PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF AS CRITICAL ELEMENTS OF THE ADVERSARIAL SYSTEM OF CRIMINAL JUSTICE IN NIGERIA

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Abstract

Under the adversarial system of criminal justice administration in Nigeria, certain elements are required for any just and fair criminal trial. Of these elements, two of them are most critical. They are the presumption of innocence in favor of a suspect/defendant and the burden of proof placed on the prosecution to prove the guilt of the defendant beyond reasonable doubt. These elements are the key foundations upon which other elements for a just and fair trial rests. They enjoy constitutional flavor. This paper examines the meaning, nature, and application of the above-mentioned elements. It further interrogates the extent to which the presumption applies to those under investigation. It finds that media trials are common in Nigeria among security agencies. The paper therefore recommends that the National Assembly should take steps to amend section 36(5) of the

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Constitution of the Federal Republic of Nigeria 1999 to accommodate suspects. Alternatively, the Supreme Court may adopt the argument of the Respondents in *Aig- Imoukhuede v Ubah* to hold that the appropriate interpretation to the phrase "charged with a criminal offence" as used in Section 36(5) is "accused of a criminal offence." Law enforcement agents are also advised to call its officers to order. The research methodology adopted in this work is doctrinal.

Keywords: Presumption of Innocence, Defendant, Burden of Proof, Adversarial Trial, Criminal Justice.

1. Introduction

The fall of man in the Garden of Eden straddles between certain key concepts and principles of criminal jurisprudence. The principle of presumption of innocence is as old as creation, as old as Genesis and as old as the Garden of Eden[1]. Even though God in His omniscient nature knew that man was guilty of the sin of disobedience, He presumed the innocence of man and withheld conviction until after a fair trial had been conducted as recorded in the biblical book of Genesis.[2] What

[1] Enobong Mbang Akpambang, "Fair Hearing: Sine Qua Non Under Nigerian Criminal Justice Jurisprudence" (2016) 52 *Journal of Law, Policy, and Globalization*

[2] The Holy Bible, The Book of Genesis, Chapter 3:1-24. Also *R. v. Chancellor, University of Cambridge (Dr. Bentley's Case)* [1723] 1 Str. 557; *Garba v. University of Maiduguri* [1986] 1 NWLR (Pt. 18) 550; *Adigun v. Attorney- General, Oyo State* [1987] 1 NWLR (Pt. 53) 678.

this then implies is that the existence of the critical element of presumption of innocence dates back to the Garden of Eden. Over the years, this time-tested principle has resultantly found its way into, and become fully entrenched in the criminal jurisprudence of virtually all civilized nations of the world albeit in varying degrees.[3] This practice is more pronounced in the common law jurisdictions[4] of which Nigeria is one.[5]

This suffices to say that the system of criminal justice administration in Nigeria is adversarial in nature.[6] Thus, the system presumes the innocence of the defendant until his guilt is established before a competent court. However, the presumption has been misconceived over time as to its applicability in money laundering cases. Some suggest that it does not apply to money laundering cases and in such cases, the burden of proof lies on the defendant. Another issue is media parade of suspects. Can it be said to be a violation of right to presumption of innocence? This cannot be answered till the scope of application of the doctrine is determined, namely, as to whether the doctrine applies to trials only or the application includes pretrial investigation. Whether a presumption of innocence applies to a non-conviction based

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3 Joseph N Sorrentino, "Demystifying the Presumption of Innocence", (1996) 15 *Glendale L. Rev.*, 16

4 François Quintard-Morénas, "The presumption of innocence in the French and Anglo-American legal traditions", (2010) 58 (1) *The American Journal of Comparative Law*, 107-149

5 Nigeria was colonized by the British and became independent in 1960

6 O. I. Derik-Ferdinand, "Admissibility of Evidence Based on Findings Neuroscience: Implications for Criminal Justice in Nigeria", (2022) 3 *International Journal of Law and Clinical Legal Education* 114

forfeiture proceeding is another vexed issue. The foregoing forms the basis of this research. To address these issues, background will be laid as to the meaning of presumption of innocence and burden of proof. Conclusion and recommendations will then be made.

