**THE PRESENTATION OF THE CASE FOR THE DEFENCE. SESSION SIX (6) PARAGRAPH C.**

**1. Nature of rebuttal evidence to be led through the witnesses for the defence**

**2. Need to adduce evidence that would discredit or controvert every material piece of oral and documentary evidence led and adduced by the prosecution witness at the defence stage.**

**3. Mode and procedure of tendering document.**

***BY***

**ROTIMI JACOBS, SAN**

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Protocols

I must express my deep appreciation for the invitation extended to me by the **NBA Institute of Continuing Legal Education (NBA–ICLE) Course Session – Criminal Litigation Training** to discuss an aspect of criminal litigation titled “**The Presentation of the Case for the Defence.”**

**1.00 INTRODUCTION**

1.01 It is a herculean task for a litigation lawyer to represent a criminal Defendant in a criminal trial. It is the expectation of the judex that the defence counsel will professionally present his client’s case, protect his interest, give proper advice, take proper and necessary steps in the pursuit of justice and as an officer of court. The client expects his counsel to do wonder to exonerate him form the legal debacle he finds himself. The perception of the society is also not so favourable in that they see the defence counsel as a person set out to supress crime and thereby prevent the defendant from getting his just dessert. The duty of a defence counsel is not an easy task, any advice he gives or the step he takes may have a debilitating effect on his client’s case. Thus, a defence counsel must therefore abreast himself with the knowledge of law, both substantive and procedural laws in order to be able to efficiently perform his role as a defence counsel. It is in this light that, I thank the organisers of this training program as it will enhance the effectiveness of the administration of criminal justice in Nigeria. The training program is in line with the Rules 11 of the Rules of Professional Conduct for Legal Practitioners which makes it mandatory that a legal practitioner **“shall participate in and satisfy the requirement of the mandatory continuing professional development program operated by the Nigeria Bar Association.”**

1.02 Our subject in this discussion is on “The presentation of the Case for the Defence”. The first observation on the topic is that, the topic assumes that the prosecution has called its own witnesses and adduced its evidence which clearly reveals that a case has been

made out against the Defendant he is prosecuting. However, the presentation of the case for the defence does not start when a Defendant is called upon to make out his defence. The defence counsel is expected to present the case of his client even through the prosecution witnesses by cross-examining them and tendering relevant documents through them to support his defence, it may even commence while representing him during investigation. There are some defences or explanation that may be required to be given during investigation by a suspect. For example, where he intends to raise a defence of alibi, such a defence must be raised as early as possible to enable the investigator to investigate same. Thus, his assignment in presenting the case of his client starts at the stage of arraignment and his duty may extend up till judgment or even thereafter.

**2.00 CASE FOR THE DEFENCE**

2.01 The “case for the defence” is the systematic and logical presentation of the case of a Defendant accused of a crime before a court of law by his lawyer. It is on this note that even the counsel is referred to as **‘defence counsel’** or simply **‘defence.’** The role of a defence counsel is to protect his client against unjustified, and unmerited conviction, punishment or sanction for the offence he did not commit or to minimise or reduce the punishment that would have ordinarily been inflicted upon him.

2.02 The defence in a criminal matter is a denial of prosecutor’s charges or allegations. It is the duty of the defence counsel to bring out the evidence in rebuttal of the evidence adduced by the prosecution. However, before he can do this, he must

1. Understand the allegations made against his client and the offences charged

2. The ingredients of the offences

3. The evidence required to prove the ingredients

4. The defences available to his client.

5. The legal issues involved in the case.

The evidence of rebuttal can be extracted from either the defence witnesses or even from the prosecution’s witnesses. Thus, this paper will highlight the tools available for the presentation of the case of the defendant and how the defence counsel may present the case of his client. It will point out the tools available to the defence to neutralise the prosecution’s case. These tools, if well utilised, are capable of discrediting or controverting every piece of material, oral and documentary evidence led and adduced by the prosecution. It is not the role of the defence counsel to change the fact of the case.

**TOOLS FOR PRESENTATION OF CASE OF THE DEFENDANT**

1. **Effective cross examination of prosecution’s witnesses –** The presentation of the case of the defence in court normally commences from the examination of the prosecution’s witnesses by the defence counsel. Cross examination of prosecution’s witnesses is a very crucial aspect of the presentation of the defence’s case.

a. The Defendant by section 36 (6) (d) of the Constitution enjoys the constitutional right to “examine in person or by his legal practitioner, the witnesses called by the prosecution before any court or the tribunal.” Section 300 of ACJA also conferred the right of cross examination on the Defendant.

b. Where the prosecution calls any witness, he must yield the witness to the Defendant for cross examination. See **Okoro v. The State** (2012) 4 NWLR (Pt.1290) 351 at 373.

c. Cross examination gives an opportunity to the Defendant to test the credibility of the testimony of prosecution’s witness. See **Okoro v. The State** (2012) 4 NWLR (Pt.1290) 351 at 373.

d. The defendant must cross examine the prosecution’s witness on every material fact in controversy which the defendant does not accept as true. Thus, the defendant must at least make the witness to be aware that he did not accept his testimony as true. See **Udom v. Umana No. 1** (2016) 12 NWLR (Pt.1526) 179 at 243 – 244.

e. It is unsatisfactory, if not suicidal for the defence counsel to neglect to cross examine a witness after his evidence in chief in order to contradict him or impeach his credit but attempt at doing so only by calling other witness or witnesses to contradict the evidence. See **Oforlete v. The State** (2000) 12 NWLR (Pt.681) 415 at 436 – 437, **Alor v. The State** (1996) 4 NWLR (Pt.445) 726 at 739, **Okasi v. State** (1989) 1 NSC 375 at 381 – 382.

f. Cross examination of prosecution’s witness is to destroy or damage the case of the prosecution and to make the court believe that the accused did not commit the offence or if he committed the offence, there are valid defences available to him. See **Emoga v. The State** (1997) 9 NWLR (Pt. 519) 25 at 34.

g. The cross examination by the defence counsel is also to assist the defence to strengthen or fortify his own case apart from weakling the case of the prosecution. **Olowookere v. State** (2011) LPELR – 9018 (CA), **Iwuoha v. Okoroike** (1996) 2 NWLR (Pt.429) 231. In **Jua v. The State** (2010) 4 NWLR (Pt.1184) 217 at 245 – 246, Tobi JSC reiterated the importance of cross examination by the defence counsel thus;

 ***“The main aim or objective of cross examination is to destroy or damage the case of the prosecution and to make the court believe that the accused did not commit the offence; or if he committed the offence, there are valid defences available to him.”***

Thus, the importance of cross examination can be seen in the presentation of the defence case even before the case of the prosecution is closed and before the Defendant is called upon to open his defence. The defence is expected to have used the tool of cross-examination to:

i. Weaken or damage the case of the prosecution.

ii. Bring out his own defence.

iii. Cast reasonable doubt on the case of the prosecution.

iv. Strengthen or fortify the case of the defence.

v. Convince the court that the defendant did not commit the offence.

vi. Even if the offence was committed, there are valid defences available to the defendant.

vii. Discredit the testimonies of the prosecution’s witnesses.

If the tool of cross-examination is properly utilised and the defence counsel is effective at it, it is capable of terminating the prosecution’s case even before the court calls upon the defendant to enter into his defence. The defendant may decide to rest his case on the case of the prosecution where it is obvious that the prosecution has failed to prove its case beyond reasonable doubt.

2. **Resting the case of the defence on the prosecution’s case –** Rather than starting with the opening address and leading evidence, one of the options open to a defendant at the close of prosecution’s case is that the defendant may rest his case on the prosecution’s case. The procedure of resting case on the prosecution’s should however be adopted with a great caution and circumspection. It is advisable to adopt this procedure where:

i. The case of the prosecution is apparently weak in law and in fact.

ii. The case is such that even if all the prosecution’s witnesses are believed, yet the offence as charged is still not proved.

iii. The prosecution’s case does not call for some explanations from the defendant.

iv. No issue of fact is required to be decided in favour of the defendant before his defence will succeed. See **Magaji v. Nigerian Army** (2008) 8 NWLR (Pt. 1089) 338 at 379 and 381, **Nwede v. State** (1985) 3 NWLR (Pt. 13) 444, **Ali v. State** (1988) 1 NWLR (Pt. 68) 1, **Igabele v. State** (2006) 6 NWLR (Pt. 975) 100.

v. No scintilla of evidence linking the defendant to the commission of the offence charged or similar offence which the defendant could be convicted in lieu of the offences charged.

vi. The prosecution fails to prove its case beyond reasonable doubt against the defendant, he (defendant) can take the full benefit of being discharged and acquitted. See **Adamu v. State** (2014) 10 NWLR (Pt. 1416) 441 at 462, **Eseyin v. State** (2015) LPELR-26015(CA).

When a defendant rests his case on that of the prosecution, the court does not make its ruling in such a case like an application for no case submission but delivers its final judgment.

