

**SUPREME COURT OF NIGERIA**  
FRIDAY 10TH MAY, 2002. SC. 201/2000  
**CORAM:- A. B. WALI, M. E. OGUNDARE,**  
**U. MOHAMMED, S. U. ONU, A. I. KATSINA-ALU,**  
**U. A. KALGO, S. O. UWAIFO, JJSC**

CHIEF GANI  
FAWEHINMI .... APPELLANT/CROSS RESPONDENT  
AND  
INSPECTOR-GENERAL  
OF POLICE & 2 ORS ... RESPONDENTS/CROSS APPELLANTS

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POLICE - Discretion - Exercise of - Criminal investigation - Police has discretion on whether or not to investigate allegation of crime - And such may be exercised depending on their capability - And overall interest of the society (H1)

POLICE - Duty - Definition - Police Act s. 4 - Duty of the police cannot be defined as ministerial - Since it is not a simple one imposed by the law (H2)

POLICE - Exercise of discretion - Investigation of crime - 1999 Constitution s. 188 - The section provides no reason for police - To refuse an investigation of alleged crime in appropriate circumstance (H3)

ORDERS OF COURT - Writ of mandamus - Intendment - The writ is used to secure performance of public duty - Of which applicant has interest - And if exercise of such involves discretion - Court is to examine whether discretion to refuse to act is properly exercised (H4)

COURTS - Exercise of discretion - Writ of mandamus - Grant - Court may not overrule discretion not to perform public duty - And may also refuse to order mandamus - On the ground that granting the order will serve no useful purpose (H5)

POLICE - Duty - Criminal investigation - Limitation - 1999 Constitution s. 308 - Police can investigate criminal allegation against a Governor - So long as they do not encounter him - In the course of

**1224** *Fawehinmi v. IGP* (2002) 5 KLR (pt. 138) 1123; (2002) 7 NWLR investigation (H6)

CONSTITUTIONAL LAW - Constitution - Interpretation - Principle - 1999 Constitution s. 308 - Where constitutional provisions are unambiguous - The same shall be given their ordinary meaning (H7)

POLICE - Investigation of crime - And criminal proceedings - Distinction - Criminal proceedings do not include police investigation - Though evidence acquired from the investigation - May be used in criminal proceedings (H8)

CRIMINAL PROCEEDINGS - Commencement - The proceedings start when an accused person is arraigned before court - Or when charge has been filed against him in court (H9)

CONSTITUTIONAL LAW - Constitution - Interpretation - “Otherwise” - Meaning - 1999 Constitution s. 308(1)(b) - The word means any lawful process or command - Which has same effect as a process of any court (H10)

ACTIONS - Allegation of crime - Lack of evidence - Effect - In absence of evidence in regard to the alleged crime - Application for order of mandamus ceased to have any purpose - And court will have no business to discuss same (H11)

ORDERS OF COURT - Mandamus - Grant - Conditions for - Applicant must inter alia show that he has specific legal right to enforce - Or an interest more substantial than general interests of others (H12)

### ***FACTS***

By way of originating summons filed before the Federal High Court Lagos, plaintiff/appellant sought inter alia an order of mandamus to compel defendants/respondents to investigate criminal allegations which he made against Governor Bola Ahmed Tinubu of Lagos State. At the trial, certain public documents i.e. Exhibits GF1, GF2 and GF3 were admitted in evidence. Respondents raised preliminary objection that by virtue of section 308 of the 1999 Constitution of the Federal Republic of Nigeria, the Governor enjoyed immu-

nity from being investigated in respect of the said criminal allegations. On the basis of the objection, the learned trial judge dismissed the originating summons.

Appellant being dissatisfied appealed to the Court of Appeal, Lagos Division. Respondents cross-appealed against the admissibility of the said Exhibits and also contended that appellant has no locus standi to institute the action. The court held inter alia that respondents are not precluded by section 308 of the 1999 Constitution from investigating allegation of crime against person name therein. Nevertheless, the court further held that respondents have discretion whether or not to investigate an allegation of crime. It also held that the admitted exhibits are inadmissible for being un-certified public documents. The court went further to hold that although appellant has locus standi to institute the action, the order of mandamus being sought will not be granted in the circumstances of this case. Aggrieved, appellant filed appeal to Supreme Court, while respondents cross appealed.

### ***ISSUES FOR DETERMINATION***

*“1. Whether the Court of Appeal was right in refusing to make an order of mandamus on the respondents where the performance of specific public duty has been clearly found established against the respondents.*

*2. Whether the provisions of section 4 of the Police Act, Cap. 359, Laws of the Federation of Nigeria, 1990 allows for the exercise of discretion by the Police on whether or not to investigate allegations of crime.”*

*“3. Whether Governor Bola Ahmed Tinubu in particular and persons named in section 308(3) of the 1999 Constitution have no immunity against investigation under s. 308 of 1999 Constitution.*

*4. Whether the judgment of the Court of Appeal was right having affirmed that the lower court was correct in the meaning it ascribed to the word ‘otherwise’ in section 308(1)(b) and yet upheld that section 308 does not shield or protect the persons covered under section 308(3) from police investigation.*

*5. Whether the Court of Appeal was right in ruling that Governor Bola Tinubu could be investigated notwithstanding the ruling of the same Court of Appeal that Exhs. GF1, GF2 and GF3 which form the substratum of the appellant’s case were inadmissible in evidence.*

6. *Whether the appellant has the locus standi to apply for writ of mandamus.*”

## **HELD**

(Unanimously dismissing the appeal and partially allowing the cross-appeal per lead judgment of **UWAIFO JSC**)  
*POLICE - Discretion - Exercise of - Criminal investigation*

**1. It follows that in their duty to detect crime, allegations of the crime committed by any person should normally be investigated by the police. But I can see nothing in section 4 of the Police Act which denies them of any discretion whether or not to investigate any particular allegation, or when they decide to investigate to do so to its logical conclusion. The need to exercise a discretion in such a matter may arise from a variety of reasons or circumstances, particularly having regard to the nature of the offence, the resources available, the time and trouble involved and the ultimate end-result. It may well be a question of balancing options as well as weighing what is really in the public interest.**

**It is inconceivable that such wide powers and duties of the police must be exercised and performed without any discretion left to responsible police operatives. Unless a statute which confers powers or imposes duties expressly or by necessary implication excludes the exercise of discretion, or the duty demanded is such that leaves no room for discretion, it is my view that discretionary powers are implied and, whenever appropriate, exercised for salutary ends. In *R. v. Commissioner of Police of the Metropolis ex parte Blackburn* (1968) 2 Q.B. 118 at 136 I find it necessary to observe that the discretion is not limited to the method of enforcement of police powers but as already said, circumstances may dictate how the discretion should be exercised as a whole as to whether, for instance, to investigate an allegation of crime or not.**

**I am satisfied that in the performance of their duty to maintain law and order, to investigate allegations of crime and to arrest, the police have and can exercise some measure of discretion. It all depends on the circumstances of every occa-**

**sion, the best of their capability, the image of the police force and the overall interest of the society. The views expressed in ex parte Blackburn (supra) and in de Smith's Judicial Review (supra) clearly support this stand.** (pp. 1236 H/1239 C)

*POLICE - Duty - Definition - Police Act s. 4*

**2. Whichever of the definitions above is taken, I am unable to accept that police duty can be adequately defined as ministerial. It cannot be said to be a simple duty imposed by law having regard to the definition of 'ministerial' in the Black's Law Dictionary and in view of the ramifications of section 4 of the Police Act. How can anyone regard the prevention of crime or the process of investigation to detect crime as simple.** (p. 1238 H)

*POLICE - Exercise of discretion - Investigation of crime*

**3. The powers and duties of a House of Assembly under section 188 and those of the police under section 4 of the Police Act are mutually exclusive. Section 188 provides no reason for the police to refuse to perform their duty to investigate an alleged crime in an appropriate circumstance. It would therefore, in my view, not constitute a proper exercise of discretion on the part of the police not to investigate in reliance on section 188.** (p. 1240 D)

*Writ of mandamus - Intendment*

**4. Mandamus is a high prerogative writ which lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest. It gives a command that a duty or function of a public nature, which normally, though not necessarily, is imposed by statute but is neglected or refused to be done after due demand, be done. If there is a discretion in the performance of the duty, the court has the power to examine whether the discretion to refuse to act has been properly exercised.** (p. 1240 F)

*COURTS - Exercise of discretion - Writ of mandamus - Grant*

**5. In the exercise of that power, the court will not lightly over-**

**rule the discretion just because it considers it desirable that the duty be performed. Even if it is found that the discretion was not properly exercised or that there was in fact no discretion at all in the matter, the court may still exercise its own discretion not to order mandamus on the general ground that the court would make no order in vain which could no longer be carried out; or on the other ground of expediency that it would serve no useful purpose even if the order were implemented. In those instances, the exercise of the court's discretion will need also to pass the usual test. If it does not, an order made by the court is liable to be set aside.**

**I think the court below was right in refusing to make an order of mandamus and also that the police have a discretion as to the investigation of alleged crimes. Even though I have remarked that it was not enough reason to rely on section 188 of the Constitution, there are potentially good reasons why in the present case the court is justified not to compel investigation by the police. The court below gave some. I shall give more in the course of this judgment. In the meantime I answer both issues raised for the determination of this appeal in the affirmative. (p. 1240 H)**

