EFCC ACT, AFF ACT, MONEY LAUNDERING PROHIBITION ACT AND RELATED LAWS: MAIN PROVISIONS, PRACTICES AND CHALLENGES OF ENFORCEMENT AND SUGGESTIONS FOR REFORM DELIVERED BY CHILE OKOROMA, DIRECTOR OF LEGAL AND PROSECUTION DEPARTMENT OF THE ECONOMIC AND FINANCIA AT THE TRAINING FOR LAWYERS AND NON-LAWYERS ON THE THEME : ADMINSTRATION OF CRIMINAL JUSTICE ACT (ACJA) AND ANTI-GRAFT LAWS/PROCEDURE ORGANISED BY THE SOCIO-LEGAL STUDIES FROM 16TH - 18TH APRIL , 2019 AT THE NIGERIAN NATIONAL MERIT AWARD HOUSE (MERIT HOUSE), ABUJA

INTRODUCTION

The Economic and Financial Crimes Commission (Establishment) Act (EFCC Act) was enacted in 2002 as the Economic and Financial Crimes Commission(Establishment) Act, 2002; and reenacted in 2004 as the Economic and Financial Crimes Commission (Establishment) Act, 2004.

Section 46 of the EFCC Act provides as s follows:

> **"Economic and Financial Crimes" means the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.;**

Section 7 of the Act provides as follows:

1. The Commission has power to -

(a) Cause investigations to be conducted as to whether any person, corporate body or organization has committed an offence under this Act or other law relating to economic and financial crimes;

(b) Cause investigations to be conducted into the properties of any person if it appears to the Commission that the person's lifestyle and extent of the properties are not justified by his source of income;

2. In addition to the powers conferred on the Commission by this Act, the Commission shall be the coordinating agency for the enforcement of the

provisions of –

(a) The Money Laundering Act 2004; 2003 No. 7, or 1995 No. 13;

(b) The Advance Fee Fraud and Other Fraud Related Offences Act 1995;

(c) The Failed Banks (Recovery of Debts) and Financial Malpractices In Banks Act as amended.

(d) The Banks and other Financial Institutions Act 1991 as amended;

(e) Miscellaneous Offences Act; and

(f) Any other laws or regulations relating to economic and financial crimes, including the Criminal Code and Penal Code.

Though some of the legislations stated above have been subsequently re-enacted as the Advance Fee Fraud and Other Related Offences Act, 2006; and the Money Laundering Prohibition Act, 2011 (as amended by the Money Prohibition Amendment Act of 2012), the EFCC on the strength of the provision of Section 7(2)(f) enforces the re-enacted legislations.

MAIN PROVISIONS

EFCC ACT

The EFCC Act creates its own offences under section 14-18. The offences relate to financial malpractices in banks;[1] terrorism and terrorism financing;[2] false information;[3] retention of proceeds of crime;[4] abetment and being an accessory to economic and financial crime[5].

Provisions are made in the EFCC Act for interim and postconviction forfeiture of properties or proceeds acquired from economic and financial crimes;[6] seizure of properties in the execution of arrest or search warrant[7]; and freezing of suspect accounts.[8]

Interim Order of Forfeiture can be obtained "ex parte" from the relevant courts for seized assets of a suspect upon the execution of a search or certain assets of a suspect which have been identified and detained, attached or frozen by the Commission pending the conclusion of the trial of the person. On conviction a final order of forfeiture ensures that the assets and properties of the convict would be forfeited to the Federal Government.

[1] Section 14 (1)
[2] Section 15
[3] Section 16
[4] Section 17
[5] Section 18
[6] Sections 29, 30 and 31
[7] Section 26
[8] Section 34

A combined reading of sections 28, 34(1) and 38(1) of the Act shows that the Commission or any officer of it has the power under the Act without hindrance to make enquiries and receive information from any authority or body including the inspection of relevant books or materials.[9] He can immediately trace and attach all the assets of a suspect acquired as a result of the commission of an offence under the Act. This can be done even before making application to the court for interim attachment or forfeiture order. The assets here include bank accounts of such person and the monies therein.

It is an offence punishable with imprisonment or fine to try to hinder the Commission or any of its officers from seeking and receiving information or refusing to comply with any lawful enquiry under the Act.[10]

The Act also requires a person arrested for commission of offence under the Act to complete an Asset Declaration Form. Such declaration must correctly outline in full all the assets of the suspect or he will be liable on conviction to a term of imprisonment.[11]This provision represents another measure that add value towards the tracing, seizing and confiscation of assets regime.

Section 14(2) of the Act gives the Commission the power to compound offences subject to section 174 of the Constitution and the powers of the Attorney General of the Federation.

The Act also empowers the Commission and its officers to receive relevant information for the execution of its function; [12]protect its informants;[13] and also provides penalties for false information[14]. It also vests on an officer of the Commission when investigating or prosecuting a case under the Act with all the powers and immunities of a police officer or any other law empowering law enforcement officers.

The Federal High Court or High Court of a State or the Federal Capital Territory are conferred with jurisdiction to try offenders under the Act;[15] the courts shall ensure that all matters brought before them by the Commission are given accelerated hearing, adopt all necessary legal measures necessary to avoid delays and abuse in the conduct of the matters;[16] and the Chief Judges of the courts shall by order under their

[10] Section 38(1) and (2)
[11] Section 27
[12] Section 38
[13] Section 39(1)
[14] Section 39(2)
[15] Section 19(1)
[16] Section 19(2)

hands designate courts to hear and determine cases emanating from the Commission.[17]

ADVANCE FEE FRAUD ACT

The Advance Fee Fraud and other Fraud Related Offences Act, was first enacted as the Advance Fee Fraud Advance Fee Fraud and Other Fraud Related Offences Decree of 1995 and later reenacted as the Advance Fraud and other Related Offences Act , 2006. Advance fee fraud is simply obtaining money by false pretence which, though had been in the Criminal Code under section 419[18]; and cheating under section 320 of the Penal Code[19] was reinvigorated by the enactment of the Advance Fee Fraud and Other Fraud Related Offences Act [20] (i.e AFFA) to address the sophisticated, endemic and the international dimensions the crime was taking and the bad image it was giving the country.

Section 1(1) (2) of the AFFA provides as follows:

(1) Notwithstanding anything contained in any other enactment or law, any person who by any false pretence, and with intent to defraud.

(a) obtains, from any other person, in Nigeria or in any other country, for himself or any other person, or

(b) induces any other person, in Nigeria or in any other country, to deliver to any person, any property, whether or not the property is obtained or its delivery is induced through the medium of a contract induced by the false pretence, commits an offence under this Act.

(2) A person who by false pretence, and with the intent to defraud, induces any other person, in Nigeria or in any other country, to confer a benefit on him or on any other person by doing or permitting a thing to be done on the understanding that the benefit has been or will be paid for commits an offence.

The basic mental element of the offence stated above is***"with intent to defraud"***.Another element is false pretence***"false pretence".*** "False pretence" is defined in the Act to mean: **" a representation, whether deliberate or reckless, made by word, in writing or by conduct, of a matter of fact or law , either past or present, which representation is false in fact or law, and which the person making it knows to be false or does not believe to be true".**

Section 2 of the Act creates other categories of the offence of obtaining money by false pretence which include a person representing himself with intent to defraud to: have the capacity to produce money by chemical treatment of a paper or

[17]Section 19(3)

[18] See, Criminal Code Act , Cap.C38 Laws of the Federation of Nigeria, 2004

[19] See, Penal Code Act, Cap.532 Laws of the Federation of Nigeria (Abuja) 1990

[20] This repealed and replaced the Advance Fraud and Other Related Offences Decree of 1995

material;[21]possessing the power or capability of doubling money by scientific of juju means; or printing, making, or issuing, any currency note not being the Central Bank of Nigeria[22].

Other offences include causing or knowingly permitting any premises under a person's occupation or management to be used for any purpose which constitutes an offence under the Act[23]; fraudulently inviting or inducing any person to visit Nigeria for any purpose connected with the commission of offence under the Act;[24] possession of documents containing false pretence which constitutes an offence under the Act when the possessor knows or ought to know that the documents contains such false pretence; and conducting a financial transaction with the proceeds of unlawful activity with the intent to carry on a specified unlawful activity designed to conceal or disguise the nature, location, source, ownership or control of the proceeds of the unlawful activity.[25]

MONEY LAUNDERING PROHIBITION ACT (MLPA)

Generally the MPLA creates and prescribes punishment for offences like assisting another person to retain the proceeds of crime or an illegal act; acquiring, possession and use of criminal proceeds; collaborating with any person to conceal the genuine nature, origin, location, disposition, movement or ownership of proceeds of crime; converting, concealing or transferring proceeds of crime to avoid prosecution or a confiscation order; failure to disclose or report international transfer of funds, suspicious transaction/making prescribed returns; tipping off; making or accepting cash payments in excess of the stipulated threshold without going through a financial institution; failure to carry out the know-your-customer obligation; destruction or removal of record or register required to be kept under the Act; conspiracy, abetting or attempting to commit any offence under the Act; and carrying out certain transactions under false identity.

Section 15 of the MLPA provides as follows:

"15(1) Money Laundering is prohibited in Nigeria.

(2) Any person or body corporate, in or outside Nigeria, who directly or indirectly –

a. conceals or disguises the origin of;

[21] Section 2(a)
[22] Section 2(c)
[23] Section 3
[24] Section 4
[25] Section 7

b. converts or transfers;

c. removes from the jurisdiction; or

d. acquires, uses, retains or takes possession or control of;

any fund or property, knowingly or reasonably ought to have known that such fund or property is, or forms part of the proceeds of an unlawful act; commits an offence of money laundering under this Act.

(3) A person who contravenes the provisions of subsection (2) of this section is liable on conviction to a term of not less than 7 years but not more than 14 years imprisonment.

(4) A body corporate who contravenes the provisions of section (2) of this section is liable on conviction to –

a. a fine not less than 100% of the funds and properties acquired as a result of the offence committed; and

b. withdrawal of licence.

(5) Where the body corporate persists in the commission of the offence for which it was convicted in the first instance, the Regulators may withdraw or revoke the certificate or licence of the body corporate.

(6) The unlawful act referred to in subsection (2) of this section includes participation in an organized criminal group, racketeering, terrorism, terrorist financing, trafficking in persons, smuggling of migrants, sexual exploitation, sexual exploitation of children, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, illicit trafficking in stolen goods, corruption, bribery, fraud, currency counterfeiting, counterfeiting and piracy of products, environmental crimes, murder, grievous bodily injury, kidnapping, hostage taking, robbery or theft, smuggling (including in relations to customs and excise duties and taxes), tax crimes (related to direct taxes and indirect taxes), extortion, forgery, piracy, insider trading and market manipulation or any other criminal act specified in this Act or any other law in Nigeria.

(7) A person who commits an offence under subsection (2) of this section shall be subject to the penalties specified in this section notwithstanding that the various acts constituting the offence were committed in different countries or places."

Section 17 provides as follows:

" A person who-

(a) conceals, removes from jurisdiction, transfers to nominees or otherwise retains the proceeds of a crime or an illegal act on behalf of another person knowing or suspecting that other person to be engaged in a criminal conduct or has benefited from a criminal conduct or conspiracy, aiding, etc; or

***(b)** knowing that any property either in whole or in part directly or indirectly represents another person's proceeds of a criminal conduct, acquires or uses that property or possession of it,*
commits an offence under this Act and is liable on conviction to imprisonment for a term not less than 5 years or to a fine equivalent to 5 times the value of the proceeds of the criminal conduct or both such imprisonment and fine.

PRACTICES AND CHALLENGES OF ENFORCEMENT

High Cost of Investigation and Prosecution

Advancement in technology has not only brought positive developments, it has collaterally and unavoidably brought about sophistication in the commission ofeconomic and financial crimes. This can cut across different jurisdictions in a very short time, with very fast means of eliminatingevidence. All but the most incompetent criminals know that investigation and prosecution are more difficult to execute if multiple jurisdictions are involved[26]. From the perspective of the criminal, it is of course even better if different legal systems, different cultures and languages can be added to the mix.

