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**Analysis and Identification of Suspected Substance in
the Trial of Drug Offences in Nigeria: A Review of Oyem
v FRN**

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Analysis and Identification of Suspected Substance in the Trial of Drug Offences in Nigeria: A Review of Oyem v FRN

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Abstract

Purpose: The purpose of the review was to show that the affirmation of the appellant's conviction in the case of Oyem v FRN by the Nigerian apex court was erroneous. To achieve the purpose, it is expedient to unravel the various errors committed by the apex court as a result of its failure to adhere to the law and to observe the peculiarities in the procedure for the trial of drug offences.

Methodology: This work adopts the doctrinal method of research which involves the use of primary and secondary sources of law. The primary sources used in this work were legislation (Acts of the National Assembly), Case laws and Decrees while the secondary sources were books and article. The review of Oyem's case in substance reveals that the apex court affirmed the conviction of the appellant on the assumption that, (1) the result of the preliminary (color) test conducted by the exhibit keeper at the NDLEA Command, using UN Narcotic Identification Testing Kit was the legal proof of the suspected substance as Indian hemp, instead of a chemist's report on the mandatory confirmatory laboratory test by an analyst and, (2) the appellant's confessional statement and guilty plea served as alternative proof that the suspected substance was Indian hemp even when the trial court did not carry out the test of veracity on the confessional statement.

Findings: The two (2) assumptions by the apex court are the main findings in this work. Furthermore, even when the appellant was charged, tried and convicted for an offence constituted by expert evidence, no expert gave evidence at the trial, at least not on record. This work is of the view that extra-judicial confession made prior to analysis of a suspected substance cannot serve as proof of the nature of the substance, that is, Indian hemp. Moreover, the Nigerian Evidence Law having provided for the method for the analysis and identification of suspected substance in the trial of drug offences no other method can be used under the law.

Keywords: *Analysis, identification, suspected substance, chemist's report, drug*

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1.0 Introduction

In an earlier case of *Nkie v FRN*¹ the apex court, as a result of the skewed submission by prosecution counsel was confronted with the following situations in affirming the conviction of the appellant: (1) both preliminary and confirmatory tests were conducted on the suspected substance and the results marked as exhibits 'B' and 'E' respectively, (2) exhibit 'E' (positive chemist report) was admitted on the date fixed for judgment after it was read in open court and no objection raised and, (3) no portion of the judgment of the trial court made reference to exhibit 'E'.

In *Oyem v FRN*² under review there are undisputed facts showing that: (1) only preliminary test was conducted, (2) no chemist's Report based on laboratory analysis was tendered and admitted and, (3) no chemist's Report was relied on in the judgment of the trial court. The judgment of the trial court as affirmed by the apex court in *Nkie's* case is to the effect that proof by a positive Chemist Report as required by the Evidence (Amendment) Act³ (EA) can be dispensed with in convicting the appellant charged with an offence constituted by expert evidence where the chemist's Report suffers admissibility deficit on the ground that it was admitted after a date for judgment has been fixed. On the other hand, *Oyem's* case found the result of preliminary (color) test sufficient to prove the identity of the suspected substance to support the conviction of the appellant without a Chemist Report or confirmatory laboratory Report as provided for in the EA.⁴

Although in both cases the conviction of the appellants were affirmed, this work finds it necessary to review *Oyem's* case after that of *Nkie's* case because with the latter decision, the apex court has clearly taken a position that analysis and identification of the suspected substance by expert evidence is not a *sin qua non* in the conviction of a drug offender. It is the propriety of this proposition that this work sets out to review. However, there are other errors amounting to miscarriage of justice in *Oyem's* case. For example (1) charging the appellant under a section of the law and trying him under another section with different elements,⁵ (2) misleading the appellant at the trial, (3) effect of the appellants confessional statement on his conviction, (4) consideration of irrelevant matters at the trial.

In this review, *Nkie's* case in which both preliminary and confirmatory tests that yielded positive results were conducted and the outcomes (Exhibits 'B' & 'E') admitted point to the legal framework for the procedure and the law in the analysis and identification of suspected substance in the trial of drug offences. In other words, in *Oyem's* case, where the procedure terminated with preliminary (color) test with one result (Exhibit PW1A) which is not even provided for in the law and with only one result (Exh. PW14) the apex court felt justified in affirming the conviction of the appellant. It is, therefore, necessary to comb the length and breadth of the law to ascertain the evidence required to prove that the suspected substance in the instant case is Indian hemp and whether it was, (1) analyzed in an accredited laboratory or a laboratory established by appropriate authority (2) by a qualified analyst (3) using scientific techniques, (4) the outcome showing positive result, (5) a report of the analysis signed by designated persons and produced at the trial, (6) report tendered by persons qualified. In fact, the above constitute the base of this review.