**Need to exercise caution –** The defence counsel needs to exercise caution before advising and taking this step of resting the case of the defence on the prosecution’s case in that

a. The defendant cannot thereafter call any witness or contradict the evidence of the prosecution. This is part of the reason why the defendant and his counsel should adopt the procedure advisedly in rare cases. In the judgment, the trial court must consider the prosecution’s case carefully, decide on the credibility of the prosecution’s witnesses and also attach weight to their evidence.

b. Where explanation is required from the defendant, it will be unwise for him to rest his case on his prosecution’s case. In **Edet** **Akpan v. The State** (1986) 3 NWLR (Pt.27) 225 at 232 a murder case where the prosecution called its witnesses and close its case and the counsel for the defendant rested his case on the prosecution’s case and announced to the court that he will not call any evidence for the defendant. The accused was subsequently convicted and his appeal to the Court of Appeal was dismissed. On further appeal to the Supreme Court, the appellant contended that the trial court failed to give him several options opened to him and that he was denied right to fair hearing. Oputa JSC in his own contribution at page 238 of the report held that:

***“Also, resting on a no case submission is a perfectly legally acceptable stratagem but when the prosecution’s case calls for some explanations which only the accused person can give and such accused decides to rest on a no case submission then the trial court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got, nor dissuaded from reaching a firm conclusion by speculation on what the accused might have said if he had testified.”***

c. It is a legal gamble and risk to rest case on the prosecution’s case as no complaint and denial of fair-hearing will be entertained after exercising such right. The defendant resting his case on the prosecution’s case only means that there is nothing in the evidence adduced by the prosecution that could persuade the court to compel him to put up his defence. Where the defendant is resting his case on the prosecution’s case, he has decided to take gamble and cannot be expected to complain. See **Obonyano v. Nigerian** **Army** (2019) LPELR 48245 CA. In **Adamu v. The State** (2014) 10 NWLR (Pt.1416) 441 at 462, Ariwoola JSC stated the law thus:

***“At the trial, the appellant rested his case on the prosecution’s case. The law is generally settled, that an accused person who at the close of prosecution’s case, decided to rest his case on that of the prosecution as presented against him is only exposing himself to risk and gamble. The reason being that if the case is such that even if all the prosecution’s witnesses had believed, yet the offence as charged is still not proved, then the accused may get away with the risk of resting his own case on that of prosecution. By that choice, the accused would have decided not to explain any defect in rebuttal of the allegation made against him.”***

Nnaemeka-Agu JSC in **Utteh v. State** (1992) 2 NWLR (Pt. 223) 257 at 274 advised defence counsel thus:

***“For, it is true that an accused person is, under our constitution, entitled to remain silent either during investigation or in court. The prosecution is still bound, as the party, on which the onus lies – a very high onus at that – to prove its case beyond reasonable doubt. But, if at the trial, the prosecution calls credible evidence which in the end remains unrebutted, the court is entitled to accept it. Indeed, the standard of proof required of the prosecution in such a case is made the much higher in cases in which the defence called no evidence in denial or refutation of the evidence called by the prosecution. This is why a prudent counsel should always resort to the doubtless right of his client to rest his case on that of the prosecution with great caution. In the instant case, I am satisfied that as the demand was proved by credible evidence, when the appellant elected to rest his case on that of the prosecution, he did so at his own peril.”***

3. **Defendant’s opening speech or address –** The third tool for the presentation of the case for the defence as prescribed by law after a no case submission has been overruled, is the tool of opening speech or address.

i. After the defendant is called upon to enter into his defence, he is entitled to address the court by stating the fact or law in which he intends to rely and make such comment as he thinks necessary on the evidence for the prosecution.

ii. Under section 301 of ACJA, section 241 of the CPA, and section 192 of the CPC, a Defendant has the right to an opening speech at the beginning of defence case.

iii. Opening is usually applicable where the Defendant intends to call other witnesses apart from himself.

iv. Opening speech or address is a right open to the defendant which can be waived.

v. The denial of the right of opening speech or address may not necessarily prejudice the case of the defence. In **Edward Hill. v. R.** (1911) 7 Cr. App. R 1 at 3, the opening speech was explained thus:

***“We wish to say that in a murder case or any other case where counsel for the defence is calling witnesses other than the prisoner, he has a perfect right to open his case before calling his evidence, without interference of any kind on the part of the judge. In this case, we thought he had been actually prevented from exercising his right, and that it had had any effect upon the result, we should have been obliged to consider the matter seriously, but it appears to have been accepted ultimately by counsel as advice from the judge, and we do not think he is entitled to complain of it now.”***

vi. The opening speech or address gives the defence counsel opportunity to explain briefly to the court the evidence he is about to lead through his witnesses, the line of his defence, the exhibit he intends to rely on. The opening speech will enable the court to easily follow the testimony of the defence witnesses.

vii. In practice, opening speech or address by the defence is optional as the defendant cannot be compelled or forced to give opening speech or address.

4. **Calling the Defendant as a witness – Three (3) options available to the Defendant in presentation of his case**

i. Where a Defendant is represented by a counsel, his counsel must explain the three options available to the Defendant whenever he is called upon to make his defence.

ii. If he is not represented by a counsel, it is the duty of the court to explain the three options available to him under the law.

iii. These options are prescribed by section 358 of the ACJA, section 287 of the Criminal Procedure Act and sections 191, 192, & 236 of the Criminal Procedure Code applicable to Northern States and also ACJL of the states. See **Josiah v. State** (1985) 1 NWLR (Pt.1) 125, **Saka v. The State** (1981) NSCC 474 at 477 – 478.

 The three options available to the Defendant are;

(i) **Make statement from the dock without being sworn and without cross examination –**

(a) The Defendant in appropriate case under section 358 (1) (a) of ACJA may make statement from the dock without being sworn and without being cross-examined by the prosecution and co-defendants.

(b) The Defendant only presents his defence from the dock without being sworn on oath and without cross examination.

(c) Such statement is not sworn evidence that may be liable to be cross-examined.

(d) The court is entitled to attach weight to the statement made from the dock by the defendant as it thinks fit.

(e) The court is enjoined to take such unsworn statement into consideration in deciding whether the prosecution has made out its case. In **R. v. Frost** & Hale (1964) 48 Cr. App. R 284 at 290 – 291, it was held that it is a misdirection to describe the statement made by the Defendant under the section as a mere comment. See also **R. v. Peacock** (1911) 13 CLR 619, **Saka v. State** (1981) NSCC 474 at 477 – 478.

(f) The court in practice do not place much weight on a mere statement made by the defendant from the dock and without being cross examined by the prosecution’s witness. In fact, in England, the practice has been abolished leaving only two options and not the three options. As stated in **Saka v. State** (supra), the provisions of section 287 of the CPA which is *in pari materia* to section 358 of the ACJA, was borrowed from the old Criminal Justice Act of England. However, the position of law has changed in England since 1982 by the enactment of section 72 (1) & (2) of the Criminal Justice Act 1982 which abolished the procedure that allows an accused person to make unsworn statement and without being cross examined. The reason for the change of this position is the utility value of unsworn statement made by the Defendant, not liable to cross examination by the prosecution and other co-defendants. However, this option is still available under our law.

(ii) **Give evidence in the witness box after being sworn and liable for cross examination –**

(a) The second option available to the defendant under section 358 of the ACJA is the right of a Defendant to give evidence in the witness box after being sworn as a witness in which case he will be liable to cross examination.

(b) It is a tough decision to make whether it is appropriate for the defendant to give evidence in his own defence. Oputa JSC in **Josiah v. State** (1985) 1 NWLR (Pt.1) 125 at 138 alluded to the fact when it held thus:

 ***“It is not easy to stand up to cross examination. It may even be difficult for a trained lawyer to decide on any particular case whether it is safe or unsafe to expose an accused person to the ordeal of cross examination. Under our system, there is no onus on the accused to prove his innocence. The law presumes him innocent. There is thus no duty on the accused to help the prosecution prove him guilty. Our law is against self – incrimination. It is in the interest of justice that every rule in favour of an accused person is meticulously observed and that no rule is broken to his prejudice. The least that the trial court could have done for the appellant whose life was at stake, (he was standing trial for his very life) was to inform him of his rights under section 287 (1) and it should be apparent on the record that each alternative was explained to the appellant since he was not represented by a legal practitioner.”***

(c) It is expected that the defence counsel will heed the advice of Oputa JSC quoted above. Where the prosecution’s case is not strong as to secure conviction, it will be unwise to put the defendant in the witness box to face the rigour of cross-examination and expose him to the prosecution who may extract damaging evidence through him.

(d) Where there is no strong case against the defendant, it will be unwise to put the defendant in the witness box and subject him to cross examination by the prosecution.

(iii) **Right to remain silent**

(a) The last and the third option open to the defendant is the right to remain silent by not giving evidence personally. He may refuse not to give evidence but call others as his witnesses or not even call anyone.

(b) The right to remain silent is a constitutional right conferred on the defendant by sections 35 (2), and 36 (11) of the Constitution. It is also a statutory right conferred under section 358 (1) (c) of ACJA.

(c) The court cannot compel a defendant to give evidence in view of the provisions of section 36 (11) of the 1999 Constitution (as amended) in that he is at liberty to remain silent at his trial. Thus, a defendant is merely a competent witness for himself and not a compellable witness. See **Eze v. FRN** (2018) FWLR (Pt.923) 123 at 158 – 159.

(d) The right to remain silent must be properly explained to the defendant by his counsel and the implication of it. Where he is not represented by counsel, the trial judge or magistrate in asking the defendant to enter his defence, must explain the options available to him. In **Odeh v. FRN** (2018) LPELR – 47370 (CA), it was held that

***“The record of the court must show that the trial court asked him the required questions and also explain to him his options so that he could make an informed choice. By the combined effect of sections 191 (b) and 236 (1) of the CPC, the appellant ought to have been asked, (i) whether he wished to give evidence on his own behalf as provided in section 236 of the CPC; in which case he would be sworn as a witness and would be liable to cross examination; (ii) whether he mean to call witnesses other than witnesses as to character. He also ought to have been told that he needed to say anything at all if he so wished. Not being furnished with the information above, it is no wonder that the appellant proceeded to say that “I do not have any defence. I still want an adjournment.” That shows the confusion in the uninformed mind of the appellant as to what to do… It was after the appellant had expressed his confused state of mind as stated above that the trial judge adjourned the case without stating what the adjournment was for. In the judgment, the trial judge held that the appellant had offered no defence that could be considered to exonerate him of the charge he faced. But then, he had not been informed of his right to give evidence on his own behalf and call witnesses. A reasonable person who was present at the trial would not leave the court with the impression that justice has been done to the appellant in the case. The trial therefore cannot be said to be fair.”***

(e) A defendant who elects to keep silent cannot thereafter complain of the denial of fair hearing. Once opportunity is given to him and he fails to utilise the opportunity, he can no longer be heard to complain of denial of fair hearing. See **Utteh v. State** (1992) 2 NWLR (Pt.223) 257 at 274. In **Ali v. State** (1988) 1 NWLR (Pt.63) 1 at 18 – 19, the Supreme Court held that

 ***“If the defence rests and refuses to put an accused person in the witness box to depose to his own version of the events, then the learned trial judge is denied the opportunity of listening to the accused tell his story, of watching his demeanour, of assessing his credibility and of making the necessary choice between his story and that of the prosecution. In the final result, the trial court will have to decide the case on the evidence before it undeterred by the incompleteness of tale from drawing all inferences that properly flow from the evidence of the prosecution. The defence has shut himself out will have himself to blame. The court will not be expected to speculate on what the accused might have said if he testified.”***

See also **Ajibade v. The State** (2013) 6 NWLR (Pt.1349) 25 at 43.

