IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON FRIDAY THE 16TH DAY OF MARCH, 2018
BEFORE THE HONOURABLE
JUSTICE M. B. IDRIS
JUDGE

SUIT NO.FHC/L/390C/16

BETWEEN:
FEDERAL REPUBLIC OF NIGERIA ..... COMPLAINANT

AND

ONYIRIOHA VALENTINE NDUBUISI..... DEFENDANT

JUDGMENT

On 14th December, 2016, the Defendant was arraigned before this Court on an amended Charge dated 13th December, 2016 for offences bordering on conspiracy, receipt and retention of possession of eleven (11) Automated Teller Machine (ATM) cards issued by Union Bank Plc in the names of different bank customers without the consent of the cardholders which offences are contrary to Sections 27(1)(b) and 34 of the Cybercrime (Prohibition Prevention etc) Act, 2015.

The amended charge is reproduced hereunder as follows:-

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"AMENDED CHARGE

COUNT 1

That you Onyirioha Valentine Ndubuisi, Madubuchi Oluchukwu (at large) and Udemezue Samuel (at large) on or about the 11th day of February, 2016 at Lagos within the jurisdiction of this Honourable Court, conspired to retain possession of Automated Teller Machine (ATM) cards issued by Union Bank Plc to different cardholders and thereby committed an offence contrary to Section 27(1)(b) and punishable under Section 34 of the Cybercrime (Prohibition Prevention Etc) Act, 2015.

COUNT 2

That you Onyirioha Valentine Ndubuisi, Madubuchi Oluchukwu (at large) and Udemezue Samuel (at large) on or about the 11th day of February, 2016 at Murtala Muhammed International Airport, Lagos, within the jurisdiction of this Court, with intent to defraud, received and retained possession of eleven Automated Teller

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Machine (ATM) cards issued by Union Bank Plc in the names of: (i), Udemezue Ijeoma; (ii) Udemezue Nkiruka; (iii) Udemezue Samuel; (iv) Duru Rosemary Ugochi; (v) Ibeawuchi Raphael; (vi) Maduabuchi Oluchukwu; [vii] Obi Onyebuchi Charls; (viii] Onuegbu Deborah; (ix) Ehirim Casmir Abuchi; (x) Ekuma Daniel Nnamdi and (xi) Echekam Arinze; which you retained without the consent of the cardholders' and thereby committed an offence contrary to and punishable under Section 34 of the Cybercrime (Prohibition Prevention Etc) Act, 2015."

The Defendant pleaded not guilty to the Charge and the case proceeded to trial with the Prosecution calling three (3) witnesses in proof of its case.

The summary of the Prosecution's case at the trial was that on or about the 11th of February, 2016, at the Murtala Muhammed International Airport, Lagos, the Defendant was arrested by Officers and Men of the National Drug Law Enforcement Agency (NDLEA) for being in

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possession of eleven (11) Automated Teller Machine (ATM cards issued to different persons during his outbound clearance for travel to Hong Kong. The persons whose names appeared on the ATM cards are: Udemezue Ijeoma, Udemezue Nkiruka, Udemezue Samuel, Duru Rosemary Ugochi, Ibeawuchi Raphael, Maduabuchi Oluchukwu, Obi Onyebuchi Charls, Onuegbu Deborah, Ehirim Casmir Abuchi, Ekuma Daniel Nnamdi and Echekam Arinze without the consent of the cardholders.

In his evidence, the Defendant stated that he works in a certain Chinese firm and does business of exporting goods to Nigeria to any person that makes a request for same. He said that most times he loses money as Nigerians hardly pay for same. That on his last trip to Nigeria, some of his friends and relatives wanted him to always send goods to him and they all mutually agreed that each of them should open accounts and hand over the ATM cards to him wherein he would withdraw money and buy any good on instruction by the person as they cannot send money to his account because he would not be able to withdraw a certain maximum because of CBN Rules. He further stated that on his way

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back to Hongkong, his residence, he was arrested by NDLEA for possessing eleven ATM cards and later transferred to EFCC.

Under cross examination, on whether he procured some fake persons to claim ownership of the cards, he denied to have brought any person or persons as owner/owners of the cards but stated that one of the card owners which is one Mr. Ehirim informed him that the EFCC contacted him as to the ownership of the cards and as to whether he voluntarily gave out his card and he came to EFCC and gave his statement.

At the conclusion of trial, parties filed final written addresses which were adopted at the address stage.

In the final written address filed by the Defendant, it was argued that the prosecution failed to prove the elements of the offences charged. That there was no proof that the Defendant agreed with anyone to commit an offence neither was there any corroboration whatsoever.

It was further argued that the prosecution failed to prove that the Defendant retained cards without the consent of the owners or knowing that they were stolen or products of theft. The Court was therefore urged to discharge and acquit the Defendant.