¹ *Nkie v FRN* (2014) 33 WRN 40

² *Oyem v FRN* (2019) 11 NWLR (Pt. 1683) 333

³ s. 55 (1) – (4) of the Evidence Act Cap – E14, Laws of the Federation of Nigeria (LFN) 2004 (as amended)

⁴ *Ibid*

⁵ ss. 14(b) & 11(b) of the National Drug Law Enforcement Agency (NDLEA) Act CAP – N30, Laws of the Federation of Nigeria, 2004 (as amended)

2.0 Explanation of Terms and Phrases

2.1 Offences Constituted by Expert Evidence

Generally, this category of offences can only be proved by facts or evidence generated by scientific principles. These principles are employed in the separation, identification and/or quantification of unknown compounds such as drug samples. In the trial of drug offences, the common techniques for the identification of prohibited substances are Gas Chromatography and Gas Chromatography/mass spectrometry. Other analytical methods based on functional groups are also available. It must be noted that in producing admissible chemist's report for the purpose of legal proceedings there are both substantive and procedural requirements.

2.2 Analysis and Identification

Because drugs or illicit substances are usually masked and trafficked either as pro-drugs or immediate precursors it is always necessary to study the nature of a suspected substance and thereafter identify it, whether or not it is a substance prohibited by the law.

2.3 Chemist Report

It is the result of the analysis and identification of the suspected substance. A negative result means the accusatory instrument is not corroborated and accordingly the accused cannot be arraigned and tried. If the result is positive, conviction then depends on the proof of the other elements of the offence.

2.4 Conviction Solely on Confession

As an offence constituted by expert evidence an accused cannot be convicted solely by his confession since the fact that the suspected substance must be proved to be a substance prohibited by the law through scientific laboratory analysis and identification.

2.5 An Analyst

In Nigeria an analyst for the purpose of analysis and identification of suspected substance in drug trials is a pharmacist or a chemist who is also a public analyst.⁶

2.6 The Laboratory as an Institution

The laboratory mentioned in Section 55 of the Evidence (Amendment) Act (EA) 2011, for the purpose of analysis and identification of suspected substances must be one accredited by NDLEA and there is only one in Nigeria located in Lagos.

2.7 Testifying on the Chemist Report

On the authority of the apex Court in *Nwachukwu v The State*,⁷ relying on the *proviso* to Section 55(1) EA, held that it is not the correct interpretation of the section that only the named officers in the section can testify when the certificate (Chemist's Report) is signed. However, (Ediru, 2017)⁸ has submitted that the only person other than the named officer is the analyst who actually conducted the test.

⁶ s. 14(2) Institute of Public Analysts of Nigeria Act, Cap 116, LFN, 2004

⁷ *Nwachukwu v The State* (2002) 12 NWLR (Pt. 782) 543

⁸ Ediru, M. (2017) A Critical Examination of Forensic Evidence in the Trial of Drug Offences in Nigeria. *GRBPL* Vol. 8 No. 4 p.146

2.8 Corroboration of Accusatory Instrument

This refers to the chemist's report of the laboratory analysis, the absence of which the court cannot exercise jurisdiction to try the accused.

2.9 Vitiating Elements

This refers to the various errors committed by the trial Court and apex court.

3.0 Proof that the Appellant Transported Indian Hemp (*Cannabis Sativa*)

The sole issue formulated by the appellant, which the apex court adopted in the appeal is as follows:

“Whether in satisfaction of the legal requirement of proof beyond reasonable doubt, the respondent was not required to establish by way of cogent and compelling evidence that the dried weeds recovered from the appellant were actually Indian hemp, in order to sustain the conviction as envisaged by the law under which he was charged, even in the face of the alleged plea of guilty and purported confessional statement of the appellant (Grounds one, two and three)”.

Even a breathless consideration should reveal that the issue is whether the respondent proved the all-important element of the offence which is the identity of the suspected substance to be Indian hemp to warrant the conviction of the appellant. Although, the submissions of both counsel on the sole issue before the apex court were so terse and ordinary to be of any assistance to the court, nonetheless, the court being the repository of the law ought to have dug deeper into the law, knowing the technical and peculiar nature of the trial of drug offences. It is submitted that while the terse submissions of counsel laid the foundation for the erroneous decision of the apex court the blame is squarely on the apex court. At least the invitation of an *amicus curia* may have solved the problem.

On the part of the appellant's counsel the only direct submission in his argument on the issue is as follows:

“That it is on the respondent to prove the ingredients of the offence as decided in *Okaraji v State* (2001) FWLR (Pt. 77) at 894 paras. G-E; (2002) 5 NWLR (Pt. 759) 21, but it failed to prove that the substance allegedly transported by the appellant was actually Indian hemp otherwise known as *cannabis sativa*. That since the PW1 was only a custody keeper; the preliminary test could not have proved that the substance was actually Indian hemp since the laboratory test result in Lagos was not available”.

In the summary of evidence/submissions of the respondent counsel, the court recorded thus:

“The learned counsel to the respondent on the other hand has submitted that the respondent has proved the 2 ingredients of the offence that the appellant (1) transported 103.1 kg of Indian hemp known as *cannabis sativa* a narcotic drug, (2) that the substance transported was actually Indian hemp otherwise known as *cannabis sativa*. He argued that the respondent proved its case through the evidence of PW1 and PW2, exhibits PW1E (car), PW1 (F1-F12) and PW2A. He maintained that by the facts and circumstances in this case, the prosecution had no burden to prove that which was admitted. That the appellant pleaded guilty and stood by it, exhibits PW1A, B and C, PW1E (car), PW1 (F1-F12) and were all tendered without objection. Even his confessional statement was admitted without objection”.