Financial services are already global and electronic, allowing transfers of money around the globe, literally in seconds. International communications, as well, are easier and less expensive than they have ever being. Criminals have quickly, and more quickly than most law enforcement agencies, adopted new means of communicating and are taking advantage of facsimile transmissions, mobile encrypted telephones, and no doubt the internet[27]. By wire transfers, letters of credit, automated teller machines, credit and debit cards, and other technological devices, enormous amounts of money can be moved from one place to another through very intricate and labyrinthine processes with adept precision.

[26] See: "International Money Laundering : Enforcement Challenges and Opportunities" Prepared for Southwestern UniversitySchool of Law Symposium on the America: Eradicating Transboundary Crime. March 10, 1995.
[27] Op. cit

Consequently, the orthodox or traditional methods are grossly inadequate or virtually impracticable for the investigation and prosecution of economic and financial crimes. Special investigative and prosecution techniques are therefore needed for them; which entail enormous resources for capacity building, including the training and re-training of the investigators and prosecutors both locally and internationally on case-building techniques; evidence gathering and other techniques of investigation and prosecution to sharpen their skills in order to keep abreast with the dexterity employed in the commission of such crimes[28]. They also have to be trained on the use of necessary modern technology, and the manner of the presentation of the procured evidence in court. Unfortunately the vital resources to meet these challenges are scarce. Added to these are the high cost and difficulties of securing the attendance of witnesses in courts. According to Justice DahiruMusdapher, former Chief Justice of Nigeria, the investigation and prosecution of James OnanefeIbori cost the UK government the sum of BPD14million (fourteen million pounds) which is estimated to be about N3.6bn.[29]

The yearly budgetary allocation to the EFCC is more often than not inadequate to enable it effectively cope with the high turnover of cases that it has to investigate and prosecute. There has been recurrent advocacy in several quarters for it to retain a reasonable percentage of the proceeds of crime that it recovers for its operations. This is highly commendable and will obviously require an amendment of its enabling Act to that effect.

Issues with the legislations

Advance Fee Fraud and other Fraud Related Offences Act

A major issue with the enforcement of the AFF Act is the problem of lack of identifiable victim, particularly when a network of criminals are involved. Obtaining property by false pretence by its nature must have an identifiable victim who has been deceived or induced by false pretence to part with property. The elements of the offence of obtaining property under false pretenceas highlighted in the case of ***Onwudiwe V FRN (2006) 10 NWLR Pt. 988 Pg. 382 at PP. 431 – 432 paras. G – C*** as follows:

(a) That there is a pretence
(b) That the pretence emanated from the accused person
(c) That it was false
(d) That the accused person knew of its falsity or did not believe in its truth;
(e) That there was an intention to defraud
(f) That the thing is capable of being stolen

[28] See: "Detection and Prosecution of Transnational Crimes ". A paper presented at the Maiden Hon. Justice (Dr.) AkinolaAguda Memorial Lecture/Seminar By Emmanuel Akomaye, MFR at The Nigerian Institute of Advanced Legal Studies, Akoka, Lagos. 15-16 February, 2012.
[29] See The Nation Newspaper of July 14, 2012.

(g) <u>That the accused person induced the owner to transfer whole interest in the property.</u>

See also **Alake v State (1991) 7 NWLR Pt. 205 page 267 at 571.**

We are all aware of the menace of the notorious "Yahoo Yahoo boys/girls" and their activities. A "Yahoo Yahoo boy/girl" can with just a telephone set stay anywhere and take advantage of the lack of physical boundaries in cyberspace to execute an internet scam. The crime is getting more organized and can involve a network of the gang located in different countries and who may not even know themselves. A case at hand now is student in his early twenties who is a "Yahoo Yahoo boy " and part of a criminal network engaged in romance scams. He was arrested with about N30m in his account which he confessed to be his share of scams committed by his gangscattered in different jurisdictions. There is no identifiable victim, so the challenge is how to prosecute him now is how to prosecute him under the AFF Act. After considering the case the window I found is to prosecute him for laundering the proceeds of crime, obtained from participation in an organized criminal group which a predicate offence for money laundering under section the MLPA.

Another issue with the AFF Act is that it appears that it is only a natural person that can be deceived or induced. Although, under section 18 of the the Interpretation Act[30],"Person"includes anybody of persons corporate or unincorporate, I do not think this definition applies in this context because it is only a person that has a mind that can be deceived or induced. See the case of **SANDA v COP (1974) NNLR 73** where the court held that a department, like a corporate body can only be induced by deception to do a thing through persons acting for it. For a finding that the Department was so induced there must be evidence that a person acting for it was so induced.

Consequently, where for instance a person has obtained money from a bank by a false cheque, the question now is whether it was the bank as an entity that was deceived or induced to part with money or the cashier or teller who paid the money by believing that the cheque was genuine. If it is accepted that it was the cashier that was deceived the challenge in investigating the case , drafting the charge and prosecuting the case is knowing the actual cashier that paid the money, and his availability to testify in court during trial particularly if the crime was discovered after the cashier had left the services of the bank.

More often thannot the testimony of the victim is very material or critical in proving advance fee fraud or obtaining money by false pretence cases. See the case of **ODIAWA V. FEDERAL REPUBLIC OF NIGERIA(2008) LPELR-4230(CA).** The facts of the case are that sometime between March 2003 and January 2004,a syndicate of fraudsters by way of an advanced fee fraud duped and obtained various sums of money amounting

---

[30] Cap. I23 Laws of the Federation of Nigeria, 2004

to about USD2M from an American citizen by name Mr. George Blick (the victim andPW1). The leader of the syndicate used a fictitious name of Abu Belgore and they used telephones(including GSM) and internet in making falserepresentation and sending fake or forged documents to their said victim who was convinced or deceived to send or transfer the various sum of US dollars to some bank accounts in Nigeria and elsewhere which were later claimed by or for the use of the syndicate. The e-mail communication between Abu Belgore and the victim gave a false representation inter-alia that there was a huge sum of US Dollars (about USD 20.5M) to be transferred to his Company account in USA from Nigeria and also to procure some contracts from Nigeria Government (or ministries) for his benefit or that of his company.

The victim reported the fraud in Nigeria through the EFCC, which started investigation into the cyber - fraud, or information technology (IT)fraud. In the course of their investigation, the EFCC, were able to trace the existence of anInternet facility called Communication Trend Limited (CTL) as the location from where thee-mails (or internet) messages were sent to the victim by Abu Belgore. The EFCC investigatingteam also found that the CTL was located at the business premises of the appellant who operated a commercial internet, browsing, business (cybercaf'E9) thereat. When the appellant'sbusiness premises were raided by the EFCC team, a green bag was recovered (Exhibit P 19) which contained copies of some of the documents sent to PW1 by Abu Belgore. In addition, a GSM telephone with an MTN line number (No.08035856409), which had been used to communicate to the said PW1 by Abu Belgore, was recovered from the appellant's office. Also in addition, the appellant made a confessional statement (in Exhibits p.15 – p 18 that he changed a password (in his computer) and was able to communicate to the victim by impersonating that he was Abu Belgore. Some personal documents of the appellant and his specimen handwriting or signatures were also recovered and sent along with the documents in Exhibit P 19 (i.e. the green bag) issued and signed by the so called Abu Belgore to the handwriting analyst (an expert) (pw5) who, in his positive report, confirmed that the two sets of documents were written by one and the same person - i.e. the appellant.

One of the pieces of evidence relied upon by the trial court to convict the defendant which was upheld by the Court of Appeal was the recognition of his voice by the victim during the taking of his plea as the voice of the person who he had had several conversations on phone during the perpetration of the crime.

When the crime is supranational or transnational it becomes more challenging to secure the attendance of victim in court for his or her testimony because of the financial implications and other factors. At times the defendants scare away the victims with threats of bodily harm etc, which brings up the issue of witness protection and the attendant implications and challenges.

A major and landmark innovation in the AFF Act is its section 17. This has established as part of Nigeria's jurisprudence a non-conviction based confiscation regimen which is a very potent tool in the fight against corruption, and economic and financial crimes in Nigeria.

Bythe said section 17 of the AFF Act an unclaimed property which has come into possession of an officer of the EFCC may be forfeited upon an application to the court. In the same vein, where any property in the possession of any person, body corporate or financial institution is reasonably suspected to be proceeds of corruption or other economic and financial crimes (which include money laundering) it may be forfeited or confiscated in favourthe government of Nigeria, upon an application to the court without prosecution or conviction of the defendant.

The stipulated procedure is that an application is made ex parte to the High Court for an order of interim forfeiture or attachment of the assets. It will have, attached to it, a schedule or particulars of the assets involved, supported by depositions in an affidavit and other relevant documents. The depositions will be to the effect, among others, that the assets are unclaimed or reasonably suspected to be proceeds of crime or unlawful activity, and such other depositions of facts revealed by investigations which will convince the court to make such interim order.

If the court is satisfied with the depositions in the affidavit it may proceed to make the order of interim forfeiture. It will also, pursuant to section 17(2) of the Act, direct that requisite notice be given to the person in whose custody the property is or publication be made in any of the national dailies for any person having interest in the property to appear before the court on a stated date to show cause why the assets should not forfeited to the Government of Nigeria.

At the expiration of 14 days or such other period as the High Court may reasonably stipulate from the date of the giving of requisite notice or making the publication, an application shall then be made by a motion on notice for the final order of forfeiture or confiscation.

Section 17(6) of the Act expressly provides that an order of forfeiture or confiscation made under the said section 17 shall not be based on a conviction under the Act or any other law.

This section has been given judicial approval as constitutional in a number of cases particularly in **LA-WARI FURNITURE & BATHS LTD v. FRN &ANOR (2018) LPELR-43507(CA)** by the Court of Appeal and the Supreme Court. Nevertheless, there is a gray area in the

provision which requires an amendment. That is section 17(4) which states that at the expiration of 14 days or such other period as the High Court may reasonably stipulate from the date of the giving of requisite notice or making the publication, an application shall then be made by a motion on notice for the final order of forfeiture or confiscation. The snag here is who does the Commission serve a motion on notice for a final order of forfeiture where no person lays claim to the property in issue? In the case of **FEDERAL GOVERNMENT OF NIGERIA; ATTORNEY-GENERAL OF THE FEDERATION; EFCC V ATTORNEY GENERAL OF DELTA STATE (SUITNO. FHC/ABJ/CS/415/2012)**pursuant to a motion ex parte under section 17 of the AFF Act the Federal High Court, Abuja presided over by Honourable Justice G.O Kolawole on the 25th of October, 2013 orderered that the sum of $15million (fifteen million) being an alleged bribe offered by Chief James Ibori to the officers of the EFCC be forfeited to the Federal Government of Nigeria as "unclaimed property". The court dismissed the claims of Delta State Government and other persons to the money. The claimants responded to the publication made after the grant of the motion exparte ordering interim forfeiture of the said money, and publication for any interested person to show cause why the said money should not be forfeited. The court held that since the claimants claims had failed there was no need for further filing of motion on notice for final order of forfeiture. It then proceeded to make the necessary orders.

Arguably, when a statute has prescribed a mode of performing an act or of exercising a right, that **mode** of performing the act or of exercising the right must be strictly complied with. See- **SYSTEMS APPLICATIONS PRODUCTS (NIG) LTD VS CENTRAL BANK OF NIGERIA (2004) 15 NWLR (Pt.897) 655.** This being the case it may be safer to order another publication of the motion on notice before a final forfeiture. Nevertheless, the said section 17(4) requires an amendment to dispense with a situation where there is no claimant after the first publication of the orders made pursuant to the motion ex parte.