(f) **When the defendant may not be called as a witness -** Defence counsel may not call the defendant to give evidence where:

i. the Defendant is reluctant and unwilling to give evidence

ii. the defendant is nervous

iii. the defendant is unable to withstand the fire of cross-examination by the prosecution

iv. the Defendant is an infant or too ill to follow the proceedings to the extent that he may not be able to give intelligent answers to questions.

v. the defendant is incapable of giving any exculpatory or useful evidence in his own defence.

vi. the defendant cannot give any useful rebuttal evidence.

vii. The story and the case of the Defendant is extremely weak.

viii. The prosecution has a water-tight case and any attempt to put the defendant in the witness box may further corroborate the case of the prosecution.

(g) It must be noted that the usual practice is for a Defendant who is raising a defence such as self-defence or alibi, has the evidential burden of placing some evidence of his defence before the court. The easiest way to discharge this burden is for the Defendant himself to give evidence.

(h) Where the Defendant fails to give evidence on his own behalf at the trial, the court may draw an adverse inference from such failure.

5. **Order of Defence Evidence**

(i) Generally, the Defendant should be called upon before any other defence witnesses to give evidence first once he decides to give evidence and call other witnesses thereafter.

(ii) The rationale for this rule is that while witnesses are normally kept out of court and out of hearing until they testify, the defendant has the right to be present throughout his trial and therefore would unfairly has the opportunity to listen to witnesses called by the defendant if the defendant is not called first and then have the opportunity to adjust his testimony to accord with that of his witnesses. See **Igwede v. Queen** (1959) NSCC 85 at 86, **Morrison v. R** (1911) Cr App R 159, **Smith v. R** (1968) 2 All ER 115, **Suton v. Queen** (2008) EWCA Crim R 3129.

(iii) However, the court has the discretion to depart from this usual procedure, particularly with respect to the evidence of witnesses that are not substantially disputed or evidence of an expert. However, character witnesses must always be called after the defendant has given evidence unless there are other witnesses as to fact.

(iv) The issue of order in which the defence is to give evidence was raised in **Daniel v. FRN** (2021) 6 NWLR (Pt.1771) 20 at 41 – 43 where the Supreme Court decision of **Igwede v. Queen** (supra), **Smith v. R (supra), State v. Sanni** (2018)9 NWLR (Pt.1624) 278, **Eke v. State** (2011) 3 NWLR (Pt.1235) 289 were cited before the Court of Appeal but in their lordships’ wisdom, it was held that:

***“In criminal trial, the accused person and his lawyer are dominis litis and shall determine the cause of the defence without interference whatsoever. Just as they cannot dictate to the prosecution the order of calling the witnesses, the prosecution cannot dictate order of the accused calling his witnesses. An accused person is entitled to conduct his case in a way and manner he deems fit.…”***

It was further held in that case that the Defendant is not a compellable witness for the prosecution by virtue of the provision of section 36 (6) (d) of the 1999 Constitution (as amended). See pages 55 – 56 of the report.

(v) With respect to the Court of Appeal, their lordships misconstrued section 36 (6) (d) of the 1999 Constitution (as amended) and the basis for the principle that the defendant gives his evidence first before he listens to other witnesses, he might call in the case except informal witnesses and witnesses whose testimonies are not in dispute.

(vi) Section 212 of the Evidence Act still recognize that whilst a witness is giving evidence, all other subsequent witnesses should go out of court and out of hearing. The basis for this is to allow the witness to give his testimony freely without being influenced by the testimony of the witnesses who are testifying before him. See **Ekang v. The State** (2001) FWLR (Pt.68) 1123 CA.

(vii) The Court of Appeal overstretched the position of the Constitution that makes the defendant not a compellable witness. The issue is not on compellability of the witness but the issue that arise from the principle of fair hearing that guarantees that witness must give their free and independent testimony before the court. A witness waiting to give evidence must not wait inside the court room except he is an expert witness or a witness on facts not disputed.

(viii) The Court of Appeal even refused to follow the decisions of the Apex Court in **Igwede v. Queen** (supra), **Smith v. R (**supra), **State v. Sanni** (supra), **Eke v. State** (2011) 3 NWLR (Pt.1235) 289. There is no connection between the right enshrined in section 36 (6) (d) of the Constitution and the order of giving evidence by the defendant. They are not related at all. It is however gratifying that there is a pending appeal on the matter.

(ix) It is advisable notwithstanding the latter decision of **Daniel v. FRN** (supra) that the defence counsel calls the defendant first where he is to give evidence and intends to call other witnesses who are not informal witnesses. In practice, the court, in assessing and giving credibility to the testimony of the defendant and his witnesses, it may work in the mind of the judex that the fact that he gives evidence last enables him to tailor his testimony along with the testimonies of his witnesses and thereby giving little credit to the testimony of the defendant.

6. **Nature of rebuttal evidence to be led through the witnesses for the defence.**

(i) **What is rebuttal evidence?**

(a) Black Law Dictionary (6th Edition) by Henry Campbell Black defined rebuttal evidence as

***“Evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party.”***

(b) Rebuttal evidence is a response to evidence given by the opponent which is intended to be refuted by the other party.

(c) Rebuttal evidence is a form of evidence that is presented to neutralise, contradict, or nullify the other evidence presented by the adverse party. Rebuttal evidence, in restrictive sense, is applicable to evidence elicited from prosecution after it is granted leave to reopen its case after the disclosure of the defendant’s case in order to enable the prosecution give rebuttal evidence on a new fact or issue raised in the defence.

(d) Thus, rebuttal evidence is a disprove and denial of a fact by evidence.

(ii) It is now firmly settled that if the evidence adduced by the prosecution is tested, scrutinized, and accepted, and conclusively points to the Defendant as the perpetrator of the crime, it is for the Defendant to rebut the presumption that he committed the crime or to cast a doubt on the prosecution’s case by preponderance of probabilities. See **Jua v. State** (2010) 4 NWLR (Pt.1184) 217 at 257, **Kalu v. State** (1993) 6 NWLR (Pt.300) 385 at 396.

(iii) Thus, where the prosecution has established a particular issue in its favour, proving the ingredients of the offence, the onus will be on the Defendant to give evidence to explain, repel, counteract, or disprove that particular issue. There is a rebuttable presumption of law that a decision will be given on a particular issue in favour of the prosecution who establishes it or rely upon it unless it is rebutted by the Defendant. See **Isma’il v. The State** (2011) 17 NWLR (Pt.1277) 601 at 633. In that case, the prosecution led evidence to establish that the deceased was last seen with the Appellant before his death but the Appellant could not give any evidence of rebuttal.

(iv) In law, there are presumptions that if certain event or thing exists, the natural consequence is that the existence of such things will be against the defendant and may lead to his conviction. It is the duty of the defence to give rebuttal evidence against the case made out by the prosecution. Such presumption is encapsulated in the doctrine of lazing.

(v) In **Igabele v. State** (2006) 6 NWLR (Pt. 975) 100, the appellant was charged with the offence of murder pursuant to section 319 of the Criminal Code applicable to Enugu State. He pleaded not guilty to the charge. The prosecution called its witnesses to the effect that the deceased was last seen alive with the appellant before his dead body was discovered. The defendant did not properly cross-examine the prosecution’s witnesses. He also refused to call any witness or to testify personally but rested his case on that of the prosecution. At 136 – 137, Ugbuagu JSC held thus:

***“I am satisfied that the evidence adduced by the prosecution was tested, scrutinised and accepted by the trial court and that it conclusively pointed to the appellant as the perpetrator of the murder of the deceased. It was for him to rebut the presumption that he committed the crime, at least, cast a reasonable doubt on the prosecution’s case by preponderance of possibilities. But remarkably and significantly, his learned counsel, refused (as he was entitled to do as the master of his client’s case), to cross-examine some of the vital witnesses of the prosecution. He also refused the appellant testifying and rested the case of the defence on that of the prosecution and thereby, “drowning” the appellant or let him “stew in his own juice” so to speak/say.”***

It can be seen from the above decision of the Supreme Court that the defence counsel was found to have failed to perform his duty to cross-examine some of the vital witnesses for the prosecution. And notwithstanding that the prosecution made out a strong case, he refused the accused person the opportunity to testify or call any witness and complicated the case by resting the case of the defence on that of the prosecution. It is not surprising that the Supreme Court used the word “drowning” his client on alter of incompetence notwithstanding that the case was a murder case.

(7) **REQUIRED REBUTTAL EVIDENCE**

This paper will, at this stage, point out the areas where the defendant must give the rebuttal evidence and where he needs to adduce evidence that would discredit or controvert the evidence of the prosecution.

**(A) The burden of proving reasonable doubt**

**(i)** A Defendant standing trial is presumed innocent until proved guilty as prescribed by section 36 (5) of the 1999 Constitution (as amended), and the standard of proving the guilt of the defendant standing criminal trial is as provided for by section 135 (1) of the Evidence Act which is that it should be beyond reasonable doubt.

(ii) Where in a criminal trial the prosecution has proved the commission of an offence beyond reasonable doubt, the burden of proving reasonable doubt shifts to the defendant and if he fails to discharge this burden, he will be convicted of the offence charged. See **Ikenne v. State** (2014) 18 NWLR (Pt.1650) 157 at 169, **Egbirika v. State** (2014) All FWLR (Pt.733) 1938 at 1956.

(iii) Where the prosecution has made out a clear case against the defendant if unanswered will lead to his conviction, the duty of adducing rebuttal evidence as to make the court find any issue in his favour will surely be on the defendant. See **Adamu v. State** (2014) All FWLR (Pt.733). In **Giki v. The State** (2018) 6 NWLR (Pt.1615) 237 at 247, Sanusi JCA, reiterated the point thus;

 ***“I must state here, that even though the burden of proof of the guilt of an accused person lies on the prosecution, where the prosecution adduced adequate evidence which shows that the accused had actually committed the offence charged, the burden of proving that he is innocent shifts to the accused in view of the provisions of section 138 (3) of the Evidence Act 2011.”***

 See also **Nasiru v. The State** (1999) 2 NWLR (Pt.589) 87 at 89. In **Ogu v. COP** (2018) All FWLR (Pt.928) 31 at 59, Kekere Ekun JSC states the law thus;

 ***“Section 36 (5) of the Constitution of Federal Republic of Nigeria 1999 (as amended), provides that every person charged with a criminal offence shall be presumed innocent until proved guilty. By virtue of section 135 of the Evidence Act 2011, the standard of proof in any criminal proceedings is beyond reasonable doubt. The burden of proving the guilt of the accused person rests squarely on the prosecution and does not shift. However, where the prosecution proves the commission of crime beyond reasonable doubt, the burden of proving reasonable doubt shifts to the accused person.”***

(iv) Where the evidence adduced by the prosecution is tested, scrutinized and accepted, and conclusively points to the defendant as the perpetrator of the crime, it is for the Defendant to rebut the presumption that he did not commit the crime or to cast a doubt in the prosecution’s case by preponderance or probabilities. See **Ikebudu v. Borno NA** (1966) NNLR 44. See **Onakpoya v. R** (1959) SCNLR 384 at 387 where the Supreme Court adopted the reasoning in **R. v. Carr Briant** thus;

 ***“In any case where, either by statute or by common law, some matter is presumed against an accused person ‘unless the contrary is proved’, the jury should be directed that it is for them to decide whether the contrary is proved; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.”***

**(B) Rebuttal of actus** **reus**

(i)It is always the duty of the prosecution to prove the very act or omission that constitute the offence.