Ultimately the court relying on the evidence placed by the prosecution and the submission of counsel resolved the sole issue for determination against the appellant as follows:

“It is the law that in order to secure a conviction for unlawful possession of Indian hemp otherwise known as *cannabis sativa*, the prosecution must establish the following beyond reasonable doubt as required by the EA.⁹

1. That the substance was in the possession of the accused;
2. That it was knowingly in his possession;
3. That the substance is proved to be Indian hemp (*cannabis sativa*) and
4. That the accused was in possession of the substance without lawful authority.

See Per Kekere-Ekun, J.S.C. in *Blessing v FRN* (2015) LPELR 24689 (SC), (2015) NWLR (Pt. 1475)1.

The contention of the appellant however is that there was no proof that the dried weeds recovered from the appellant were Indian hemp. It must be noted that the appellant admitted and confessed that he committed the crime, pleaded that he was guilty and had no cause why he should not be convicted. Besides, PW1 stated at page 22 from line 9 and page 23 from line 3 of the record as follows:

“I conducted a preliminary test on the weed in the presence of the accused and other witnessing officers. The test proved positive for *cannabis sativa*, a Narcotic Drug... The sample of the drugs along with the transparent evidence punch I took for testing to Lagos laboratory”

Again, when exhibits PW1 F1-12 being the 12 bags of dried weeds (Indian hemp) were tendered in evidence against the appellant, he raised no objection to their admissibility. The lack of objection to the tendering of exhibit PW1 F1-12 means that he accepted and understood very well that the dried weeds were Indian hemp, otherwise called *cannabis sativa*... Once the substance is proved to be Indian hemp, the burden shifts to the accused to establish that he has lawful authority to be in possession or to deal in the substance. See per Galadima, JSC in *Okewn v FRN* (2002) NWLR (Pt. 1309) 327, 358 C-D. If the appellant knew that what he was carrying were not bags of dried weeds and prohibited by the law, he would not have confessed to the crime or offence. He has in fact; taken down the burden of proof placed upon the prosecution to prove that it was a narcotic drug or Indian hemp”.

At this juncture, it is expedient to examine what the parties and the court said or failed to do that resulted in the failure of justice in the *Oyem's* case, all having at some point alluded to the fact that the proof that the suspected substance is Indian hemp and an ingredient of the offence that must be proved.

4.0 The Review in Substance

The contention of the appellant on the sole issue adopted by the apex court was that in the absence of a report on the laboratory test from Lagos the positive result of the preliminary (color) test conducted by the Exhibit keeper in the presence of the appellant, Exhibit PW1A, did not and could not have proved the suspected substance to be Indian hemp, the confessional statement of the appellant notwithstanding. It is submitted that the appellant's contention, as terse as it is, is the correct position of the law. However, the failure to state the exact evidence (chemist's report), the procedure to generate the evidence under the law by way of analysis and identification and particularly that the law does not provide for preliminary test as the mode of proof portrayed the appellant as a joker before the court. The appellant ought to have used the provisions of the EA and the Recommended Methods for the

⁹ s. 135 of the Evidence Act Cap – E14, Laws of the Federation of Nigeria (LFN) 2004 (as amended)

Identification and Analysis of *cannabis* and *cannabis* products (Revised and Updated)¹⁰ in persuading the apex court not to affirm his conviction on the basis of the result of the preliminary test conducted by the exhibit keeper.

The United Nations (UN) directive as to how to conduct a laboratory analysis on a suspected substance underscores the need for the court to convict only on the result of a confirmatory test, which according to the exhibit keeper was at the time of conviction still pending in the NDLEA laboratory in Lagos. The UN recommended methods are hereby reproduced:

“It is still the traditional belief that only the fruiting and flowering tops and leaves next to the flowering tops contain significant quantities of the psychoactive constituent (THC); they are known as the “drug containing parts”, and generally it is only these parts of the plant that are sold in the illicit market. Color tests for *cannabis* are among the most specific color tests available (only a few plants such as henna, nutmeg, mace and acrimony give false-positive results). However, a positive color test only provides an indication of the possible presence of *cannabis* containing material and not a definitive identification of *cannabis*. It is therefore mandatory for the analyst to confirm such results by the use of additional, typically more discriminative techniques. For example a laboratory may allow a combination of a color test, thin-layer chromatography and microscopy for *cannabis* plant material for positive identification, provided that at least three *cannabinoids* are identified by TLC”.

It is instructive to note that the above methods in the Manual for use by National Drug Analysis Laboratory was put in place by the UN Division of Narcotic Drug in 2009 before the latest amendment of the EA.¹¹ Neither the Manual nor the EA provides for the result of preliminary (color, presumptive) test as proof of identity of suspected substance. It is submitted that the color test conducted by the exhibit keeper at the command office of the National Drug Law Enforcement Agency (NDLEA) using the UN Narcotic Identification Testing Kits is to determine whether or not to send the suspected substance to the laboratory in Lagos for confirmatory test. This procedure is consistent with both the method in the Manual and the provisions of the EA requiring only the report on the laboratory analysis as proof of the identity of the suspected substance.