*POLICE - Duty - Criminal investigation - Limitation*

**6. The views were expressed (as I paraphrase them) that (1) the police could conduct their investigation up to a point that would not amount to a breach of section 308, (2) the investigation would need to be discreet and could be overt or covert; and (3) when the investigation is concluded as far as it is possible to go, and the allegation or the commission of crime appears supported, the police must remember that they cannot proceed further to the stage of arrest. I have no doubt in my mind that the court below correctly understood and stated the effect of section 308 of the Constitution on police duty to investigate the allegation or commission of crime by persons protected thereunder.**

**In my view, his further submission that the functionaries mentioned in section 308 of the 1999 Constitution cannot be investigated is based on the untenable premise (1) that police**

**investigation is part of criminal proceedings and (2) that every police investigation of a suspect should lead to his arrest and “must of necessity involve the taking of his statement under caution.” The court below, of course, rightly found no merit in this contention. It held as already indicated, that police investigation could be carried out upon a criminal allegation against a Governor so long as the police do not encounter him in the course of the investigation.** (pp. 1243 H/1247 F) B

*Constitution - Interpretation - Principle* C

**7. I agree with learned counsel for the appellant/cross-respondent that the provisions of that subsection are clear and unambiguous and should be given their ordinary interpretation. The cross-appellants would rather they be given a broad interpretation to include police investigation. I can find nothing in the entire section to suggest that a literal interpretation will not sufficiently and correctly bear out its meaning. The proper approach to the interpretation of clear words of a statute is to follow them in their simple, grammatical and ordinary meaning rather than look further because that is what prima facie gives them their most reliable meaning. This is generally also true of the construction of constitutional provisions if they are clear and unambiguous even when it is necessary to give them a liberal or broad interpretation. When the terms are plain and involve no ambiguity they must be given their meaning upon the ordinary and surrounding circumstances.** (pp. 1244 B/1246 E) D  
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*POLICE - Investigation of crime - And criminal proceedings* G

**8. There can be no support for the argument on behalf of the respondents/cross-appellants that police investigation is part of criminal proceedings as envisaged under section 308(1)(a) of the 1999 Constitution. Criminal proceedings do not include police investigation as an act. The findings or the result or conclusions reached eventually in the investigation could. It is true that the evidence acquired in the course of police investigation may be used in criminal proceedings and become decisive of their outcome, but that does not make the investi-** H

**gation itself criminal proceedings. No amount of a liberal interpretation of the constitutional provision of section 308(1)(a) of the 1999 Constitution can make it so.**  
(p. 1246 E)

B *Commencement of criminal proceedings*

**9. A stage could be reached in an investigation where it might look, from the evidence, that there is sufficient cause to believe that an accused has emerged or been discovered. It is usually at that stage that he is arrested, charged and cautioned. Eventually, the proceedings held against him for an alleged offence arising from the investigation become known as criminal proceedings. It follows that criminal proceedings are commenced when an accused person is arraigned before a court, or at the least, when an information or a charge has been filed against him in court.** (p. 1246 H)

*Constitution - Interpretation - "Otherwise" - Meaning*

**10. Issue 2 is simple. Section 308(1)(b) of the 1999 Constitution says that "a person to whom this section applies shall not be arrested or imprisoned during [his period of office] either in pursuance of the process of any court or otherwise." The bone of contention is what the word "otherwise" refers to. The word can mean no more than "any lawful process or command" which has the same effect as a "process of any court." It must be ejusdem generis an enforceable process, command or order meant to be obeyed. Ejusdem generis rule helps to confine the construction of general words within the genus of special words which they follow in a statutory provision or in a document.** (p. 1249 B)

*ACTIONS - Allegation of crime - Lack of evidence - Effect*

**11. But if the cases were brought to court and no evidence was produced in connection with the allegations, the court would have no business to engage in such a discussion of the constitutional issue. Exhibits GF1, GF2 and GF3, if admissible, would have formed the basis of the evidence made available to the police to get them to investigate the alleged crime, fol-**

lowing which failure, mandamus order was sought. As they were found to be inadmissible, the affidavit referred to by the court below to which the said documents were exhibited in support could no longer speak for itself. It no more had any evidential value in regard to the said allegations of crime. Without that evidence, the application for the order of mandamus would cease to have any purpose. It would be purely academic to press argument on it and expect the court's opinion thereon. As said by Lord Mansfield in *R. v. Barker* (1662) 3 Burr 1265 at 1267 [cited with approval by this court in *Shitta-Bey v. Federal Public Service Commission* (1981) 1 SC 40 at 53]:

*"A mandamus is a prerogative writ; to the aid of the subject is entitled, upon a proper case previously shown, to the satisfaction of the court."*

There cannot be a proper case previously shown if an essential ingredient forming the background to the facts and circumstances imposing a public duty upon a person alleged to have failed to perform that duty is not supported by evidence.

In my view, the absence of the evidence intended by exhibits GF1, GF2 and GF3 was enough to terminate these proceedings, or, at any rate, enough to base a discretion not to order mandamus as there was nothing to show that the allegations of crime were real and to hold therefore that Governor Tinubu should not, or need not, be investigated.

(p. 1252 A)

*ORDERS OF COURT - Mandamus - Grant - Conditions for*

12. The authorities are to the effect that a person who seeks an order of mandamus must, among other things, show that he has a legal right to ensure the performance of a duty. Admittedly, the issue of the locus standi of an applicant for mandamus cannot be said to be free from difficulties. It would appear that such locus standi may depend on two alternative factors in regard to the duty allegedly not performed after demand: (a) Either that the applicant must have a specific legal right to enforce, or a specific legal right to the enforcement of the duty

***(b) Or, that the applicant has a sufficient legal interest or an interest more substantial than the general interests of other members of the community or interest-group to which he belongs, or that he is specially aggrieved by the non-performance of the duty more than other members of the public generally.*** (pp. 1255 F/1256 A)

### **REPRESENTATION**

Omotayo Oyetibo, with Olalekan Bolaji for the appellant  
 S. G. Ehindero A.I.G. with O. A. Ochogwu, D. Umaren and K. Attah  
 for the respondents/cross-appellants

### **CASES REFERRED TO**

Commissioner for Local Govt. Lands & Settlement v. Kaderbhai  
 (1931) AC 652  
 Lasisi v. Registrar of Companies (1976) 7 SC 73  
 Fawehinmi v. Akilu (1987) 4 NWLR (Pt. 67) 797  
 R. v. Commissioner of Police of the Metropolis ex parte Blackburn  
 (1968) 2 Q.B. 118  
 Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40  
 Adejumo v. Adejumo (1989) 3 NWLR (Pt. 110) 417  
 Okere v. Nlem (1992) 4 NWLR (Pt. 234) 132  
 Asakitikpi v. The State (1993) 5 NWLR (Pt. 296) 641  
 A-G Kaduna v. Hassan (1985) 2 NWLR (Pt. 8) 483  
 Rotimi v. McGregor (1974) NSCC 547  
 Braithwaite v. D.G.M. (1998) 7 NWLR (Pt. 557) 307  
 R. v. Lewisham Union Guardians (1897) 1 QB 498  
 R. v. Leicester Guardians (1899) 2 QB 632  
 R. v. Barker (1662) 3 Burr 1265

### **STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria 1999, ss. 188, 214  
 (1), 308(1)(a)  
 Police Act Cap 359, LFN 1990, s. 4  
 Criminal Procedure Law of Lagos State, ss. 59 (1), 340, 343

### **BOOKS REFERRED TO**

De Smith's Judicial Review of Administrative Action 4<sup>th</sup> Ed., p. 549

Words and Phrases, permanent Ed. vol. 27, p. 367

Black's Law Dictionary 5<sup>th</sup> Ed., p. 899

### **LEAD JUDGMENT BY UWAIFO JSC**

By an originating summons filed by the appellant on 7th October, 1999 at the Federal High Court, Lagos, he sought *inter alia* an order of mandamus to compel the respondents to investigate criminal allegations which he made against Governor Bola Ahmed Tinubu of Lagos State. It is unnecessary to go into the details of the said allegations, or of the procedural skirmishes at the trial court, except to say that on 14th December, 1999, Egbo-Egbo, J., who presided dismissed the summons upon a preliminary objection raised that by virtue of section 308 of the 1999 Constitution, the Governor enjoyed immunity from being investigated in respect of the said criminal allegations.

On the view taken in respect of section 308 of the Constitution that there was immunity against investigation, the appellant appealed to the Court of Appeal, Lagos Division. The respondents cross-appealed against the court's findings as to the admissibility of certain documents [exhibits GF1, GF2 and GF3] and also as to the locus standi of the appellant to institute the action. On 5 June, 2000, the Court of Appeal in a considered judgment concluded (1) that although the respondents [the police] have a discretion in matters of crime investigation, they were not precluded by section 308 of the 1999 Constitution from investigating allegations of crime committed by persons occupying the offices named therein; (2) that in the circumstances of this case no order of mandamus compelling the respondents to investigate the allegations made against Governor Bola Ahmed Tinubu would be made; and (3) that the appellant had the locus standi to institute the action. As to exhibits GF1, GF2 and GF3 in question which were admitted in evidence by the trial court, the view of the court below was clearly that being un-certified public documents, they were inadmissible.