(ii) This is referred to in the legal palace as the ‘actus reus’ or physical element of the offence. It is the doing of the act that constitutes the offence and the prosecution must prove beyond reasonable doubt, the act done by the defendant that constitutes the offence.

(iii) Where the prosecution has proved the physical element of the offence beyond reasonable doubt, it is the duty of the defendant to give rebuttal evidence that the physical elements of the offence were not committed.

(iv) For example, if he is charged with the offence of murder, to lead evidence that there was no killing of the deceased or that the killing was accidental.

(v) It is not permissible in law for the defendant to deny the actus reus and then raise the defence of accident. The defendant cannot deny the actus reus and plead the defence of accident. See **Iden v. State** (1994) 8 NWLR (Pt.365) 719 at 729, **Amaremor v. The State** (2010) 7 NWLR (Pt.1193) 317. In the case of stealing, it is for the defence to show that no property was stolen or that if even stolen, it was not stolen by him.

**(C) Rebuttal of Mens Rea –**

(i)Mens rea simply means a guilty mind. The guilty mind instigates the guilty act or flows into the guilty act.

(ii) Intent can be proved either positively where there is proof of declared intent of the defendant or inferentially, from the overt act by the defendant.

(iii)In law, a defendant is taken to intend the consequences of his voluntary act, when he foresees that it will probably happen, whether he desires it or not. See **Olaiya v. The State** (2018) 10 NWLR (Pt.1626) 1 at 22.

(iv) Where the prosecution has been able to prove the criminal knowledge or guilty mind or intention to commit the offence to support actus reus, the burden of producing rebuttal evidence is on the defendant to demonstrate that he does not have the requisite mental element.

(v) Such mental element is always expressed in the statute as

(a) Knowingly

(b) Wilfully

(c) Purposely

(d) Recklessly; or

(e) Negligently.

(vi) The rebuttal evidence must point to the fact that the act was not done wilfully, knowingly, purposely or negligently.

(v) From the authorities cited above, where the prosecution has been able to prove the act or omission which is the actus reus and where the intention to commit the offence which is the mens rea has been proved, it is the duty of the defence to give rebuttal evidence that he did not commit the actual offence and that even if it is committed, he did not have the necessary guilty intention or mind.

**(E) Defendant’s duty to prove his defence**

(i) The Prosecution only has a duty to prove the guilt of the defendant and in doing so, he must prove his case beyond reasonable doubt.

(ii) The prosecution is not under any duty to prove the defence or the defences of the defendant.

(iii) The law is settled that it is the sole and singular duty of the defendant to prove his own defence(s). In **Olaiya v. The State** (2018) 10 NWLR (Pt.1626) 1 at 18,

 ***“The defence is one of facts which must be pleaded and proved by the riffle handler, this time, the appellant. The law does not obligate the prosecution to prove the prosecution, while purporting to prove their case, prove the defence of the accused as part of the prosecution’s case; it has been held in Paul Ameh v. The State (1978) NSCC 365, that where in a criminal proceeding, the prosecution put before the trial court two versions of one incidence, one proving the allegation and the other the defence, they would have thereby failed to prove their case beyond reasonable doubt… At all times, the accused person has the evidential burden of proving his defence or casting reasonable doubt on the prosecution’s case. When he asserts a defence, it behoves him to prove it. Sections 131, 136 (1) & 137 of the Evidence Act, 2011 are clear and very material on this.***

 See also **Ezekwe v. The State** (2018) 14 NWLR (Pt.1639) 209 at 222.

In **Edoho v. State** (2010) 14 NWLR (Pt. 1214) 651 at 682 – 683, Adekeye JSC reinstated the law thus:

***“In order to establish the defence of provocation, it is the duty of the accused person to adduce credible and positive evidence to support the allegation of provocation. Where an accused fails to adduce such evidence in support of his defence, the trial court has to rely on the evidence before it as adduced by the prosecution. A defence of provocation cannot be at large without supporting evidence.”***

**(F) Exception to presumption of innocence**

(i) If the penal law exempted some persons or created an exemption for an offence, no onus of proving the exemption or exception is on the prosecution. The onus of proving such exemption or exception is on the defendant.

(ii) By the proviso to section 36 (5) of the 1999 Constitution (as amended) and sections 139 (1) & 140 of the Evidence Act, the burden of proving the existence of any circumstances which brings a defendant’s case within any exception or exemption from or qualification to the operation of any law rests on the defendant and he has the burden of proving facts within his own knowledge.

(iii) The section was construed in **Daudu v. FRN** (2018) 10 NWLR (Pt.1626) 169 at 183, it was held that

 ***“Even though section 36 (5) of the 1999 Constitution provides that every person charged with a criminal offence shall be presumed to be innocent until he is proven guilty, the proviso allows for shifting the burden of proof on the defendant. The section provides thus…By section 19(3) of the Money Laundering Act, if an accused person is in possession of pecuniary resources or property which is disproportionate to his known source of income or he obtained an accretion to his pecuniary resources or property, the burden of giving a satisfactory account of how he made the money or obtained the accretion shifts to him. The prosecution is relieved of the burden of having to proof that the money so found in his account or in his possession is proceed from illegal trafficking.”***

 See also **Ogu v. COP** (2018) 8 NWLR (Pt.1620) 134 at … Kekere Ekun JSC held that

 ***“The burden of proving the existence of any circumstance which brings the case within any exception to or exemption from or qualification to the operation of any law, rests on the accused person. He also has the burden of proving any fact especially within his knowledge. See sections 139 (1) of the Evidence Act and the provision of section 36 (5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).”***

(v) The implication of the proviso is for example, where a defendant is charged for criminal breach of trust as a public servant, once the charge states that he is a public servant, the burden is on the defendant to prove that he is not a public servant, thereby bringing him out of the provision of section 315 of the Penal Code.

**(G) Proof that the property is a proceed of crime**

(i) The onus of proving that the property in respect of which a restitution or forfeiture order is to be made is from the proceeds of the alleged crime is on the prosecution and it discharge the onus by merely proving that the defendant acquired the property which is beyond his legitimate and normal income.

 (ii) The onus on the prosecution however, as in civil cases is discharged on the preponderance of balance of probabilities and not beyond reasonable doubt as prescribed in criminal cases. The court may infer from the circumstances of the case that the property is a proceed of the crime alleged against the defendant if the property is beyond the legitimate income of the defendant.

(iii) In **Ogunlana v. State** (1995) 5 NWLR (Pt. 395) 266 at 291, it was held by Iguh JSC thus:

 ***“It is important to observe that the 1st Appellant admitted in his examination-in-chief that he was only a clerk at the government Costal Agency on a salary of N180 per month. Similarly, the 2nd Defendant admitted that he was on a salary of only N220.50 per month. It is also worthy of note that the appellants by some strange coincidence acquired their respective properties in issue contemporaneously with the burglary and stealing for which they were tried and convicted. it was in the face of the above sudden metamorphosis of the appellants from the humble rank of low working class, with some of them jobless to nouveaux riches of posh saloon cars owning class contemporaneously with the theft in question that the trial court, in the absence of any reasonable explanation, came to the irresistible conclusion that the appellants’ properties in issue were properties into which the complainant’s plugs had been converted. I think that the learned trial Judge was entitled to infer circumstantially that these properties were bought, all about the same time as it were, with the proceeds of the crime. I agree entirely with the learned counsel for the respondent that to insist, as the Court of Appeal appeared to have done, on direct evidence of the fact of acquisition of these properties with the proceeds of the theft will be tantamount to placing less premium on the practice of proof by circumstantial evidence.***

 ***It ought however to be noted that the onus of proving that the property in respect of which a restitution or forfeiture order is to be made is from the proceeds of an alleged theft is on the prosecution. But this onus, as in civil cases, is discharged on the preponderance or balance of probabilities and not beyond reasonable doubt as prescribed in criminal cases. See R. v. Ferguson (1970) 2 All E.R. 820. Upon a careful consideration of all the evidence adduced before the trial court, I cannot, with respect accept the view of the court below that the prosecution did not establish that the complainant is entitled to the properties restored to him by the orders of the trial court. In the circumstance, the lone issue for determination in the cross-appeal must be answered in the negative.”***

(iv) The fact that the defendant or convict is in possession of a property for which he cannot satisfactorily account, and which is disproportionate to his known source of income or that he had at the time of the alleged offence may be a proof and taken into consideration by the court as corroborating testimony of any witness in the trial. It is this principle that the Supreme Court took into consideration in **Ogunlana v. State** (supra) quoted above.

(v) This principle is also enacted into section 19 (5) of the Economic and Financial Crimes Commission Act, 2004 and section 54 of the Corrupt Practices and Other Related Offences Act which provides that where at any time an accused had any property for which he is unable to give satisfactory account as to how he came into his ownership, possession, custody or control shall be presumed to corroborate any evidence relating to the commission of the offence. See **Gana v. FRN** (2018) 12 NWLR (Pt.1633) 294.

(vi) Similar provision was interpreted by the Supreme Court in the case of **Daudu v. FRN** (2018) 10 NWLR (Pt.1626) 169 at 182 – 183, considered the effect of Section 19 (3) of the Money Laundering (Prohibition) Act, 2004 in its judgment delivered on 28th January 2018 at pages 13 and 14 thus:

 ***By Section 19 (3) of the Money Laundering Act, if an accused person is in possession of pecuniary resources or property which is disproportionate to his known source of income, or he obtained an accretion to his pecuniary resources or property, the burden of giving a satisfactory account of how he made the money or obtained the accretion shifts to him. The prosecution is relieved of the burden of having to prove that the money so found in his account or in his possession is proceeds from illicit traffic in narcotic drugs or psychotropic substances or of any illegal act.***

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

His Lordship concluded at pages 189 thus:

***“I find that the prosecution made out a case under Section 19 (3) of the Money Laundering (Prohibition) Act 2004 since there was proof supplied by the defence that the appellant was in possession of pecuniary resources which are disproportionate to his known source of income which he could not satisfactorily account for.”***

**(H) The evidence of sanity of the Defendant**

(i) By law, every person is presumed to be of sound mind and to have been of sound mind at any time in question until the contrary is proved.