The requirements of the law in generating the chemist’s report that can sustain conviction as found in the EA¹² are as follows:

(1) “Either party to the proceedings in any criminal case may produce a certificate signed by the Government Pharmacist, the Deputy Government Pharmacist, an Assistant Government Pharmacist, a Government Pathologist or Entomologist, or the Accountant-General, or any other Pharmacist so specified by the Government Pharmacist of the Federation or of a State, any pathologist or entomologist specified by the Director of Medical Laboratories of the Federation or of a state, or any accountant specified by the Accountant-General of the Federation or of a state (whether any such officer is by that or any other title in the service of the State or of the Federal Government), and the production of any such certificate may be taken as sufficient evidence of the facts stated therein:

¹⁰ Manual for use by National Drug Analysis Laboratory (New York: United Nations Division of Narcotic Drug, 2009), pp. 15 & 33

¹¹ s.55(1) – (4) of the Evidence Act Cap – E14, Laws of the Federation of Nigeria (LFN) 2004 (as amended)

¹² Ibid

(2) Notwithstanding subsection (1) of this section any certificate issued and produced by any officer in charge of any laboratory established by the appropriate authority may be taken as a sufficient evidence of facts stated in it.

(3) Notwithstanding subsections (1) and (2) of this section the court shall have the power on the application of either party or of its own motion to direct that any such officer as is referred to in the subsection shall be summoned to give evidence before the court if it is of the opinion that, either for the purpose of cross-examination or for any other reason, the interests of justice so requires.

(4) The President may by notice in the Federal Gazette, declare that any person named in such notice, being an officer in the public service of the Federation employed in a forensic science laboratory in a rank not below that of Medical Laboratory Technologist shall, for the purpose relating to any subject specified in the notice, and while such declaration remains in force subsection (1) of this section shall apply in relation to such person as they apply in relation to an officer mentioned in that subsection. Provided that a certificate signed by such person shall not be admissible in evidence if in the opinion of the court, it does not relate wholly or mainly to a subject so specified as in such notice”.

From the above provisions of the law, the procedure and legal requirements for generating the evidence to prove that the suspected substance is Indian hemp was not satisfied because the requirements of both preliminary (color) and confirmatory tests under the Manual were not met. It is, therefore, submitted that in the light of the above no chemist’s report of a confirmatory laboratory test signed by the designated government officer was ever produced before the court. This work submits further that only a report produced in accordance with the procedure in the UN Manual in satisfaction of the provisions of the EA could have served as the proof of the suspected substance, Indian hemp as in the instant case.

This position is based on the evidence of the exhibit keeper PW1 at the trial that: “I conducted a preliminary test on the weed in presence of the accused and other witnessing officers. The test proved positive for *cannabis sativa* a narcotic drug. The sample of the drug along with the transparent evidence pouch I took for testing to Lagos laboratory.” This evidence of PW1 which ended with “I took for testing to Lagos laboratory” without what happened at the Lagos laboratory to the same and no mention of any report on the test being before the court clearly shows that the appellant was convicted without a positive chemist’s report of a confirmatory test.

On why no conviction can be sustained in the circumstance this work associates with the case of *Stevenson v Police*,¹³ where the court held thus: “It is certainly an error in law in the observance of the law of evidence in finding an accused guilty even on a plea of guilty in relation to a crime the nature of which requires the production of the article concerned or a chemist’s report on the article... It is difficult to say that there has been no miscarriage of justice without knowing whether the chemist’s report would support the case for the prosecution or not”.

All in all, this work submits that any conviction in a trial for drug offences without a positive confirmatory chemist’s report conducted by an analyst according to the UN Manual and the provisions of the EA,¹⁴ properly signed and tendered by qualified persons and admitted is an error in procedure and law amounting to miscarriage of justice. Moreover, the proof that a

¹³ *Stevenson v Police* (1966) 1 All N. L. R. 538

¹⁴ s. 55(1) – (4) of the Evidence Act Cap – E14, Laws of the Federation of Nigeria (LFN) 2004 (as amended)

suspected substance is prohibited by the law, Indian hemp in the instant case, is mandatory. In fact no lawful trial can be initiated without the corroboration of the accusatory instrument by a positive chemist's report. In this regard the procedure under the New York Penal Law as stated by Murray¹⁵ is as follows:

“In illegal drug cases, the Government is required to present a laboratory analysis proving that the substance recovered is actually some illegal substance as opposed to ground up aspirin or something legal. When the Government provides this laboratory report to the Court, the accusatory instrument is said to be “corroborated”, a fancy way of saying that the accusation has been independently verified in some way. In misdemeanor cases the Government has a set period of time to “corroborate” the accusatory instrument. For a B misdemeanor, the Government has 60 days to get the laboratory report. If the Government fails to get the laboratory report in 60 days on a B misdemeanor, the case must be dismissed because the accusatory instrument was never “corroborated”... the Court does not have jurisdiction to hear an uncorroborated violation. For criminal possession of *marijuana* that are misdemeanor or even felony offences, depending on the amount involved, the Government is allowed 60days to 6 months depending on the case to get the laboratory report.”