2. Meaning and Nature of Presumption of Innocence

A presumption is the product of a rule according to which on proof of one fact the judge or jury may or must find that some other fact exists.[7] A presumption may either be of fact or of law. Presumption of innocence falls under the category of presumption of law whereby the judge or jury as the case may be, must find that the presumed fact exists unless sufficient evidence is adduced to the contrary. In *Abubakar v Yaradua*, Niki Tobi JSC held thus:

> A presumption of law is merely an invocation of a rule of law compelling a fact finder to reach a particular conclusion in the absence of evidence to the contrary. It otherwise means a mandatory deduction which law directs to be made having regard to rules of law and practice laid down for courts use. It is a procedural device, which takes place of evidence in certain cases until the facts in lieu of which the presumption operates are shown. Presumption of law is in fact a preliminary rule of law which may disappear in the face of rebutted evidence. However, in the

[7] James P McBaine, "Burden of proof: Degrees of belief", (1944) 32 *Calif. L. Rev.*, 242

> absence of evidence to the contrary the presumption stands. See Chief Afe Babalola (Ed), Law and Practice of Evidence page 361. This is a very adequate definition of presumption. I cannot put it better. A presumption of law is law and the court can make use of it. A presumption of law will however, fossilize into air if it is rebutted. Of course, a party can rebut the evidence if it is a rebuttable presumption. Where presumption is irrefutable it stands for all time, like the rock of Gibraltar.[8]

Presumption can also be rebuttable or irrefutable.[9] When the presumption is irrefutable, no evidence can be received to contradict the presumed fact.[10]It is a cardinal principle of the common law, which is based on the adversarial system, that everyone is presumed to be innocent until proved guilty. Nigeria's criminal jurisprudence is rooted in common law.[11] The common law jurisdiction is unlike the inquisitorial civil

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[8] (2008) 19 NWLR Pt.H20 Pg.1 at Pg.155,

[9] An example of an irrefutable presumption of law is section 30 of the Criminal Code, (Cap. C 38 Laws of the Federation of Nigeria, 2004), which says that a person under the age of seven years is not criminally responsible for any act or omission. In other words, a person under 7 years is presumed to be incapable of committing any offence. Another example is found in the legal principle that a male person under the age of 12 is presumed to be incapable of having carnal knowledge, (Ibid, section 30).

[10] Cross and Jones, *Introduction to Criminal Law*(London: Butterworths, 9th ed. 1980), p.52; T. Aguda, *The Law of Evidence in Nigeria*, (Sweet &Maxwell, 2nd ed., 1974) p. 216.

[11] Ikenga KE Oraegbunam, "The jurisprudence of adversarial justice", (2019) 15 Ogirisi: A New Journal of African studies, 27-51

law jurisdiction where the judge is allowed to undertake a voyage of inquisition and discovery by descending into the proverbial arena, exhuming facts and questioning evidence,[12] all aimed at determining the guilt, or innocence of an accused person.

This principle has been given constitutional imprimatur in Section 36(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)[13] which provides thus: "Every person who is charged with a criminal offence shall be presumed to be 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 such person the burden of proving particular facts."

Presumption of innocence emphasizes that a person accused of any crime is always to be assumed to be blameless until the accuser, in this case, the prosecution, proves the guilt of the defendant in accordance with the law.

2.1 Scope of the Principle of Presumption of Innocence in Nigeria

We have seen that presumption of innocence is sacrosanct in the Nigerian administration of criminal justice system. However, to what extent? Does the presumption arise during

[12] S Fagbemi, O Odiaka, "X-Raying the roles of legal practitioners in adversarial system of justice in Nigeria", (2017) 5 (3) *International Journal of Innovative Legal and Political Studies*, 21-32

[13] Which shall henceforth be referred to as the 1999 Constitution

trial or even before trial? The 1999 Constitution states that **"Every person who is charged with a criminal offence**[14] shall be presumed to be innocent until he is proved guilty"[15].

When critically examined, the section is to the effect that "**every person who is charged with a criminal offence…"** What are the categories of persons contemplated therein? Would it then be safe to infer that section 36 (5) implies that the presumption of innocence is to be borne in mind beginning from when a suspect is charged to court? In other words, since the Constitution did not mention investigation, police invitation, or arrest, etc., does it imply that the law enforcement agencies are at liberty to deal with the suspect as if he were already a condemned criminal? Does it mean that the presumption would only commence when such a suspect is charged to court? This question came up as an issue in the case of *IGP v Ubah*[16] and the Court of Appeal held that "For there to be an infringement of the right to be presumed innocent until proved guilty under Section 36 (5), the accused must have been charged to court. Presumption of innocence on the part of the prosecution during investigation does not arise because their business is to ascertain whether there is sufficient evidence to sustain the charges and then to prosecute the offender. Presumption of innocence arises after the accused has been charged to court."[17]

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14 Bolded and underlined for emphasis

15 Section 36 (5) of the 1999 Constitution

16 (2014) LPELR-CA/L/199A/2013

17 *Ibid*

Also in a similar case of *Aig- Imoukhuede v Ubah*[18] delivered on the same day with *IGP v Ubah,*[19] the court held that the condition precedent for the activation of the right to presumption of innocence is that the person must have been charged with a criminal offence.[20] Furthermore, the court held that the phrase "charged" in the said section refers to an arraignment of an accused before a court of law or a tribunal having judicial powers to convict and punish the accused, if found guilty. It does not extend to administrative or ministerial investigative bodies.[21]The court concluded thus,