(ii) The word ‘presume’ implies the possibility that the thing being presumed may be rebutted.

(iii) Arising from the presumption of soundness of mind is the burden placed on the accused or the defendant who set up a defence of insanity to lead evidence to prove same. To rebut the presumption of sanity, the Defendant must give evidence of rebuttal that he was insane. See **Onakoya v. The Queen** (1959) NSCC 384 at 387, **R. v. Carr Briant** 29 Cr. App R. 76, **Popoola v. State** (2013) 17 NWLR (Pt.1382) 96.

(iv) The burden of proof required is less than that required at the hand of the prosecution in proving the case beyond a reasonable doubt. The burden may be discharged by evidence satisfying the court of the probability of that which the Defendant is called upon to establish.

(v) It is the duty of the defendant to show that he was insane within the meaning of the provisions of sections 284, 285 & 286 of ACJA. See **Origbo v. The State** (1972) 11 SC 1 at 133, **Ughiaka v. The State** (1984) 2 SC 1, **State v. John** (supra).

(vi) The burden of proof of insanity is discharged on the balance of probabilities as in the civil cases. He must show that the evidence he relies on sufficiently proves insanity. See **Queen v. Biu** (1964) NNLR 45, **Idowu v. State** (1972) 5 SC 10, **Emeryi v. The State** (1973) 3 SC 215, **Arisa v. State** (1988) 3 NWLR (Pt.83) 386, **Oladele v. The State** (1993) 1 NWLR (Pt.269) 294 at 307 – 308.

In **Peter v. State** (1997) 12 NWLR (Pt. 531) 1 at 28,

***“By section 141 (3)(c) of the Evidence Act, Cap 112, Laws of Federation of Nigeria 1990, the burden of proving insanity is on the defence. Although, this burden is merely as in civil cases, that is to say by preponderance of evidence…. An accused person who contends that he is insane had the duty to rebut the presumption of law which presumes every person to be of sound mind at anytime which comes in question until the contrary is proved.”***

**(I)** **Doctrine of last seen**

(i) The law presumes that a defendant last seen with the deceased before his death, is responsible for his death. As in the case of **Isma’il v. State** (supra) where the prosecution succeeded in proving that the Appellant was the person last seen with the deceased, the Defendant must give a rebuttal evidence or explanation of what happened.

(ii) Where there is no rebuttal evidence, the doctrine of ‘last seen’ will be applicable. See **Igabele v. State** (2006) 6 NWLR (Pt. 973) 100 at 136 – 137.

**(J) Presumption in accident cases –**

(i) In accident cases, the presumption of law with regard to the liabilities of owners without further information is that the owner is prima facie liable because the court is entitled to draw the inference that the vehicle was being driven by the owner, his servant or agent at the material time.

(ii) For the owner to avoid liability, both criminal or civil liability, he must lead evidence that the vehicle was neither driven by the owner, his servant nor his agent at the material time. See **Eseigbe v. Agholor** (1993) 9 NWLR (Pt.316) 128, **Maduga v. Bai** (1987) 3 NWLR (Pt.62) 635 at 641, **Kuti v. Balogun** (1978) 1 SC 53 at 58.

**(K) Presumption of natural and probable consequence of the defendant’s act**

(i) The presumption of law is that a person intends the natural consequences of his act.

(ii) Once the prosecution proves an act of the defendant that amounts to a crime, the law presumes that the defendant intends the natural consequences of his act.

(iii) In **Nkanu v. The State** (1980) NSCC 114, the appellant was tried at the High Court of Cross Rivers State and convicted of murder of a 60year old woman. He denied the killing and pleaded insanity as a result of intoxication. The defence was rejected by the trial court for absence of evidence in support of such defence, his appeal to Court of Appeal was dismissed and contended at the Supreme Court that he had been drunk with palm wine at the time of the incident and that the trial judge did not consider his defence of temporary insanity due to intoxication, that he had no motive of killing the deceased. It was held at pages 122 – 123 of the report thus;

 ***“Whether the appellant was insane in the legal sense at the time he decapitated the old woman, Edu Efe Ntomo is a question of fact to be determined by the jury and not be medical men, however eminent and is dependent upon the previous and contemporaneous act of the party. Mere absence of any evidence of motive for a crime is not sufficient ground upon which to infer mania … Insanity being a matter of defence, the owner of establishing it lies upon the defendant. There is no evidence whatsoever, to the effect that the palm wine or the cigarette had on the other three persons who drank and smoke on that occasion. Such evidence may have been able to establish the potency of the palm wine and the cigarette. From all indications, the three other persons were unaffected.”***

(iv) Thus, the defendant in Nkanu’s case is expected to give evidence on the effect of the palm wine and cigarette on him as well as other people who drank the palm wine and smoked the cigarette. He is also expected to give evidence of fact of the previous and contemporaneous act of his.

(v) In **Shazali v. State** (1988) 5 NWLR (Pt.93) 164, the appellant set fire in her husband’s house after she had taken out her two children out of the building and the deceased’s husband was trapped in the house with the fire burning there. She was convicted of culpable homicide punishable with death and on her contention that she did not intend the death of the deceased. Agbaje JSC stated the law thus:

 ***“I have held earlier on in this judgment that it was the smoke from the fire in the house that night that killed the deceased. The appellant started the fire knowing full well that the deceased was fast asleep inside the house then. She did not wake up the deceased, whilst she moved her children out of the house. The door to the house was subsequently found locked from outside. There was incontrovertible evidence that besides the appellant, the deceased and their children, there was no one around then. The irresistible conclusion is that it was the appellant who locked the door. It is an elementary proposition of the criminal law that every person is taken to intend the natural and probable consequences of his or her act. See for instance R. v. Dim 14 WACA 154 at 155. The probable consequence of the fire started by the appellant in the house that night with the deceased sleeping and trapped inside it is that the deceased would at least inhale the smoke from the fire. So, the appellant must be taken to intend this consequence.”***

(vi) As in the case of Shazali, since the prosecution proved those factual facts, it is the duty of the defence to lead rebuttal evidence that she did not start the fire, that she tried to wake the deceased up, that she was not the one who moved the children out of the house and that she did not lock the deceased inside the house. All these rebuttal evidences were lacking in that case and she was rightly convicted. See **George v. State** (1993) 6 NWLR (Pt.297) 41 at 50, **Ukpong v. The State** (2019) LPELR – 46427 SC, **Garba v. The State** (2000) 6 NWLR (Pt.661) 378.

(vii) In **Afolabi v. State** (2016) 11 NWLR (Pt.1524) 497, the appellant shot the deceased at the chest and claimed that he did not intend to kill him. It was held at the Supreme Court that mere assertion that he did not intend to kill him will not amount to rebuttal evidence. It was held at page 519 – 520 of the report thus:

***“The appellant states emphatically in exhibit adjudged to have been freely and voluntarily made that he aimed his gun at the chest of the deceased at close range and shot him. It was his further evidence that the deceased fell down and could not move again. At that point, he ran to the village head and reported that he had killed a man. In the circumstance, did he intend to kill the man? I had earlier stated in this judgment that a person is taken to intend the natural anti probable consequences of his act. So, when the appellant aimed his gun at the chest of the deceased and shot, did he intend to keep him alive? I do not think so. at least he intended to cause him grievous bodily harm. And in view of the force of a gunshot aimed at the heart, the engine room of a man’s life, it can safely be concluded that the appellant intended to jill the deceased but his action, the report he made to the village head notwithstanding. Had the appellant shot the deceased on the leg maybe, just maybe, one would have though otherwise. At the age of the appellant, he ought to have known that the part of the body of the deceased he aimed at (the heart) was the last that could have entered his mind if he had intended the man to stay alive. I agree with the lower court that the appellant intentionally shot and killed the deceased. All the arguments of the learned counsel for the appellant which had nothing to do with whether or not the killing was intentional, are of no moment. They are discountenance. This issue is accordingly resolved against the appellant.”***

**(L) Ownership of stolen vehicle**

(i) Registration of a vehicle with a motor licensing office creates a prima facie case that the person who registered it is the owner of the vehicle. See **Julius Berger v. Ede** (2003) 8 NWLR (Pt.823) 526.

(ii) Where the court reaches a conclusion based on the fact before it that the vehicle was not registered based on the defendant charged with stealing, there is a rebuttable presumption that the defendant is not the owner of the vehicle, the defendant has a duty to give rebuttal evidence to the effect that, notwithstanding the registration of the vehicle in the name of the complainant, he in actual act owns the car. See **Oluwatoyin v. State** (2018) LPELR–44441 (CA) at 25 – 28.

**STANDARD OF PROOF BY A DEFENDANT**

(i) If a defendant is required by law in a criminal trial to prove a fact whether in form of special defence to the charge or of any other particular or peculiar fact, the defendant discharges the burden merely by preponderance of evidence just as in civil cases.

(ii) In **Bakare v. State** (1987) 1 NWLR (Pt. 52) 579 at 595 where Karibi-Whyte JSC held that:

***“It is clear from the evidence that at the close of the case of the prosecution, the prosecution had discharged the burden that the deceased died from the intention or reckless act of the appellant. The burden now shifted on the appellant to establish on the balance of probabilities circumstances of exculpation such as accident, self-defence, insanity etc. – section 137(3) of the Evidence Act. Police v. Anozie (1954) 21 NLR 29. The only evidence adduced by the appellant having not been believed, the burden of proof on him was not discharged. The onus did not shift again to the prosecution and the prosecution will now be taken to have proved its case beyond reasonable doubt. Since the story of the appellant was not believed, there was no evidence upon which to compare in the totality of the case and consider the existence of a reasonable doubt with respect to the guilt of the accused.”***

See **Sani v. State** (2018) 8 NWLR (Pt. 1622) 412 at 437, **Gwoji Jire v. The State** (1965) NNLR 52, **R. v. Oshunbiyi** (1961) 1 All NLR 453.

