIA

The subsistence of crude oil crimes in Nigeria is so widespread and complex involving pipeline vandalism, illegal refineries, diverse transport systems, and multiple criminal gangs with international criminal connections. The complexity of the criminal enterprise was summed up by Katsouris and Sayne [55] as follows:

> "There is order in the seemingly chaotic operations of crude oil theft and refining. Some reports have identified two operational levels of these crimes. The first involves those engaged in the theft of crude oil, which is inefficiently refined for supply to local markets desperate for fuel used for various purposes. At the other level is the larger scale, more organised operation for international export, which we know reaches far across the globe. The latter has fast become aparallel industry with a developed supply chain and growing sophistication. The operations at both levels involve trained engineers who weld valves to high pressure pipelines, allowing the criminals to return at night to siphon crude oil. Boat yards help to construct and supply barges to the thieves to transport crude oil around the creeks."[56]

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same reasoning were applied in *R v Dixon* [1998] 1 S.C.R. 244 and in *R v Mann* [2004] 3 S.C.R. 59, 2004 SCC 52. In the two cases, the court said: "…the fact that the evidence has been obtained by entrapment, or by an agent provocateur, or by a trick, does not of itself require the judge to exclude it. If, however, he considers that in all the circumstances the obtaining of the evidence in that way would have the adverse effect described in the statute, then he will exclude it."

[51] Ashworth, A and Blake, M. *The presumption of innocence in English law*. Crim LR 306 E, 1996

[52] M. Hunter. Judicial Discretion: Section 78 in Practice. Criminal Law Review 558, 1994.

[53] J F Stephen. *A Digest of the Law of Evidence*, 12th Edition, Art 147, 1936.

[54] See: *R* v *Keenan* [1989] 3 All ER 598

[55] Christina Katsouris and Aaron Sayne. Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil, Published by Chatham House United Kingdom, September 2013. Adapted from www.chathamhouse.org/nigeriaoil retrieved 26 November 2017

[56] Christina Katsouris and Aaron Sayne, ibid, p. 3. The report further summed the situation as follows: "It is estimated that up to a fifth of the oil is delivered to small scale refineries in the creeks and mangroves, where it is boiled to produce low grade diesel fuel or petrol. The efficiency of these so-called 'bush' refineries is estimated at barely 20 per cent because the heavy end of crude that cannot be refined is just dumped into the environment. The products of this refining process enter the local fuel supply chain with some dire consequences for the economy (damaged machinery and loss of revenue). A higher volume of stolen crude oil is taken to large ocean-going tankers waiting offshore, which export oil to refineries outside the country. Some of these tankers reportedly meet mid-ocean to transfer and blend their stolen cargo, aiming to obliterate the origin of the crude oil. Only recently, we discovered that a line was welded to our Forcados Terminal export line where export quality crude oil was being stolen. Such an underwater operation does not come easy to us in the industry, but some criminals were able to install a theft point without detection. Investigations are ongoing to understand how this was done. So, who is behind these activities? Unfortunately, SPDC as a corporate organisation is unable to say categorically those behind these crimes. But we have noticed a high number of young people among those arrested by Government Security Forces. They appear to be those eager to make a living. At great risks to their lives, they are attracted by the immediate gains. A number of fatalities have been recorded during such operations, especially at illegal refineries and during transfer to boats."

The menace of crude oil related criminal activities are systematically causing enormous ecological destruction in the Niger Delta area of Nigeria where the crude oil is being exploited. From 2010 to 2016, the criminal activities, is estimated to be nearly three-quarters of the crude oil that went missing from Shell facilities into the environment. Yet, the larger blame for environmental degradation is often attributed to the multinational oil companies that are legitimately undertaking crude oil exploration and production activities.

Unfortunately, most of the notable cases of crude oil thefts are centred on the private individual criminal activities whilst there are higher dimension of crude oil stealing in Nigeria involving corporate entities which are often ignored. For example, sources from Nigeria observed that:

> "Between 1996 and 2014, underinvoicing of oil exports from Nigeria to the United States hit $69.8 billion, a 24.9 per cent worth of all oil exports to the United States. Brassoil is one of the IOCs allegedly fingered in crude oil shipments from Nigeria to different parts of the world between 2011 and 2014. Government, in a the suit marked FHC/L/CS/2016 sought to recover lost revenues arising from undeclared and underdeclared crude oil shipments from Nigeria to different parts of the world between 2011 and 2014, starting with shipments to the United States."[57]

In many similar cases, the prosecution often finds it difficult to procure substantial evidence to successfully prsecute the perpatrators due to beauracatic bottle-necks and corruption. For cases not involving corporate entities, there are signs that Nigeria is making progress in tackling the criminal activities.