These authorities were relied on:-

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1. SECTION 36(5) OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA AS AMENDED,
2. SECTION 304 OF THE ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015
3. SECTION 27(1)(b) OF THE CYBERCRIME (PROHIBITION PREVENTION ETC) ACT, 2015
4. SECTION 34 OF THE CYBERCRIME (PROHIBITION PREVENTION ETC) ACT, 2015
5. AREH VS. COP (1959) W.N.L.R 230
6. ONAH VS. OKENWA & ORS (2010) LPELR-4781 (CA),
7. FABIAN NWATURUOCHA VS. THE STATE (2011) LPELR-8119 (SC),
8. OMOTOLA VS. STATE (2009) 2 FWLR (PT. 468) PG 3456.
9. ACHIBONG VS. STATE (2006) 14 NWLR (PT. 1000) PG 359 RATIO 11
10. OKORO VS. STATE (1988) 5 NWLR (PT. 94) PP 32 - 33, PARAS. G-A

In the written address filed by the Prosecution, the Court was urged to convict the Defendant on these grounds that:-

(a) During his testimony in chief while

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defending himself, the Defendant admitted the allegation against him. He admitted being in possession of the ATM Cards. He admitted under cross examination that the cards were not issued to him. He also admitted being in possession of the cards because he wanted to circumvent the provisions of existing Laws on money laundering and cash movement across borders. Indeed, the law is settled that a free and voluntary confession of guilt made by a Defendant, if it is direct, positive and proved is sufficient to warrant the conviction of a Defendant without any corroborative evidence as long as the Court is satisfied of the truth of the confession. See **JOSEPH IDOWU VS. THE STATE (2000) 7 SC (PT II) 50; AKPAN VS. STATE (1991) 5 SC 1.**

(b) the Defendant made statements to the effect that he was in possession of the eleven (11) ATM cards because he wanted to beat money laundering provisions and because of Central Bank

of Nigeria restriction policy on money movement and funds transfers, is sufficient for the Court to conclude that the Defendant knew what he was doing and therefore knew the consequences of his actions. See **AFOLABI VS. STATE (2016) LPELR-40300 (SC).**

(c) The mere fact that the Defendant refused to produce the persons issued with the ATM cards found in his possession lends credence to the fact that the eleven (11) ATM cards belonging to different persons were retained by him without the consent of the cardholders and such would ordinarily constitute card theft. To further buttress this fact, the evidence before this Court is to the effect that the Defendant procured the services of impersonators to make statements that they were the owners of two of the eleven ATM cards; a fact which investigation by the EFCC proved was false and misleading.

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(d) The testimonies of PW1 and PW2 which were not controverted during cross examination are corroborative evidence that prove the truthfulness and correctness of Defendant's statement both to EFCC and NDLEA and which statements were admitted in evidence before this Court as exhibits A2, B, B1 and B2 respectively.

I have read the entire processes filed, and I have carefully reviewed and evaluated the evidence of the parties, and Exhibits A, A1- A6, B- B2 tendered by the Prosecution through its witnesses.

The question that arises for the determination of the Court is whether the Prosecution has proved the essential elements necessary to ground a conviction for the offences charged.

In **ONAGORUWA VS. STATE (1993) 7 NWLR (PT 303) 49 AT 85 PARAGRAPHS C-D,** the essential ingredients of a case was defined per Tobi JCA (as he then was) as:

"An element without which the offence cannot be sustained in law. It is an

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indispensable and important element of the offence."

Initially, the Defendant was charged along with two other persons but the Charge was subsequently amended to reflect that these persons were at large. They are said to have conspired to retain possession of eleven (11) ATM cards issued by Union Bank Plc to different cardholders contrary to Section 27(1)(b) of the Cyber Crimes Act, 2015 which provides as follows:

> *"A person who -*
> *Aid, abets, conspires, counsels or procures another person to commit any offence under this Act, commits an offence and is liable on conviction to the punishment provided for the principal offence under this Act. "*

The Defendant was also charged under Section 34 of the same Act which provides as follows:

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"A person, other than the issuer, who receives and retains possession of two or more cards issued in the name or names of different cardholders, which cards he knows were taken or retained under circumstances which constitute a card theft, commits an offence and is liable on summary conviction to imprisonment for a term of 3 years or to a fine of N1,000,000.00 and is further liable to repay, in monetary terms, the value of loss sustained by the cardholder or forfeit the assets or goods acquired with the funds from the account of the cardholder."

The definition of 'Card' is as contained in Section 58 of the Cybercrime Act to mean: a bank card, credit card, or payment card. While it defines 'Cardholder' to mean the person named on the face of a bank card, credit card or payment card to whom or whose benefit such a card is issued by an issuer.

The essential ingredients which the Prosecution needs to prove to secure a

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conviction against the Defendant in this Charge include:

(a) That the Defendant was in possession of eleven (11) ATM cards issued to different cardholders by Union Bank Plc.

(b) That the ATM cards were not issued in the name of the Defendant.

(c) That the cards were retained by the Defendant in circumstances that would constitute card theft.