Money Laundering Prohibition Act

The first criminalization ofmoney laundering in Nigeria was the provision of section 13 of the National Drug Law Enforcement Agency Decree No. 48 of 1989[31] . Under the section, it was an offence to knowingly or intentionally launder funds acquired through specified unlawful activities[32]. Also made specifically punishable was the transportation of funds or monetary instruments acquired through unlawful activities (with knowledge of their sources).[33]

However, the first substantive anti-money laundering (i.e AML) legislation in Nigeria was the Money Laundering Decree of 1995 which repealed the said section 13 of the NDLEA Decree. This was the domestication of the resolution of The Vienna Convention. Under the Convention State Parties were required to criminalize the laundering of proceeds of

[31] Cap. 253 Laws of the Federation of Nigeria 1990.

[32] Section 13(1)

[33] Section 13(2)

drugs. However, under the convention the only predicate offences for money laundering were drug trafficking related crimes. This was the deficiency that the Money Laundering Decree of 1995[34] was fraught with.

Pursuant to the Palermo Convention[35] which enjoined States parties to criminalize money laundering and include all serious crimes as predicate offences for money laundering, the Money Laundering (Prohibition) Act of 2003 was enacted, and re-enacted as the Money Laundering (Prohibition) Act of 2004 to include "any other crime or illegal act". As a result of the controversies raised by some ambiguous, and penal provisions of the Act of 2004; and pressures from the Financial Action Task Force[36] on Nigeria to review her AML legislation there is now a further re-enacted anti-money laundering Act known as the Money Laundering (Prohibition) Act, 2011 (ie MLPA). The MLPA of 2011 has further been amended by the Money Laundering (Prohibition) (Amendment) Act, 2012.

Under 15 (2) MLPA the prosecution must prove the following ingredients in order to secure conviction in a money laundering prosecution

1. That the Defendant directly or indirectly;

    a. concealed disguised the origin of any fund or property; or
    b. converted or transferred any fund or property; or
    c. removed from the jurisdiction any fund or property; or
    d. acquired, used, retained or took possession or control of any fund or property.

2. That the Defendant knowingly or reasonably ought to know that the fund or property was, or formed part of the proceeds of an unlawful act.

3. That the unlawful act is included in the offences listed in subsection (6) of section 15 of the Act.

Any person or body corporate in or outside Nigeria, who directly or indirectly –
The offence can be committed by any person or body corporate in or outside Nigeria who directly or indirectly.

---

[34] Now the Money Laundering Act of 1995

[35] In December 2000, the United Nations Convention Against Transnational Organized Crime was adopted in Palermo. Italy, that is why the Convention is referred to as Palermo Convention.

[36] The **Financial Action Task Force on Money Laundering** (FATF) was established during the 1989 G7 Summit in Paris to combat the growing problem of money laundering. The task force was charged with studying money laundering trends, monitoring legislative, financial and law enforcement activities taken at the national and international level, reporting on compliance, and issuing recommendations and standards to combat money laundering.

A person under the above provision includes a natural person and a body corporate . This is borne out by section 18 of the Interpretation Act [37] which provides that which provides that a person includes anybody corporate or incorporate. In the case of Altimate Investment Ltd v Castle & Cubicles Ltd [38]the Court of Appeal held that in the Interpretation Act, the word is defined as including any company or association or body of persons, corporate or incorporate. This being the case, the inclusion of the words body corporate becomes superfluous. It was not in the previous MLPA[39]. It might have been included there to avoid controversy, for emphasis or to satisfy the demands of the international standard setters, like FATF.[40]

Thus, the offence of money laundering is capable of being committed by both natural persons and companies. A company can only be criminally liable if those in actual control of the company(for example, the managing director and other directors) are proved to have the requisite *mensrea* and *actusreus* .[41]

In addition the words"*any person*" mean that it may not necessarily be the person who participated in the predicate offence that generated the criminal proceeds.

Furthermore, the offence can be committed by a person or body corporate not only in Nigeria but outside Nigeria. This can arise where the predicate offence that yielded the proceeds took place outside Nigeria, but the proceeds is laundered or transferred to Nigeria or used to acquire assets in Nigeria. This accords with international best practices in view of the transnational character of money laundering. The proceeds of crime can be "l*ayered*" from one jurisdiction to another in keeping with the nature of money laundering. Under the Ghanaian Anti-Money Laundering Act of 2008 the "unlawful activity" that can constitute predicate offence of money laundering means conduct which constitutes a serious offence, financing of a terrorist act or contravention of a law whether the conduct occurred in Ghana country or elsewhere[42].

In UK, under the Proceeds of Crime Act, 2002 the criminal conduct which can constitute predicate offence for money laundering is defined as an offence in any part of the UK or conduct which would constitute an offence in any part of the UK if it had occurred. The definition includes the proceeds of crimes committed abroad, provided the foreign act generating the proceeds would have resulted in an offence if committed in the UK. Thus the place where the conduct took place is completely irrelevant. What matters is

---

[37] Cap. 123 Laws of the Federation of Nigeria 2004

[38] (2008) All FWLR (Pt. 417) 124 B-C

[39] See section 14(1) MLPA , 2004

[40] Article 26 of the UNCAC require State Parties to adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with the Convention. See also Recommendation 2 of the FATF 40 Recommendations.

[41]See :Tesco Supermarkets Ltd v Nattrass (1972) AC 153.

[42]Section 1 (2) Anti-Money Laundering Act 2008.

whether that conduct would constitute an offence if it had taken place in the UK. It is irrelevant that the conduct would not be criminal under the laws of the country where it took place.[43]

conceals or disguises the origin of , converts or transfers, removes from jurisdiction any fund or property.

These are some of the various ways in which money laundering can be committed in Nigeria. However, the words "conceals or disguises the origin of"; "converts or transfers" "removes from jurisdiction" are not defined in the MLPA. This is unlike the PCA of UK which, in section 327(3) defines " concealing and disguising criminal property" as "concealing or disguising its nature, source, location, disposition, movement or ownership of any rights with respect to it". The MLCA of US uses the following words "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;" . The provisions of the UK and US legislations in this context are more explicit than that of Nigeria. The actual meanings of the words in the Nigerian MLPA are more likely to pose interpretation problems since dependence has to be placed on their ordinary dictionary meanings.

In addition, the word "Jurisdiction" is not defined or specified under the MLPA, unlike the PCA which specifies jurisdiction to be England, Wales Scotland or Northern Ireland. Under the PCA any person who removes criminal property from any of the three legal jurisdictions within the UK commits money laundering. Therefore an individual who takes criminal property with the requisite *mensrea*in the form of cash from Glasgow to Cardiff would commit an offence under the Act. This may not be so in Nigeria since 'jurisdiction' is not defined under the MLPA aforesaid. It is therefore difficult to say that a person who 'removes' any fund or property which is proceeds of unlawful act with the stated *mensrea*from Sokoto to Port Harcourt has 'removed' same from 'jurisdiction' under the Act.

The English case of R v Fazal[44] illustrates the commission of the offence of money laundering by conversion of the criminal property. The Appellant, Fazal held a bank account at Barclays Bank. Between 1 June 2006 and 1 August 2006 a third party made seven deposits into the Appellant's account and it was not disputed that the monies were derived from fraudulent activity with which the Appellant was not associated. The prosecution alleged that the Appellant had permitted his bank account to be used by a third for money laundering and that the money was "converted" for the purposes of section 327(1) (c) of the PCA when the monies were paid into and out of the account.

---

[43] See UK Part II : UK Law and Practice, by Toby Graham published in Butterworths International Guide To Money Laundering and Practice Secon Edition

[44] Case no. [2009] EWCA Crim. 1697 Reported in Lloyd's Law Reports 2009

Section 327(1)(c) of PCA provides that a person commits an offence if he: conceals; disguises; converts; transfers; or removes criminal property from England and Wales or from Scotland or from Northern Ireland. But the word "converts" is undefined in the Act. At the trial the Appellant explained to the jury that he had given his bank details to one Butt who had been a longstanding friend of the family. Butt had asked the Appellant to allow him to use his bank account because of an unspecified problem with Butt's own account. At the time the Appellant was not using his bank account because he was unemployed and receiving only 20 pounds a week from his parents. The Appellant submitted at the trial that there was no evidence before the jury that he had converted criminal property because on each occasion the lodging of the monies had been done by a third party. The trial judge rejected the Appellant's submission and he was subsequently convicted.

On appeal it was held as follows:

1. A person may lodge, receive, retain and withdraw monies from his account , each of which would amount to a converting of the monies concerned, by asking or allowing an agent to do so. Whether the agent acted innocently or dishonestly, it does not prevent the owner of the account from, converting money which goes through his account by means of its operation in this way.
2. There are several instances of converting the money as it is paid into the account, received, retained and withdrawn. When money passes through a bank account it changes its nature from money likely to be owned by one bank but representing a debt owed to one creditor into money owned by another bank and representing a debt owed to another creditor. Finally, when the money is withdrawn in cash, if it is withdrawn in cash, it becomes transferred into cash into the hands of the withdrawer.
3. Accordingly, at each stage as the property concerned passed through the Appellant's account, it was being converted within the meaning of section 327(1)(c) of PCA.

Much as the element of money laundering that was emphatically considered in the case was conversion of proceeds of crime, there were other elements of the *actusreus* of money laundering in section 327(1) (c) which are retention, and transfer of proceeds of crime or criminal property were also evident as the court found, and the Appellant could have been convicted for any of them. It is also arguable that there was concealment and disguising of the criminal property. Concealing and disguising criminal property are defined in section 327(3) of PCA as "concealing or disguising its nature, source, location, disposition, movement or ownership of any rights with respect to it". In so far as the said deposits were made into the said account of the Appellant by Butt both knowing or suspecting that the property concerned constituted or represented criminal property, that is to say benefits from criminal conduct there was

concealment and disguising of their sources or ownership of the them, which is for the purpose of legitimizing the criminal property, the very essence of money laundering.

Transfer includes transfer by any means of legal or beneficial interest in the fund or property, and also change of location particularly from one jurisdiction to another.

Another case which amply demonstrates classical acts of conversion, concealing, disguising, transfer and removal from jurisdiction of proceeds of crime is the Court of Appeal decision of Jersey in the **Attorney General Vs Raj ArjandasBhojani**[45] the defendant, an Indian national, made a criminal fortune of almost US$40 million selling vehicles to the Nigerian Government under two separate contracts in 1996 and 1997 through a Panamanian shelf company, named Tata Overseas Sales and Services, (TOSS), which was in reality a front for him personally. The true purchase prices of the vehicles were inflated by between 400 and 500% at the behest of the then Head of State of Nigeria, General SaniAbacha, and a second Nigerian government figure, one Colonel Mohammed BubaMarwa. As a consequence, the defendant charged Nigeria some US$184 million for vehicles which were in truth worth about US$38 million. He concealed the overcharge by falsely representing that his front company, Tata Overseas Sales and Services was part of Tata India, the manufacturer of the vehicles, and was selling to Nigeria at genuine manufacturer's prices.

The entire inflated cost over both contracts was paid on General Abacha's order to bank accounts at Bank of India Jersey, (BOIJ), held in the name of the defendant's front company, TOSS. From the Jersey accounts of TOSS and a second Panamanian front company called Britannic Trade Corporation, (BTC), the defendant then paid almost US$100 million in bribes from the sale proceeds to coded and company bank accounts in Switzerland and elsewhere which he knew were beneficially owned by the Abacha family members and by the said Colonel Marwa. This, in total, was the criminal conduct in Nigeria which gave rise to the defendant's own proceeds of crime – namely the US$40 million profit which he personally made over both fraudulent contracts.

The defendant kept his US$40 million proceeds of crime at BOIJ from 1997 until the 20th October, 2000, when the Financial Times ran a major expose on Nigerian government corruption under General Abacha in which it revealed that the Swiss authorities had launched a money laundering investigation and had identified the coded Swiss accounts of the Abacha family into which they knew he had paid millions in bribes in 1996.