By the procedure in the above passage, no person is to be arraigned without a report indicating that the substance possessed by the accused is prohibited by the law, since the court has no jurisdiction to hear an uncorroborated violation. If this procedure is adopted and the charge contains the element that the accused had the knowledge that he was in possession of a substance prohibited by the law as in the instant case, then the accused will be in a better position to plead guilty, if that is his case. In the circumstance, this work recommends the adoption of the above procedure for the trial of drug offenders by Nigeria.

The mandatory requirement of the identification of suspected substance to be a substance prohibited by the law using scientific laboratory techniques does not and cannot accommodate the excuse that there is only one laboratory for drug analysis in Nigeria and cannot justify the conviction of the appellant, due to delay in the arrival of the report from Lagos. As to what Nigeria can do to ensure prompt analysis and production of chemist's report in court and to secure the integrity of the process is to accredit private laboratories and those in faculties of pharmacy in Nigerian universities as well as analysts in private practice by the NDLEA.

5.0 Other Vitiating Elements in the Review

As earlier stated, the conviction of the appellant without a positive confirmatory chemist's report on the suspected substance as Indian hemp rendered the decision of the trial court and its affirmation by the apex court a nullity. This alone was sufficient for the courts to discharge and acquit the appellant. However, there were other issues which the court was obligated to consider and resolve one way or the other by way of review of the facts before the court in order to arrive at a just decision. As in this case, it is a settled principle of law that an accused who pleaded guilty to an offence can still lawfully appeal on two (2) grounds:

1. That the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it or

¹⁵ Murray, D. ‘Criminal Possession of Marijuana in New York state’ Copyright 1999-2010 <http://www.queensdefense.com>> accessed on 20th January, 2015

2. That upon the admitted facts he could not in law, have been convicted of the offence charged.

It was on the basis of the second ground that the appellant appealed his conviction to the apex court on three grounds and a sole issue for the court to determine. The sole issue had two prongs:

- a. That the suspected substance was not proved to be Indian hemp a substance prohibited by the law which proof is mandatory in an offence constituted by expert evidence.
- b. That his plea of guilty and purported confessional statement did not relieve the prosecution the burden of proving the alleged offence beyond reasonable doubt.

In the main review above the mandatory nature of the procedure and the requirements of the law as to the proof that the suspected substance is Indian hemp have been raised, canvassed and agitated before the court in this work. However, the appellant's issue is a compound one in that it also covers the question whether or not his guilty plea or confessional statement rendered the proof of the offence beyond reasonable doubt otiose. The holdings of the apex court on this aspect of the issue have been stated above but at this juncture this work needs to feast on the holdings for the reason why the appellant's conviction ought not to have been affirmed.

First, the apex court held that to secure conviction the prosecution must prove:

1. That the substance was in the possession of the accused;
2. That it was knowingly in his possession;
3. That the substance is proved to be Indian hemp (*cannabis sativa*) and
4. That the accused was in possession of the substance without lawful authority.

This holding calls for the penal provision under which the appellant was charged, as well as the charge itself:

Section 11(b) - Any person who without lawful authority exports, transports or otherwise traffics in the drugs particularly known as cocaine, LSD, heroine or any other similar drugs shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life.

The charge - "That you Faith Osama (F) and Chukwudi Oyem (M) on or about 30th November 2011 along Abaji-Abuja express Road within the jurisdiction of this honourable court knowingly transported 103.1 killograms of Indian hemp otherwise known as *cannabis sativa*, a narcotic drug in an Army green 307 Peugeot vehicle with fake ministry of defence number plate FG 78/06 without lawful authority and thereby committed an offence contrary to and punishable under section 14(b) of the NDLEA Act, Cap N30, Laws of the Federation of Nigeria, 2004".

With due respect to the apex court, that the suspected substance was knowingly in the appellant's possession is not an ingredient in the offence charged. In fact, 'knowingly in the appellant's possession' is not an ingredient to be proved by the prosecution unless the accused sets up the defence of unwitting possession, that is, he did not know that the suspected substance was in his possession, which is not the case here. It is submitted that mere recovery of the suspected substance from the appellant is sufficient proof of possession. In the case of *DPP v Brooks, Diplock L. J.*¹⁶ defined possession as follows: "In the ordinary

¹⁶ *DPP v Brooks* (1974) 2 All E. R. 840 at 843l; (1974) 2 W.L.R 898 at 902

use of the word ‘possession’ one has in one’s possession, whatever is to one’s own knowledge is physically in one’s custody or under one’s physical control”.

So in the instant case, the apex court affirmed the conviction of the appellant on the ground that the prosecution proved that the suspected substance was knowingly in the appellant’s possession, whereas the prosecution at the trial stated that it proved knowingly transporting 103.1kg of Indian hemp against the appellant. It is submitted that ‘transporting’, as an action word, is *the actus reus* but ‘knowingly’ which is not used in the penal provision refers to the state of mind which is the *mens rea* and that the proof of one is not proof of the other. Knowingly transported, allegedly proved by the prosecution is not the same with knowingly being in possession; hence, the offence was not proved at the trial.