(iii) Thus, proof on balance of probability is contingent upon the defendant satisfying the minimum standards required in proof of any distinctive defence he has raised or is relying upon. In **Peter v. State** (1997) 12 NWLR (Pt. 531) 1 at 21, it was held that the defence of insanity, though can be proved on a balance of probability, the standard of proof is not met only by the *ipsi dixit* of the defendant. Even in **Mohammed v. State** (1997) 9 NWLR (Pt. 520) 169 at 213 – 214, it was held that a defendant in a criminal trial is not a competent witness as regards his mental status on an issue relating to defence of insanity.

**3.00 Mode and Procedure of Tendering Document.**

(i) The mode and the procedure of tendering documents are regulated by the Criminal Procedures applicable to the trial courts in a criminal matter as well as the provisions of Evidence Act.

(ii) The Criminal Procedure prescribes the mode in which the documents to be tendered in a criminal proceeding are to be frontloaded or discovered while the issue of admissibility or the tendering of the documents is governed strictly by the Evidence Act.

1. **Frontloading of documents**

(i) The law prescribes that the proof of evidence be made available to the defendant. The provisions of section 379 of the Administration of Criminal Justice Act only prescribes that the prosecution must frontload every document that it intends to rely upon during trial. This is called the proof of evidence.

 (ii) There is no corresponding duty under the section on the defendant to frontload document. However, there are practice directions issued by the Heads of Courts that requires the defendant to disclose its witnesses and frontload documents.

(iii) It is the summary of statement of witnesses that is strictly called proof of evidence. In **FRN v. Wabara** (2013) 5 NWLR (Pt.1347) 331 at 350, M.D Mohammad JSC held that

***“It’s worth the while to know that proofs of evidence are not the same as the statements of witnesses the appellant would call at the trial. Proof of evidence are summaries of the statement of those witnesses to be called at trial by the appellant. It is for that reason that the rules required and affirmation from the applicant that the evidence against the respondent as summarized in the proof of evidence, prepared by the appellant will be the evidence against the respondents. In respect of whose trial the court is urged to grant the leave to prefer a charge. Even at the trial, the respondents, on the authorities are only entitled access to the statement of the prosecution’s witnesses on the fulfilment of certain conditions.***

See also **Dada v. FRN** (2014) LPELR-24255 CA, **Pius v. State** (2012) LPELR-9304 CA.

(iv) Thus, strictly, the proof of evidence is the summary form of testimony of witnesses. Proof of evidence are mere summaries of statement of witnesses to be called by the prosecution and it is settled law that they are not pieces of legal evidence on which the court can act upon. Thus, proof of evidence cannot be equated with the testimonies of witnesses called at the trial. See **Idagu v. State** (2018) 15 NWLR (Pt.1641) 127 at 153.

(v) The purpose or the essence of the statement of witnesses is to ensure that there is available that evidence from persons who did one thing or the other or by circumstantial evidence could prove an alleged offence as charged. It is within the discretion of a prosecutor to prefer such evidence that it considers sufficient to prove a charge beyond reasonable doubt. Thus, it is the requirement of section 379 that the defendant shall be given all the facilities for the preparation of his defence. This is in line with the provision of section 36 (6) (b) of the 1999 Constitution (as amended). section 36 (6) (b) of the 1999 Constitution (as amended) provides that

***“Every person who is charged with a criminal offence shall be entitled to***

***(b) be given adequate time and facilities for the preparation of his defence”***

(vi) It is in line with this constitutional requirement that section 379 of the Act makes elaborate provisions for the facilities to be provided to the defendant while filing an information. These materials include the summary of statement of the witnesses. From the way the section is couched, it may even be necessary to frontload not only the summary of the statement but the actual statement of the witnesses because the statement includes those materials that the prosecution would intend to rely upon during trial, although, it cannot tender it except during cross examination.

(vii) The constitutional requirement has also been construed by the apex court in a number of cases. In **Okoye v. COP** (2015) 17 NWLR (Pt. 1488) 276 at 300, the defendant was charged for a summary offence before a Magistrate court, and he applied that the prosecution supplies him the material it intends to rely on and same was not made available. The Supreme Court held that;

***“The moment an accused person is facing a charge, his personal liberty is at stake and before that liberty is taken away, he must be afforded every opportunity to defend himself. It is immaterial whether he elects to be tried summarily or on information, once he becomes aware that he has a charge hanging over his neck for an infraction of the law and makes a request either orally or in writing for any facilities to prepare for his defence, the Court must accede to his request and the prosecution has to comply… If order 3 rules 2(1) of the High Court of Anambra State (Civil Procedure) Rules, 2006 provides for front-loading of documents to enable a defendant know what the claim against him entails so as to enable him prepare for his defence, how much more is it expected of the prosecution to provide the necessary facilities to a person accused of an offence to enable him prepare his defence”.***

(viii) Any order made by the court upon the request, either orally or in writing by the defendant for facilities to prepare for his defence, is an order made in case management or direction pursuant to Section 36 (6) (b) of the 1999 Constitution quoted above. However. The defendant or accused person has a duty to apply to the Court for the prosecution to supply additional documents to him. It is not sufficient to serve notice to produce on the prosecution, the defendant must go further to apply to Court for the Order of production. In the case of **Nweke v. State** (2017)15 NWLR (Pt. 1587) 120 at 140 – 141 Galinje JSC said:

**“*If the Appellant strongly wanted some facilities which where not made available to him, he must have applied formally to the trial court for an order compelling the Respondent to make available those facilities which he require for his defence. In the passage which I reproduce elsewhere in this judgment in the case of Ebele Okoye .v. COP (supra) which learned counsel for the Appellant cited and placed much reliance upon, this court clearly stated that any request for the facilities necessary for the preparation for the defence of an accused must be made to the court”.***

(ix) In **Madukaegbu v. State** (2018) 10 NWLR (Pt. 1626) 26 at 46 – 47 and 52 – 54, the Supreme Court reviewed the decisions on **Okoye v. COP** (supra) and, **Nweke v. State** (supra) and distinguished the two cases and held that an accused who strongly wants facilities which were not made available to him would have to apply formally to the trial court for an order compelling the prosecution to make available those facilities, which he require for his defence. Once he becomes aware that he has a charge hanging over his neck for an infraction of the law and makes a request either orally or in writing for any facilities to prepare for his defence, the court must accede to the request and the prosecution has to comply. The request should be made to the court and not to the prosecution

(x) Proof of evidence is to criminal trial what pleadings is to civil trial. However, proof of evidence in criminal trial does not have to contain every bit of evidence that the prosecution requires as long as it contains relevant and sufficient facts to sustain the case of the prosecution. See **Ukanacho v. Attorney General, Imo State** (2012) LPELR-15355 CA, **Amadi v. Attorney General, Imo State** (2012) LPELR-15347 CA.

**2. Discovery (Disclosure) of documents**

(i) In a criminal case, the term “**discovery**” or disclosure refers to the obligation on parties to disclose to each other certain information concerning the case.

(ii) It is also the process of **obtaining evidence or material in possession of the adversary.**

**(iii) The procedure for discovery is a potent instrument by which both the prosecution and the defendant can obtain and tender documents that are in possession of either of them. The defence counsel may require the prosecution to make available certain materials or facts that are within the prosecution’s possession which the defence has no access to.**

**(iv)** The prosecution must disclose to the defendant the material or evidence which it will rely on at the trial by serving the proof of evidence as argued earlier.

(v) Other material pertaining to the case which the prosecution does not intend to use may be requested for through the process of discovery or disclosure of documents. It generally relates to the service by the prosecution on the defence of unused material.

(vi) The extent to which the defence may be required to provide information or material to the prosecution is considerably limited to the case upon which they will rely at the trial.

(vii) Thus, it is only the material that defendant intends to use that the prosecution can use the process of discovery or disclosure to obtain from the defendant.

(viii) The reason for this disparity between the obligation which falls on the prosecution and the defence is the unequal resources at the disposal of the state or the prosecution on one hand and the individual charged as a defendant on the other hand.

**(ix)** The procedure in the United Kingdom and the United States both of which practice adversarial system of criminal justice like Nigeria, is that before the commencement of trial, there is usually a stage of discovery. See sections 1 – 21 of the Criminal Procedure and Investigation Act, 1996 of the United Kingdom. It is at this stage of discovery that both the prosecution and the defence will engage in the analysis of the proof of evidence. It is at this stage that the defence may request for information or material in possession of the prosecution which are not contained in the proof of evidence and that may help the defendant in the presentation of his defence. It is at this stage that the prosecution must disclose to the defendant any material requested by the defence which the prosecution does not intend to use i.e., the unused material.

(x) Discovery is one of the major areas of active case management that is intended to accelerate the expeditious trial of a criminal case. It flags the need for preparation by all concerned. It emphasises the desirability of the presence of the respective counsel to make decision and assist the court to the maximum extent. Issues are identified, documents not challenged are also identified and agreed upon by the parties and every non-contentious issues are resolved before the commencement of trial and during the period of discovery and disclosure.

(xi) In Nigeria, there are no comprehensive rules of disclosure as in that of the United Kingdom and the United States of America. It is only the head of courts that have made Practice Directions that prescribe rules for disclosure.

(xii) An attempt has been made by the Chief Judge of the Federal High Court to address this issue through the **Federal High Court Practice Directions, 2013** where certain duties are imposed on the Defendant in criminal cases. The duties are as follows:

Duties of the defence to:

i. Specify in writing, the defence being raised

ii. Specify in writing those aspects of the prosecution case which are agreed

iii. Specify in writing those aspects of the prosecution case which is in dispute

iv. Specify in writing which witnesses are required for cross examination, and why.

(xiv) Similarly, the Practice Direction issued by the Chief Judge of the FCT High Court contains provisions relating to frontloading of materials and disclosure by the defendant. Order 5, Rule 4 provides that “**after the service on the defendant of the materials that the prosecution intends to rely on, the defendant shall indicate on the case management form what aspect of the prosecution’s case he agrees or disagrees and may elect to disclose the defence he intends to raise at the trial**”

The word “may elect” used in that order seems to have given discretion to the defendant not to disclose the defence he intends to raise at the trial. It should not be at the discretion of the defendant to decide whether or not to disclose his defence to the prosecution.