The appellant has further appealed to this court; so have the respondents cross-appealed. The appellant in the main appeal set down two issues for determination thus:

*"1. Whether the Court of Appeal was right in refusing to make an order of mandamus on the respondents where the performance*

*of specific public duty has been clearly found established against the respondents.*

2. *Whether the provisions of section 4 of the Police Act, Cap. 359, Laws of the Federation of Nigeria, 1990 allows for the exercise of discretion by the Police on whether or not to investigate allegations of crime.”*

The respondents formulated two issues also as follows:

“1. *Whether the Court of Appeal has discretion to make an order of mandamus or to refuse it having regard to the circumstances of the case in question and the provision of section 308 of the 1999 Constitution.*

2. *Whether the respondents have discretion either to investigate or not every allegation of crime reported and the manner and mode of carrying out their investigations having regard to the provision of section 4 of the Police Act, Cap 359 Laws of the Federation of Nigeria 1990.”*

I think the issues as formulated by the parties are the same if only the question of discretion is taken as implied in the appellant’s issue 1. I shall treat both issues together.

The submission of the appellant in respect of the two issues can be briefly put. The appellant at both the trial court and the court below established that the respondents are public officers who, by virtue of the Police Act, have a duty of seeing and ensuring that crime is prevented and detected, that offenders are apprehended, that there is preservation of law and order, that there is protection of life and property and that there is due enforcement of all laws and regulations. This is so because the Nigeria Police was set up for the purpose, and given the duty, of ensuring public peace and security, and obedience to the law. In that regard, they must investigate all allegations of crime. The court below having acknowledged that the respondents have a duty under section 4 of the Police Act to investigate all allegations of crime leveled against any person, was wrong to refuse to make an order of mandamus compelling them to investigate the appellant’s allegation that Mr. Bola Ahmed Tinubu, Governor of Lagos State made false declaration and false statement both under oath when he was about to stand election for Governor.

The appellant relies on *Glossop v. Heston and Isleworth Local Board* (1879) 12 CH. D. 102 where at pp. 115-116, James L.J.

observed inter alia that: *“A mandamus might, on proper evidence of refusal.... be applied for in the Queen’s Bench Division in the exercise of its great prerogative jurisdiction to compel all bodies having an authority.... to perform the duties the Legislature had imposed on them. That mandamus might be applied for by any individual who could see that something the public body ought to do was neglected to be done.”* He then makes the following submissions in his brief of argument: B

*“5.21. I submit that where the statute creating the duty admits of no exercise of discretion on the part of the obligor, id est, person under obligation to perform the duty imposed therein, then an order of mandamus must of necessity be granted by the court in so far as other conditions are satisfied by the applicant.”* C

*5.22. It is submitted that the duty expected of the police under section 4 of the Police Act, Cap. 359, Laws of the Federation of Nigeria, 1990 is a ministerial duty which does not give any discretion to the police on whether or not to perform the duty expected of them therein.”*

It seems to me if the above two paragraphs from the appellant’s brief of argument are read together [preferably in the reverse order], it will be quite easy to see that his argument is that in the present case, the court below had no discretion but was bound to order mandamus. But then the appellant has gone further in paragraph 5.23 with the heading *On Nature and Scope of Discretion of the Court in an Application for Mandamus*, where he states- E  
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*“The grant of an order of mandamus is as a general rule a matter for the discretion of the court. The order is not one granted as a matter of right nor is it issued as a matter of course.”*

The appellant thereafter went at great length to discuss the discretionary nature of an order of mandamus - indeed in twenty-two paragraphs - and ended as follows:

*“5.44. I submit that this Honourable Court can rightly interfere in the instant case with the exercise of the discretion of the lower court refusing to grant the order of mandamus as same was exercised in complete disregard of well established principles, sound judgment and good sense.”* G  
H

*5.45. I respectfully urge this court to hold that the lower court in refusing to grant the order of mandamus sought did not do so*

*judicially and judiciously.”*

With due respect, it seems to me there is some inconsistency in the appellant’s argument as above. Having taken a position that in the present case an order of mandamus must of necessity, in law, be granted since the appellant fulfilled all necessary conditions, the contention, in my view, would have been that the court below had no discretion in the matter, or was in law wrong to exercise any discretion, and not that the discretion was not judicially and judiciously exercised. It is needless to say that the appellant cited a number of authorities, particularly on the exercise of the discretionary power of a court, too numerous to recount. I find no need to recount them.

The respondents argue that mandamus is a generally discretionary remedy and that it is up to the court to grant or refuse it after taking into consideration all relevant facts and circumstances, citing Commissioner for Local Government Lands and Settlement v. Kaderbhai (1931) AC 652 at 660 per Lord Atkin; Lasisi v. Registrar of Companies (1976) 7 SC 73 at 92; Fawehinmi v. Akilu (1987) 4 NWLR (pt. 67) 797 at 872 per Craig JSC; Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40 at 52 per Idigbe JSC. It was then contended that the court below properly exercised its discretion not to make the mandamus order.

It is the respondents’ further submission that the police have a discretion in the way they perform their duty and when they do exercise that discretion as appropriate, the courts will as a rule not interfere. References were made to a passage from De Smith’s Judicial Review of Administrative Action, 4th edition, page 549 and the observation of Lord Denning M. R. in R. v. Commissioner of Police ex parte Blackburn (1968) 7 QB 118 at 136.

The appellant is no doubt right in his argument that by virtue of the fact that section 214(1) of the 1999 Constitution recognizes one police force for Nigeria and the said police are given a duty under section 4 of the Police Act [now in Cap. 359, Laws of the Federation of Nigeria, 1990] to prevent and detect crime, apprehend offenders, preserve law and order, protect life and property and enforce all laws and regulations with which they are directly charged, and that it is an important statutory duty which they owe to the generality of Nigerians and all other persons lawfully living within Nigeria. ***It follows that in their duty to detect crime, allegations of***

***the crime committed by any person should normally be investigated by the police. But I can see nothing in section 4 of the Police Act which denies them of any discretion whether or not to investigate any particular allegation, or when they decide to investigate to do so to its logical conclusion. The need to exercise a discretion in such a matter may arise from a variety of reasons or circumstances, particularly having regard to the nature of the offence, the resources available, the time and trouble involved and the ultimate end-result. It may well be a question of balancing options as well as weighing what is really in the public interest.***

***It is inconceivable that such wide powers and duties of the police must be exercised and performed without any discretion left to responsible police operatives. Unless a statute which confers powers or imposes duties expressly or by necessary implication excludes the exercise of discretion, or the duty demanded is such that leaves no room for discretion, it is my view that discretionary powers are implied and, whenever appropriate, exercised for salutary ends. In R. v. Commissioner of Police of the Metropolis ex parte Blackburn (1968) 2 Q.B. 118 at 136 Lord Denning M.R. observed inter alia:***

*“Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is the Commissioner of Police of the Metropolis or the chief constable, as the case may be to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter.”*

The learned author of de Smith’s Judicial Review of Administrative Action, 4th edition, states the position inter alia at page 549 as follows:

*“The public duty of a Chief Officer of Police to take due measures for the purpose of enforcing the law... is potentially enforceable by mandamus... But a substantial margin of discretion will be conceded to the police as to the appropriate method of enforcement. The police thus retain very considerable freedom to formulate and*

*implement general policies and to decide what to do in a particular case without incurring the risk of judicial intervention. Other bodies with statutory responsibilities for the enforcement of law would appear to be in much the same position."*

**I find it necessary to observe that the discretion is not limited to the method of enforcement of police powers but as already said, circumstances may dictate how the discretion should be exercised as a whole as to whether, for instance, to investigate an allegation of crime or not.**

The appellant has argued further that police duty is ministerial and therefore does not permit of any discretion, and may be compelled by mandamus. Some definitions as to what is 'ministerial' were submitted. One is from Words and Phrases, Permanent Edition vol. 27 at p. 367 where the learned author says that-

*"A 'ministerial' act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed."*

And going further he adds that -

*"Where a duty of an Administrative Officer in a particular situation is so plainly prescribed that it is free from doubt and equivalent to a positive command, it is so far 'ministerial' that its performance may be compelled by mandamus."*

The other definition referred to is in Black's Law Dictionary, 5th edition at page 899 where it is recorded:

*"Ministerial duty. One regarding which nothing is left to discretion - a simple and definite duty imposed by law, and arising under conditions admitted or proved to exist."*

In Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40, this court observed at page 54 per Idigbe JSC that the word "ministerial" has no fixed meaning but *"is sometimes used to describe any duty, the discharge of which does not involve any element of discretion or independent judgment."*

**Whichever of the definitions above is taken, I am unable to accept that police duty can be adequately defined as ministerial. It cannot be said to be a simple duty imposed by law having regard to the definition of 'ministerial' in the Black's Law Dictionary and in view of the ramifications of section 4 of**

***the Police Act. How can anyone regard the prevention of crime or the process of investigation to detect crime as simple.***

Black's Law Dictionary (supra) at page 1041 says: "*Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits and is an essential attribute of government*" Indeed, the police are the outward civil authority of the power and might of a civilized country. The generality of the public is potentially affected one way or another by their action or inaction. I think it will be a denigration of the aura of authority they represent and a disservice to society to suggest that they can exercise no discretion in their duty of the maintenance of law and order, or, to be specific, in their investigation of any particular allegation of crime even if it were to be an obvious wild-goose chase. ***I am satisfied that in the performance of their duty to maintain law and order, to investigate allegations of crime and to arrest, the police have and can exercise some measure of discretion. It all depends on the circumstances of every occasion, the best of their capability, the image of the police force and the overall interest of the society. The views expressed in ex parte Blackburn (supra) and in de Smith's Judicial Review (supra) clearly support this stand.***

In the present case, the appellant by a letter dated 21 September, 1999 addressed to the 1st respondent, copiously stated facts and circumstances of alleged crimes committed by Governor Bola Ahmed Tinubu. He gave notice to the 1st respondent to make public within 14 days of the receipt of the letter through courier service the outcome of his investigation of the alleged crimes. He said: "*The issue of immunity does not arise yet at the stage of investigation. Your duty at this stage is to conduct an investigation into the matter and make the outcome thereof public.*" An earlier letter dated 13 September, 1999 on the same subject had been addressed to Governor Tinubu by the appellant and one dated 23rd September, 1999 to the Speaker, Lagos State House of Assembly.