One of the negative effects of corruption is the failure of the monitoring and regulatory agencies to apprehend the corporate offenders and to gather evidence to prosecute them. For example, the Crude Oil (Transportation and Shipment) Regulations 1984 was intended to curb the menace of crude oil theft involving the corporate entities. One such mode of stealing crude oil which the regulaton was tailored towards eradication is "topping."[58]Under the Crude Oil (Transportation and Shipment) Regulations regime, topping is explicitly prohibited hence, no tanker or ship tanker is allowed within or outside any loading terminal in Nigeria. Also, except with formal approval, within the limits of operating practice and when lifting from two or more oil and gas terminals, no ship or

[57] http://www.marineandpetroleum.com/content/698bn-crude-theft-fg-pursues-iocs'-prosecution retrieved 31 December 2017

[58] 'Topping', is a term used in describing the illegal act whereby the shippers of crude oil loading of crude oil onto the ship-tankers more than the approved quantity hence, under-declaring the actual quantity they ship. The topped up quantity is therefore not paid for. For instance, Where a company has paid for 90,000 barrels of crude oil per day, the company is thus permitted to go to the designated terminal to lift the allocated quantity. Sadly, instead of lifting the allocated 90,000 barrels per day, they load and depart with the terminal with 150,000 barrels per day. The extra quantity lifted is stolen. The stolen crude oil in excess of the legally permitted quantity is known as "topping."

tanker is allowed to carry "dead freight."[59] The Crude Oil (Transportation and Shipment) Regulations makes mandatory to verify ships' tank capacity by the appropriate government agency and, in the event of any fabricated declaration of capacity and/or modification of the documentations in respect of ship/ tanker capacity, the chatter party and the licensed party shall be criminally liable. The regulation, therefore, forbids the use of ballast[60] tanks for the carriage of crude oil.

5. LESSON FROM *MT ANUKET EMERALD v. FRN (2017) LPELR-42326(CA)*

There are very few case laws on crude oil crimes in the sense that, most of the cases are often decided by the lower courts hence, not often recorded in the law reports. However, in MT *Anuket Emerald v. F.R.N,* MT Anuket, a ship tanker was intercepted on March 8, 2015 by officers of the Nigerian Navy, during a routine patrol within Nigerian waters. Further investigation by the EFCC revealed that the registered owner of the vessel is Combe Shipping Limited and the beneficial owner is Alliance Tankers Incorporated and that the ship flies Panama Flag with IMO number 9393644. Furthermore, it was discovered that Monjasa DMCC of Dubai UAE are the chatterers of the vessel. During the inspection, Abdulahi Alaya, a Senior Detective Superintendent of the EFCC testified that MT Anuket Emerald with the International Maritime Organisation, IMO number 9393644 was the vessel and that it had petroleum products onboard. It was also discovered that Monjasa DMCC of Dubai UAE was the chatterers of the vessel. The prosecution tendered the cargo on board the vessel and the log book which were admitted by the judge as exhibits. The defendants were charged with an offence of dealing in petroleum products without lawful authority or appropriate licence contrary to section 19(6) of the Miscellaneous Offences Act Cap M17, Laws of the Federation of Nigeria 2004 and punishable under section 17 of the same Act.

Amongst others, it was argued that the prosecution proofs of evidence did not sufficiently disclose that the appellant committed any offence within 200 metres of any installation within the Exclusive Economic Zone to vest the trial court with jurisdiction under Section 4 of the Exclusive Economic Zone Act,[61] to try the appellant for the offences charged under the Miscellaneous Offences Act[62] and under section 4 of the Petroleum Act.[63]

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[59] This is the "charge payable on space booked on a ship but not utilized by the charterer or the shipper. It is imposed at full freight rates, less loading and handling charges"
(Adapted from: www.businessdictionary.com/definition/dead-freight.html on 2 January 2018). In essence, it means that a ship which has the capacity to lift and carry 200,000 barrels of crude oil is forbidden from being used to lift crudes from terminals where the shipper or chatters is only licenced to lift less than the quantity that the ship can accommodate. It implies that, the remaining spacecould be used to steal crude oil by way of topping.

[60] Ballast tanks are mainly used in carrying water.

[61] Section 4(1) of the Exclusive Economic Zone Act Cap. E17 Laws of the Federation 2004 states *inter alia*: "Any act or omission which (a) takes place on, under or above an installation in a designated area or any waters within 200 metres of such an installation; and (b) would, if taking place in any part of Nigeria, constitute an offence under the enactment in force in that part, shall be treated for the purposes of that law as taking place in Nigeria."