Furthermore, it can only be said here that both the prosecution and the courts lashed on the alleged confession and plea of guilty of the appellant in arriving at their conclusion. This is because there is no shred of evidence on record from which knowledge as in ‘knowingly’ could have been inferred, being a state of the mind incapable of direct proof. It is, therefore, expedient to determine whether or not knowingly transported or ‘knowingly being in possession of a suspected substance’ can be proved by confession and/or plea of guilty. In other words, whether or not the appellant knew that what he was transporting or in possession of was Indian hemp. This is important in the light of the apex court’s query:

“If the appellant knew that what he was carrying were not bags of dried weeds and prohibited by the law, he would not have confessed to the crime or offence. He has in fact; taken down the burden of proof placed upon the prosecution to prove that it was narcotic drug or Indian hemp”.

As earlier stated in this work, a drug offence is constituted by expert evidence meaning that there is an element of the offence that must be proved with facts generated by an analyst in a laboratory using scientific principles. This is the essence of the provision of the law found in the EA.¹⁷ The law in that regard does not recognize any other means of proof of such facts. Therefore confession or plea of guilty, however direct, positive and unequivocal cannot displace this mode of proof of a suspected substance through a scientific laboratory analysis and identification.

At this juncture, it is important to turn to the reasons in an earlier work by (Ediru, 2019)¹⁸ why the apex court should not have affirmed the conviction of the appellant relying on his confession and plea of guilty. It is the principle of law that an offence is proved beyond reasonable doubt only if all the ingredients of the offence are proved. In the case of *Ajayi v State*¹⁹ the apex court held as follows:

“What then is proof beyond reasonable doubt? It simply means the establishment of all the ingredients of the offence charged in tandem with the dictate of section 138 of the Evidence Act and Section 36(5) of the 1999 Constitution (as amended). See *Alabi v The State* (1993) 7 NWLR (Pt. 307) 511. Proof beyond reasonable doubt is not beyond all iota of doubt or proof to the hilt. See: *Nasiru v The State* (1999) 2 NWLR (Pt. 589) 1 at 13. Proof beyond reasonable doubt as propounded by Lord Sankey, L.C. in *Woolmington v DPP* (1935) AC

¹⁷ s. 55(1) of the Evidence Act Cap – E14, Laws of the Federation of Nigeria (LFN) 2004 (as amended)

¹⁸ Ediru, M. *Drug Abuse and Trafficking in Nigeria: Law, Practice and Ancillary Matters*, (Lagos, Malthouse Press Limited, 2017) pp. 291-308

¹⁹ *Ajayi v State* (2013) LPELR – 19941 (SC)

462 must be kept within its proper compartment. Otherwise, it may cleave. *Per* Fabiyi, JSC (pp. 30-31, paras. D-A.)

The review has so far revealed that the suspected substance in the instant case was not proved to be Indian hemp, one of the ingredients with which the appellant was charged and tried; hence, the affirmation of the appellant's conviction by the apex court is erroneous. Apart from the heavy reliance on the appellant's confession and guilty plea in the leading judgment by Abba Aji (J.S.C.), in the concurring judgments the justices also did the same in the following words:

1. Onnogen, (C.J.N.) – In the case at hand, appellant, a graduate of accounting admitted having dealt with *cannabis sativa* for 20 years. He admitted that what he carried was the drug and he pleaded guilty to the charge. It is not his case that he pleaded in ignorance or that he did not know he was transporting Indian hemp.
2. M. D. Muhammad (J.S.C.) – In the instant case where in addition to appellant's confessional statement has further pleaded guilty to the charge, further proof of the very charge has been rendered unnecessary.
3. Aka'ahs, (J.S.C.) – The prosecution took all the necessary precautions despite the guilty plea by the appellant to prove the offence charged.
4. Okoro (J.S.C.) – I am of the considered view that with or without the testimonies of PW1 and PW2, the court was right to convict the appellant based on his unequivocal plea of guilt.

Peremptorily, it should be noted that the confessional statement made extra-judicially and plea of guilty before the court by the appellant are admissions made at different settings. Now that all the justices of the apex court saw nothing wrong with the confessional statement but took it to be direct, positive and unequivocal, it is time to demand for how the court tested the confessional statement before relying on it. In other words, whether the appellant by his confession intended to admit all the ingredients of the offence particularly that the suspected substance is Indian hemp. The court stated that the offence has the four ingredients already stated above. To convict based on confessional statement alone the law requires that the appellant must have intended to admit all the ingredients of the offence. Also, the law makes it desirable though not mandatory that some other evidence consistent with the confessional statement be produced. Therefore in an offence constituted by expert evidence that can only be produced by scientific laboratory analysis as in the instant case, the requirement of corroboration becomes mandatory. This is because the suspected substance cannot be proved to be Indian hemp by confessional statement. Before this work moves on to demonstrate this point, it is to be recalled that the exhibit keeper told the court that he only conducted preliminary (color) test on the suspected substance and sent the sample to Lagos laboratory and nothing was said about the result (report) being before the court.