(d) That the Defendant intended to use the cards to commit fraud or circumvent the provisions of existing laws

The burden of proof in criminal trials is on the prosecution. This burden follows the presumption of innocence in favour of a Defendant. This is provided in Section 36(5) of the Nigerian 1999 Constitution (as amended).

This section puts the burden of proving the existence of circumstances bringing the offence with which the Defendant is charged within any exception or exemption or qualification on the Defendant or the defence of insanity or intoxication.

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The section provides *inter alia* that any Defendant charged with a criminal offence shall be presumed to be innocent until he is proven guilty.

> Section 135(2) of the Evidence Act provides that *"the burden of proving that any person has been guilty of a crime or wrongful act is subject to Section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action."*

A similar provision is made in Article 6 of the European Commission on Human Rights.

And the person who asserts in this case is the Prosecution. Unlike in civil cases where the burden of proof may be on the Plaintiff or Defendant depending on the outcome of the pleadings of the parties, but in a criminal case, the burden is always fixed on the Prosecution to prove the guilt of the Defendant beyond reasonable doubt, as the Defendant is presumed to be innocent. It is never the law that the Defendant should prove his innocence, as there is no such burden on him. This burden on the Prosecution could be illustrated with the case of **BELLO VS. STATE (2007) 10 NWLR (PT. 1043) 564** where the appellant

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was arraigned on a three-count charge of conspiracy and armed robbery. The appellant was alleged to have robbed some persons at the Ikoku Market, Abeokuta in company of two other persons at large. The appellant on his part alleged that he was not at the scene of the crimes and testified that he was on a motorbike when someone cut the strap of his bag and the knife also sliced him in the abdomen, he fell to the ground bleeding, where he was accosted by PW1 and PW2 accusing him of robbing them earlier. The trial court convicted the accused person based on the testimony of PW1, PW2 and PW3, without considering the defence of mistaken identity put up by the Defendant. Holding that the appellant bare denial did not create any reasonable doubt in the case of the prosecution. It then sentenced the appellant to death by hanging. On appeal, the Court of Appeal in allowing the appeal, held that in a criminal trial, an accused person does not have to utter a word. The duty is on the prosecution to prove the charge against the Defendant beyond reasonable doubt. And the prosecution cannot go below proof beyond reasonable doubt to ground the conviction of an accused standing trial in Nigerian Courts, otherwise the constitutional presumption of innocence will be tampered with and breached which is null and void, as it was not for the

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Prosecution, as opposed to where he pleads not guilty thereby putting himself upon his trial and Prosecution to the strictest proof of his guilt beyond reasonable doubt. See **AMACHREE VS. NIGERIAN ARMY (2003) 3 NWLR (PT. 807) 256 AT 387.**

Section 140 of the Nigerian Evidence Act provides that:-

> *When a fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

This section simply implies that if the existence of a particular fact or state of things is within the knowledge of the Defendant of which other persons may not have the privilege of knowing its existence, the burden of proving that fact or state of things if he wishes to rely on it would be on him. After all, it is impossible to force a man to state or give information of what he does not know. For instance, If a person is accused of driving without a drivers' licence, the onus will be on him to prove that he possess drivers licence by producing it. Thus in **RAHMAN VS. COMMISSIONER OF POLICE (1973) NMLR 87**, where the appellant represented to a hotel that he was a pilot of an Airline with which the hotel had arrangement to provide accommodation and

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appellant to adduce evidence to create reasonable doubt in the case of the prosecution. It was for the prosecution to prove its case beyond reasonable doubt against the Defendant.

It should be pointed out here, that the prosecution in trying to discharge this burden needs not prove the guilt of the Defendant beyond every shadow of doubt. See **BAKARE VS. STATE (SUPRA)** or that it must call a host or barage of witnesses. See **AKPA VS. STATE (2008) 14 NWLR (PT.1106) 72 @ 95.** All it needs do is to call witnesses that are capable of adducing material evidence to ground the conviction of the Defendant. See **AJIE VS. STATE (2000) 11 NWLR (PT.678) 2.**

It should be emphasized therefore, that it is settled law that in a criminal trial, the onus remains on the Prosecution to prove or establish the charge against the Defendant(s) beyond reasonable doubt and that the onus or burden of proof never changes or shifts, because it is the policy of the Courts of law to be willing to let ten (10) guilty persons go free, than for one innocent person to be convicted and sentenced in error . See **ABDULLAHI VS. STATE (2008) 5-6 SC (PT. 1) 1 @ 20,** hence the standard is never lowered. However it must be pointed out here that where a Defendant person has admitted guilt, the burden may likely be lesser or lighter on the

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food to its pilots. He was convicted for cheating by impersonation contrary to Section 324 of the Penal Code. The appellant refused making a statement to the police, neither did he testify at the trial. The prosecution on its part did not lead evidence to show that the appellant was not a pilot. The appellant contended on appeal that the duty to establish that the appellant was not a pilot was on the prosecution. The appeal was dismissed on the ground that the fact of the appellant being a pilot was peculiarly within his personal knowledge, hence the burden was on him and not the prosecution. This much was also held in **OTTI VS. POLICE (1956) NMLR 1,** that the burden of proving that the appellant had a valid license as a money lender was on him and not the prosecution.