> Section 36 (5) is explicit and unambiguous in stipulating that it is only when a person "is charged with a criminal offence" that he "shall be presumed innocent until he is proved guilty". The condition precedent for the activation of that right is the arraignment or charging of the person "with a criminal offence". The right in Section 36(5) cannot be activated until the person is charged. 1st and 2nd Respondents had not yet been charged to court. The alleged criminal offences were still under investigation when the suit was filed. Section 36(5) does not apply.

In the latter case,[22] the Respondents' counsel argued that the appropriate interpretation to be given to the phrase "charged

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18 (2015) 8 NWLR (Pt.1462) 399

19 Supra

20 *IGP v Ubah* (Supra) At 408.

21 *Ibid*

22 *Aig- Imoukhuede v Ubah* (Supra)

with a criminal offence" as used in Section 36(5) is "accused of a criminal offence." He stated that this becomes even clearer when the provisions of Section 36(5) is compared to that of Section 36(7) of the same Constitution which commences with the phrase "when any person is tried for a criminal offence". He further argued that if the law makers had intended that the phrase "charged with a criminal offence" should be restricted only to trials for criminal offence, they could have clearly specified so in the manner they did in Section 36(7).This was indeed a brilliant argument by the Respondents. It appeals to logic to suggest that the word 'charge' in section 36(5) of the 1999 Constitution be interpreted as synonym of 'accused'. Unfortunately, however, such interpretation will do violence to the clear and unambiguous word (charged). A charge is a process by which all the ingredients or elements of an allegation are brought to the notice of the accused.[23]This meaning is corroborated by the Supreme Court in *Okereke v James*[24] that the word "charge" appears only in criminal trial.[25] It is therefore submitted that the decisions of the Court of Appeal in the two cases above are in tune with the dry letters of section 36 of the Constitution. The decisions can hardly be faulted because the law is settled that ordinary grammatical meanings are to be ascribed to the provisions of statutes, including the Constitution. Niki Tobi clarified this issue in the case of *Excellence Communications Limited v Duke*[26] thus:

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[23] JOSEPH SHAGBAOR IKYEGH, J.C.A in his concurring judgment in *Aig-Imoukhuede v Ubah* (Supra)

[24] (2012) 16 NWLR (Pt.1326) 339

[25] *Ibid* at 351 per Rhodes-Vivour, J.S.C.

[26] (2007) 16 NWLR (pt.1059) 22

> In the interpretation of the Constitution, the court is bound by the provisions of the Constitution. Where the provisions of the Constitution are clear and unambiguous, the court must give a literal interpretation to them without fishing for a likely or possible meaning. This is because by the clear and unambiguous provisions, the makers of the Constitution do not intend any other likely or possible meaning. However, where the provisions are not clear, a court of law can fish for a likely or possible meaning to bring out or arrive at the intention of the maker of the Constitution. Even here, the Court has no jurisdiction to go out on an unguarded voyage of discovery completely outside the intention of the makers of the Constitution. The court is expected to apply a compass in a ship to navigate the waters to arrive at the intention of the makers of the Constitution.[27]

It was a sound reasoning by the Court of Appeal[28] that the advice given in several Supreme Court cases that a liberal approach be adopted when interpreting the constitution, especially the fundamental rights provisions do not enjoin the courts to create rights where there are none.

This paper reiterates that the decision of the Court of Appeal is correct. Without prejudice however, this paper has a

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[27] *Ibid* @ 47-48 H-C

[28] *Aig- Imoukhuede v Ubah* (Supra)

reservation about the true intention of that provision. This is because the provision must have been intended to protect both suspects and defendants from sanction without first undergoing criminal trial. Be that as it may, the above decisions stand as the law today. Hopefully, the law makers would one day re-examine the provision.

2.2 Media trial

The Microsoft Encarta Dictionary defines the media as: "The various means of mass communication considered as a whole, including television, radio, magazines, and newspapers, together with the people involved in their production."[29] Today, the media space has greatly expanded. With the advent of the internet, we now have the conventional media and what we now know as the social media. The social media has been defined as: "the collective of online communications channels dedicated to community-based input, interaction, content-sharing and collaboration. Websites and applications dedicated to forums, micro blogging, social networking, social bookmarking, social curation, and wikis are among the different types of social media.[30] Some examples of social media platforms include: Face book, Twitter, About me, Google+, Hotlist, Instagram, My Life etc.