In response to the news of the money laundering investigations, the next working day, Monday 23rd October, the defendant committed the first of three money laundering offences by converting the balances of the TOSS and BTC bank accounts at BOIJ into freely negotiable bankers' draft in a total sum of $43.9 million. He then committed the

[45] JCA034 dated on February 10, 2011(Unreported)

second money laundering offence by having the drafts couriered or transferred out of Jersey. The drafts remained out of the banking system until 2nd November when the defendant committed the third money laundering offence by converting the drafts by paying them into the accounts at BOIJ of three different front companies owned by him, rather than into the TOSS and BTC accounts from which the drafts had come. Each conversion and the removal was done with the purpose of avoiding a Jersey prosecution and/or a Jersey confiscation order.

Mr. Bhojwani was charged at the Royal Court of Jersey on 3 counts of conversion of proceeds of criminal conduct and removal of proceeds of criminal conduct from the jurisdiction of Jersey contrary to Article 34 (1)(b) of the Proceeds of Crime (Jersey) Law 1999. He was found guilty, convicted and sentenced to 6 years imprisonment on each count. His appeal was dismissed.

Acquires, uses, retains or takes possession or control of any fund or property.
Any person who acquires, retains or takes possession or control of fund or property, knowingly or reasonably ought to have known that such fund or property is, or forms part of proceeds of an unlawful act commits an offence of money laundering under the MLPA. This may arise where a party who did not commit or participate in the commission of the predicate offence purchases, acquires, use or takes possession of for example a house purchased with the proceeds of crime with the stated *mensrea.* Acquiring is wide enough to embrace almost every dealing in property which passes through the hands of the accused person. It is irrelevant if the accused person's acquisition of the property is merely temporary or transitory.[46]

Under the MLPA once a person acquires, uses, retains, takes possession of any property knowingly or reasonably ought to have known that such property is, or forms part of proceeds of an unlawful act he commits an offence of money laundering. It is immaterial that the person acquired it for adequate consideration or even more than its market value. This is unlike the provision of the UK POCA where once a person acquires, uses or has possession of criminal property with the knowledge or suspicion that it represents the benefit of criminal conduct, he commits an offence of money laundering, if no adequate consideration was given. The burden of establishing inadequate consideration rests on the prosecution.[47] The High Court in *R v Hogan* [48]had to consider the defence of adequate consideration to a section 329 POCA 2002 offence.

The defendant had purchased scaffolding, from a third party. The scaffolding had belonged to his former employer. The defendant paid only one-sixth of the value of the

[46]UK Part II : UK Law and Practice by Tony Graham; Butterworths International Guide To Money Laundering Law and Practice.Page 22.
[47]Section 329 (2) PCA.
[48]*[2007] EWHC (Admin) 978*

scaffolding, he only knew the seller by their first name, he paid cash and did not obtain a receipt.

The Court had to consider whether the prosecution had the burden of proof to show that the defendant had not acquired the property for adequate consideration. The Court held that once the issue of adequate consideration had been raised, the matter should be regarded as an element of the offence, which had to be proved by the prosecution to the normal standard.

The Court stated that section 329(2)(c) determined that where the court had concluded that adequate consideration had been given for the acquisition of property, then no offence would be made out under the Act even if the offender had known that the property had been stolen.

The case also raised the issue of the correct test to determine whether the consideration was adequate or not. The Court held that the question of adequacy of consideration was a separate issue from the state of mind of the offender and accordingly required a separate test. The Court stated that the issue of whether the consideration provided had been adequate had to be decided as a question of fact by the jury on a case-by-case basis. The question of whether consideration is adequate is an objective one.

The government of UK considered the defence of adequate consideration necessary to protect persons, such as tradesmen, who are paid for ordinary goods and services in money which they may know or suspect comes from crime.[49] The effect of this defence is that persons who are paid money for ordinary goods and services are not under any obligation to question the source of the money.[50]

Knowingly or reasonably ought to have known that such Fund or Property is, or forms part of the Proceeds of Unlawful Act.

The *mensrea* of the offence as we can see from the above is ***"knowingly or reasonably ought to know"*** that the funds or property constitute proceeds of crime. Since the offences are not strict liability offences, any of the acts without the requisite *mensrea* would not constitute an offence. This provision is similar to the Proceeds of Crime Act of South Africa[51].The *mensrea* that is required is not actual knowledge but where a reasonable mind will know that the property is proceeds of crime then that knowledge would be imputed on the Defendant. In **R V Pace**[52] Davis LJ of the Privy Council stated the law thus:

> ***"Even so, as observed by Lord Hope in paragraph 62 of his speech in Saik, the margin between knowledge and suspicion is perhaps not all that great, at all***

[49]Butterworths at page 31

[50]Id. at page 31

[51] Section 4 POCA

[52] (2014) ECWA Crim.186

> ***events where the person has reasonable ground for a suspicion. Where a defendant can be shown deliberately to have turned a blind eye to the provenance of goods and deliberately to have failed to ask obvious questions, then that can be capable, depending on the circumstances of providing evidence going to prove knowledge or belief."***

The UK *mensrea* in this regard is knowing or suspecting that the property constitutes or represents the benefit of criminal conduct.

The phrase***"reasonably ought to have known"*** in the MLPA means constructive knowledge. If from the facts evident in the entire transaction the person or criminal defendant who may not have actual notice reasonably should have known that the fund or property forms part of proceeds of unlawful act, then he is deemed to have constructive notice. It is submitted that the test is that of a reasonable or ordinary man who finds himself in the same circumstances as the criminal defendant. Unlike Nigeria the South African legislation defines "knowledge" and "ought reasonably to have known" in section 1 of Financial Intelligence Centre Act of 2001. It sets out the test to determine whether or not a person has knowledge of a fact or whether or not such person reasonably ought to have known or suspected such fact.

A person has knowledge of a particular fact if such person has actual knowledge, or if a court of law is satisfied that such person believes that there is a reasonable possibility of the existence of a fact, and such person fails to confirm or refute the existence of such fact[53]. Further, a person ought reasonably to have known or suspected a fact if a reasonably diligent and vigilant person has both the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position and the general knowledge, skill, training and experience that he or she in fact has.[54] In addition FICA also sets out the circumstances in which a person ought reasonably to have known that the property with which he is dealing with forms part of the proceeds of unlawful activities[55]. The test for actual knowledge is, in terms South African case law[56] commonly known as the 'willful blindness test'. This test was summarized in the case of *Frankel PollakVinderine Inc. v Stanton NO*[57] as follows:

> "Where a person has a real suspicion and deliberately refrains from making enquiries to determine whether it is harmless, where he or she sees red (perhaps amber) lights flashing but chooses to ignore them, it cannot be said that there is an absence of knowledge of what is suspected or warned against".

---

[53]Section 1(2).
[54]Section 1 (2).
[55] Section 1(2) and (3)
[56] This strengthens the test set out in FICA)
[57] (1996) 2 SA 582 (W) 596 C-D

Although the test for willful blindness assists prosecutors in establishing the existence of actual knowledge, the majority of prosecutions in South Africa are instituted not on the basis that a person had actual knowledge that the property formed part of the proceeds of unlawful activities, but rather on the basis that a person ought reasonably to have known this fact[58]. The onus of proof in the later case, having regard to the provisions of FICA, may be more easily discharged by the prosecution, which may lead to more prosecutions of money laundering offences in South Africa.[59]

Under the US federal criminal law, the requirement of knowledge can also be satisfied by constructive knowledge through what is known there as the doctrine of 'conscious avoidance' or 'deliberate ignorance' which is the same as 'wilful blindness'. The doctrine seeks to prevent a person from willfully and intentionally remaining ignorant of a fact that is material to his or her conduct in order to avoid criminal liability. US courts frequently apply this doctrine in money laundering cases where a party has deliberately avoided learning facts about the conduct of another party to the transaction, even though the circumstances of the case made it highly likely that the criminal defendant party was aware that the other party was seeking to launder proceeds of criminal activity.[60]

It is uncertain in UK whether knowledge includes constructive knowledge. The mensrea requirement is found in the definition of criminal property in the interpretation clause. It requires the criminal defendant to know or suspect that property constitutes or represents the benefit of criminal conduct. What matters is the status of the property. There is no need for knowledge or suspicion of the crime that gave rise to the property or the identity of the person who committed the crime. Essentially all that is necessary is knowledge or suspicion that the property being dealt with is 'dirty money'.[61]

Though there have not been any concluded cases based on the MLPA of 2011as amended where the courts interpreted the provisions of the Act stated above some cases decided under the previous MLPA 2004 will demonstrate the courts' interpretation of the provisions of the MLPA 2004 and the challenges the Prosecution faced in proving money laundering cases in court.

Federal Republic of Nigeria V James Onanefelbori and Others.

The case of Federal Republic of Nigeria V James Onanefelbori& 5 Others. James Onanefelbori was the Executive Governor of Delta State, Nigeria from May 1999 to May 2007. He was investigated and charged alongside others for money laundering, offering of gratification and refusing to declare his assets by the Economic and Financial Crimes Commission (EFCC). Curiously, the charges were quashed by Michael Awokulehin

---

[58]Id.Butterworths page 553
[59]Id. 553.
[60]Id. Page 637.
[61]Id. Page 22

(Honourable Judge) pursuant to a preliminary objection that no prima facie case was made out against him by the proofs of evidence and statements of witnesses to warrant his trial. It is significant to note that asat time the charges were quashed, his plea to them had not been taken, and the witnesses had not testified.

One of the issues considered in the case was the applicability of the *Ejusdem Generis* rule of interpretation which is to the effect that when specific words in a statute are followed by general words the general words are construed within the confines of the meaning of the specific words.

Section 14 (1) (a) and (a) of the MLPA provides as follows;

"Any person who –

(a) converts or transfers resources or properties derived directly or indirectly from illicit traffic in narcotic drugs and psychotropic substances **or any other crime or illegal act**, with the aim of either concealing or disguising the illicit origin of the resources or property or aiding any person involved in the illicit traffic in narcotic drug or psychotropic substances **or any other crime or illegal act** to evade the legal consequences of his action , or

(b) collaborates in concealing or disguising the genuine nature, origin, location ,disposition , movement or ownership of the resources property or right thereto derived directly or indirectly from illicit traffic in narcotic drugs or psychotropic substances **or any other crime or illegal act,**

commits an offence under this section and is liable on conviction to a term of not less than 2 years or more than 3 years."

The argument of counsel to Ibori in the case was that by virtue of the *ejusdem generis* rule of interpretation of statutes the words **'any other crime or illegal act"** used in the section apply only to funds derivable from offences traceable to narcotic drugs and psychotropic substances, and not corruption . Consequently, the entire charge fell outside the purview of section 14 of the MLPA. The court agreed with the submission and held as follows:

> *"In the instant case, it is my view that the words " any other crime or illegal act" in Section 14(1) of the Money Laundering Act are to be construed Ejusdem Generis with those which preceded them and are to be restricted or limited to funds even remotely connected to illicit traffic in narcotic drugs or psychotropic substances . For a charge under Section 14(1) of the Money Laundering (Prohibition) Act, 2004 to be sustained, the Prosecution must first and foremost establish that , or at least link such*

funds to those directly or remotely made or obtained in the course of illicit traffic or narcotic drugs and psychotropic substances.'

It is this erroneous interpretation that informed the quashing of most of the 170-count charge against Ibori because the court keptemphasizing that the counts did not state where the sums of money allegedly laundered were derived from. It is pertinent to reiterate that trial had not been conducted at this stage.