By a letter dated 27th September, 1999, the 1st respondent replied the appellant in four short paragraphs, two of which being of the essence, and they read:

***"2. Your attention is being drawn to sections 188 and 308 of the Constitution of the Federal Republic of Nigeria 1999 which are***

*considered relevant to the matter.*

3. *In view of the quoted sections and particularly section 308, the Inspector-General of Police believes the law should be allowed to take its course as is already being done by the Lagos State House of Assembly."*

B Apparently, it was in view of the above that the 1st respondent took no steps to investigate the allegations of crime made by the appellant. It looks a peculiar situation under which the police took umbrage. But in my respectful view, when properly understood, for the police to do that is tantamount to abdication of duty.

C Section 188 of the 1999 Constitution deals with the removal of a Governor or Deputy Governor from office and the procedure to follow. It is to be noted that it is a matter within the powers of the House of Assembly. It is completely irrelevant to the request of the D appellant. ***The powers and duties of a House of Assembly under section 188 and those of the police under section 4 of the Police Act are mutually exclusive. Section 188 provides no reason for the police to refuse to perform their duty to investigate an alleged crime in an appropriate circumstance. It***  
 E ***would therefore, in my view, not constitute a proper exercise of discretion on the part of the police not to investigate in reliance on section 188.*** Section 308 of the 1999 Constitution relates to immunity of the incumbent of any of the offices mentioned therein from legal proceedings, arrest, imprisonment or court process to compel appearance in court. This is an issue directly arising in F the cross-appeal and will be considered later.

***Mandamus is a high prerogative writ which lies to secure the performance of a public duty, in the performance of which the applicant has a sufficient legal interest. It gives a command that a duty or function of a public nature, which normally, though not necessarily, is imposed by statute but is neglected or refused to be done after due demand, be done. If there is a discretion in the performance of the duty, the court***  
 H ***has the power to examine whether the discretion to refuse to act has been properly exercised. In the exercise of that power, the court will not lightly overrule the discretion just because it considers it desirable that the duty be performed. Even if it is found that the discretion was not properly exercised or that***

**there was in fact no discretion at all in the matter, the court may still exercise its own discretion not to order mandamus on the general ground that the court would make no order in vain which could no longer be carried out; or on the other ground of expediency that it would serve no useful purpose even if the order were implemented. In those instances, the exercise of the court's discretion will need also to pass the usual test: see de Smith's Judicial Review of Administrative Action, 4th edition, pages 538-564. If it does not, an order made by the court is liable to be set aside:** see Adejumo v. Adejumo (1989) 3 NWLR (pt.110) 417 at p. 445; Okere v. Nlem (1992) 4 NWLR (pt.234) 132 at p. 149; Commissioner for Local Government v. Kaderbhai (supra) at pp. 660 - 661.

**I think the court below was right in refusing to make an order of mandamus and also that the police have a discretion as to the investigation of alleged crimes. Even though I have remarked that it was not enough reason to rely on section 188 of the Constitution, there are potentially good reasons why in the present case the court is justified not to compel investigation by the police. The court below gave some. I shall give more in the course of this judgment. In the meantime I answer both issues raised for the determination of this appeal in the affirmative.**

I now proceed to consider the cross-appeal. The cross-appellants raise four issues for determination, namely:

*"1. Whether Governor Bola Ahmed Tinubu in particular and persons named in section 308(3) of the 1999 Constitution have no immunity against investigation under section 308 of 1999 Constitution.*

*2. Whether the judgment of the Court of Appeal was right having affirmed that the lower court was correct in the meaning it ascribed to the word 'otherwise' in section 308(1)(b) and yet upheld that section 308 does not shield or protect the persons covered under section 308(3) from police investigation.*

*3. Whether the Court of Appeal was right in ruling that Governor Bola Tinubu could be investigated notwithstanding the ruling of the same Court of Appeal that Exhs. GF1, GF2 and GF3 which form the substratum of the appellant's case were inadmissible in evi-*

dence.

4. *Whether the appellant has the locus standi to apply for writ of mandamus.*"

In the respondents' brief of argument to the cross-appeal, the issues are reduced to three by merging the above issues 1 and 2, otherwise the thrust of both formulations of the issues by the parties is the same. I think issues 1 and 2 of the cross-appellants' brief of argument can conveniently be taken together.

The two issues demand to know whether section 308(3) does not cover immunity against investigation and whether the word "otherwise" as used in section 308(1)(b) has any limiting factor. Section 308 of the 1999 Constitution reads in full:

*"308 - (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section -*

*(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;*

*(b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and*

*(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:*

*Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.*

*(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.*

*(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor, and the reference in this section to 'period of office' is a reference to the period during which the person holding such office is required to perform the functions of the office."*

Learned counsel for the respondents has criticized the interpretation of section 308(1) by the court below which limited 'pro-

ceedings' to proceedings in court and excluded police investigation. In learned counsel's view, police investigation is part of criminal proceedings. In the respondents/cross-appellants' brief of argument, he states:

*"12.12. The definition of investigation involves the principles of law, audi alteram partem. The police while investigating must hear the other side i.e. the Governor. It must of necessity involve the taking of his statement under caution and the visit of the locus in quo, that is Chicago in the United States of America and Ibadan in Nigeria. To arrest, search and record statements are processes in the course of investigation."*

It is learned counsel's submission that section 308(1) provides absolute immunity against investigation and prosecution; and that the word "otherwise" in section 308(1)(b) is to be read to include police investigation which he regards as "an extra-judicial process."

Learned counsel for the appellant/cross-respondent submits that section 308 should be given a literal interpretation as it is clear and unambiguous, and that the word "otherwise" as used in section 308(1)(b) should be read ejusdem generis. Thus, as submitted, investigation by the police cannot be interpreted to be part of criminal proceedings. It is further submitted that the intendment of section 308 and all that it means fall under three immunities, namely that as regards the functionaries mentioned therein while in office:

- (i) no civil or criminal proceedings can be instituted against them in their private capacities;
- (ii) they cannot be arrested or imprisoned pursuant to any process of court; and
- (iii) no court can compel their appearance.

I consider the submissions of both counsel to be on an issue of great importance which ought to be closely considered. The court below, while recognizing that the functionaries protected under section 308 of the 1999 Constitution could not be arrested, imprisoned or prosecuted, observed that that section was not intended to completely shield them from investigation of an alleged crime. ***The views were expressed (as I paraphrase them) that (1) the police could conduct their investigation up to a point that would not amount to a breach of section 308, (2) the investigation would need to be discreet and could be overt or covert; and (3) when***

*the investigation is concluded as far as it is possible to go, and the allegation or the commission of crime appears supported, the police must remember that they cannot proceed further to the stage of arrest. I have no doubt in my mind that the court below correctly understood and stated the effect of section 308 of the Constitution on police duty to investigate the allegation or commission of crime by persons protected thereunder.*

Both parties made submissions as to how to approach the interpretation of section 308(1). *I agree with learned counsel for the appellant/cross-respondent that the provisions of that subsection are clear and unambiguous and should be given their ordinary interpretation. The cross-appellants would rather they be given a broad interpretation to include police investigation. I can find nothing in the entire section to suggest that a literal interpretation will not sufficiently and correctly bear out its meaning. The proper approach to the interpretation of clear words of a statute is to follow them in their simple, grammatical and ordinary meaning rather than look further because that is what prima facie gives them their most reliable meaning:* see *African Newspaper v. Federal Republic of Nigeria* (1985) 2 NWLR (pt.6) 137; *Salami v. Chairman L.E.D.B.* (1989) 5 NWLR (pt. 123) 539; *Ogbonna v. Attorney-General, Imo State* (1992) 1 NWLR (pt.220) 647. *This is generally also true of the construction of constitutional provisions if they are clear and unambiguous even when it is necessary to give them a liberal or broad interpretation.*

It cannot be suggested that clear and unambiguous terms of our Constitution may be rewritten or construed beyond what they mean in the guise of liberal or broad interpretation. That was never the aim of Sir Udo Udoma JSC in his observation in *Nafiu Rabiu v. The State* (1981) 2 NCLR 293 at p. 326. What he said was no more than that in construing our Constitution, mere technical rules of interpretation more suitable to ordinary statutes should not be applied in a way as to defeat the principles of government enshrined in the Constitution; and that-

*“where the question is whether the Constitution has used an expression in the wider or in the narrower sense,... this court should*