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[29] Hon. Justice Peter A. Akhihiero, "The Impact of 'Media Trial' on the Constitutional Presumption of Innocence" being a paper presented at the Law Week of the Nigerian Bar Association, Benin Branch, which held on the 9th day of May, 2017, 7-8

[30] *Aig- Imoukhuede vs. Ubah*(Supra)

Parading suspects before the media by law enforcement agents has become the order of the day in Nigeria. In October 2016, some judges' homes were raided by the Department of State Service (DSS) in what was termed "operation sting". In that same operation, five judges were arrested on corruption charges. This operation was blown open by the media and the judges were tried in the court of public opinion before actual arraignment and trial. It was reported that: '…in an attempt to give legitimacy to an otherwise despicable modus and acts of crude vendetta against some judges, the DSS embarked on serial media trial of the arrested judges'.[31]

Another case that comes to mind is that of popular Instagram comedian Pankeeroy who was arrested for alleged computer-related fraud.[32]The comedian according to the statement released by the EFCC, claimed to have gone into a bitcoin scam after he suffered depression - due to a number of reasons. It was also said that he had been presenting himself as a vendor who redeems bitcoin vouchers using the bitcoincoretrading.com platform to defraud his unsuspecting victims.

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[31] Fogam, P.K "Crusade Against Corruption and the Effects of Trial by the Media", paper delivered at an event of National Association of Judicial Correspondents (NAJUC), as cited by Akinnola, R., "Justice Ademola: Between Media Trial and Court Trial", https://www.vanguard.com/2017/04/justice-ademola-media-trial-court-trial/ accessed on October 2, 2022

[32] Ayo Onikoyi, "Bloggers lied about my EFCC arrest — Comedian Pankeeroy" available at https://www.vanguardngr.com/2021/05/bloggers-lied-about-my-efcc-arrest-%E2%80%95-comedian-pankeeroy/amp/ accessed on October 1, 2022

That very day, the arrest of the comedian trended on social media making room for public condemnation, even though the court is yet to find him guilty. After a month in detention, the comedian regained his freedom. Pankeeroy's legal representative later dismissed the allegations against the comedian, saying that no petition was written against him and he was not found guilty of any crime. But what many failed to see is the damage media trial has done to the reputation of Pankeeroy. Many brands might want to work with him but due to his arrest which is a form of scandal, may decide otherwise.

A similar case is that of the alleged killer of Super-TV CEO, Chidinma who has been subjected to questioning from various media organizations[33] even though only the court has the jurisdiction to do so. In *Ndukwem Chiziri Nice v AG Federation & Anor*,[34] Justice Adebukola Banjoko of the High Court of Federal Capital Territory held that:

> The act of parading him (the suspect) before the press as evidenced by the Exhibits annexed to the affidavit was uncalled for and a callous disregard for his person. He was shown to the public the next day of his arrest even without any investigation conducted in the matter. He was already prejudged by the police who are

[33] Esther Onyegbula, "UPDATED: I stabbed Super TV CEO because of drugs, alcohol influence — 300L Unilag student" available at https://www.vanguardngr.com/2021/06/breaking-i-stabbed-super-tv-ceo-because-of-drugs-alcohol-influence-%E2%80%95-300l-unilag-student/amp/ accessed on September 28, 2022

[34] (2007) CHR 218

> incompetent, so to have such function, it is the duty of the court to pass a verdict of guilt and this constitutes a clear breach of Section 36(4) and (5) of the Constitution of the Federal Republic of Nigeria, 1999 on the doctrine of fair hearing.[35]

FCT High Court made reference to section 36(5) as one of the basis for the decision. This is directly in conflict with the decisions of the Court in *Aig- Imoukhuede v Ubah*[36] and *IGP v Ubah* which are to the contrary. While this paper would have preferred the decision of the High Court in this matter, being more in tune with justice, it is constrained however, to state that the decision may not survive an appeal based on the principle of judicial precedence which is entrenched in section 287(2) of the constitution as follows: "The decisions of the Court of Appeal shall be enforced in any part of the Federation by all authorities and persons, **and by courts with subordinate jurisdiction to that of the court of Appeal." (Emphasis supplied).**

The binding nature of the decision of the Court of Appeal on High Courts was reiterated in the case of *Olokunlade v Ademiloyo*[37] as follows:

> It is trite that the decision of the Supreme Court is binding on all courts of Law in Nigeria, just as the decision of the Court of Appeal is binding on

[35] *Ibid* at 232

[36] (2015) 8 NWLR (Pt.1462) 399

[37] (2011) LPELR-CA/IL/75/2009

> the High Court and the latter has no option than to submit to the decision of the Court of Appeal and follow it.[38]