On appeal the Court of Appeal in FRN V James OnanefeIbori and others[62] the Court of Appeal per Saulawa JCA held as follows:

> **"Most regrettably, I would want to believe that the Lower Court has failed to be rightly guided by the aptly authoritative decision in the case of *SPDC VS. FBIR (Supra)*. Having critically appraised the entirety of the provisions of the Money Laundering (Prohibition) Acts of 2003 & 2004 in question, I am of the considered view that the provisions of Section 14(1) are very clear and rather unequivocal. Arguably, by virtue of the two salient phrases - "*Or any other crimes;*" and "*Any illegal act;*" as couched in Section 14 (1) of the extant Money Laundering (Prohibition) Act, 2004 (Supra), it is so obvious that the intendment or object inherent therein is not (merely) to the criminality of illicit trafficking in narcotic drugs and psychotropic substances as was erroneously assumed by the Lower Court. As aptly postulated by the learned senior counsel, the words "or" and "other" couched in the said phrases in section 14(1) are disjunctive."**

Federal Republic of Nigeria V Orji UzorKalu& Others.

The Court of Appeal decision in the consolidated cases of Orji UzorKalu V Federal Republic of Nigeria & Others; and Ude Jones Udeogu and 1 Other V Federal Republic of Nigeria V Federal Republic of Nigeria [63] affirmed the learned court's position in the case of FRN V James Onanefe. Orji UzorKalu was the Executive Governor of Abia State from 1999 to 2007. The EFCC, pursuant to complaints from some citizens of Abia State, preferred charges against him and two other persons one of which was his company, Slok Nigeria Ltd. It was alleged that Orji UzorKalu as Governor of Abia State corruptly enriched himself using his company, Slok Nigeria Ltd. And some of his aides to steal sums of money running into billions of naira from the funds of Abia State. The EFCC, after investigation, convinced that there was substance in the allegations filed charges against him and the others at the Federal High Court, Abuja.[64] Orji UzorKalu brought an application to quash the charge against him. Ude Jones Udeogu and SlokNig.Ltd also filed applications to quash the charges against them on the grounds, inter alia, that

[62] (2014) LPELR-23214(CA)
[63] (2014) 1 NWLR PT. 1389
[64] Charge No. FHC/ABJ/CR/56/2007

they were charged under the non-existing Money Laundering Act and that the charges did not disclose any *prima facie* case. Their applications were dismissed. Aggrieved, they filed an appeal at the Court of Appeal. One of the issues that came up for consideration in the consolidated appeals was whether the phrase **"any other crime or illegal act"** as used in section 14(1) of the Money Laundering Act 2003 is intended to criminalise, not only laundering of proceeds of drug offences but also proceeds of any other crimes or illegal act. The Court of Appeal per EjembiEkoJCA(as he then was) held as follows:

> *" Here the history of money laundering prohibition offences becomes material. The international community had faced the menace of cross border drug trafficking offences. With time international terrorist activities became an issue of global concern. To check the menace of organized terrorist organizations and their activities it became necessary to criminalise the laundering of moneys derived not only from drug related offences, but also illegally acquired funds from criminal and/or corrupt activities, I do not think the rule of ejusdem generis would avail the appellant in the submission that "any other crimes or illegal acts" should only relate to funds or property derived from drug related offences. The phrase "or by any other" is intended by the Legislature to emphasise strongly that any other crimes or illegal acts are not construed in terms of ejusdem generis to limit the offence under the section to only drug related offences.. The Act , particularly in section 14(1) thereof, is broad based and it extends to funds or property derived from drug related offences as well as any other crime or illegal acts. Section 14(1) is intended not to be exhaustive. The argument that, by the rule of ejusdem generis section 14(1) criminalises only the laundering of proceeds of drug related offences is lame .."*

Previous to the aforesaid Court of Appeal decision in the consolidated case of Orji UzorKalu and Ude Jones Udeogu the said controversial provision in section 14(1) of the Money Laundering Act had been amended in the re-enacted MLPA of 2011 (as amended by the MLPAA of 2012) which effectively and legislatively obliterated any grounds for any such controversy. The MLPA all the offences that are the "unlawful acts"[65] that can constitute predicate offences for money laundering, which of course includes corruption.

Federal Republic of Nigeria V Chief Michael Botmang

The first corruption related money laundering case which went through full trial was the case of FEDERAL REPUBLIC OF NIGERIA V CHIEF MICHAEL BOTMANG[66]. Chief Michael

---

[65]See section 15(1) and (6) of the MLPA, 2011 (as amended by the MLPAA of 2012).

[66]

was the Deputy Governor of Plateau State of Nigeria from 1999 to November 2006. He became the Executive Governor of the State from November 2006 to April 27th 2007 following the impeachment of the erstwhile Executive Governor, Chief Joshua CibiDariye. He reverted to the position of Deputy Governor of the State in the same April 2007 after the nullification of Chief Dariye's impeachment and his reinstatement as the Executive Governor. While being the Governor of the State Chief Botmang was alleged to have laundered several sums of money belonging to the State. He was investigated by the EFCC, and on the 11th of July 2008 charged to the Federal High Court, Abuja on a 31-count charge of money laundering.

The prosecution's case was that the Plateau State Government under the leadership of the accused person obtained a loan of N749m sometime in November 2006 from intercontinental Bank Plc to rehabilitate the Jos Main Market which was destroyed by fire, and another loan of N100m from Bank PHB Jos which was meant for Local Government Elections in the State. Part of the said loan of N749m was paid out as classified cheques on the instructions of the accused person . It was discovered during investigation that:

a. There were unusual withdrawals of money from the Plateau State Government Account with the Jos Branch of intercontinental Bank Plc.;
b. From the office of the Accountant General of Plateau State that most of the cheques used to withdraw money from the account were not reflected in the Cheques Movement Register;
c. That the cheques used to withdraw money from the account were regarded as classified cheques and were not supposed to be reflected in the Cheques Movement Register
d. After withdrawing the via classified cheques, the money would be handed over to the accused person.

The accused person was then alleged to have laundered moneys by transferring some of the proceeds into his bank accounts, and converting the others, all the with the aim of concealing their illicit origin contrary to section 14 (1) or the MPLA 2003.

Two of the witnesses who testified for the prosecution were the Accountant General of the State from November 2005 – April 2007, NuhuMadaki (Prosecution Witness 2) , and NanshalBinwai (Prosecution Witness 4), the Accountant General of the State from 5th of February-30th of March 2007.

According to the Cashier in the Accountant General's office, Paul Datugun who testified as Prosecution Witness 3 (PW3) the said classified cheques, which were government cheques, were on the instructions of the Accountant Generals (during their respective periods of service), raised and issued in his name. They would be dully signed by the concerned signatories, after which he, as payee, would take them to the bank, sign the withdrawal of the moneys, and leave without collecting them. He was

instructed on each occasion by the relevant Accountant General not to collect the moneys, and that they would be delivered to the Government House. The classified cheques were not entered into the Cheques Movement Register contrary to what was normally done with other cheques. No person testified that he personally handed over the moneys to the Accused person. The Accused person also denied receiving any such money. The Accountant General, NuhuMadaki stated in his testimony that:

> ' a substantial amount of the loan was paid out as classified cheques on the instructions of the accused person who was the Governor then. Classified cheques are payments we usually make on codes. They are paid to Government Houses on the instructions of the Governor'.

The said Accountant General NuhuMadaki in his statement to the EFCC stated that the proceeds of the said classified cheques were, on the accused instructions, delivered to the accused person by the Bank Manager of the Intercontinental Bank Plc, one Danjuma Mohammed. He also stated in his said statement that the sum of N250,000,000.00 (two hundred and fifty million naira) was taken out as classified funds on the instructions of the accused person. The succeeding Accountant General NanshalBinwai (PW4) in his statement to the EFCC also corroborated the testimony of his predecessor by stating that several sums of money totaling N789,082,982 were given to the accused as classified payment on his instruction. The accused denied all these.
The accused admitted authorizing payments by classified cheques but stated that he did not receive any money from any person through the classified cheques. Instead, the moneys withdrawn through classified cheques were used for elections.
The court while discharging the accused held as follows:

> *" From the entire gamut of the evidence adduced by the prosecution in respect of State moneys withdrawn vide classified cheques, there is no evidence to support the Prosecution's submission in his written Address that it was intended or that indeed it sought to conceal the origin of the money.*
>
> *The totality of the evidence before the Court with regard to classified cheques from the Accused person, PW2 and PW4 the two Accountants Generals who authorized the classified cheques and PW3 the Cashier who wrote the classified cheques in his name and took same to the Bank to be cashed, there is no evidence to support the contention of the Prosecution that the movement of funds vide classified cheques in any way concealed the genuine nature , origin, location, disposal, or ownership of the money as provided for in section 14 (1) of the Money Laundering Act.*
>
> *The evidence before the Court shows that PW2 and PW4 as Accountant Generals of the State authorized payments after approvals from the Accused person as*

Governor vide classified cheques. PW3 Cashier in Government House would write the chequesi.e Government cheques in his name which would be duly signed by the authorized signatories. He would then take them to the Bank, sign and counter sign them and leave without collecting the cash represented on the cheques based on the instruction from PW2 and PW4, PW2 or PW4 would collect the cash from the Bank and take it to Government House and disburse same for various government purposes.

……It would appear however that the coded payments by classified payments which are not recorded in the Cheque Movement Register support the Prosecution's submission that the payment concealed or disguised the movement of the funds. That is all. This by itself cannot ground the conviction of the Accused person for money laundering under section14 (1) of the Money Laundering Act or for the lesser offences of stealing or conversion"[67]

A number of issues are manifest for consideration in this case in relation to the investigation and prosecution of money laundering cases in Nigeria.

Firstly, both Accountant Generals were not categorical and positive in their testimonies in court as they were in their statements that the proceeds of the classified cheques were being taken to the accused persons on his instructions. In fact there was no mention whatsoever of the name of the said DanjumaUsman, the Intercontinental Bank Plc Manager who was allegedly taking the moneys left in the bank to the accused person. As the court rightly stated, he was not called to give evidence, being a very material witness. The investigators ought have interviewed him and recorded statement from him regarding the assertions of two Accountants General. The court therefore rightly found as follows:

" The Prosecution did not make any issue relating to DanjumaUsman whom the Accused person denied delivered any money to him. For example, there is no evidence that the Bank Manager who allegedly delivered money to the Accused person was ever interrogated . Also not shown to have been interrogated was the Director of Finance whom the Accused person alleged was responsible for receiving the disbursing overhead funds meant for Government House."

Secondly, there was no indication whatsoever that the accounts of the Accused person were ever investigated to find out if there were any inflows of funds at the time material to the case. There was also no indication that there was an investigation of the assets of the Accused together with those of his family members and cronies to show

[67]Pages 89 and 90 of the Judgment.

that there was an outstanding or inexplicable accretion in his or their assets.[68] Money laundering is more proved by circumstantial evidence than by direct evidence. More so, section 19(5) of the EFCC Act states that in any trial for an offence under Act[69] the fact that an accused person is in possession of pecuniary resources or property for which he cannot satisfactorily account and which is disproportionate to his known sources of income, or that he had at or about the time of the alleged offence obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and taken into consideration by the Court as corroborating the testimony of any witness. This submission has been upheld in See FRN V Daudu*(infra*)

FRN V GABRIEL DAUDU[70]

Money laundering is a derivative offence. There must be an underlying illicit act or offence which generated the proceeds of crime being laundered. It must be based on a predicate offence. For a long time now there has been a controversy on whether there must be proof, of all the elements of the predicate offence, or general evidence of unlawful act before proof of money laundering can succeed. The Supreme Court in this case laid the controversy to rest and to a large extent simplified the proof of money laundering in the Nigerian criminal jurisprudence.

The Appellant who was the CaretakerChairman of Ogori/Magongo Local Government of Kogi State on 30 October, 2014 was charged by the EFCC, and convicted on several counts of money laundering by the Federal High Court, Lokoja in Charge No. FHC/LKJ4C/2011 presided over by I. E. Ekwo J. He appealed unsuccessfully against his conviction to the Court of Appeal, Abuja. On further appeal to the Supreme Court the following arguments among others ensued.