*wherever possible, and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution."*

I do however accept that there are occasions on which the terms of a Constitution demand a liberal, and where necessary, broad interpretation. This is particularly true when one remembers that a constitution does not normally use elaborate words. The words are expected to be interpreted to give them their best effect. This is what Ogundare JSC gave expression to in *Director S.S.S. v. Agbakoba* (1999) 3 SC at p. 77 where he put it generally that:

*"One does not expect to find in a constitution minute details for it is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In setting up an enduring framework of government, the framers of our Constitution undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men and women, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative provisions which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of Government."*

*The Courts will give especially broad, liberal construction to those constitutional provisions designed to safeguard fundamental rights."*

I think this approach should normally be at the background so as to be able to accommodate the social changes which advancement and the passage of time have brought in their trail. This does not mean changing the words used by the framers of the Constitution, but coming to terms with changing times even upon a literal interpretation of clear and unambiguous words. In *James v. Commonwealth of Australia* (1936) AC 578 at p. 614, Lord Wright, delivering the judgment of the Privy Council, observed inter alia:

*"It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the*

words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act [i.e. the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted: *British Coal Corporation v. The King* (1935) AC 500, 518. But that principle may not be helpful, where the section is, as s. 92 may seem to be, a constitutional guarantee of rights, analogous to the guarantee of religious freedom in s. 116... The true test must, as always, be the actual language used. Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the Act of 1900; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used. But new and unanticipated conditions of fact arise... The problems, however, of the Constitution can only be solved as they emerge by giving effect to the language used.'

The whole essence is to approach the interpretation of the Constitution in order to uphold it to meet the purpose of the framers and the aspirations held out by it for the larger society primarily by looking at the words used until there is the need to take other factors into consideration. **When the terms are plain and involve no ambiguity they must be given their meaning upon the ordinary and surrounding circumstances.**

**There can be no support for the argument on behalf of the respondents/cross-appellants that police investigation is part of criminal proceedings as envisaged under section 308(1)(a) of the 1999 Constitution. Criminal proceedings do not include police investigation as an act. The findings or the result or conclusions reached eventually in the investigation could. It is true that the evidence acquired in the course of police investigation may be used in criminal proceedings and become decisive of their outcome, but that does not make the investigation itself criminal proceedings. No amount of a liberal interpretation of the constitutional provision of section 308(1)(a) of the 1999 Constitution can make it so. A stage could be reached in an investigation where it might look, from the evidence, that there is sufficient cause to believe that an accused has emerged or been discovered. It is usually at that**

**stage that he is arrested, charged and cautioned. Eventually, the proceedings held against him for an alleged offence arising from the investigation become known as criminal proceedings:** see *Obadara v. President, Ibadan West District Council* (1965) *N.M.L.R.* 39. **It follows that criminal proceedings are commenced when an accused person is arraigned before a court, or at the least, when an information or a charge has been filed against him in court:** See *Oyediran v. The Republic* (1966) 4 NSCC 252 255, *Asakitipi v. The State* (1993) 5 NWLR (Pt. 296) 641 652. In *Post v. United States* 161 U.S. 583 (1896) cited by learned counsel for the appellant/cross-respondent, it was observed by the United States Supreme Court at p. 613:

*“Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate.... The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced. The grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court.”*

It is very plain that learned counsel for the respondents/cross-appellants, with all due respect to him, overstated the meaning of criminal proceedings by his submission that they include police investigation. **In my view, his further submission that the functionaries mentioned in section 308 of the 1999 Constitution cannot be investigated is based on the untenable premise (1) that police investigation is part of criminal proceedings and (2) that every police investigation of a suspect should lead to his arrest and “must of necessity involve the taking of his statement under caution.”** The court below, of course, rightly found no merit in this contention. It held as already indicated, that police investigation could be carried out upon a criminal allegation against a Governor so long as the police do not encounter him in the course of the investigation.

I think I can say this that in a proper investigation procedure, it is unlawful to arrest until there is sufficient evidence upon which to charge and caution a suspect. It is completely wrong to arrest, let alone caution a suspect, before the police look for evidence implicating him. If this is well understood, then it will be easy to appreciate how a Governor (for example) can be investigated, evidence both analytical and forensic assembled, collated and weighed without breaching section 308(1) of the 1999 Constitution which puts restrictions on legal proceedings, arrest or imprisonment, or the compelling of appearance by process of court, as far as he is concerned. The dignity of that office and freedom from coercive personal harassment of the incumbent are not thereby breached.

That a person protected under section 308 of the 1999 Constitution, going by its provisions, can be investigated by the police for an alleged crime or offence is, in my view, beyond dispute. To hold otherwise is to create a monstrous situation whose manifestation may not be fully appreciated until illustrated. I shall give three possible instances. Suppose it is alleged that a Governor, in the course of driving his personal car, recklessly ran over a man, killing him; he sends the car to a workshop for the repairs of the dent or damaged part or parts. Or that he used a pistol to shoot a man dead and threw the gun into a nearby bush. Or that he stole public money and kept it in a particular bank or used it to acquire property. Now, if the police became aware, could it be suggested in an open and democratic society like ours that they would be precluded by section 308 from investigating to know the identity of the man killed, the cause of death from autopsy report, the owner of the car taken to the workshop and if there is any evidence from the inspection of the car that it hit an object recently, more particularly a human being; or to take steps to recover the gun and test for ballistic evidence; and generally to take statements from eye-witnesses of either incident of killing. Or to find out (if possible) about the money lodged in the bank or for acquiring property, and to get particulars of the account and the source of the money; or of the property acquired? The police clearly have a duty under section 4 of the Police Act to do all they can to investigate and preserve whatever evidence is available. The evidence or some aspect of it may be the type which might be lost forever if not preserved while it is available, and in the particular instances given it can

be seen that the offences are very serious ones which the society would be unlikely to overlook if it had its way. The evidence may be useful for impeachment purposes if the House of Assembly may have need of it. It may no doubt be used for prosecution of the said incumbent Governor after he has left office. But to do nothing under pretext that a Governor cannot be investigated is a disservice to the society. I therefore answer issue I in the affirmative. B

**Issue 2 is simple. Section 308(1)(b) of the 1999 Constitution says that “a person to whom this section applies shall not be arrested or imprisoned during [his period of office] either in pursuance of the process of any court or otherwise.”** C  
**The bone of contention is what the word “otherwise” refers to. The word can mean no more than “any lawful process or command” which has the same effect as a “process of any court.” It must be ejusdem generis an enforceable process, command** D  
**or order meant to be obeyed. Ejusdem generis rule helps to confine the construction of general words within the genus of special words which they follow in a statutory provision or in a document.** One or two examples will suffice to illustrate the rule as closely as possible to the situation in section 308(1)(b). In Ashbury E  
 Railway Carriage & Iron Co. v. Riche (1875) L.R.H.L. 653, the statement in a Memorandum of Association was that one of the objects of the company was “to carry on the business of mechanical engineers and general contractors.” The House of Lords, per Lord Cairns L. F  
 C., said that the expression “general contractors” was limited by the previous words “mechanical engineers,” and that it ought to be confined to the making of contracts connected with that business. In Attorney-General v. Secombe (1911) 2 K.B. 688, section 11(1) of the Customs and Inland Revenue Act 1889 which referred to gifts G  
 “retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise” came up for interpretation as to what “or otherwise” delimited. It was held that those words must be confined to an enforceable arrangement of a sort which was ejusdem generis H  
 with contract. I answer issue 2 in the affirmative.

Issue 3 is whether the Court of Appeal was right that Governor Bola Tinubu could be investigated notwithstanding having ruled that exhibits GF1, GF2 and GF3 which form the substratum of the appellant's case were held inadmissible in evidence. The cross-appel-

lants' argument is that since the request for an order of mandamus was based on no evidence, the court below could simply have ruled to that effect. The cross-respondent objected to the nature of the argument canvassed in support of the issue by the cross-appellants and asked that it be discountenanced. However, the cross-respondent in the alternative argued that the mere fact that those exhibits were held inadmissible was not fatal to the case presented.