The point must be made, that for this burden to be on the Defendant, then the existence of that fact or state of affair must be especially within his knowledge; for if the existence of that fact is well known to the Defendant, as well as the Prosecution, then the burden of proof still rests on the Prosecution to prove same beyond reasonable doubt. Thus in **JOSEPH VS. INSPECTOR-GENERAL OF POLICE (1957) NRNLR 170,** where the Defendant was convicted and sentenced for taking part in an unlawful procession without a license contrary to

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Section 3(a) of the Police Ordinance. On appeal, it was held that the onus of the proof of the absence of a valid license was on the prosecution. It was further observed, that since it was the police that was charged with the duty of issuing such a license, the fact of its existence was within their knowledge, hence the burden of proof was on them.

It has been pointed out earlier, that the burden of proving the guilt of the Defendant that he was the person who committed the offence and no one else is on the Prosecution, but the degree of cogency to be satisfied by the Prosecution in order to convince the court that it is indeed the Defendant that committed the offence is what is referred to as standard of proof. And this standard in criminal cases is proof beyond reasonable doubt, and not necessarily proof beyond every shadow of doubts, as some may be fanciful or imaginary.

In **OGBORU VS. IBORI (SUPRA)** the court in explaining what the standard of proof in criminal trials is observed thus:-

> *Beyond reasonable doubt means 'it is proof that precludes every reasonable hypothesis except which it tends to support' and verily it is a proof that is inconsistent with the guilt of*

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the accused person or against whom the allegation has been made. Therefore it can be said that for evidence to attain the height that could bring about a conviction it must exclude beyond reasonable doubt every other hypothesis or conjecture or proposition except that of the guilt of the accused. If the evidence is wobbly, thermative or vague or is compatible with both innocence and guilt, then it cannot be described s being beyond all reasonable doubt.

See also **BUHARI VS. OBASANJO (2005) 23 NSC AT 442 @ 703.**

In proving previous conviction of a Defendant pursuant to Section 248 of the Evidence Act 2011, although the section does not provide for the standard of proof required, the Prosecution is still required to prove same beyond reasonable doubt. The point must be made here that what determines the standard of proof in a peculiar case is the cause of action.

In proof of its case, the Prosecution called three (3) witnesses and tendered Exhibits. For a detailed evaluation of the Charge, it is proper at this point to analyze the ingredients of this offence vis-a-vis the evidence before the

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Court.

Prosecution Witness 1 (PW1) - Jonathan Barde, who is an Operative of the Economic and Financial Crimes Commission, testified that he knows the Defendant as Onyrioha Valentine Ndubuisi. He informed the Court that on 1st of March, 2016, Officers of the National Drug Law Enforcement Agency (NDLEA) handed over the Defendant to the Lagos Zonal Office of the EFCC. He further stated that at the point of handover, the Defendant was handed over with his international passport, eleven (11) Union Bank ATM cards issued in different names, the statements the Defendant made to the NDLEA and e-ticket.

PW1 stated further that he interviewed the Defendant and witnessed the making of the Defendant statement to the EFCC. It was his further testimony that the Defendant admitted that he was not the owner of the ATM cards; that the ATM cards belonged to certain and different persons. That the Defendant admitted being the person who opened the accounts culminating to the issuance of the ATM cards

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with the help of friends and relations. It was PW1's further testimony that the Defendant admitted being in possession of the eleven (11) ATM cards because of Central Bank of Nigeria's restrictions on money movement and transfer policy. He further testified that the Defendant made statement to the EFCC during investigation and wrote in his statement that his intention for opening the accounts and for being in possession of the eleven (11) ATM cards was because he wanted to circumvent the provisions of the Money Laundering Act regarding movement of money from one country to the other.

To corroborate PW1's testimony, during proceedings, PW2, Esther Rwang Nobore, an Operative of the NDLEA testified before the Court on 5th April, 2017. In her testimony, she stated that she knows the Defendant in the course of her official duty. She testified that she was detailed to obtain the statement of the Defendant. Prior to obtaining his statement, the Defendant orally told her that he was intercepted at the Murtala Muhammed International airport, Lagos on 11th February,

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2016 on his way to board flight to China and that he had in his possession at the time of his arrest 11 ATM cards issued by Union Bank Plc to different cardholders.

PW2 also testified that the Defendant stated that he asked his family members to open the accounts because of Government restriction policies regarding transferring funds out of Nigeria. It was PW2's further testimony that in the course of investigation, they found out that the ATM cards were issued by Union Bank Plc. PW2 stated that they demanded for the mandate cards of the persons Union Bank issued the ATM Cards to and when response from Union Bank was analyzed, it was discovered that the ATM card owners were based in Anambra State. It was her further testimony that on discovery of this fact, she told the NDLEA Office at Anambra State to write to the ATM cardholders and they did wrote, but no response was received from the cardholders. Exhibits B, B1 and B2; being the statements the Defendant made to the NDLEA were tendered and admitted in evidence without objection from the defence. PW2 also identified the 11 Union Bank Plc ATM cards and othe

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exhibits transferred to EFCC along with the Defendant.