The Practice Direction of the High Court of the Federal Capital Territory, 2017 by its Order 5 made elaborate provisions for disclosure. The Order states thus:

***“(1) In the High Court, both the prosecution and the defence shall disclose to each other and the court, relevant materials and/or information within their knowledge or in their possession or accessible to them pertaining to the case, that will assist the court***

***a. to identify the issues to be decided upon in the course of the trial and/or***

***b. to narrow down the issues that are in dispute and/or***

***c. to ensure a speedy and fair hearing for the defendant, victim, witnesses and other parties***

***(2) The court shall encourage the prosecution and the defence to agree on non-contentious evidence.”***

(xv) Under **sections 5 and 6 of the Criminal Procedure and Investigation Act, 1996**, of the United Kingdom, the defendant is required to give the prosecution a Defence Statement and the content of the defence statement are prescribed by **section 6A of the Criminal Procedure and Investigation Act, 1996 (as amended)**. They are:

a. The defendant must file a defence statement or case statement

b. The defence written statement must set out the nature of the defence, including any particular defence on which the defendant intends to rely

c. Indicates the matters or fact on which the defendant takes or join issues with the prosecution and why he takes such issue

d. Set out particulars of the matters or fact on which the defendant intends to rely for the purpose of his defence

e. Indicate the point of law, (including any point as to the admissibility of evidence) that the defendant wishes to take at his trial and any legal authority on which the defendant intend to rely for this purpose

f. In the case of an alibi defence, provides the name, address and date of birth of any alibi witness or as many of these details as are known to the defendant.

(xvi) Under **section 6 (c) of the Criminal Procedure and Investigation Act, 1996**, the defendant must give a Defence Witness notice and he is required to serve the Court and the prosecutor with the defence or case statement. In **Archbold Criminal Pleading, Evidence and Practice, 2019** at paragraph 4.147, the learned author commented on the status of the prosecution and the defence case statement thus:

***“The prosecution case statement is a document with no evidential value. It does not limit the prosecution in the evidence they call; and it can only be used for comment subject to the restriction set out in section 10 of the 1987 Act (section 34 of the 1996 Act); R.v. Mayhew (1992) Crim. L.R. 313 CA, where Taylor L.J. in giving judgment of the Court stated:***

***It would be undesirable for case statement to be put as a matter of course before juries as if they were projections of the indictment or particulars thereof. The object of ordering a case statement is to inform the opposing party of the case that it is intended to be put forward so as to facilitate preparation for trial and avoid surprise. If there is a significant departure, then subject to the Judge’s discretion under section 10, the jury may be appraised of it. But to provide the jury with pleadings and to raise pleading arguments would tend to confusion and diversion from the virtual issues.”***

(xvii) As can be seen from the decision of **R. v. Mayhew**, the object of requiring the defendant to disclose his case statement and also the duty of the prosecution to frontload are to facilitate preparation for trial by the prosecution and to avoid springing surprises on the prosecution by the defendant and undue delay in the criminal justice system. The defence counsel should allow the practice direction of the learned Chief Judge of the Federal High Court to stand and I suggest that the Administration of Criminal Justice Act should contain similar provisions as in the **Criminal Procedure and Investigation Act, 1996**.

(xviii) The unused materials are the materials available to the prosecution which it might think are not relevant to establish its own case or that may be unfavourable to its case. The unused material can be accessed through the process of discovery.

(xix) The process of discovery and disclosure can be used by the defence for the purpose of:

i. Discovering all the statements of potential witnesses who made statements during investigation and whose statements were not frontloaded or disclosed in the proof of evidence.

ii. Obtaining materials that are exculpatory in nature which naturally would not support the case of the prosecution but would advance the case of the defence.

iii. The unused materials are usually unfavourable to the prosecution but helpful to the defence.

iv. Narrowing down and agreeing upon non-contentious evidence and documents.

v. It may also narrow down the issues that are in contention.

(xx) It is unfortunate that the defence counsel have wrong impressions about the process of disclosure or discovery because it also places some obligations on the defendant. However, if the procedure is properly utilised, it may expedite the criminal trial and the defendant may recover exculpatory evidence that the prosecution may not naturally use for its case.

**Subpoena and witness summons**

**(i)** ASubpoena is a writ or summons issued in an action or a suit requiring the person to whom it is directed to be present at a specific place and time, and for a specified purpose under a penalty for non-attendance. See the case of **Famakinwa v Unibadan** (1992) 7 NWLR (pt 255) 600 at 626 paragraphs D-E.

(ii) It is an order of court compelling the attendance of a witness who may otherwise not be available to testify, produce documents or produce documents and testify.

(iii) Subpoena is the most frequently adopted means of securing the presence or attendance of a witness in trial before the High Court. See **Police v. James** (1949) 19 NLR 66, **Igwenagu v. IGP** (1959) NRNLR 80 and **Queen v. Onyediye** (1961) All NLR 669.

(iv) A magistrate issues witness summons while judge issues a subpoena and witness summons.

(v) In the case of **Police v. James** (1949) 19 NLR 66, it was held that a Magistrate Court has no power to issue a subpoena. Failure to obey the subpoena amounts to contempt of court and such disobedient individual may be liable to committal to prison.

(vi) **Types of subpoenas –** There are two varieties of separate subpoena; subpoena ad *testificandum* is used to compel a witness to attend and give evidence and subpoena *duces tecum* is used to order a person to appear and to bring specified documents or records. However, in the case of **Odu-Alabe v. Ologunebi** (2015) LPELR - 25746 (CA), the Court of Appeal held that there are three types when it held that:

***“There are three kinds of subpoena (a)Subpoena ad testificandum: this has been defined as an important writ of court or tribunal. See IBRAHIM v. OGUNKEYE & ORS (2010) LPELR - 4456. Subpoena ad testificandum orders a witness to appear to give oral evidence while (b)Subpoena duces tecum is merely to appear and bring specified documents or records while (c)Subpoena duces tecum ad testificandum is a jumbo subpoena which combines two conditions or characteristics - appear, bring specific documents and give testimony”.***

(vii) Flowing from the above, it is a hornbook law that there are two distinct forms of subpoena, the duces tecum, which is used for purpose of having a witness produce a document and the ad testificandum which is used for purpose of having a witness adduce viva voce evidence.

(viii) However, there is also the hybrid or amalgam of the subpoenas, the subpoena ad testificandum et duces tecum, which is employed to have a witness adduced viva voce evidence and also produce documents. The Supreme Court in explaining the hybrid subpoena in **Dickson v. Sylva** (2017) 18 NWLR (Pt.1567) 167 at 192, held thus;

***“In legal parlance, the above subpoena (subpoena* et duces tecum ad testificandum) is a process to cause a witness to appear and tender a document and testify. This process commands him to lay aside all pretences and excuses and appear before a court therein named, at a time therein mentioned to bring with him and produce to the court, books, papers, in his hands tender to elucidate the matter in issue”.**

(ix) **The legal effect of a subpoena duces tecum is different from a subpoena ad testificandum –** Generally, by Section 205 of the Evidence Act, oral evidence given in any proceeding must be given on oath or affirmation. However, by Section 218 of the Evidence Act, a party may be summoned to produce a document (subpoena duces tecum) without being summoned to give evidence, and by Section 219 of the Evidence Act, a person summoned to produce a document does not become a witness by the mere fact that he produces it and he cannot be cross-examined unless and until he is called as a witness.

(x) So, by the provisions of the law, a witness who is on a subpoena to produce document need not be sworn as a witness, but it suffices if he produces the document required. See **Flourmills of Nigeria Plc & Anor v. Nigeria Customs Service Board & Ors** (2016) LPELR - 41256 (CA)**, Haske v. Magaji (2008) LPELR - 8330 1 at 17 and Lagos v. Jibrin (2008) LPELR - 4419 1 at 19-20.** In the case **of Nasir & Anor v. EFCC & Anor** (2020) LPELR - 51427 (CA), it was held:

***“A person subpoenaed to produce need not enter the witness box as his duty is merely to produce to the court the documents named in the subpoena. For whatever purpose, the said CW2 was sworn before telling the Court that he was subpoenaed to produce the documents, which he brought to court. He was also made to file a written statement on oath contrary to settled position of the law on such persons appearing on subpoena to produce. He was not examined in chief and therefore the need to cross-examine cannot arise. Whatever the subpoenaed person said to Court was between himself and the Court. The claimant also cannot examine him concerning any other thing outside the tendering of the documents. If, however, he is converted to a full witness then, the normal course of dealing with such class of witness must be observed ...”***

(xi) However**,** a witness brought via subpoena ad testificandum would have been on oath and cross-examined by the adversary of the party calling him. A person subpoenaed to produce a document is not a witness liable to be cross-examined once it is subpoena duces tecum that was served on him. He will however be liable to be cross-examined once the party calling him fails to limit himself to the document the witness is asked to produce before the court. Once the witness enters into the witness box and is sworn or affirmed before the court before producing the document, he has become a witness for all purposes and is liable to be cross examined. See **Onwuamaka v. Okolie** (1955-56) WRNLR 1959, **Famakinwa v. University of Ibadan** (1992) 7 NWLR (Pt.255) 608 and **Akano v. Nigerian Army** (2000) 14 NWLR (Pt.687) 313 at 328-329.

(xii) However, until a person merely ordered to produce document is made a witness by being sworn or affirmed, he cannot be cross-examined by the opposite side. For a person summoned to produce a document does not just for that reason become a witness and he does not need to be sworn and is not liable to be cross-examined. See **Oguntayo v. Adelaja** (2009) All FWLR (Pt.495) 1626 and **Anatogu v. Iweka** (1995) 8 NWLR (Pt.415) 547.