First, let me say I see nothing out of place in the argument canvassed by the cross-appellants on this issue. I do not think issues properly framed should be too narrowly discussed. They should be duly appreciated and relevantly considered as much as the facts and circumstances allow. As with the present issue, it is on the question of the reality of the situation that if there was no evidence of the alleged false documents presented by Governor Tinubu, then there is nothing for the court to decide. The matter should be brought to an end. The cross-respondent's reaction is stated in his brief of argument as follows:

*"4.17. It is submitted and as rightly found by the court below that the case before the court was the determination of the question whether or not a governor or persons stated in section 308(3) of the 1999 Constitution could be investigated by the police over criminal allegations made against such persons.*

*4.18. Basically, all that is required to be considered by the court is whether there was a complaint made worth compelling the police through an order of Mandamus, to investigate. The court is not at that stage required to look into the weight of the complaint and/or the evidence in support of such complaint. In a proceedings for order of mandamus, the issue of culpability is basically not before the court.*

*4.19. The court below affirming this basic position of law held at page 438 of the records thus:-*

*'The lower court did not and never had to express a belief or disbelief in the allegation that Mr. Bola Ahmed Tinubu committed any criminal offence.'*

*4.20. Conclusively, the admission of exhibits GF1, GF2 and GF3 did not in any way vitiate the proceedings and conclusion of the trial court, neither could it in anyway render ineffective the decision of the court below to the effect that Governor Bola Ahmed Tinubu*

*could be investigated, as same was basically not the essence of the case before the court below.”*

I do not think, on the whole, I agree with this argument. I certainly see where the entire perception went wrong. I must begin with the submission that: *“In proceedings for order of mandamus, the issue of culpability is not before the court.”* The court below had this to say: B

*“In the instant case, exhibits GF1, GF2 and GF3 being public documents could only be used in evidence if the certified copies of them were produced. If they were documents which by the Evidence Act could not be used in any civil proceedings, it matters not in my view whether they were produced for use in an interlocutory application or a substantive suit. They remain inadmissible in both situations...”* C

*Having made the above point, I must say that the error of the lower court in not formally pronouncing exhibits GF1, GF2 and GF3 inadmissible has not in any manner affected the proceedings and the conclusion arrived at. This is because, as the relevant depositions in the affidavit in support of the originating summons (i.e. paragraphs 8 and 9) revealed, the purpose of exhibiting exhibits GF1, GF2 and GF3 was to show that Mr. Bola Ahmed Tinubu had indeed deposed on oath to untrue facts. But the true essence of the case before the lower court was a determination of the question whether or not a governor could be investigated by the police for criminal offences committed during his period of office. In other words, the court below was to determine the true scope and import of section 308 of the 1999 Constitution. In order to invoke the jurisdiction of the lower court to determine the meaning of section 308 of the 1999 Constitution, the applicant did not need to prove that indeed Mr. Bola Ahmed Tinubu had committed a particular criminal offence.* D  
E  
F  
G

*It is therefore my view that the admission in evidence of exhibits GF1, GF2 and GF3 played no role whatsoever in the case before the lower court; and as it turned out the lower court did not and never had to express a belief or disbelief in the allegation that Mr. Bola Ahmed Tinubu committed any criminal offence.”* H

With all due respect to the court below, the above observation is rather misleading. It may well be true that in discussing whether the police in law, by virtue of section 308 of the 1999 Constitution, can

investigate allegations of crime made against Mr. Tinubu no proof is required that he did commit any such crime. **But if the cases were brought to court and no evidence was produced in connection with the allegations, the court would have no business to engage in such a discussion of the constitutional issue. Exhibits GF1, GF2 and GF3, if admissible, would have formed the basis of the evidence made available to the police to get them to investigate the alleged crime, following which failure, mandamus order was sought. As they were found to be inadmissible, the affidavit referred to by the court below to which the said documents were exhibited in support could no longer speak for itself. It no more had any evidential value in regard to the said allegations of crime. Without that evidence, the application for the order of mandamus would cease to have any purpose. It would be purely academic to press argument on it and expect the court's opinion thereon:** see *Akeredolu v. Akinremi* (1986) 2 NWLR (pt.25) 710 at 725. No court will order mandamus unless it is in the public interest: see *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (PT. 102) 122 at 174. **As said by Lord Mansfield in *R. v. Barker* (1662) 3 Burr 1265 at 1267 [cited with approval by this court in *Shitta-Bey v. Federal Public Service Commission* (1981) 1 SC 40 at 53]:**

**"A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court."** [Emphasis mine]

**There cannot be a proper case previously shown if an essential ingredient forming the background to the facts and circumstances imposing a public duty upon a person alleged to have failed to perform that duty, is not supported by evidence.**

**In my view, the absence of the evidence intended by exhibits GF1, GF2 and GF3 was enough to terminate these proceedings, or, at any rate, enough to base a discretion not to order mandamus as there was nothing to show that the allegations of crime were real and to hold therefore that Governor Tinubu should not, or need not, be investigated.** The court could also in the exercise of its discretion have refused to order mandamus on the ground that in the peculiar circumstances of the case,

if it is true that Governor Tinubu misrepresented his qualifications to the Independent National Electoral Commission, that cannot now invalidate his popular mandate when he was elected Governor of Lagos State. It can then be said that it is not worth the problem of judicial intervention. It is enough to await the decision of the electorate if and when he seeks re-election. In the absence of the evidence which exhibits GF1, GF2 and GF3 was meant to represent 1 answer issue 3 in the negative. This seems to me justifiable on the ground that the alleged crime is not in our society at the moment regarded so serious as to be a bother when there are far more serious crimes affecting their daily life (and I think the court below made this point), or that it is such that if not investigated now and the evidence in respect of it preserved, it may be lost forever. B C

The last issue (i.e. issue 4) is whether the appellant has the *locus standi* to apply for a writ of mandamus in this case. The cross-appellants argue that the appellant has not shown any special or personal interest to confer *locus standi* on him to support an application for mandamus. For instance, that he was not a governorship candidate of Lagos State. The appellant on the other hand contends that he did not need to be a governorship candidate or show that he is entitled to vote or be voted for in Lagos State. With that contention I am in agreement. He relies on section 59(1) of the Criminal Procedure Law (CPL) of Lagos State which confers on him a civil responsibility and right to lay a complaint before the police whenever he reasonably suspects that any person has committed an offence. I am impressed also with that submission as far as laying a complaint before the police on reasonable suspicion of any person having committed an offence is concerned. But section 59(1) does not confer a right beyond laying such a complaint. One must therefore expect to be shown a relevant provision of the law which confers a right to press for a mandamus if the police did nothing to investigate the complaint, or a special or personal interest above the general interest of the public to enable an application for a mandamus to be brought in a situation like this. The case of *Fawehinmi v. Akilu* (1987) 4 NWLR (pt. 67) 797 relied on by the appellant does not assist him. There at page 833 this court per Obaseki JSC said: D E F G H

*“The appellant as a person, a Nigerian, a friend and legal adviser to Dele Giwa, deceased, has a right under the Criminal Proce-*

B *procedure Law to see that a crime is not committed and if committed, to lay charge for the offence against any one committing the offence in his view or whom he reasonably suspects to have committed the offence. The law has given every person that right in order to uproot crime from our society. The respondent as a law officer who has seen the information drawn up by the appellant and has declined to prosecute the offence therein stated at public instance is under a clear duty to endorse a certificate to that effect on the information. Since the respondent has failed to carry out the statutory duty, the appellant is justified in bringing this application for the order of mandamus by a two stage procedure.*

D I think the above observation has some bearing with, and was much influenced by the enablement in, the provisions of sections 340 and 343 of the Criminal Procedure Law (Cap. 32) of Lagos State which were specifically relied on by Obaseki JSC. Thereafter, an amendment was introduced by the Criminal Procedure (Amendment) Edict No. 7 of 1987 to section 340(2) which now reads:

E *“Subject as hereinafter provided no information charging any person with an indictable offence shall be preferred unless the information is preferred pursuant to an order made under Part 31 to prosecute the person charged for perjury.”*

F In view of this amendment, this court in *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (pt. 102) 122 at 171 said per Karibi-Whyte JSC:

G *“Since the general provision in section 340(1) is subject to the specific provision in section 340(2), it follows that other offences other than perjury must be initiated in accordance with the Criminal Procedure Law. Hence, the information within the meaning of section 342 relied upon by Chief Gani Fawehinmi for the exercise of his right must be limited to the offence of perjury.”*

H The appellant himself does not seem to base his right to bring this application for a mandamus on any statutory provision apart from his reliance on section 59(1) of the CPL of his right to lay a complaint. The question therefore is where does his *locus standi* derive from in regard to this application? The court below thought he had the necessary *locus standi* but the reason for this is doubtful. The court said:

*“The case of the applicant is that section 59(1) [of the Crimi-*

*nal Procedure Law] confers on him the right to make a complaint and that in the exercise of that right he reported his complaint against Mr. Bola Ahmed Tinubu to the respondents but that the respondents failed and or neglected to honour his complaint by investigating it. He therefore invoked section 6(6)(b) of the 1999 Constitution to enable the lower court to determine whether or not the respondents were right to refuse to investigate the complaint he made and which section 59(1) Cap. 33 of Lagos State above gave him the right to make. It is my firm view therefore that the applicant has the necessary standing to bring the suit.”*

Reference was then made to *Fawehinmi v. Akilu* (1987), supra. First, I have to remark that this action brought by the appellant was not to determine whether the respondents were right in refusing to investigate his complaint. It was to compel them by an order of mandamus to investigate and to make the outcome public, I do not see that the police have a duty to make the outcome of their investigation public. Second, section 6(6)(b) of the 1999 Constitution does not confer *locus standi* on any litigant but merely allows the court to determine any question as to his civil rights and obligations. But he must show that his civil rights and obligations have been infringed before section 6(6)(b), which vests judicial powers in the court and provides forum for litigation, will enable the court to look into a person's grievance. Third, the court below seems to have concluded that because the appellant had a right to make the complaint that also gave him the right to go to court. It does not, in my view, follow at all.