The Defendant while testifying in his defence on 3rd November, 2017 admitted before the Court that he was arrested by the NDLEA Officials at the Murtala Muhammed International Airport because he had eleven (11) ATM cards in his possession during check-in preparatory to travel out of Nigeria. The Defendant further stated during defence that when asked why he had the ATM cards with him, he responded that they were owned by friends and relations.

Further, Exhibits A2, B, B1 and B2; which are the extra judicial statements the Defendant made to the EFCC and NDLEA during investigation are quite corroborative in the present circumstance. The Defendant was truthful in that he admitted complicity in the offence with which he was charged. The law is that facts admitted need no further proof.

A confession is an admission made out at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. See Section 28 of the Evidence Act. For a statement to amount to a

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confession, first of all a crime must have been committed with which the Defendant is charged or intended to be charged. The Court in **YAKUBU VS. STATE (2012) 12 NWLR [PT.1313] 131 AT 143-144** provided categorically the meaning of confessional statement, the Court stated inter alia that a confessional statement in law, is one in which the person alleged to have made the statement admits unequivocally in the statement that he committed the offence he is charged with. In **ONUNGWA VS. STATE (1976) 2 SC 169**, it was held that the confessional statement made by the Defendant to the police that the Blood stained matchet belonged to him, even before he was charged was still a valid confessional statement, as a confessional statement is one made at any time

A confessional statement could be made at any time and in so far as it is voluntary, it is valid and conviction could be grounded on it. In **NIGERIAN NAVY VS. LAMBERT (2007) 18 NWLR [PT. 1000] 100**, the Supreme Court held inter alia that a confessional statement in order to amount as such must be direct position and not equivocal. Nor can a statement amounting to only an implication in crime be regarded as confession. The confessional statement when made while

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the Defendant was still in the custody of the police is extra- judicial, while it is judicial when made during the proceedings in Court by pleading guilty to a charge or by admitting the commission of the crime in a preliminary inquiring. But our focus here shall be the extra-judicial confession otherwise referred to as informal confession

The law is that whether a confession is made orally or in writing, they are attached the same weight. It is however admissible for a confessional statement to be in writing to avoid legal hurdles in proving an oral confessional statement. It is also important for the Defendant to make the confession himself, a confession made by a counsel on behalf of the Defendant is of no weight. It is like a plea of the Defendant to the charge being made by his counsel on his behalf. See **R. VS. PEPPLE (1949) 12 WACA 441; R. VS. INYANG (1931) 10 NLR 33.** It is irregular and cannot therefore be considered valid. Section 29(1) of the Evidence Act provides that:-

> *In any proceeding, a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.*

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Interestingly, it should be noted that in so far as the confessional statement is relevant to any matter in issue in the proceedings and it is not excluded as being involuntary, then the Court can act on it and it is immaterial however it was obtained. Thus in the case of **IGBINOVIA VS. STATE (1981) NSCC 63,** the appellant was charged with the murder of the deceased, a taxi driver. The appellant had asked the deceased to accompany him so that they could buy petrol. The deceased also in need of petrol followed the appellant. The appellant and three other men were later seen in the car with the deceased, who told his sister that he was going to buy fuel. The deceased never returned home. While in police custody, a police officer was disguised as a dangerous criminal and was planted in the cell to extract information. In their discussion, the appellant confessed killing the deceased. The two lower courts convicted the appellant based on the confessional statement. The appellant further appealed contending that the confessional statement was not admissible due to how it was obtained. The Supreme Court in dismissing the appeal held that the confessional statement was admissible since it is relevant to the issue and was voluntarily made and cannot be rendered inadmissible based on how it was obtained.

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Paradoxically, it should be pointed out here, that whether a confessional statement is relevant to the issue becomes immaterial where it is not voluntary, as it is the voluntariness that makes it admissible and gives the court the impetus to act on it as valid. Similarly in **OSHO VS. STATE (2012) 8 NWLR (PT. 1302) 243 AT 295** per Nwodo JCA observed thus

> *.... I wish to restate the settled law that once a confession is voluntarily made, by an accused and the confession is direct and unequivocally related to the offence for which he is charged, the confession is sufficient to support conviction without corroboration, once the court is satisfied with its truth. The duty of the court is to satisfy herself of the truthfulness as a confession by examining it in the light of the other credible evidence before the court. This principle was also reiterated by Olagunnwumiju JCA in the case of Ogun v. The State (2012) LPELR-15342 (CA).*

In fact, the importance of the confessional statement was examined by the Apex Court in **THE PEOPLE OF LAGOS STATE VS. UMARU (2014) LPELR 22466**. The

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Court held: "*I think the tendering of the accused's statement made at the Police considered to be confessional is very vital, necessary and fundamental in grounding a conviction otherwise the conviction is defective and can be quashed and any sentence premised upon it can actually be set aside. Hence, it should be noted, that the Accused confessional statement must always be tendered in evidence, whether it is favourable or not,*" as was done herein.