Still on the legality of media trial, the Ecowas Community Court of Justice sitting in Abuja in the case of *Dyot Bayi & 14 Ors. v Federal Republic of Nigeria*[39] condemned it in the following words:

> The Court is of the opinion that for the fact that the Defendants presented the Applicants before the press when no judge or court has found them guilty, certainly constitute a violation of the principle of presumption of innocence."[40]

Is the above decision of the ECOWAS court binding on Nigeria? There will hardly be a direct and straightforward answer to this question for the following reasons: Article 15 (4) of the Revised Treaty of ECOWAS provides that: "Judgments of the Court of Justice SHALL BE BINDING on the Member States, the institutions of the Community and on individuals and corporate bodies."

As a signatory to the Revised Treaty of the Economic Community of West African States (ECOWAS), Nigeria is legally bound by the judgment of the court. This is consistent

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38 Per Aji, J.C.A. (P.31, Paras.C-D)

39 (2004-2009) CCJLER 245

40 *Ibid* at 265

with the elementary principle of international law *'Pacta Sunt Servanda'*.[41]

However, that is not the end of the matter. On implementation of treaties, the 1999 Constitution states as follows: "No treaty between the Federation and any other country shall have the force of law except to the extent to which such Treaty has been enacted into law by the National Assembly".[42]

The National Assembly has not domesticated or enacted the Revised Treaty and the Protocols relating to the Court into law. Does the non-domestication of the Treaty imply that Nigeria is not under a legal obligation to enforce the judgment given by the Court?

Notwithstanding the obligations of Nigeria under international law, within the realm of Nigerian jurisprudence and legal system, Article 15 (4) of the Revised Treaty which declares the judgment of the Court binding on Nigeria does not enjoy the blessings of the Nigerian Constitution having regard to the mandatory provisions of Section 12 (1) of the Constitution. Thus, the judgments given by the Court are only binding on honour and do not have force of law in Nigeria since the National Assembly is yet to domesticate the Revised Treaty and Protocols[43] relating to the Court

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41 Agreements are binding

42 Section 12 (1) of the Constitution

43 Inibehe Effiong, "Dasuki: Is The ECOWAS Court Judgment Binding On Nigeria? By Inibehe Effiong" available at https://sahara reporters.com

2.3 Presumption of Innocence and Money Laundering

Another situation that has generated serious controversy is the application of presumption of innocence to money laundering cases. This debate became popular, if not arose, after the decision of the Supreme Court of Nigeria in the case of *Daudu v FRN*.[44] While some are of the opinion that the doctrine applies to money laundering cases, others do not.[45]

While it is true that in Money Laundering and corruption cases, the Defendant has to establish the legitimacy of a money found in his possession, suggesting that the state has no duty to prove the guilt of the accused once he is found in possession of pecuniary resources or property beyond his means is to stretch the intention of the apex court Justices[46] to a bizarre extent. What the court did in that case was to give life to an existing law, to wit, section 19(2) of the Money Laundering Act.[47] We

/2016/10/05/dasuki-ecowas-court-judgment-binding-nigeria-inibehe-effiong accessed on October 2, 2022

44 (2018) 10 NWLR (Pt.1626) 169, 183 E -F (2018) LPELR-43637(SC)

45 See generally Sylvester Udemezue, "Has the Recent Supreme Court Decision in Dauda V. FRN Changed the System of Criminal Justice Administration in Nigeria?" available at https://dnllegalandstyle.com /2018/has-the-recent-supreme-court-decision-in-dauda-v-frn-changed-the-system-of-criminal-justice-administration-in-nigeria-an-opinion-by-sylvester-udemezue/#:~:text=FRN.,evidential%20burden%20to%20negative%20it. Accessed on October 2, 2022 and O. G. Chukkol, "The Legality Or Otherwise Of Keeping A Large Sum Of Cash (Money) At Home." available at https://thenigerialawyer.com/the-legality-or-otherwise-of-keeping-a-large-sum-of-cash-money-at-home-by-o-g-chukkol/ accessed on October 2, 2022

46 In *Daudu v FRN*

47 Cap M18. Laws of Federation of Nigeria (LFN), 2004

have similar provisions in other legislations like section 19(5) of the EFCC Act,[48] section 319A of the Penal Code,[49] sections 132 and 136 of the Evidence Act,[50] etc.