***The authorities are to the effect that a person who seeks an order of mandamus must, among other things, show that he has a legal right to ensure the performance of a duty. Admittedly, the issue of the locus standi of an applicant for mandamus cannot be said to be free from difficulties. It would appear that such locus standi may depend on two alternative factors in regard to the duty allegedly not performed after demand: (a) Either that the applicant must have a specific legal right to enforce, or a specific legal right to the enforcement of, the duty: see R. v. Lewisham Union Guardians (1897) 1 Q.B. 498; R. v. Leicester Guardians (1899) 2 Q.B. 632; R. v. Customs and Exercise Commissioners ex parte Cook (1970) 1 WLR 450 at***

455; see also de Smith's Judicial Review of Administrative Action, 4th edition, p. 550. **(b) Or, that the applicant has a sufficient legal interest:** see de Smith's (supra) p.540; **or an interest more substantial than the general interests of other members of the community or interest-group to which he belongs, or that he**  
 B **is specially aggrieved by the non-performance of the duty more than other members of the public generally:** see pp. 551-564 of de Smith's (supra); R. v. London (City of) Union Assessment Committee (1907) 2 K.B. 764 where a rating authority was held not to have  
 C a sufficient legal interest to obtain a mandamus to compel an assessment committee to perform its statutory duties properly, and there Fletcher Moulton L.J. took the view at pp. 793-794 that, a fortiori, members of the public would have no locus standi.

I will therefore answer issue 4 in the negative as I am not satisfied that it have been shown that the appellant has a specific legal right to enforce or to the enforcement of the police duty to investigate alleged crimes, or that his interest which is above that of the general public has been affected. In the result, I dismiss the appeal and partially allow the cross- appeal to the extent and in the manner  
 E the issues have been resolved with particular reference to the issue of locus standi. I make no order as to costs.

### WALI JSC

F I have had the privilege of reading before now, the lead judgment of my learned brother Uwaifo, JSC and I agree with it in its entirety and adopt the reasoning therein as mine. However and for emphasis I wish to comment on Section 308 of the 1999 Constitution on which the Cross-appeal by the Respondents/Cross-Appellants is predicated.  
 G

Section 308 of the 1999 Constitution provides as follows:-

*“(1) Notwithstanding any thing to the contrary in this Constitution, but subject to subsection (2) of this Section:-*

H *(a) no Civil or Criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;*

*(b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the*

*process of any court or otherwise; and*

*(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:*

*Provided that in ascertaining whether any period of Limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.*

*(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.*

*(3) This Section applies to a person holding the office of President, or Vice President, Governor or Deputy Governor, and reference, in this section to 'period of office' is a reference to the period during which the person holding such office is required to perform the functions of the office".*

It is the contention of learned counsel for the cross-appellants that the Court of Appeal, in its interpretation of Section 308 (1)(a) of the 1999 Constitution adopted the narrow and disjunctive approach without taking into consideration the whole provisions of section 308 of the said Constitution, and this approach, submitted learned counsel, resulted in its wrong conclusion that Criminal proceedings referred to in the section, did not include police investigation. Among the authorities cited and relied upon by learned counsel is the definition of the word "investigation" on page 825 of Black's Law Dictionary, 6th Edition which is as follows:-

*"To follow up step by step by patient enquiry or observation. To trace or track, to search into, to examine and inquire into with care and accuracy legal inquiry,"*

I have looked into the cases cited by learned counsel for the cross-appellants to wit: Attorney-General Kaduna v. Hassan (1985) 2 NWLR (pt. 8) 483; Rotimi v. McGregor (1974) NSCC 547; Adewunmi v. Attorney-General Ondo State & Ors. (1996) 8 NWLR (pt. 464) 73 and Braithwaite v. D.G.M. (1998) 7 NWLR (pt. 557) 307 and have found none to be in support of the Cross-appellants' submissions.

Investigation of a Criminal complaint by the police against

any of the office holders mentioned in section 308(3) of the 1999 Constitution is not tantamount to laying a criminal complaint before a court. Investigation of a criminal complaint by the police is in my view a preliminary course which may or may not result in a criminal prosecution. In *Asakitipi v. The State* (1993) 5 NWLR (pt. 296) 641  
 B this court opined that criminal proceedings commences when the person suspected is arraigned before the Court on a formal charge and his plea taken. See also the American case of *Post v. United States* (1896) 161. U.S. 583; 16 Court Reporter, page 611 at 613,  
 C cited by learned counsel for Appellant/Respondent, in which it was held-

*“Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least,  
 D by complaint before a magistrate. Virginia v. Paul, 148 U.S. 107, 119, 121, 13 Sup. Ct. 536; Rex v. Philips Russ & R. 369; Reg. v. Parker, Leigh & C. 459, 9 Cox, Cr. Cos. 475. The submission of a bill of indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret,  
 E and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced. The grand jury may ignore the bill, and decline to find any indictment; and it cannot be known whether  
 F any proceedings will be instituted against the accused until an indictment against him is presented in open court.”*

The interpretation of section 308 of the 1999 Constitution by the Court of Appeal, particularly subsections (1) and (3) thereof, reads:-

G *“The provisions which the lower court needed to interpret in the first instance was section 308(1) of the 1999 Constitution. It provides that ‘no civil or criminal proceedings’ shall be instituted or continued against a person to whom the section applies. It seems to me that the use of the noun ‘proceedings’ after ‘civil or criminal’ make it  
 H very clear and incontrovertible that what draftsman had in mind was proceedings in court. Proceedings in that context mean the proceedings in a civil or criminal court or tribunal. It is also obvious that the draftsman could not have been referring to police investigation by employing the words civil or criminal proceedings.”*

Notwithstanding the interpretation above, it must not be assumed that a blanket authority is given to the police to question the officer mentioned in Section 308(3) while in office no matter how strong such evidence might be against him. Such evidence must be kept in the cooler until such time the officer vacates the office.

As I have nothing more useful to add to what my learned brother Uwaifo, JSC has said in the lead judgment, I shall also dismiss the main appeal and allow the Cross- appeal in part as contained in the lead judgment.

I adopt the order relating to costs made in the lead judgment.

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### **OGUNDARE JSC**

I agree entirely with the judgment of my learned brother Uwaifo JSC just delivered, a preview of which I have read now. He has dealt exhaustively with all the issues raised in the two appeals arising in this matter. I adopt his reasoning as mine.

The Court of Appeal is clearly right in holding that section 308 of the Constitution of the Federal Republic of Nigeria, 1999 does not extend to grant to the officers mentioned in subsection (3) thereof immunity from police investigation into allegations of crimes made against them. That Court is equally right in holding that police, however, have a discretion whether or not to conduct investigation into any complaint made to them. And the court will not intervene if on the facts of a particular case, the discretion is properly exercised.

For the reasons given in the lead judgment of Uwaifo JSC, I think the Court below is, however, wrong in its conclusions (a) that the Appellant has *locus standi* to apply for an order of mandamus in this case and (b) that notwithstanding that Exhibits GF1, GF2 and GF3 are inadmissible, the Appellant's case for mandamus is not thereby affected. Surely, without Exhibits GF1, GF2 and GF3, the whole exercise becomes academic. Appellant's case is not for an interpretation of section 308 of the Constitution but for an order of mandamus to compel the Respondents to investigate his complaint of commission of criminal offences by Governor Bola Ahmed Tinubu. Without those documents, there would be no basis for the complaint.

That the Appellant has a right to lodge a complaint to the police is beyond dispute. Section 59(1) of the Criminal Procedure

Law of Lagos State gives him that right. It is a right he enjoys with the other members of the public. But for him to apply for an order of mandamus to compel the police to investigate his complaint, he must show that he has an interest in the matter more than the general public. This the Appellant has failed to show in this case. I, therefore, hold that he lacks locus standi to make the application for an order of mandamus.

The other two complaints of the Cross-Appellants have been fully stated in the judgment of my brother Uwaifo JSC; I need not set them down in this judgment. It is sufficient for me to say that I, too, find them unmeritorious and I reject them.

In summary, I dismiss the main appeal and allow the cross-appeal in part only. I abide by the order for costs made by my brother Uwaifo JSC.

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### **MOHAMMED JSC**

I have had an opportunity of reading and considering beforehand the opinion of my learned brother, Uwaifo JSC, in the judgment just read. He expressed fully and accurately my own views on the issues canvassed in both the main appeal and the cross-appeal. I would only add a few words for emphasis.

The two issues identified for the determination of the appeal by the appellant are as follows:

F “1. *Whether the Court of Appeal was right in refusing to make an order of mandamus on the respondents where the performance of specific public duty has been clearly found established against the respondents.*

G 2. *Whether the provisions of section 4 of the Police Act, Cap. 359, Laws of the Federation of Nigeria, 1990 allows for the exercise of discretion by the Police on whether or not to investigate allegations of crime.”*

H Mandamus is issued from the High Court and directed to any person, corporation, or inferior court, requiring them to do some particular thing which appertains to their office and duty. In its application it may be considered as confined to cases where relief is required in respect of the infringement of some public right or duty and where no effective relief can be obtained in the ordinary course

of action.

Mandamus is indeed a discretionary remedy. In a situation like the facts of this case it will be a futile exercise to issue mandamus to order the police to investigate Governor Tinubu who under Section 308 of 1999 Constitution is immune from prosecution while in office. In this situation there is no practical possibility of enforcing obedience to an order to the police to investigate against Governor Tinubu when the police have no power to invite the Governor to make a statement. In *Re Fletcher's Application* (1970) 2 All E.R. 527 courts declined to review the adequacy of the grounds upon which the Parliamentary Commissioner for Administration had refused to commence investigation.