Still on the reliance of the court on the confessional statement, this work maintains that the failure of the court to reproduce the confessional statement, *verbatim*, is most unhelpful to an academic review such as this. It is submitted that from the comment of Abba Aji (J.S.C.) on the confessional statement and those of the concurring justices there is nothing in the confessional statement that can be taken to be the proof that the suspected substance is Indian hemp. Even at that this work proceeds to demonstrate why confessional statement cannot be used to prove that a suspected substance is Indian hemp in the light of the case of *Stephenson v Police*,²⁰ where the apex court in interpreting the word, "knowingly" under the Indian hemp

²⁰ *Stephenson v Police* (1966) 1 All N. L. R. 544

Decree²¹ held that the word was to protect a person who though may be aware of the physical existence of the article (Indian hemp) but is innocent of its actual identity (nature).

The Kernel of the decision in that case is that an accused may be aware that the suspected substance is in his possession but may not know the identity of the substance he has in his possession. Whereas in the instant case, the absence of any prior evidence that the suspected substance is Indian hemp, through laboratory analysis and identification the confession by the appellant that he has dealt with *cannabis sativa* for 20 years ought to have raised doubt as to the truth of the confessional statement. Obviously, the confessional statement was made before preliminary (color) test which in law is not a confirmatory test conducted on the suspected substance. Even if the confessional statement was made after the color test the exhibit keeper who conducted the test had doubt about the authenticity of the result; hence, he sent the sample to the laboratory in Lagos for confirmatory test. The report on the confirmatory test never came from Lagos and without been produced before the court the appellant was convicted. The facts before the court by way of review ought to have raised a more serious doubt in the mind of the court whose duty legally it was to determine the weight to attach to the confessional statement. In the light of the doubt about the truth as to whether the confessional statement proved the suspected substance to be Indian hemp, the court ought to have resolved the doubt in favor of the appellant in the circumstance.

In relying on the appellant's confessional statement in its decision, the court ought to have amongst other questions asked itself whether or not the confession is possible or true before convicting the appellant. This work submits that the court did not consider this vital point before convicting the appellant. The law is that an accused cannot confess to what is not within his knowledge or not true. See *Haruna v A.G.*²² *Ajimobi v INEC* (2009) All FWLR (Pt. 477) 91 at 105. This work has demonstrated clearly that the appellant could not have confessed that what he had in his possession, the dried weeds, were Indian hemp because as at the time he made the alleged confessional statement he had no knowledge of any laboratory report to that effect. Even after making the confessional statement no positive report of a confirmatory test was produced before the court.

It is submitted that the confession by the appellant that he has dealt with *cannabis sativa* for 20 years is most irrelevant to the instant case under review. If anything, it could only have been relevant to the severity of the sentence if convicted and not the conviction for the offence of knowingly transporting 103.1 kg of Indian hemp for which he was charged and tried.

Furthermore, this work submits that in the instant case the appellant did not intend to admit the truth of all the essentials of the offence and at the same time upon the admitted facts the appellant could not in law have been convicted of the offence charged. On these two grounds on which an accused is entitled to appeal, notwithstanding a plea of guilty, the court bears the burden of ensuring that none is present in the case before convicting the accused. In other words, once an accused pleads guilty, the court is under obligation to resolve the two issues naturally emanating from the two grounds which are (1) whether or not the accused intends to admit all the essentials of the offence and (2) whether or not the accused could have in the circumstances of the case be convicted before proceeding. It is further submitted that the trial court in the instant case ought not to have convicted and the conviction affirmed by the apex court based on the above review.

²¹ s. 20(a) of the Indian hemp Decree (now Indian hemp Act, Cap-16, LFN, 2004)

²² *Haruna v A.G* (2012) All FWLR (Pt. 632) 1617

The position of the law on the first issue is as found in Nasarawa State Administration of Criminal Justice Law,²³ which provides thus:

Section 273(1), where a defendant pleads guilty to an offence with which he is charged, the court shall:

- (a) record his plea as nearly as possible;
- (b) invite the prosecution to state the facts of the case; and
- (c) enquire from the defendant whether his plea of guilty is to the facts as by the prosecution;

(2) Where the court is satisfied that the defendant intends to admit the truth of all the essential elements of the offence for which he has pleaded guilty, the court shall convict and sentence him or make such order as may be necessary, unless there shall appear sufficient reason to the contrary.

(3) Where the defendant pleads guilty to a capital offence, a plea of not guilty shall be recorded for him.

As earlier submitted, the appellant was not in position to admit that the 103.1kg of dried weeds he transported is Indian hemp because the only evidence to so prove that is a chemist report produced by a drug analyst, using scientific principles in a laboratory. It is submitted that the trial court could not have satisfied itself that the appellant intended to admit the all-important ingredient that the dried weeds he transported was Indian hemp since no chemist's report was produced before the court. According to the prosecution as earlier stated the exhibit keeper conducted only a preliminary test which proved positive for *cannabis sativa*. This work has demonstrated fully that the only mode of identification of a suspected substance is the analysis in a scientific laboratory by an analyst. The result of the analysis is usually in form of a chemist's report which ought to have been placed before the court which was not done; hence, the court could not have satisfied itself that the dried weeds were Indian hemp. The conviction of the appellant is therefore erroneous.

In the case of *Okereke v Yar'dua & Ors*²⁴ the apex court held that:

“It is settled law that where legislation lays down a procedure for doing a thing there should be no other method of doing it. See *CCB PLC v A-G (Anambra State) (2002) 10 SCNJ 137* at 163; *Buhari v Yusuf (2003) 4 NWLR (Pt. 841) 446* at 498. *Per Onnoghen, JSC (p. 36 paras. B-C)*.