Section 34 of the Cybercrime Act has made it an offence for the Defendant or any other person to be in possession of two or more Cards issued in the name of different persons. *Ipso facto,* the issue of whether or not the cards were reported stolen does not arise for determination by this Court. The cards need not be reported stolen for an offence to be committed using the ATM Cards. All that Section 34 of the Act requires is that the Defendant was in possession of two or more cards issued in different names to different cardholders in circumstances that would constitute card theft.

The evidence before the Court especially that of PW1, PW2, DW1 (the Defendant himself) and the Exhibits tendered by the Prosecution

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support the case of the Prosecution. The Defendant admitted that he initiated the opening of the account by virtue of which the eleven (11) cardholders were issued because of Federal Government restriction policies on Money laundering. It is clear that this is an unequivocal admission of guilt which is enough to ground a conviction without more. The Court in **OSETOLA VS. STATE (2012) LPELR- 9348 (SC)** held that where an extra judicial statement has been proved to have been made voluntarily and it is positive and unequivocal and amounts to an admission of guilt, such confession will suffice to ground a conviction.

It is also clear that the Defence Counsel's understanding of PW2's (Esther Rwang Nobore) testimony in Court is greatly misunderstood. It is not correct that PW2 testified under cross examination that *"under investigation, NDLEA through her called the owners of the ATM cards and they confirmed that they were aware that the Defendant was in possession of their ATM cards and that their cards were not stolen or missing."* The above quoted is not PW2's testimony. What PW2 stated

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was that NDLEA demanded for the mandate cards of the persons Union Bank issued with the ATM Cards and when response from Union Bank was analyzed, it was discovered that the ATM card owners were based in Anambra State. PW2 further testified that on discovery of this fact, she told the NDLEA Office at Anambra State to write to the ATM cardholders and they did but no response was received.

I will discountenance the Defendant summary of PW2's testimony because it is intended to mislead this Court. I have looked at the records particularly with reference to PW2's testimony. In her testimony, PW2 stated that in the course of investigation, they found out that the ATM cards were issued by Union Bank Plc and that they demanded for the mandate cards of the persons Union Bank issued with the ATM Cards and when response from Union Bank was analyzed, it was discovered that the ATM card owners were based in Anambra State. PW2 further testified that on discovery of this fact, she told the NDLEA Office at Anambra State to write to the ATM cardholders and they did but no response was received. The defence also erred

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as they merely examined evidence in bits and refused to consider the totality of evidence before the Court. In **ALAKE VS. STATE (1992) LPELR-403** the Court of Appeal observed:

> *" In determining the strength of the case of the prosecution, an appellant cannot take pockets of evidence in isolation but must take into consideration the totality of the evidence before the court. An appellant has no legal right to take the evidence before the court in convenient installments and come to the conclusion that the case was not proved beyond reasonable doubt."*

One of the ingredients of the offence under Section 34 of the Cybercrime Act is that the ATM cards were issued in the names of persons other than the Defendant. The Prosecution has demonstrated through its witnesses as well as the Exhibits tendered that the eleven ATM cards found in the possession of the Defendant were in the names of other persons. Exhibit A speaks volume about this. What is more, all the

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witnesses for the Prosecution as well as the Defendant himself testified affirming this fact. See **OSETOLA VS. STATE's** case (supra).

The Prosecution also established through the testimony of PW3 - Felix Osioni, a staff of Union Bank Plc that the eleven ATM cards were linked to customers of the Bank who were not the Defendant. For purposes of emphasis, Union Bank Plc issued these cards to: Udemezue Ijeoma, Udemezue Nkiruka, Udemezue Samuel, Duru Rosemary Ugochi, Ibeawuchi Raphael, Maduabuchi Oluchukwu, Obi Onyebuchi Charls, Onuegbu Deborah, Ehirim Casmir Abuchi, Ekuma Daniel Nnamdi and Echekam Arinze. It is clear that these names do not have any bearing or correlation with the Defendant herein.

In analyzing Section 34 of the Cybercrime Act as it relates to possession of eleven ATM Cards by the Defendant, the only logical and plausible conclusion that this Court can arrive at is that the Defendant retained possession of these eleven ATM cards in circumstances that would constitute

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card theft.

This is so because the Prosecution led evidence to establish that the Defendant had these ATM cards in his possession preparatory to travelling outside Nigeria. The Prosecution also led evidence establishing that these ATM cards were issued to eleven different persons other than the Defendant. It is therefore clear that the Defendant knew as can be gleaned from Exhibits A2; B, B1 and B2 that the circumstances under which the Defendant came in possession of these Cards are suspect.