**4. Extra-judicial statements made by the witnesses**

i. Definition of extra-judicial statement – An Extra Judicial Statements is a statement written or made outside the court by a potential witness or a defendant or a suspect. See **Ajudua v FRN** (2017) 2 NWLR (Pt. 1548) 1 at 13.

ii. Inadmissibility of extra-judicial statement but only admissible for cross-examination – In **Okeke v. State** (2018) All FWLR (Pt. 939) 2089 at 2111, Ogunwunmiju JCA (as he then was) said: ***“The extra judicial statement of a witness in a criminal trial is inadmissible as evidence for either side. The admissible evidence is the evidence on oath in open Court by the witness which is subject to cross examination by the adverse party. The only time when an extra judicial statement of a witness is admissible is where a party seeks to use it to contradict the evidence of a witness already given on oath. The defence counsel will ask for the statement and give reason to the court for doing so. On production by the prosecution, the defence counsel must seek to tender it and refer to specific passages which contradict the evidence of the witness. After it has been admitted in evidence, the specific portions of the statement of the witness made to the police must be shown to the witness to read out or counsel may read it out to the witness the witness must be given an opportunity to explain the contradiction. Failure by the witness the contradiction in the evidence on oath of the witness and the contents of extra-judicial statements can then be used to make an issue during defence counsel’s address. See sections 232 and 233 of the Evidence Act, 2011. The court is not allowed to pick and choose between the two statements. See State v. Fatai Azeez (2008) 14 NWLR (Pt. 1108) 439, Igenti v. State (2013) LPELR-2086(CA).”***

iii. It is the duty of the defence’s counsel during cross-examination to seek to tender the extra-judicial statement of the prosecution witnesses where there are material contradictions which may be used to discredit the witnesses. In **Daniel Peter v. The State** (2013) LPELR-20302(CA) pg. 18 paras. A – D, the Defence’s Counsel castigated the prosecution for not tendering the extra judicial statement at the trial, the Court of Appeal held that:

***“We must understand that the argument of learned Appellant’s counsel is essentially that it is the duty of the prosecution to tender extra judicial statements made by its witnesses as exhibits during the trial. It is my humble view that, that is not the position of the law. The position of the law is that before the court can admit and make use of an extra judicial statement made by the prosecution witnesses, the witnesses must have been confronted with the statement under cross examination. The only use the statement of a prosecution witness who gave evidence in court can be made of is for discrediting him in cross- examination by the defence.”***

See also **Igenti v. State** (2013) LPELR–20861(CA), **Okechukwu Chukwu v. The State** (2010) LPELR -15360(CA), **Ojo v FRN** (2008) 11 NWLR (Pt. 1099).

iv. The defence’s right to use the extra judicial statement is not automatic but upon fulfilling the following procedure as restated in **Igenti v. State** (2013) LPELR – 20861(CA) as follows:

***“Let me restate the inconsistency rule. Where a witness in a criminal trial made a prior extrajudicial statement materially inconsistent with his evidence on oath, the trial judge, not being permitted to pick and choose which evidence to believe, is obliged to disbelieve both and put no probative value on them. For the rule to be activated by the defence, during cross examination of the witness, the defence counsel is obliged to demand from the prosecution a copy of the said extrajudicial statement of the witness which ordinarily should be in the prosecution’s file and part of the proofs of evidence. The portion of the extra judicial statement materially different from the witness’s evidence on oath would be put to him to give him opportunity to explain. Thereafter the extrajudicial statement should be tendered and admitted as evidence. The point would then be made an issue during address by defence counsel.”***

v. Therefore, the procedure for tendering extra-judicial statement by the defence for the purpose of contradiction is:

a. The defendant’s counsel during cross-examination will remind the defendant that he had made an extra-judicial statement.

b. He will further be asked that he has made statements touching on the very issue the defence intends to contradict him. If the answer is positive, he will take further steps.

c. Draw his attention to the portion of the previous statement made by him.

d. The defence counsel will ask for the original statement from the prosecution for the purpose of contradicting the witness on the statement.

e. Upon production by the Prosecution, the defence counsel must seek to tender it and refer to specific passages which contradict the evidence of the witness.

f. After it has been admitted in evidence, the specific portions of the statement of the witness made to the Police must be shown to the witness to read out or counsel may read it out to the witness.

g. The counsel must draw the attention of the witness to the contradictory statement made in the extra-judicial statement and the oral statement made before the court by him.

i. The witness must be given an opportunity to explain the contradiction.

vi. Failure by the witness to explain the contradiction in the evidence on oath of the witness and the contents of the extra judicial statement can then be used to make an issue during defence counsel's address. See S. 232 and 233 of the Evidence Act 2011. The Court is not allowed to pick and choose between the two statements. See **Afam Okeke v. State** (2016) LPELR-40024 (CA), **Olayode v. State** (2018) All FWLR (Pt. 941) 260 at 289 – 290.

vii. The law forbids tendering a witness’s previous statement in a proceeding, be it civil or criminal, during the witness’s evidence-in-chief. Such statement can only be tendered and put in evidence by the defence or opponent of that witness on application during cross-examination to contradict the witness who made them. See **Agbeyin v. State** (1967) NMLR 129, **Ifenedo v. State** (1967) NMLR 200, **R. v. Joshua** (1964) 3 NSCC 1, **Layonu v. State** (1967) NMLR 411 at 413, **Hausa v. The State** (1994) 6 NWLR (Pt. 350) 281 at 304, **Olayode v. State** (2018) All FWLR (Pt. 941) 260 at 289 – 290.

viii. The Supreme Court in the recent case of **State v. Nwafor** (2021) 18 NWLR (Pt. 1809) 533 at 563 – 564 have changed the law as it would appear that the prosecution could tender extra-judicial statements made by the prosecution’s witnesses or the defendant’s own witnesses while leading them in-chief. This is quite a departure from a long line of authorities of all the superior courts in Nigeria. Agim JSC held thus: ***“Usually, the prosecution does not tender in evidence the extra-judicial statement of its witness made at the pretrial stage as part of its case. the witness having testified, the prosecution may decide not to tender his or her extra-judicial statement. The prosecution may decide to tender it as evidence to show the consistency in the testimony of the witness or to show that it is not an afterthought in accordance with section 237 of the Evidence Act, 2011 or to contradict its witness, with that statement after causing the court to declare him a hostile witness. The common practice is that the defence introduces the said written statement of the prosecution’s witness for the purpose of contradicting him or her. What is prevalent in criminal trial is the use of such previous written statement to contradict the prosecution’s witness that made it in accordance with section 232 of the Evidence Act. So the argument of learned counsel for the appellant that the previous written statement of a prosecution witness cannot be admitted or used except for the purpose of contradicting him or her is not correct. It can be used to show consistency in the testimony of the witness in accordance with section 237 of the Evidence Act.”***

ix. No doubt, section 237 of the Evidence Act has created an exception that extra-judicial statement of a witness is inadmissible except for the purpose of contradicting him. The prosecution can tender the extra-judicial statements of its witnesses to show consistency in the testimonies of such witnesses. Also, the defendant can tender the extra-judicial statements of his own witness in order to show consistency in the testimony of his witness in court. and the extra-judicial statement.

**5. Computer generated documents**

(i) Prior to the Evidence Act 2011, the various laws on evidence from 1958 to 2011, were silent on the admissibility of electronic evidence. The Evidence Act, 2011 brought about a new paradigm.

(ii) The Act acknowledges and recognizes the existence of electronic evidence.

(iii) Section 84 of the Act addresses a broad spectrum of legal issues relating to admissibility of electronic evidence. Specifically, section 84 (1) provides for admissibility of *“a statement contained in a document produced by a computer”*. Subsection (2) enumerates four conditions that must be satisfied before such a statement becomes admissible; while section 84 (4) requires that a certificate be signed to authenticate the document and the computer that produced it by a person occupying a responsible position in relation to any matter mentioned in sub-section (2).

(iv) In the case **Federal Republic of Nigeria v. Olutola Ojo & Anor (2018) LPELR**-45541(CA) ((Pp. 21-23, para. E-E)) it was held that:

***"Heavy weather has being made on Section 84(2) of the Evidence Act in respect of a certificate issued by relevant person who did generate computer production. … The correct interpretation to be given to this Section 84 of the Evidence Act where electronically generated document is sought to be demonstrated is that such electronically generated evidence must be certified and must comply with preconditions laid down in Section 84(2). See DICKSON v CHIEF TIMIPRE MARILIN SYLVA & ORS (2016) LPELR - 41257 (SC); KUBOR v DICKSON (2013) ALL FWLR (PT.676) 392 at 429 Therefore, in the light of the above, Exhibit Q7 & R not having been backed up is inadmissible. The purpose of a certificate is to authenticate the means of production. They are expunged from the records."***

(v) The whole essence of the section is to ensure that only authentic documents produced by computers are admitted in court proceedings.

(vi) Authentication here simply means, the party offering electronic evidence must adduce sufficient evidence to support a finding that the document in question is what it purports to be. For evidence to be authentic it must be what it claims to be. Under section 84, the proponent of electronically-generated evidence is to establish two basic things: (a) the functionality of the computer that produced the document and (b) the authenticity of the information contained in the document i.e., that the information has not changed or been altered.

**PROFESSIONAL DUTY OF DEFENCE COUNSEL**

Rules 37 & 38 of the Rules of Professional Conduct for Legal Practitioners prescribes basic conduct for a lawyer engaged to defend a defendant in a criminal matter. The basic or primary duty of a defence counsel under the Rules are;

1. Defence’s counsel shall exert himself by all fair and honourable means to prove before the court all matters that are necessary in the interest of justice.

2. He shall not stand or offer to stand bail for a person for whom he or a person in his law firm is appearing.

3. In murder trial, the defence’s counsel shall be deemed to have given a solemn undertaking subject to any sufficient unforeseen circumstances that he would personally conduct the defence provided his fee is paid.

4. Where the defendant discloses facts which clearly and credibly show his guilt, the lawyer shall not present any evidence inconsistent with those facts and shall not offer any testimony which he knows to be false.

5. A lawyer assigned to defend an indigent defendant shall not withdraw from the case except for substantial reason but shall exert his best effort in the defence of the accused.

6. Representing his client competently. (See Rule 16 of the Rules of Professional Conduct for Legal Practitioners).

7. Represent his client within the bounds of the law as prescribed under Rule 15 of the Rules of Professional Conduct for Legal Practitioners. For example;

i. Advice to the client which he reasonably ought to know will amount to a breach of the law or bring the court into a disrepute.

ii. Conduct a defence, delay trial or take over action that would serve merely to harass or maliciously injure another.

iii. Fail to or neglect to inform his client legal option available to him.

iv. Knowingly use perjured or false evidence.

v. Knowingly make a false statement of law or fact

vi. Participate in the creation or preservation of evidence when he knows or ought reasonably to have known that the evidence is false;

vii. Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent; or

viii. Knowingly engage in other illegal conduct or conducts contrary to any of the rules.

**4.00 CONCLUSION**

4.01 With the above observations and comments, it is hoped that the issues raised herein will generate more discussions and benefit all of us in the practice of law. Once again, I must commend the NBA Institute of Continuing Legal Education (NBA – ICLE) Course Session for giving me the opportunity to relay my view and thank you for listening.

Thank you.

**ROTIMI JACOBS, SAN.**

GLORIOUS CHAMBERS,

50, QUEEN STREET,

ALAGOMEJI,

YABA, LAGOS.

08038301221

rotimijacobs\_co@yahoo.com