In other words, where as in the instant case the court accepted the appellant's confession and plea of guilty as proof that the transported dried weeds were Indian hemp, the holding of the apex court is clearly erroneous. In overruling the appellant's counsel on this point the apex court held as follows:

“It has been contended by his counsel that the court ought not to convict solely on his confessional statement since the test result of the substance was yet to come out. This is foul and does not have a place in our criminal jurisprudence. It is only advised that it is desirable and not mandatory. In fact, the law is trite on this that an accused can be convicted solely on his confessional statement. “A court can convict on a confessional statement alone without corroboration once it is satisfied of the truth of the confession. “See per Clara Bata Ogumbiyi J.S.C in *Blessing v FRN (2015) LPELR 24689 (SC), (2015) 13 NWLR (Pt. 1475) 1*”.

²³ ss 273 (1)(a) – (c), (2) & (3) of the Nasarawa State Administration of Criminal Justice Law, 2010

²⁴ *Okereke v Yar'dua & Ors (2008) LPELR – 2446 (SC)*

Unfortunately, with due respect to the justices of the apex court in the instant case no test of the veracity of the confession was carried out to ascertain the truth of the confession, moreover the confessional statement was not recorded *verbatim*. *Edun & Anor v FRN*²⁵ on conditions to be satisfied before a confession can be used in convicting an accused person the apex court held as follows:

“... I need to reiterate that a confessional statement to be so acclaimed and utilized solely it must be direct, positive, true and unequivocal of facts that satisfy the ingredient of the offence the accused person confessed to have committed. Also an accused person can be validly convicted for the offence of criminal misappropriation solely on the bases of his confessional statement if and only if the elements of the offence as contained in sections 16 and 308 of the Penal Code as the appellant was, are inferable from the confessional statements and after the test of veracity of the confession had been carried out by the court and it is found that the confession constitutes true admission of the commission of the offence. See *Haruna v A.G* (2012) All FWLR (Pt. 632) 1617 at 1635; *Ajimobi v INEC* (2009) All FWLR (Pt. 477)91 at 105”.

We submit in the light of the authority in *Edun’s* case that the all- important ingredient, the identification of the dried weeds as Indian hemp through scientific analysis was not carried out, there being no chemist’s report, the reliance of their Lordships on the appellant’s confession in affirming his conviction was erroneous and a miscarriage of justice. Whereas the nitty-gritties of the above procedure and legal requirements for the analysis and identification of suspected substance in the trial of drug offences are of utmost relevance to the review of *Oyem’s* case, elaborate discussion on same is outside the scope of this work. However, the needed understanding has in an earlier work been provided by (Ediru, 2019).²⁶

6.0 Conclusion

It is very worrisome that what started like a mere inadvertence in the case of *Nike v FRN*, where the apex court in Nigeria affirmed the conviction of the appellant where the chemist’s report required to prove the suspected substance to be Indian hemp suffered admissibility deficit, has in the case under review metamorphosed into outright affirmation without the analysis and identification of suspected substance and absence of a chemist’s report before the court. Most worrisome are the reasons given by the apex court for so affirming the conviction:

1. that the result of the preliminary (color) test conducted by the exhibit keeper at the NDLEA Command, using UN Narcotic Identification Testing Kit was the legal proof of the suspected substance as Indian hemp, instead of a chemist’s report on the mandatory confirmatory laboratory test by an analyst and,
2. that the appellant’s confessional statement and guilty plea served as alternative proof that the suspected substance was Indian hemp even when the trial court did not carry out the test of veracity on the confessional statement.

In other words, the current position of the law in Nigeria today is that a person tried for drug offences can be convicted without a chemist’s report on the nature of the suspected substance. Also, that a confession or plea of guilty by accused person which the court considers as direct, cogent and unequivocal is sufficient to convict even without the test of

²⁵ *Edun & Anor v FRN* (2019) LPELR – 46947 (SC)

²⁶ Ediru, M. *Drug Abuse and Trafficking in Nigeria: Law, Practice and Ancillary Matters*, (Lagos, Malthouse Press Limited, 2017) pp. 291-308.

veracity of the confession. Ultimately, the conclusion by this work is that since drug offences are constituted by expert evidence the affirmation of the appellant's conviction without proof by a chemist's report produced by an analyst is a violation of the principle of law and procedure and therefore a miscarriage of justice. It is submitted that miscarriage of justice vitiates the decision or judgment of a court; hence, Oyem's case does not reflect the position of the law in Nigeria.

7.0 Recommendations

Having regard to the various errors committed by the apex court in substantive law and procedure in the analysis and identification of the suspected substance in the instant case, it is desirous to recommend thus:

- a. legislative intervention for the adoption of the New York State practice in which only corroborated accusatory instruments are accepted by the court for the trial of suspects. In other words, no suspect can be arraigned for trial without a chemist's report, even if the suspect pleaded guilty.
- b. legislative intervention to the effect that a suspect cannot be convicted upon his confession alone however direct, cogent and unequivocal.

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