PW1 testified in Court that during investigation at the EFCC, the EFCC requested the Defendant to produce the owners of the ATM cards. It was appalling that instead of inviting the persons whom Union Bank Plc issued the ATM cards to, the Defendant procured/engaged the services of a certain Madubuchi Oluchukwu and one Udemezue Samuel to pose as the persons that Union Bank Plc issued two out of the eleven ATM cards to. PW1 and PW3 also demonstrated to this Court the areas of inconsistencies between the persons whom the

Defendant procured and the persons whom Union Bank Plc issued the ATM cards to.

Firstly, PW1 while testifying stated that two persons who were male approached the Commission and made statements (Exhibits A3 and A4) that they are the owners of two of the ATM cards; the subject matter of this Charge. PW1 testified further that one Madubuchi Oluchukwu, male, 32 years (as contained in his statement to EFCC) approached the Commission and made statement that he gave his ATM card to the Defendant. It was his further testimony that when Exhibit A6 was received from Union Bank and analyzed, The EFCC discovered that the Maduabuchi Oluchukwu whose details appeared in Exhibit A6 was a female who opened the account and not a male. PW1 further testified that the account was opened sometime in 2006 and not in 2016 as alleged by the Defendant. PW1 also told the Court about the striking difference in the name of the person whom the Defendant procured and the name of the account holder as gleaned from the Exhibit A6. While Exhibit A6 spelt one of the names of the account holder as MADUABUCHI

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the impersonator spelt of its names as MADUBUCHI with the letter 'a' missing from the spelling given by the impersonator. It was observed that the impersonator, while not knowing how to spell the fraudulently adopted name, omitted the alphabet "A" while spelling Maduabuchi (but rather spelt it Madubuchi).

It appears that no amount of pressure would make anyone misspell his name. I hold that the non inclusion of the alphabet 'A' from Madubuchi's name was not an omission but premised on the fact that the impersonator is not the owner of the name as he was procured to make statement to the EFCC.

Also, almost the same scenario played out with Udemezue Samuel. PW1 also informed the Court that the Udemezue Samuel who came to make statement at the EFCC wrote that he was 38 years. This was contrary to the contents of Exhibit A6 which PW1 and PW3 revealed to the Court that the Udemezue Samuel who opened an account with Union Bank was born on 24th July, 1951. It is undisputable that any person born in 1951 would not be 38 years in 2016 when the

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statement was made to the EFCC.

It must be pointed out that while the Defendant stated that he assisted the cardholders to open the account early 2016, investigation through Exhibit A6 revealed that Maduabuchi's account was operational way back in year 2006; a period spanning about ten years before the purported opening of the accounts by the Defendant. I will discountenance the testimony of the Defendant when he stated that he did not procure the writers of Exhibits A3 and A4 to make statements to the EFCC. I hold that the testimony of the Defendant is false and nothing but a calculated attempt to absolve himself of any liability. This is so because there is no way the writers of Exhibits A3 and A4 would ordinarily not come to the EFCC office if they were not told by the Defendant that the Defendant had issued at the EFCC.

Also of note is the fact that in spite of Defendant assertion that he had the consent of the owners to be in possession of their ATM cards, the Court noted that the Defendant was

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the only witness for the Defence. It was reasonably expected that the only plausible option open for the Defendant would be for him to call as witnesses for the defence, all the eleven persons who gave him their ATM cards but he failed to do so.

I have no doubt that the failure of the Defendant to call as defence witnesses all or some of the persons who gave him their ATM cards to testify has left doubt in his testimony. I hold that such failure is a minus to his defence as his defence would crumble without the testimony of those persons whom he alleged gave him the eleven ATM Cards. It is trite that he who asserts must prove. See **OLAGUNJU VS. OBAJIN (2011) LPELR-4850 (CA).** I hold that the Defendant's failure to call the eleven persons who gave him ATM cards issued by Union Bank Plc can only mean that the Defendant stole the eleven ATM cards from the Card owners.

From the evidence, the correct position of the investigation carried out by NDLEA and EFCC was that in the NDLEA scenario, it wrote to the cards owners but they did not respond. In the scenario

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of the EFCC, the Defendant was asked to produce the card owners and rather than produce them, the Defendant invited two impersonators who posed as Maduabuchi Oluchukwu and Udemezue Samuel as owners of two of the ATM cards. The Court holds that the Defendant was given ample opportunity by the NDLEA and the EFCC to prove his innocence but he chose not to do so. The Court further holds that the Prosecution had discharged the burden placed on it when it asked the Defendant to produce the card owners. The Court holds that the burden of proving the existence of the owners of the card owners shifted to the Defendant the very minute the Prosecution afforded him the opportunity to do so. What is more, the Defendant neglected to either produce the owners of the eleven ATM cards either during investigation and/or defence in Court. The Court holds, that since the Prosecution discharged the burden placed on it to prove the Defendant was in possession of the ATM cards without the consent of the owners after it gave the Defendant the opportunity to produce the card owners, the evidential burden has automatically shifted to the Defendant to prove that he had possession of the

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cards with the consent of the owners. On this, see the case of **UDO VS. STATE (2016) LPELR-4072.** It is not enough for the Defendant to just assert. He needs to place sufficient materials before the Court in proof of this assertion.