Learned Senior counsel for the appellant J.B Daudu SAN in attacking the findings made by the learned trial judge contended that the onus fell on the appellant's shoulders to establish the lawfulness or legality of each and every lodgement he made into his accounts thus reversing the time honoured rule that the burden of proof in criminal matters lies on the prosecution. He said the Court of Appeal got it wrong and fell into the same error as did the Federal High Court by shifting the onus of proof onto the appellant and failed to ascertain whether the ingredients of the offence of Money Laundering was established beyond reasonable doubt by the prosecution. He argued that the Court below in seeking to review the prosecution's evidence and that of the

[68] Section 7 (2) of

[69] The MLPA is one of the Acts enforced by the EFCC and forms part and parcel of the EFCC Act. See \ section 7(2) of the EFCC Act.

[70] (2018) LPELR-43637 (SC)

defence could not link any of thefunds charged to the Local government funds but decided to shift the onus of proof to the Appellant.

The Appellant's counsel further submitted that all the counts revolved around the provisions of Section 14(1)(a) of the Money Laundering (Prohibition) Act, which required the proof by the prosecution of the predicate offence. Consequently, by shifting the burden of proof to the appellant, his presumption of innocence which is constitutionally guaranteed was breached by the trial Court and the Court of Appeal. He submitted placing reliance on Sections 131, 132 and 135 Evidence Act, 2011that in all criminal cases, the onus of proof is on the prosecution to prove the guilt of the defendant beyond reasonable doubt. He further submitted that these statutory provisions are in alignment with the constitutional principle encapsulated in Section 36(5) of the 1999 Constitution as amended. It is argued that the Nigeria Criminal jurisprudence puts the burden on theprosecution to prove that the appellant has committed a crime or illegal act i.e. misappropriation and conversion of the funds of the Ogori/Magongo Local Government Area which crime or illegal act has generated resources which the appellant has converted or transferred to his accounts with the aim of concealing or disguising the true or illicit origin thereof. The placement of the onus of explaining innocuous funds in his account, unrelated and untraceable to local government funds was a colossal error on the two lower Courts particularly the Court of Appeal.

WahabShittuEsq, learned counsel for the respondent submitted that the lower Court did not reverse the onus of proof placed on the prosecution to prove its case beyond reasonable doubt. He argued that a distinction should be drawn between the legal burden of proof beyond reasonable doubt which rests and stays with the prosecution in the criminal trial process, as opposed to the evidential burden of proof which constantly shifts from the prosecution to the defendant depending on where the pendulum of evidence swings in the proceedings, where civil or criminal. He said that if the totality of evidence led in the proceedings before the trial Court is examined, the prosecution proved its case beyond reasonable doubt. He maintained that the prosecution placed sufficient evidence to prove the charge against the appellant beyond reasonable doubt as required by law and the onus shifted to the appellant to rebut the evidence presented by the prosecution and this did not translate to mean shifting of the burden of proof to the appellant.

The learned counsel to the Respondent gave an analogy that if in a given situation a huge lodgement of five billion Naira is found in the private account of a public officerwhose total emoluments and entitlements during the period under reference should not exceed one Million Naira, it is the duty of the prosecution to show that the said Five Billion Naira was found in the private account of the said public officer within

the given period and also tender relevant statement of account of the public officer in proof of the said questionable lodgements, using that premise to hold that the public officer had come about the huge difference in his account from laundered funds or dirty money arising from illicit transactions. It is the duty of the affected public officer to provide explanations to show that the said amount lawfully came into his possession through his legitimate earnings and emoluments. This duty of explanation will not translate to a shifting of the burden of proof from the prosecution to the defendant, it will only mean the shifting of the evidential burden as opposed to the legal burden on the defendant to satisfactorily explain how he came about the humongous amount found in his private account.

Learned counsel for the Respondent argued that it was a highly misplaced submission by learned senior counsel in stating that it waswrong to shift the burden of proof from the prosecution to the appellant pointing out that since the appellant was standing trial for Money Laundering, the fact that he is in possession of pecuniary resources or property for which he cannot satisfactorily account and which is disproportionate to his own known sources of income, this may be proved and taken into consideration by the Court as corroborating the testimony of any witness in the trial and placed reliance for this submission onSection 19 of the Economic and Financial Crimes Commission (Establishment) Act 2004.

The Supreme Court per Akaahs JSC in resolving the issue held that:

> **"Proving Money Laundering cases is a herculean task because it requires a prior establishment of the predicate offence before the money laundering aspect can be established. To obviate this problem a remedy was introduced by statutorily inferring money laundering from not only the conduct of the defendant but his lifestyle which is similar to the Proceeds of Crime Act 2002 of the UK. Even though Section 36(5) of the 1999 Constitution provides that every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty, the proviso allows for shifting the burden of proof on the defendant. The Section provides thus:- "36(5) Every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty provided that nothing in this Section shall invalidate any law by reason only that the law imposes upon any person the burden of proving particular facts". By Section 19(3) of the Money Laundering Act, if an accused person is in possession of pecuniary resources or property which is disproportionate to his known source ofincome, or he obtained an accretion to his pecuniary resources or property, the burden of giving a satisfactory account of how he made the money or obtained the accretion shifts to him. The prosecution is relieved of the burden of having to prove that the money so found in his account or in his possession is proceeds from illicit traffic in**

narcotic drugs or psychotropic substances or of any illegal act. To explain the point further, where A is a fixed salary earner and suddenly his account is credited with an amount beyond his income or has property which his legitimate income cannot afford, the burden shifts to him to explain how he got the money with which he bought the property or the legitimate transaction he was engaged in for which the account was credited."

Undue Delays in the Judicial Process

A former Chief Justice of Nigeria, Justice DahiruMusdapher at the Second Annual Conference on the Reform of Criminal Justice Administration held in Asaba in June 2012 stated that:

> **"Almost every criminal trial, especially on serious charges of corruption, is now preceded by endless objections and applications to quash charges. This effectively stalls the main proceedings and results in the misuse of judicial time and resources.[71]Some judges, wittingly or unwittingly, aid this process by failing in their duty to be firmly in control of criminal proceedings in their courts and allowing these gimmicks to go on unabated."**

The problem of undue delays in criminal justice administration is chiefly what the Administration of Criminal Justice Act, 2015 set to eliminate. By Section 1 of the Act is the purpose of is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim.

As stated by Professor YemiAkinseye-Geroge , SAN[72]

> **Several factors compelled the change from the old criminal procedure laws (CPA and CPC) to the new one (ACJA). These include delay in the dispensation of justice, congested dockets of the courts, abuse of arrest powers by the police, excessive use of imprisonment due to lack of alternatives, congestion of prisons and high population of Awaiting Trial Persons (ATPs), lack of witness protection, and above all, anachronistic and convoluted procedures. But by far the most notorious feature of the old criminal procedure system was that it was highly susceptible to abuse and manipulation through the use of interlocutory appeals and stay of proceedings. These seriously undermined the ability of the courts to conclude trials which involved high profile defendants. These**

[71]Judges and Delays in Criminal Justice System. Published as an editorial in the Punch Newspapers edition of June 14, 2012

[72] See: The Administration of Criminal Justice Act (ACJA) 2015: Introductory Notes:

defendants were able to delay their trials for several years through the filing of various interlocutory applications and appeals which stalled the substantive criminal proceedings.

I shall now proceed to consider some of the innovative provisions of the ACJA in so far as they relate to prosecution of economic and financial crimes for the purpose of determining their effectiveness in criminal justice delivery.

It is imperative to point out that the ACJA is fraught with some clerical errors that can make the construction or interpretation of its provisions controversial and equivocal. For instance, section 270(11) provides that:

> **Where a defendant has been convicted under subsection (9)(a), the presiding judge or magistrate shall consider the sentence as agreed upon and where he is…**

There is no section 270(9)(a) in the Act. The draftsman, from the context of the section, actually wanted to refer to section 270(10)(a). Since the work of the judex is to interpret and not to make the law can the court on its own take it that the draftsman actually wanted to refer to section 10(a) and not section 9(a) which does not exist? Similarly, section 270((10)(b) makes reference to subsection (6) of the said section 270 when in actual fact the correct subsection under reference is subsection (7) of section 270. This is very clear from the context of section 270(10)(b).

NO OBJECTIONS TO A CHARGE

One of the major obstacles to effective criminal justice delivery was the incessant objections to charges on the grounds that they are defective. More often than not, such objections are frivolous to the knowledge of the defence whose main intention is to appeal up to the Supreme Court against the ruling of the court dismissing the objection, and have the trial stalled for many years with the ultimate aim of eventually frustrating the prosecution of the case. A former Chief Justice of Nigeria, Justice DahiruMusdapher (of blessed memory) at the Second Annual Conference on the Reform of Criminal Justice Administration held in Asaba in June 2012 deprecated this ignoble practice as follows:

> **Almost every criminal trial, especially on serious charges of corruption, is now preceded by endless objections and applications to quash charges. This effectively stalls the main proceedings and results in the misuse of judicial time and resources. Some judges, wittingly or unwittingly, aid this process by failing in their duty to be firmly in control of criminal proceedings in their courts and allowing these gimmicks to go on unabated.**[73]

---

[73]Judges and Delays in Criminal Justice System. Published as an editorial in the Punch Newspapers edition of June 14, 2012

Aside from the case against Chief Joshua Dariye; the cases against Jolly Nyame, and Orji UzorKalu, and others, former Governors of States in Nigeria, which were all commenced in the High Court or Federal High Court in 2007 were all objected to before any witnesses could be called; and the rulings of the trial courts appealed unsuccessfully against up to the Supreme Court while the trial was put on hold by orders for stay of proceedings. The process of appeal from the trial court to Supreme Court took an average of eight years before the cases returned to the trial courts for trial.

To curb this malaise the ACJA in section 221 forbids objections being taken or entertained during proceedings or trial on the ground of an imperfect or erroneous charge. Where however, objections are raised to the charge or information such objection shall only be considered along with the substantive issues and a ruling delivered thereon at the time of delivery of judgment.

However, the recent decision of the Court of Appeal Kaduna division in **SHEMA V FRN [74]** delivered on the 5th day of February, 2019 runs contrary to the spirit of the foregoing provision. The appellant was arraigned before the Federal High Court Katsina on 26 count charges bordering on money laundering. He pleaded not guilty to all the charges. He thereafter caused a motion on notice to be filed on the 8th day of April, 2018 wherein he prayed for the quashing of all the charges on grounds of abuse of court processes and non-disclosure of prima facie case among others. The parties adopted their written addresses and advanced arguments in respect of their stand points. The learned trial judge after hearing the parties did not rule on the application, rather he deferred the ruling and stated that the said ruling shall be delivered together with the final judgment. On appeal the Court of Appeal held that that Preliminary Objection touching on jurisdiction in criminal matter must be heard and determined first by court before proceeding with the substantive matter. This decision is really a set back to the progress the ACJA has brought to our criminal justice system. The matter is however on appeal to the Supreme Court.