The Supreme Court in *Daudu v FRN*[51] never intended to turn law on its head by repealing or nullifying the presumption of innocence entrenched in section 36(5) of the constitution. Furthermore, it was not the intention of the Court to introduce an inquisitorial system of administration of justice which requires a person to prove his innocence. Besides, it does not have power to do so.[52] What the Court did was to restate the law as it relates to evidential burden of proof in money laundering cases. Evidential burden is based on public policy and the need for an accused person to at least say something in respect of the charge against him. In fact, by section 137 of the Evidence Act, 2011, such explanation is to be on a balance of probability. That is to say, once his explanation is the most probable, the case of the prosecution shall fail.

2.4 Presumption of innocence and non-conviction based forfeiture proceedings

Non Conviction Based Asset Forfeiture is a critical tool for recovering the proceeds and instrumentalities of corruption. It

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48 Chapter E1, LFN 2004

49 Cap P3, LFN, 2004

50 Cap. E14, 2011

51 Supra

52 Supreme Court is established by the 1999 Constitution pursuant sections 6(5) and 230 thereof. It can therefore not act beyond its judicial powers of interpretation under sections 6(6)(a&b)

allows for criminal assets to be forfeited to the State even in the absence of criminal conviction, the stated objective being to undermine the profit incentive of criminal activity.[53] It can be essential to successful asset recovery when the violator is dead, has fled the jurisdiction, is immune from investigation or prosecution, or is essentially too powerful to be prosecuted.

The practice is recognized in Nigeria and has been entrenched in legislations such as the Advance Fee Fraud and other Fraud Related Offences Act,[54] Economic and Financial Crimes Establishment Act,[55] Money Laundering Act[56] etc. Now the issue is: Can presumption of innocence apply to such cases? Decided cases seem to be unanimous that the answer is no. Thus in the course of interpreting section 17 of Advance Fee Fraud Act in the case of *La-Wari Furniture & Baths Ltd v FRN & Anor,*[57] the court of appeal held :

> On presumption of innocence, I must say that the Appellant in the instant case was never on trial for a criminal offence, therefore the doctrine of presumption of innocence is not applicable to the circumstances of the case. The issue of innocence of the Appellant does not come into

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[53] Jennifer Hendry, Colin King, "How far is too far? Theorising non-conviction-based asset forfeiture", (2015) 11 (4) *International Journal of Law in Context*, 398-411

[54] Cap. A6, LFN, 2006

[55] *Op cit*

[56] *Op cit*

[57] (2018) LPELR-43507(CA). Oyelowo Oyewo, "The Legality of Executive Order No. 6, 2018 on Asset Recovery in Nigeria", (2019) 81, *JL Pol'y & Globalization*, 1

> play in a non-conviction based forfeiture proceeding.

The same position was restated by the Court of Appeal in *Jonathan v FRN*[58] that: "In answer to each of these questions from the Appellant, from the first, the provision of Section 17 of the AFF[59] does not require a trial and conviction before its application. Rather, it provides in the fashion of non-conviction based forfeiture models for a Motion Ex Parte to be followed by a Motion on Notice. In my opinion, Section 17 provides properly so called for an action in rem and not a form of quasi-criminal proceedings. In any event, the law is that where a statute prescribes the mode of doing an act, such an act can only be competently done in the way and manner prescribed by the statute."

2.5 Presumption of Innocence after Conviction

There must be an end to litigation, and in this wise, the pronouncement of judgment on the defendant by the court brings the criminal trial to an end. The judgment is the final opinion of the court on all issues raised in the course of the proceedings.[60] Usually, the defendant who is convicted and sentenced would appeal the decision of the court to a higher court, i.e. the Court of Appeal.[61] What then should agitate our

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58 (2018) LPELR-43505(CA)

59 Advance Free Fraud and other Fraud Related Offences 2006

60 Court becomes *functus officio* in the circumstance

61 Appeal is a constitutional right in Nigeria. This is provided in section 241, 242, and 243 of the 1999 Constitution. In *Emeakayi v C.O.P.* [2004] 4

minds now is: Does the pronouncement of guilt on the defendant abrogate the defendant's right to be presumed innocent while an appeal subsists? In other words, does the finding of guilt, conviction, and sentencing of the defendant terminate the defendant's right to be presumed innocent even while the defendant has appealed the judgment? Is the defendant entitled to bail pending the appeal? In answering this question, reliance would be placed on judicial precedents and statutes.

It is settled law that conviction by a lower Court is correct until subsequently set aside on appeal.[62] This position of law also obliterates the presumption of innocence of a convict.[63] This position was emphasized in *Okene v C.O.P., Cross River State*[64] that:

> In bail after conviction, the constitutional right to presumption of innocence of the accused is lost and therefore the bail is no longer automatic, consequently, the burden of proof of bail at that stage shifts to the accused person. On the other hand, in bail pending trial, the accused person is vested with the constitutional guarantee of the

NWLR (Pt.862)158 it was held that, "A right of appeal to the Court of Appeal is a constitutional right exercisable by a party aggrieved with the decision of a trial court from whose decision appeal goes to the Court of Appeal."