The appellant in his brief referred to the case *Reg. v. Commissioner of Police of the Ex parte Metropolis. Ex parte Blackburn* (1968) 2 Q.B. 118. In that case the appellant submitted that Lord Denning, M.R. spoke on the nature of the duty of the police and held that it was within the power of the Commissioner of Police for the Metropolis, as it was of every police constable, to enforce the law of the land. The court below has considered the facts and the law decided in that case in detail. At the risk of repeating what was decided in that case I have to affirm that the police have a discretion in appropriate circumstances to decide whether to conduct investigation following a complaint lodged before them or prosecute suspected persons. I believe that the appellant would only be satisfied following his complaint, if the police conduct a thorough investigation in this case, which must extend to the United States of America. Such an investigation may involve recording of statements of persons involved in issuance of certificates to Ahmed Tinubu in the United States of America and the recording of the statement of Ahmed Tinubu himself. Can such investigation be concluded without infringement to the provision of section 308 of 1999 Constitution? Oguntade, Learned Justice of the Court of Appeal is right wherein he observed in his judgment thus,

*“that the respondents are incapable of determining how best to meet the duties for crime detection imposed upon them by Section 4 of the Police Act. This is the more so in a case as this where the respondents have to steer their ship and maneuver it skillfully and with discretion as to avoid a collision with the provisions of Section 308 of the 1999 Constitution. Without the constraining effect of Sec-*

*tion 308, it would be difficult enough for the Court to assume the role of supervising the Police in crime detection and investigation. If the Police in the attempt to investigate ask the Governor any question which he declines to answer, that is the end of the matter. The purpose of Mandamus is thus defeated."*

B Judicial review of Administrative actions is not always available for the asking. Even if a case falls into one of the categories where judicial review will lie, the court is not bound to grant it, because the jurisdiction to make any of the various orders available in judicial  
C review proceedings is discretionary. An important obstacle to obtaining the relief by the applicant for a writ of mandamus is his interest in the proceedings. The overriding rule governing the standing of the applicant to apply for the writ is that the court must consider that he has sufficient interest in the matter to which the application relates. In  
D the case of *R. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Business Ltd.* (1982) A.C. 617 at 659 Lord Roskill held,

*"The term "interest" should perhaps not be given a narrow construction, but should be regarded as including any connection,*  
E *association or inter relation between the applicant and the matter to which the application relates."*

It is therefore necessary for the appellant to show a legal right requiring performance of the duty he wished the police to undertake. He must also establish that he is specially aggrieved by the non-  
F performance of the duty he applied for review. See also *Akilu v. Fawehinmi* (2) (1989) 3 NWLR (Part 102) 122

The police have therefore a discretionary power to consider each complaint lodged before them and decide whether to conduct  
G an investigation. Each case will be determined on its merit. The police are well aware of the constitutional immunity given to Governor Tinubu while in office. It is my view that the court will not issue mandamus to compel the police to investigate the complaint of crime lodged by the appellant against the governor after knowing very well  
H that there is no practical possibility of enforcing obedience to the order.

For these reasons and the fuller reasons given by my learned brother in the lead judgment I find no merit in this appeal. It is accordingly dismissed. I do not wish to add to the decision of my

learned brother on the cross-appeal. I abide by it and all the consequential orders made.

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### **ONU JSC**

I had the advantage of a preview of the judgment of my learned brother Uwaifo, JSC just delivered. I am in entire agreement with it.

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### **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Uwaifo JSC just delivered. I entirely agree with it.

Section 308 (1)(a) of the Constitution of the Federal Republic of Nigeria, 1999 provides thus:

*“308-(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section - (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office.”* (Underlining mine)

I think the language of section 308 is clear and unambiguous. It must be given its plain meaning. It is in this light that I agree with the Court of Appeal that section 308 does not grant to the officers mentioned in subsection (3) thereof immunity from police investigation into allegations of crime made against them. Investigation into a criminal complaint is not tantamount to instituting or bringing criminal proceedings. Criminal proceedings cannot be said to be instituted or brought until a formal charge is openly made against the accused in court. In other words criminal proceedings commence when the accused is arraigned before the court on a formal charge and his plea taken. See *Asakitikpi v. The State* (1993) 5 NWLR (Pt. 296) 641.

As I have already stated I entirely agree with the judgment of my learned brother Uwaifo JSC. For the reasons he gave I also dismiss the main appeal and allow the cross-appeal in part as contained in the leading judgment. I also abide by the order for costs.

**KALGO JSC**

I have read in advance the judgment just delivered by my learned brother Uwaifo JSC in this appeal, and I entirely agree with his reasoning and conclusions.

B The prerogative writ of mandamus is issued or ordered by the courts to secure or enforce the performance of a public duty. It is pre-eminently a discretionary power and the courts will decline to award it if other legal remedies are available and effective. An applicant for the grant of the order must show that he, has sufficient legal C interest to protect and that he has demanded the performance of the public duty from those obliged to do so and was refused.

In the instant case, the appellant has asked the trial court to order mandamus on the respondents (the Nigeria Police) to carry out investigations of a criminal nature against the incumbent Governor of Lagos State Mr. Bola Ahmed Tinubu. He argued that the Police in Nigeria have a public duty to investigate crimes reported to them by virtue of the provisions of Section 4 of the Police Act. Cap. 359 Laws of Federation of Nigeria 1990. The respondents however maintained that although they have a public duty to investigate crimes E under the law, they also have a discretion to decide which crimes should or should not be investigated having regard to the circumstances. On this they relied on *R. v. Commissioner of Police Exparte Blackburn* (1968) 2 Q.B. 118 at 136 and the letter dated 27th September 1999 (Exhibit GF 7) in reply to the appellants' letter (Exhibit F GF 5) dated 21st September 1999.

There is no doubt in my mind that the duty of the Police under Section 4 above cannot be categorized as being ministerial and as such there is an element of discretion or independent judgment available in it. See *Shitta Bey v. Federal Civil Service Commission* (1981) 1 SC 40. Looking closely at the contents of Exhibit GF 7, the respondents may have used them as reason for not embarking on the investigation: whether that was good reason having regard to their duty under Section 4 of the Police Act has been fully discussed in the H leading judgment. I do not intend to say more on that other than to agree that Police duty under Section 4 of the Police Act and the duty of the House of Assembly under Section 188 of the 1999 Constitution are mutually exclusive. But the point must be made that the police have a discretion, in appropriate circumstances in the way they

carry out their duty. When so exercised, it is only in very obvious and exceptional circumstances that the court may interfere with their discretion.

On the provisions of Section 308 of the 1999 Constitution it will be sufficient to say that on the ordinary meaning assigned to them, Governor Bola Ahmed Tinubu sought to be investigated, as the incumbent Governor of Lagos State would appear clearly to have immunity from any civil or criminal proceedings against him whilst in office. The combined effect of the provisions of Section 188 and 308 of the Constitution in the instant case makes it appropriate for the respondents to exercise a discretion not to go ahead with the investigation at the request of the appellant. This is why, in my respectful view, the trial court and the Court of Appeal refused to order mandamus in favour of the appellant as the discretion was properly exercised by the Police. See De Smiths Judicial Review of Administration Action 4th Edition page 538 - 564. It is also my view that although the appellant has the legal right to lodge a complaint under Section 59 (1) of Criminal Procedure Law of Lagos State, as he did, he has not shown that he alone had the legal right to demand investigation of the complaint leading to the issue of mandamus. He has therefore failed to justify the exercise of the discretion of the courts to grant the order of mandamus in his favour.

In respect of the counter-claim of the respondents, it must be clearly understood that there is a distinction here between "*Proceedings*" and "*Investigation*" leading to the proceedings. In civil proceedings, investigation is hardly necessary, but in criminal proceedings, where allegations of crime are made, there is almost always the need to ensure that there is sufficient evidence to prosecute and these may involve questioning, arrest or even detention where necessary of the person or persons involved. There is no doubt that in all criminal allegations, investigation plays an important part and it will make or mar subsequent criminal proceedings, but that does not make it qualify as being part and parcel of the "*proceedings*." It follows therefore that police investigation of a criminal allegation is not and cannot be regarded as criminal proceedings, so as to qualify as such "*proceedings*" under Section 308 (1) of the 1999 Constitution. It appears to me clearly therefore that the holders of the offices mentioned in Section 308 (3) of the 1999 Constitution can be investigated but

only to the extent that they should not be questioned, arrested or detained or asked to make any statement in connection with such investigation. I think the main purpose of Section 308 of the 1999 Constitution is to allow an incumbent President, Vice President, Governor or Deputy Governor mentioned in that section a completely  
B free hand and mind, in the performance of his or her duties and responsibilities whilst in office, so that no encumbrances may be placed in his or her way in the execution or performance of the public duties and responsibilities assigned to the office which he or she holds under the Constitution. But this is not intended to grant, him or her, an  
C immunity forever from full criminal investigation or any criminal proceedings in respect of any offence allegedly committed by him or her during the tenure of office.

In sum, I find that the order of mandamus was rightly refused  
D by the Court of Appeal in this case and that the Police in Nigeria, have a discretion depending on the circumstances of each case, whether to investigate any criminal allegation or not and that they have properly exercised the discretion in this case. I also find that the incumbent Governor of Lagos State has immunity from any civil  
E or criminal proceedings in this case whilst in office.

For the above and the more detailed reasons given by my learned brother Uwaifo JSC in the leading judgment, I also dismiss the appeal and allow the cross-appeal in part and abide by the order  
F of costs made therein.

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