NO MORE STAY OF PROCEEDINGS IN CRIMINAL TRIALS

To further discourage and prevent interlocutory appeals the ACJA in section 306 abolished stay of proceedings in criminal trials. By this provision an application for stay of proceedings in respect of a criminal matter before the court shall not be entertained. This provision which has been held to be constitutional and given judicial approval in the case of **OLISA METUH v FRN[75]** is similar to section 40 of the EFCC Act which had been held to be constitutional and accords with the decision of the Court of Appeal in **N.A.A V ENYI**[76] where the court held that:

[74] CA/K/432/C/2018
[75] (2017) All FWLR Pt. 901 722
[76] (2001) 15 NWLR PT.735 173 at 181-182, paras.H-A,

> **Generally, it is the constitutional right of a party to appeal against an interlocutory order if that party is dissatisfied with it….However, it is not a right to have proceedings stayed until the appeal is finally determined.**

Prior to the decision of the Supreme Court in Metuh's case the Court of Appeal in **AJIBOYE v FRN**[77] had upheld the said section 40 of the EFCC Act as constitutional. The Court of Appeal per Ogbuinya JCA stated in very clear terms that :

> **The provision, section 40 of the Act, exhibits all the elements / incidents of an ouster clause . It has clearly made this specie of applications for a stay of proceedings with regard to criminal matter initiated by the commission non-justiciable. In clear terms ,the provision has divested the court of the requisite jurisdiction to adjudicate over any application for stay of proceeding germinating from a criminal trial being prosecuted by the commission. The law mandates the courts, in deserving circumstances , to uphold ouster provision. See *Miscellaneous Offences Tribunal v. Okoroafor* (2001) FWLR (Pt.8) 1730, (2001) 18 NWLR (Pt.745) 295. The provision has used the word 'shall' which imports mandatory obligation on the court to observe the provision to the letter. See *Agbiti v. Nigeria Navy; Amoshima v. State*. The provision is made more compulsive by the usage of the negative phrase "shall not be entertained until judgment is delivered by the High Court" vis-à-vis an application for a stay of proceedings of a criminal matter.**

NO TRANSFER OF CASES WHERE WITNESSES HAVE BEEN CALLED

Another clog in the effective and expeditious determination of economic and white-collar crimes is the notorious act of blackmailing and petitioning against judges to the Chief Judge of the particular court for transfer of the case by counsel when they feel that the odds in a case are against them with the sole aim of delaying or virtually torpedoing the trial. By section 98(2) of ACJA it is no longer going to be business as usual because the Chief Judge can no longer transfer a case from one judge to another where witnesses have been called.

Even when there is a petition against a presiding judge before the testimony of witnesses, the transfer of the case shall not be at the discretion or whims and caprices of the Chief Judge. In such a case, the Chief Judge shall cause the petition to be investigated by an independent body of not more than three reputable legal practitioners within one week and report back to him. The decision of the Chief Judge whether to transfer the case or not will then depend on their findings and recommendations.[78]

[77] (2013) All FWLR Pt. 694 155; See also the earlier case of Okeke v. FRN (2009) 9 NWLR (Pt. 1145)

[78] Section 98(1) and (3).

This section 98(2) of ACJA was upheld in the case of **SULE LAMIDO & OTHERS V FRN.**[79]AlhajiSuleLaimido and others were standing trial before Honourable Justice A.F.A Ademola (now retired) at the Abuja Division of the Federal High Court for money laundering offences. The Prosecution had called 17witnesses and the 18th witness, who was the second to the last witness, was in the witness box when Justice Ademola and the lead defence counsel, Joe AgiSAN were arraigned and tried by the High Court of the Federal Capital Territory, Abuja. They were however, discharged and acquitted of the allegations against them.

While their trial was ongoing, the Honourable Chief Judge of the Federal High Courttransferred the case to Hon. Justice B. O. Quadri of the same court sitting in Abuja. The Defendants filed a Motion on Notice, and sought anorder that the case file be returned to the HonourableJustice A. F. A, Ademola on grounds that, since witnesses had been called beforeHonourable Justice Ademola, the Chief Judge could not transfer the case to another judge by virtue of section 98(2) of the ACJA; and Justice Ademola was no longer standing trial. The prosecution opposed the application on grounds that since the trial judge and the lead defence counsel had stood trial together in corruption related charges, though acquitted, it was no longer in the interest of justice for the Honourable Justice Ademola to continue to hear the case. The learned trial judge Honourable Justice Quadri dismissed the application and ordered accelerated trial of the case.

Dissatisfied with the decision of the court, the Defendants appealed to the Court of Appeal which allowed the appeal and ordered that the case be remitted back to the Chief Judge for re-assignment to Honourable Justice Ademola to conclude same. Honourable Justice Ademola coincidentally retired a few days after the Court of Appeal's judgment, thus rendering his conclusion of the case, as ordered by the Court of Appeal, impracticable.

DISPENSATION TO ELEVATED JUDGES TO CONCLUDE PART-HEARD CASES

Trial *de novo* is an anachronistic practice which has stubbornly refused to leave both our civil and criminal justice system. I commenced a case in 2003. As a result of the frequent transfer of judges of the Federal High Court the case passed through three Judges and came to the fourth one. It had to commence *de novo* before each Judge. The fourth Judge was determined to conclude the case. Unfortunately, after the parties had adopted their final written addresses and the case was adjourned for judgment the presiding Judge died in 2016 before delivering the judgment. The case has again commenced de novo before the fifth judge after a period of 13 years. I also have another case before the High Court of a State where ACJA does not apply and the trial Judge was elevated to the Court of Appeal after overruling the no case submission of

[79] Appeal No: CA/A/607C/2017

the defendant. The case had to be commenced *de novo*. The EFCC has many of such cases.

To reduce the incidences of trials *de novo* the ACJA has in section 396(7) granted dispensation to a Judge of the High Court who has been elevated to the Court of Appeal to continue to sit as a High Court Judge and conclude his part-heard cases within a reasonable time.

PLEA BARGAIN

Prior to the enactment of the ACJA there had been serious controversies on whether plea bargain is part of our criminal justice system or not. This argument gained momentum following the resolution by EFCC of some high profile corruption cases through plea bargain.

The comments of the former Chief Justice of Nigeria, HonourableDahiruMusdapher (of the blessed memory) at a workshop for judicial correspondents entitled: "Plea Bargain and other Emerging Trends in Criminal Justice Administration in Nigeria", compounded the controversy. According to him the concept was not only dubious, but was**:"never part of the history of our legal system- at least until it was surreptitiously smuggled into our statutory laws with the creation of the Economic and Financial Crimes Commission, EFCC."**[80] Though other speakers at the workshop, and other fora disagreed with him to the effect that his assertion did not represent the true position of the law, the controversy did not settle until the enactment of the ACJA, which has now laid it to rest by virtue of its section 270.

The said section 270 makes elaborate guidelines for plea bargaining. The purpose of this provision is to encourage parties to explore the possibility of resolving criminal matters through the process in order to avoid delays and save costs. The Supreme Court of the United States of America had, in upholding the concept of plea bargain as an essential component of the country's administration of justice, stated that:

> **If every criminal trial were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities**[81]

Prior to the codification of plea bargain in ACJA, the EFCC had disposed some high profile cases through the process of plea bargain. Reliance had been put on section 14(2) of the Act which provides as follows:

> **" Subject to the provisions of section 174 of the Constitution of the Federal Republic of Nigeria 1999 (which relates to the power of the Attorney-General of**

[80] "Nigeria: Pea Bargain- CJN Slams EFCC" reported in the Vanguard of 6th March 2012.

[81] 272 U.S 451

the Federation to institute, continue, takeover or discontinue criminal proceedings against any person in any court of law), the Commission may compound any offence punishable under this Act by accepting such sums of money as it thinks fit, exceeding the maximum amount to which that person would have been liable if he had been convicted of that offence.".

Some of the plea bargain agreements generated so much controversy which culminated in Supreme Court holding that a plea bargain or non-prosecution agreement must be in writing. This holding was in the case of **ROMRIG NIGERIA LTD V FRN (2017) LPELR-43834(SC) I at pp. 22-25, paras. F-D.** The prosecution preferred 66 count charge against the Appellant and 6 other accused persons before the trial Court. The appellant herein, was the 5th accused person and he and his co-accused were alleged to be involved in the laundering of the funds belonging to the Edo State Government and Local Government, of the State.

On being served with the charge, the accused persons filed an application dated 4th February, 2011 challenging the jurisdiction of the Federal High Court Benin to entertain the charge. The application was predicated on the doctrines of double jeopardy and condonation. They complained that they have been charged at the Federal High Court, Enugu in charge No FHC/EN/6C/2008 between FRN v. LUCKY NOSAAKHARE IGBINEDION and Others and that Judgment wasentered after a plea bargain arrangement between the accused persons and the prosecution.

In opposing the motion, the prosecution filed a counter affidavit, wherein it was stated that neither the appellant herein, nor any of the accused persons was convicted in the charge filed at Enugu Federal High Court for the offence of money laundering and that it was only the 1st accused person (Lucky Igbinedion) who was charged and convicted for the offence bordering on non-disclosure of assets (Money in GTB Account) before the trial Court.

The prosecution stated that it is not in dispute that charge no. FHC/EN/6c/2008 was filed by the respondent herein, at Enugu Division of the Federal High Court and that it is also not in dispute that the name of appellant featured as one of the accused persons in the charge filed at Enugu While the charge was pending, Lucky Igbinedion approached the prosecution for a plea bargain arrangement which was strictly between the EFCC on one part and Lucky Igbinedion and KIVA corporation on the other part.

The trial court held in favour of the Prosecution (Respondent) the accused (Respondent) appealed unsuccessfully to the Court of Appeal and eventually to the Supreme Court which held as follows per Sanusi JSC:

"In addition, there must be a written agreement between the appellant and the respondent on the issue of compounding of the crime for which the appellant was charged and also the amount to be accepted by the respondent must be explicitly stated in the written agreement compounding the offence no more no less".

OTHER COURT PROCEEDING MEASURES FOR EFFECTIVE JUSTICE DELIVERY

Upon arraignment the trial of the defendant shall proceed on a day-to-day basis until conclusion of the case[82]; but where it is not practicable, no party shall be entitled to more than five adjournments from arraignment to final judgment with the interval between the last and subsequent adjournments not exceeding fourteen working days[83]; where parties have exhausted their adjournments and the trial has not been concluded the interval between one adjournment and another shall not exceed seven days inclusive of weekends[84]; the court may award reasonable costs to discourage frivolous adjournments[85]; the court may order bench warrant, award fine of even imprison a recalcitrant witness who has been issued summons or subpoena to testify for the prosecution or defence and he consistently and willfully fails to attend court for his testimony[86].

There are also provisions, where practicable, for electronic recording of confessional statements of witnesses[87], and court proceedings[88]; protection of witnesses in economic and financial crimes offences by having them testify via video link, screened or masked, by written deposition as experts, and any other measure that the court considers appropriate in the circumstance;[89] trials in absentia where the defendant who is on bail jumps bail, refuses or fails after arraignment to appear for his trial.

HOW EFFECTIVE HAS ACJA BEEN AS A RIGHT TOOL FOR EFFECTIVE JUSTICE DELIVERY PARTICULARLY WITH RESPECT TO ECONOMIC AND WHITE COLLAR CRIMES?

There is no gainsaying the fact that the ACJA has made some far- reaching reforms and provisions aimed at speeding up criminal justice delivery. To my mind the ACJA is a revolutionizing and ground-breaking legislation which if implemented will deliver effective justice in economic and financial crimes in particular and others in general. However, like all very laudable legislations that Nigeria is endowed with, its implementation and practice faces daunting challenges.

---

[82]Section 396(3).
[83] Section 396(4)
[84] Section 396(5)
[85] Section 396(6)
[86] Sections 397; 398; 399;and 400
[87] Section 15 (5)
[88]Section 364
[89] Section 232

The first challenge is that ACJA does not operate across the States of the Federation. It only applies to the Federal High Court and the High Court of the Federal Capital Territory. Economic and white-collar crimes are not prosecuted only in these two courts. The force or impact of ACJA does not extend to such crimes prosecuted in State High Courts. In effect, such economic and white-collar crimes prosecuted in the State High Courts continue to be bedeviled by the obsolete criminal procedure laws with their inherent loopholes which are exploited to cause delays.

A very good example is the case of **IBRAHIM SHEHU SHEMA & ORS v. FRN** where the defendants who include a former governor, objected to their arraignment in January, 2016 and subsequently appealed unsuccessfully up to the Supreme Court against the decisions of the two lower courts overruling their objection.