62 *Nigerian Army v Mowarin* (1992) 4 NWLR (Pt. 235) 345.

63 *Chief Olabode George & Ors. v. Federal Republic of Nigeria* (2010) LPELR-4194 (CA); *Enebeli v. Chief of Naval Staff* (2000) 9 NWLR Pt. 219 Pg. 119; *Gasali v. F.R.N (2016) LPELR-41295* (CA).

64 (2008) ALL FWLR (PT.413) 1386

> presumption of innocence. Consequently, the burden of proof after the applicant has placed materials before the court shifts to the prosecution to show cause why the accused should not be granted bail."[65]

In the same vein, the same Court of Appeal held in *Ogbonna v FRN* [66]that: "The point must be made that it is easier to secure bail before conviction than after conviction. This is so because the presumption of innocence in favour of the Applicant is no longer in his favour since he has been convicted already."

Thus, it is clear that until the judgment of the lower court convicting the defendant is set aside, the conviction subsists and the presumption of innocence in favour of the accused abates, even if the defendant applies for bail pending appeal.

3. Burden of proof

Burden of proof is merely an onus to prove or establish an issue.[67] When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.[68]Burden of proof usually is in two categories, namely:

i) General burden of Proof
ii) Evidential burden of proof.

3.1 General burden of proof

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65 *Ibid* at 1395, paras. E-F

66 (2019) LPELR-CA/L/365C/2018(R)

67 *Honika Sawmill (Nig.) Ltd v. Hoff* (1994) 2 NWLR (Pt.326) 252

68 Section 132(2) of the Evidence Act, 2011

This is otherwise known as legal burden of proof. It simply has to do with the duty to prove guilt of the accused person. It has its root in the provisions of section 36(5) of the 1999 constitution which provides that, "every person charged with a criminal offence is to be presumed innocent until he is proved guilty". This burden which is always on the prosecution must be proved beyond reasonable doubt by virtue of the provisions of section 135 of the Evidence Act. This was reiterated in the case of *Idowu v. The State*[69] as follows:

> I wish to state at this juncture that in an accusatorial system of administration of justice as practiced in this country, the general burden of proof lies always on a party or person who alleges. In criminal trials, the general or legal burden of proof lies on the prosecution and does not shift, to prove the guilt of the accused person. This is in consonance with Section 36(5) of constitution of the 1999 Federal Republic of Nigeria, which guarantees to all persons accused or charged with a criminal offence, the right to be presumed innocent until he is proved guilty, This constitutional provision therefore squarely places on the prosecution the ultimate burden of proving the guilt of the accused. The prosecution must discharge this burden beyond reasonable doubt, by proving every ingredient of the offence charged by credible evidence. This includes

[69] (2011) LPELR-CA/AE/43/C/2010

> countering or rebutting any defence raised by the accused.[70]

Where at the close of evidence, an essential ingredient of the offence has not been proved, a doubt would have been created as to the guilt of the accused and he shall be entitled to a discharge and acquittal.[71]

In all cases where the commission of a crime is in issue, the prosecution is bound to prove the guilt of the accused person being the party who asserts in the affirmative. There is no duty on the accused person to prove his innocence.[72]Also, in the case of *Onwe v State,*[73] the Supreme Court held that:

> The law is very clear on who the burden of proof in a criminal case reside. Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria and Section 135(2) of the Evidence Act have placed the burden of proof in criminal cases squarely on the prosecution, who must prove its case beyond reasonable doubt and a general duty to rebut the presumption of innocence

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[70] Also *Mustapha v State* (2007) 12 N.W.L.R (Pt.1049) P.637; *Chukwu v State* (2007) 13 N.W.L.R (Pt.1052) P.430 and *Abdullahi v The State* (2008) 17 N.W.L.R (pt.1115) p.203. See also sections 135 and 138 0f the Evidence Act.

[71] *Idowu v State (supra)*

[72] *Yesuf v FRN* (2017)LPELR 43830(SC); *Yelli v State* (2017) LPELR-42134(CA)

[73] (2017) LPELR-42589(SC)

> constitutionally guaranteed to the accused person. This burden does not shift."