[62] Cap. M17, Laws of the Federation of Nigeria, 2004

[63] Petroleum Act 1990

It was also contended that, the appellant was not within the territorial jurisdiction of the court when it was arrested in that it was in transit and did not intend to land in any sea port in Nigeria. To supports its argument, the appellant invoked the principles of *Ocean Fisheries Nig. Ltd v. Board of Customs and Excise and Anor*[64]and *A-G Federation v. A-G, Abia State and Ors*[65]where the lack of jurisdiction did affect the merits of the cases. In this instance, the dispute over jurisdiction was based on how evidence was adduced. To sustain its position, the respondent maintained that it was not the character or the nature of the materials in the proofs of evidence that the court should be concerned about, rather, the court should look at relevance of the evidence to the facts as in the cases of *Onwudiwe v. F.R.N;*[66] and also, in *Eze v. F.R.N.*[67] The conviction of the defenadants were upheld by the court of appeal irrespective of the contention over the proofs of evidence which points to the fact that, the defendants may have been arrested beyond the 200 nautical miles radius of Nigeria's sea waters.

6. CONCLUSION

There are very few cases where the courts are prepared to control prosecution evidence with regards to the impropriety of the law enforcement agencies.[68] A large number of the instances where the court is unwilling to admit inappropriately obtained evidence are within the confine of confessional evidence.[69] These are frequently obvious in the exclusion of evidence contained in section 78 of PACE (UK) and section 29(2) of the Evidence Act (Nigeria).[70]

Generally, the courts may admit evidence obtained from 'improper means'. Such means include; police surveillance, *agents provocateurs*, entrapment, and bugging without predilection to the defendants' rights to privacy. In the United Kingdom's case of *R* v *Khan,*[71] the defence contended that the evidence of a private conversation in the defendants' house was inadmissible and that it should be excluded. The House of Lords held that there is no right of privacy in English law, so the evidence was admissible, even though the English court was obliged to comply with the rights to private and family life contained in Article 8 of European Convention on Human Rights 1998. The House of Lords said:

[64](1986) FHCLR at 95
[65] (2001) 11 NWLR (Pt. 725) at 689
[66] (2006) 10 NWLR (Pt. 988) 382 at 425
[67] *(1987) 1 NWLR (Pt. 51) 506 at 519, 520 and 529. Also see: Atolagbe v. Awuni (1997) 9 NWLR (Pt. 522) 536, Amadi v. N.N.P.C. (2000) 10 NWLR (Pt. 674) 76; Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Obaba v. Military Governor of Kwara State (1994) 4 NWLR (Pt. 336) 26; Eimskip Ltd. v. Exquisite Industries (Nig) Ltd. (2003) 4 NWLR (Pt. 809) 88; Odofin v. Agu (1992) 3 NWLR (Pt. 299) 350; and, Bature v. State (1994) 1 NWLR (Pt. 320) 267*
[68] A.Choo. *Improperly obtained evidence: a reconsideration.* 9 Legal Studies 261, (1989)
[69] See Section 76 of PACE (UK) and Section 29 Of the Evidence Act 2011 (Nigeria)
[70] Section 29 (2) of the Evidence Act 2011 explictly provides information on when the confessions made by defendants shall not beadmitted by the court as evidence against the defendants. For example, when it is shown to the court that the confessions were or may have been obtained (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at that time, to render unreliable any confession which might be made by him in such consequence.
[71] [1994] 4 All ER 426

> "… even if there had been such a right which had been breached, this was merely one of the matters to be taken into account when exercising discretion. Moreover, evidence that had been obtained improperly, or even unlawfully, remained admissible. This was subject to the power of the trial judge to exclude it in the exercise of his common law discretion or under s 78. This discretion would be exercised if the admission of the evidence would render the trial unfair. On the facts of this case, the trial judge was fully entitled to hold that the circumstances in which the evidence was obtained did not cause unfairness to the defendant."[72]

Lord Nolan stated (*obiter*):

> "It would be a strange reflection on our law if a man who has admitted his participation in the illegal importation of a large quantity of heroine should have his conviction set aside on the grounds that his privacy has been invaded."[73]

From the foregoing discourse, particularly from the case of MT *Anuket Emerald v. F.R.N*,[74] the authors of this paper conclude that the prosecuting authotities in Nigeria should routinely gather evidence and prosecute the suspected crude oil thieves irrespective of the nature and process of obtaining such evidence. This is because the instances in which the method of obtaining evidence is more likely to affect its reliability will considerably decrease particularly confessional evidence. To achieve this result, there is the need for consistency in recording of evidence especially, interrogations. The scanty nature of prosecution and conviction of the majority of the crude oil thieves in Nigeria is creating the enabling grounds for the crime to thrive in the absence of deterrence.

This paper therefore, shows that the extent to which the courts should regulate prosecution evidence is not specified in the prevailing statute and at common law. Therefore, the courts are mainly primed to exercise the preference to exclude improperly obtained admissible evidence where such admission would have an adversative consequence on the objectivity of the proceedings. This being the current state of affair, it is inexcusable for the law enforcement agents in Nigeria to negate the obligation to arrest, investigate and prosecute the criminal elements engaging in small, medium and large scale theft of crude oil.

[72] cited in Edward Philips, ibid, pp. 5-6.
[73] *R* v *Khan (Sultan)* [1996] 3 All ER 289 at p. 302
[74] *Supra*

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