If the two cases of **Dr. MuazuBabangidaAliyu**and **Ibrahim ShehuShema** pending before state High Courts are being delayed because ACJA does not apply there, the case of **FRN v OLISA METUH & 1 OTHER**[90] is a test case for the effectiveness of the ACJA. It is a case that has challenged almost to elastic limit the implementation of the provisions of the Act.

The defendants were arraigned on the 16th January, 2016 on a 7 -count charge on offences contrary to Money Laundering (Prohibition) Act, 2011 as amended in 2012. They pleaded not guilty. Within less than a month after trial started on the 25th January, 2016 the prosecution called eight (8) witnesses who testified and closed its case precisely on the 8th February, 2016; and the stage was set for the Defendants to open their defence. They chose to exercise their right to make no case submissions. Counsel were ordered to file and exchange written addresses on the no case submission. The trial court delivered a ruling on the 9th March, 2016 dismissing the no case submission, and ordered the defendants to enter their defence.

Metuh wrote a petition to the Chief Judge against the presiding Judge alleging bias against him and requesting for the transfer of the case to another Judge of the court. He, through his counsel, also filed a motion on notice demanding that the Judge should recuse himself. It is now history that both applications failed.

The Defendants then filed separate notices of appeal to the Court of Appeal against the dismissal of their no case submissions.

The Court of Appeal in a judgment delivered on the 24th May, 2016 struck out/dismissed the Appellants' appeals on the no case submission. Still being dissatisfied, the Appellants appealed to the Supreme Court over the striking out/dismissal of their no case submissions. The Supreme Court fixed the hearing of the appeal for the 2nd November, 2017.

---

[90] FHC/ABJ/CR/05/2016

The Appellants in the meantime, filed a Motion at the Supreme Court in March, 2017 praying for an order of the Court staying further proceedings in the main trial pending the determination of their appeal against the striking out /dismissal of the no case submission. The application for stay of further proceedings at the trial court was vehemently opposed by the prosecution. Arguments for and against the Motion were canvassed and the Supreme Court reserved its judgment for the 9th June, 2017. In a landmark judgment delivered on the 9th June, 2017, the apex court dismissed the motion, and held that stay of proceedings could not be granted by virtue of section 306 of ACJA and section 40 of the EFCC
Act. [91]

Back at the trial court, trial continued. However, in April 2016, the Defendants who were hitherto being defended by the same set of counsel decided to split their defence whereby the 2nd Defendant, a company belonging to the 1st Defendant, Destra Investments Limited engaged a separate counsel for its defence. The new counsel filed a notice of preliminary objection at the trial court challenging counts 1 and 2 of the charge on the grounds that the said counts labeled against the defendants allegations bordering on "award of contracts" over which the Federal High Court lacked jurisdiction.

The prosecution while arguing that the counts do not border on allegations of "contract award" argued in the main that pursuant to sections 396(2) and 221 of ACJA the hearing of the preliminary objection to the charge shall only be considered along with the substantive issues and ruling thereon made at the time of delivery of Judgment. This contention was upheld by the trial court. The 2nd Defendant appealed against this decision to the Court of Appeal in **DESTRA INVESTMENTS LTD V FRN & 1 OR**[92].In a unanimous Judgment delivered on the 10th May 2017 the Court of Appeal dismissed the appeal and upheld the provisions of section 396(2) and 221 of ACJA.

The Appellant further appealed to the Supreme Court in **DESTRA INVESTMENTS LTD V FRN & 1 OR[93].** In a judgment delivered on the 12th January, 2018, the Supreme Court dismissed the appeal and affirmed the judgment of the lower court.

In the same vein the apex court on the 9th February, 2018 also dismissed the appeals on the no case submission separately filed by the appellants in **METUH V FRN & 1 OR[94] and DESTRA INVESTMENTS V FRN & 1 OR[95].**

---

[91]See METUH V FRN (2017) NWLR (PT. 1575) S.C 157
[92] See Appeal No: CA/A/248c/2016
[93]No.SC/451/2017
[94]Appeal Nos: SC/457/2016
[95]SC/470/2016

Following the striking out/dismissal of the appeals of the defendants on the no case submission by the Court of Appeal and Supreme Court for failure to obtain leave to appeal on issues of mixed law and facts, the Defendants have filed separate notices of appeal against the dismissal of the no case submission and motions on notice seeking leave of the Court of Appeal to appeal against the dismissal of the no case submission. The case is still ongoing for defence. Lest we forget the prosecution had closed its case since February, 2016, a period of more than three years now.

The foreseeable way of indirectly procuring a stay of proceedings in an economic and white-collar crime case is the practice of quickly processing the record of appeal and transmitting same to the Court of Appeal, and then demand that the trial court should not engage in judicial insubordination or impertinence by continuing with the case when the Court of Appeal is seized with it. I do not think this admonition will stand in the face of obvious statutory provision of section 306 which has been accorded judicial recognition by the Supreme Court.

Another issue that has tested the effectiveness of ACJA as a veritable tool for effective justice delivery is the said section 396(7) of the Act which provides as follows:

> **Notwithstanding the provision of any other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time.**

I have been reliably informed that this is practiced in Ghana and The Gambia. It is a welcome development and will to a large extent address the problem of commencing trial *de novo* before each succeeding judge. However, the provision throws up a number of issues which I will like to discuss.

The first one is its constitutionality, that is whether a person who: has taken oath as a Justice of the Court of Appeal; has started performing his duties as such; and has ceased to be a judge of the High Court can return to his previous position (when the oath he took as a Judge of the Court had ceased to subsist) and function as such to conclude part-heard matters he was trying in his capacity as a Judge? Does our Constitution allow such functions in dual capacities? Can the provision stand in the face of the Supreme Court's decision in the notorious case of **OGBUNYIYA V OKUDO**[96] whereJustice Nnaemeka-Agu's judgment as a High Court Judge was nullified on the

[96] (1979) SC 6-9 SC 32

grounds that he was *functus officio* as he had ceased to be a Judge of the High Court of Anambra State as at the time he was elevated to the Court of Appeal, and hence gave the judgment without jurisdiction.

Going by the natural and ordinary meaning of the provision it appears that it has automatically granted dispensation to every Judge who is elevated to the Court of Appeal and who has part-heard matters to conclude same by the use of the words, ***shall have dispensation to continue to sit as a High Court Judge.*** It does not give the President of the Court of Appeal or any other person the power or discretion to either choose to grant the dispensation or not. This will be very difficult in practice because there is hardly any such Judge that would not have part-heard matters before his elevation to the Court of Appeal. The situation is made more complicated by the proviso to the subsection to the effect that such dispensation shall not prevent the Judge/Justice from assuming duty as a Justice of the Court of Appeal.

In practice, the President of the Court of Appeal granted dispensation to some to Justices of the Court of Appeal to conclude part-heard matters in the trial court. The case that immediately comes to mind is the case of FRN V ORJI UZOR KALU and others which was pending before Honourable Justice M. Idris before his elevation to the court of Appeal. Interestingly, it was the Defendants who applied through their counsel to the President of the Court of Appeal for the dispensation to Honourable Justice Idris to conclude the case which was granted. After the Honourable Justice overruled the no case submission of the Defendants, they appealed to the Court of Appeal, and one of the grounds of appeal was that section 396(7) of ACJA is unconstitutional and Honourable Justice Idris having been elevated to the Court of Appeal lacked the requisite jurisdiction under the constitution to preside over the matter.

Although the ACJA has stipulated the trial of cases on day-to-day basis and the maximum number of adjournments a party should have in a case some perennial problems will make the implementation of this very difficult. They include inadequate infrastructures, like electronic recording machines and the personnel to man them; regular power supply; unconducive working conditions; and congestion of cases in the court's docket. A judge with heavy caseload and who is recording proceedings in long hand should not reasonably be expected to conduct trials from day-to-day. Granted that the Act makes provision for electronic recording of court proceedings in section 364, but how many of the courts have the resources to afford the necessary machinery for that, and also manage effectively the hydra-headed problem of epileptic power supply?

Furthermore, by the provision of Section 270 one of the instances in which plea bargain can be executed is under section 270 (2) which is during or after the presentation of the

evidence of the prosecution, but before the presentation of the evidence of the defence. Aside from obtaining the consent of the victim of the crime or his representative there are three other conditions for entering into a plea bargain in this instance, one of which is where the entire evidence laid by the prosecution is insufficient to prove the offence charged beyond reasonable doubt.

I wish to opine that a situation will hardly arise where the defendant, being fully aware that the prosecution's case is insufficient to prove the charge against him, will nevertheless agree to a plea bargain that will obviously result in a conviction and sentence. Even if it does, it will be in very few situations under sections 223; 224; 225; 229; 230; 231; 233; 234; 235 and 236 of the Act. The said sections include situations where the evidence is insufficient to prove beyond reasonable doubt the offence charged but is sufficient to prove a similar, lesser or kindred offence(s) not charged; and where the evidence is not sufficient to prove the offence charged beyond all reasonable doubt but is sufficient to prove an attempt to commit the offence charged.

Even if any of such situations arises in this instance, the prosecution is still not at liberty to enter into a plea deal except the other two conditions also co-exist; that is that the defendant has agreed to return the proceeds of the crime or make a restitution to the victim or his representative; and to cooperate with the investigation and prosecution of the crime by providing relevant information for the successful prosecution of other offenders in a case of conspiracy.

CONCLUSION/RECOMMENDATIONS

There are other legislations which EFCC enforces which for reasons of time are space constraints could not be discussed here. Nevertheless, I believe that this paper has brought to the front burner some of the provisions, issues and pitfalls in some of the legislations discussed. It has also spotlighted some of the practices and challenges associated with their enforcement and the application of the ACJA.

In conclusion I wish to make the following recommendations:

Firstly, the EFCC Act needs to be amended to enable the Commission retain a particular percentage, possibly seven percent, of whatever funds it recovers to enable it strengthen its capacity to carry out its onerous functions.

Secondly, the AFF Act needs to be amended to include situations where it is obvious that property has been obtained from a victim by false pretence but he cannot easily be identified or traced as in the case of "Yahoo Yahoo boys/girls".

Thirdly, the word "Jurisdiction" in the MLPA should be defined to mean Nigeria.

Fourthly, the words "conceals or disguise" ; converts or transfers"; "knowingly" and " reasonably ought to have known" in the MLPA should be clearly defined for purpose of clarity, and to obviate the problem of diverse and inconsistent interpretations.

Fifthly, the errors in sections 270(10)(b) and 270(11)of ACJA should be corrected by an amendment.

Sixthly, while we await the Supreme Court's pronouncement in the appeal against the Court of Appeal decision in Shema v FRN it may be necessary to initiate an amendment to section to section 221 of ACJA by including the wordslike "notwithstanding that the objection is to the jurisdiction of the court".

Seventhly, *trial de novo* has become anachronistic in our criminal justice system and should be abolished particularly with respect to corruption, economic and financial crimes cases where evidence is merely documentary and demeanour of witness has little role to play.

Finally it is pertinent to stress that the role of the Judges is very central and pivotal to the success or failure of the implementation of ACJA as a tool for effective justice delivery. Their resoluteness is by and large a very strong determinant factor in its success . They must put their feet strongly on the ground and whip into line erring prosecutors or defence counsel who may wish to deploy delay and dilatory tactics aimed at slowing down the speedy dispensation of justice. The Supreme Court has shown the subordinate courts the path to follow by imposing heavy fines against counsel who were adjudged to be abusing the court process.[97]

[97] The Supreme Court fined a lawyer, Mr. ToluBabaleye, N2m for filing a frivolous appeal to delay the hearing of a suit filed by a former Chairman of the House of Representatives' Committee on Appropriation, AbdulmuminJibrin, to challenge his suspension for 180 legislative days since September 28, 2016. https://www.dnllegalandstyle.com/supreme-court. 1 Million Naira cost was also awarded against J.S Okutepa SAN by Supreme Court in the case of **AbubakarVs Senator** Ali for bringing forward an appeal unknown to settled law.