Assuming, the Defendant's position that he had the consent of the cards owners to be in possession of their ATM cards, is the correct position, does such consent absolve the Defendant from breach of the provisions of Section 34 of the Cybercrime Act? Also assuming that the persons who had these ATM cards did not report them stolen or missing or that Union Bank did not receive any report of the missing ATM cards, is the Defendant absolved of any criminal liability for contravention of Section 34 of the Cybercrime Act? Assuming again that the Defendant did not know that being in possession of two or more cards issued in the names of different persons is in contravention of Section 34 of the Cybercrime Act, does that absolve him of having committed the offence? The answers to the above posers are in the negative.

Clearly, the provision of Section 34 of the

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Cybercrime Act is explicit and unambiguous. It is trite principle of law that ignorance of the Law is not a defence for committing an offence. Whenever a Defendant in a criminal trial has to prove a fact, be it in the form of a special defence to the charge leveled against him, or of any other particular or peculiar fact, the Defendant discharges this burden merely by preponderance of evidence, as in an ordinary civil suit. See **NTITA VS THE STATE (1993) 3 SCNJ 28; IJEOMA VS. STATE (1990) 6 NWLR (PT. 158) 567 CA.; R. VS. ONAKPOYA (1959) 4 FSC 150 and R. VS. ECHEM 14 WACA 158.** Thus, in **EDOHO VS. STATE (2010) ALL FWLR (PT. 530) 1262 SC,** it was held that the standard of proof of the defence of insanity is on the balance of probabilities.

However, if the Defendant fails to meet this standard, the issue in question will be resolved against him. Thus, in **EDOHO VS. STATE (2007) ALL FWLR (PT. 374) 370 CA,** it was held that the establishment of insanity rests on the Defendant and the standard by which such defence will be as in civil cases, namely, on balance of probabilities or preponderance of evidence. However, that in the instant case, the appellant failed to call the native doctor from

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whom he allegedly received medication to testify to that effect, coupled with the inability of the DW3, the prison warder, to produce any record of the Nigerian Prisons, Eket, where he had purportedly recorded the violent behaviour of the appellant; hence this fell short of the standard of proof to sustain the defence of insanity by a Defendant

Also, proof on balance of probabilities is contingent upon the Defendant satisfying the minimum standards required *in* proof of any such defences. Thus, in **PETER VS. STATE (1997) 12 NWLR (PT. 531) 1 S.C,** it was held that even though insanity can be proved on a balance of probabilities, this standard of proof is not met only by the ipse dixit of the Defendant. Indeed, it was held in **MOHAMMED VS. STATE (1997) 9 NWLR (PT. 520) 169 S.C** that a Defendant in a criminal trial is not a competent witness as regards his mental status on an issue relating to the defence of insanity.

However, the burden of proof placed on a Defendant in a criminal charge is not discharged only by evidence tendered by him but also by supportive evidence tendered by the prosecution. This is gatherable from the provisions of section 139(2) of the Evidence Act, which are to the following

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effect:

> *"139. (2) The burden of proof placed by this Part upon a Defendant charged with a criminal offence shall be deemed to be discharged if the Court is satisfied by evidence given by the Prosecution, whether on cross- examination or otherwise, that such circumstances in fact exist."*

In other words, once there is a lapse in the case of the Prosecution capable of securing an acquittal for the Defendant, or through ingenuous cross-examination of Prosecution witnesses by the Defendant, the latter secures either contradictions in the case of the Prosecution or establishes his defence, he ought to be discharged and acquitted.

I have reviewed the testimony of PW1 and PW2 to this Court, and the extra judicial statements of the Defendant which he made to the EFCC and the NDLEA, respectively and tendered in Court as Exhibits A2 and B, and B2.

On the reverse page of Exhibit A2, the Defendant stated thus:

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"And the reason why I open those cards is because of the CBN restriction on money movement and transfer policy."

Also, on the reverse page of Exhibit B, the Defendant wrote:-

"My reason for carrying these master cards is for fast business transaction in Hong Kong. I devised this method of financing my business because of government imposition of $10,000.00 USD for private individuals."

Also, the Defendant wrote the following as his last sentence on Exhibit B2:

"Because of CBN cash movement restriction, I now ask those people to help me open those account to enable me do my business."

From the quotations above, the only plausible and reasonable conclusion a reasonable man and the Court would arrive at is that the Defendant knew the provision of the Law regarding

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In the light of the plea of allocutus, this Court shall tamper justice with mercy. The Defendant has already spent 3 months in detention prior to his conviction. This Court shall therefore take this into consideration in sentencing the convict. In the light of these facts, the convict is hereby sentenced to 2 years imprisonment on Count 1 ad 2 years imprisonment on Count 2. The terms shall run concurrently.

M.B. IDRIS
JUDGE
16/3/18

M. S. Owede for the Prosecution

E.C. Chukwumah with O. Uche for the Defendant

Cashier's Office
DATE 30/4/18
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