3.2 Evidential Burden

This simply means the burden to adduce evidence in proof of an assertion.[74] This arises after the satisfactory discharge of the legal burden of proof which is the foundation upon which it can shift from one side of a case to the other.[75] Where a party fails to discharge the legal burden or onus of proof placed on him, the basis on which the evidential burden can arise would be absent or non-existent.[76] Thus, this burden needs not even first lie in the prosecution, it can squarely lie on the Defendant. One of such instances is when facts are peculiarly within the knowledge of the accused[77], or when the defences of insanity and intoxication are relied upon[78] or in pleas of *autrefois acquit* or *autrefois convict.*[79]

In a criminal trial, the rule is stricter. The prosecution that prefers the charge against the defendant is duty-bound to prove the entire ingredients contained in the alleged offence to the satisfaction of the court. This duty to prove all the ingredients of the alleged offence(s) in the charge sheet by adducing sufficient evidence to the satisfaction of the court is what is

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74 *M. V. Long Island v FRN* (2018) LPELR-CA/L/1045C/2016

75 *Ibid*

76 *Ibid*

77 Section 140 Evidence Act, 2011

78 Section 139 (3)(c) Evidence Act, 2011

79 Section 36 (9) (10) Constitution of the Federal Republic of Nigeria, 1999 (as amended).

called the burden of proof. It is a burden compelling the prosecution to show by adducing cogent and satisfactory evidence that it is the defendant and no other person that is responsible for the offence charged.

But while the prosecution must always prove the guilt of the prisoner, there is no such burden laid on the defendant to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.[80] If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

Proof "beyond reasonable doubt" has no precise definition, DENNING S.J. (as he then was) in *Miller v Minister of Pensions*[81] provided a guide when His Lordship held that: "Proof beyond reasonable doubt need not reach certainty, but it must carry a high degree of probability." Thus, "If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence: Of course it is possible but not in the least probable, the case is proved beyond reasonable doubt.[82]

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[80] *Lord Sankey LC, Woolmington v Director of Public Prosecutions* [1935] All ER Rep 1, House of Lords.

[81] (1947) 2 All ER 372

[82] Denning J. (as he then was) in Miller v Minister of Pensions [1947] 2 All ER 372

However, Onu, JSC in *Igabele v State*[83] warns that: "...proof beyond reasonable doubt as has been shown in this case, is not synonymous with proof beyond any shadow of doubt but ought to be proof beyond reasonable doubt..."[84]

4. Recommendations and Conclusion

This work looked at the nature of presumption of innocence and burden of proof in criminal trials in the light of Nigeria's adversarial administration of criminal justice system. It observes that even though media trial is rife in Nigeria, courts have held that victims do not enjoy presumption of innocence. The paper also finds that presumption of innocence applies to money laundering cases, but does not apply to Non Conviction Based Forfeiture cases. In view of the decisions in *Aig-Imoukhuede v Ubah* and *IGP v Ubah* which are ad idem that section 36(5) do not apply to persons under investigation, it is hereby recommended that the National Assembly should take steps to amend section 36(5) of the 1999 Constitution to accommodate suspects. A consciousness of this position of the Court of Appeal by police will be dangerous to the populace as police officers may want to take advantage of it to treat suspects as criminals. Such abuse is possible in a country as Nigeria. Alternatively, the Supreme Court may adopt the argument of the Respondents in *Aig- Imoukhuede v Ubah* to hold that the appropriate interpretation to the Phrase "charged

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[83] (2006) LPELR-1441(SC) (Pp 23 - 23 Paras A - B). See also *Oteki v. A.G. Bendel State* (1986) 2 NWLR (Pt. 24) 648

[84] Similarly, in earlier case of *Miller v Minister of Pensions*[84] His Lordship, PER LORD DENNINGS J (as he then was) held that proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt.

with a criminal offence" as used in Section 36(5) is "accused of a criminal offence." The latter interpretation can be justified by the "living tree" doctrine of constitutional interpretation enunciated in Edward v Canada[85] which postulates that the Constitution "must be capable of growth to meet the future." The Supreme Court has also admonished in *Marwa v Nyako*[86] that:

> a constitution is intended to be permanent and must be interpreted by looking at the past and according to present conditions in order to fulfil the object and true intent of the constitution. A constitution must therefore be interpreted and applied liberally. A constitution must always be considered in such a way that it protects what it sets out to protect or guides what if set out to guide. By its very nature and by necessity a constitution document must be interpreted broadly in order not to defeat the clear intention of its framers."[87]

The Nigerian Police is also advised to call its officers to order. Media parade does not add to evidence, it only subjects' victims to ridicule as sometimes the victims turn out to be innocent. They should concentrate on gathering evidence and appropriately presenting them in court against the Defendants as opposed to media display.

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[85] [1932] AC 124. It was wired with approval by the Supreme Court in *Saraki v FRN* (2016) LPELR-40013(SC)

[86] (2011) LPELR-SC.272/2011 (CON)

[87] Per Onnoghen, J.S.C (Pp. 57-58, paras. C-A