IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA ABUJA
ON 23RDSEPTEMBER, 2021

BEFORE HIS LORDSHIP HON. JUSTICE CHIZOBA N. OJI
PRESIDING JUDGE

SUIT NO: FCT/HC/CR/292/2015

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

AND

1. **ALI ANGBA (ALIAS ISA)**
2. **SUNDAY JACOB** } **DEFENDANTS**

APPEARANCES:
RAHMAT MOHAMMED FOR THE PROSECUTION
D. E. SOLOMON FOR THE 1ST DEFENDANT
PATIENCE IGBITA FOR THE 2ND DEFENDANT

RULING IN TRIAL WITHIN TRIAL

In the course of the examination-in-chief of PW2 – Abayomi George – a Senior Security Intelligence Officer (SSIO) on 8th May 2018, he sought to tender the extra-judicial confessional statements of Ali Angba, the 1st Defendant and Sunday Jacob, the 2nd Defendant.

Mr Omowaye, learned counsel for the 1st Defendant objected to the admissibility of the statement of the 1st Defendant on the ground that "the statement was not voluntarily made by the 1st Defendant."

He urged the court to discountenance the application made by the Prosecution to tender the said confessional statement as an exhibit before this court.

Mr NivenAliyuMomoh(of blessed memory) for the 2nd Defendant objected to the admissibility of the 2nd Defendant's extra judicialstatement "because it was not a voluntary statement."

The court thus ordered a trial within trial to determine the voluntariness or otherwise of the extra judicial confessional statements of the 1st and 2nd Defendants.

Abayomi George, the officer of theDepartment of State Security and Yahaya Isa Mohammed, his superior officer testified as PW1 and PW2respectively in the trial within trial. They testified to the effect that the statements of the two defendants were voluntarily made. They were cross examined and discharged in the trial within trial.

The 1st Defendant, Ali Angba testified as DW1 andSunday Jacob the 2ndDefendant as DW2 in the trial within trial.

In his examination in chief, DW1 Ali Angba said his statement was not voluntarily made. He testified he was beaten and tortured and that he sustained injuries and was covered in blood. He was treated at the hospital. Again he testified that he was forced to copy a statement already prepared by officers of the Department of State Security. He mentioned PW1 Abayomi George as one of those that tortured him.

In cross examination he maintained that he was forced to copy what Amodu Solomon wrote, as his statement. That "everything written there are lies."

DW2 Jacob Sundaytestified inter alia that he was beaten by officers of the Department of State Security. His head was broken. He was treated at the clinic. The torture was so bad that he stooled on his body. He was also forced

to copy a statement already prepared by officers of the Department of State Security.

In cross examination, he maintained that he copied the statement from a statement given to him by Ibrahim Abuya, an officer of the Department of State Security because of the beating.

Both Defendants were cross examined and discharged from the trial within trial.

In his written address in the trial within trial, Mr OlusojiOmowaye for the 1st Defendant urged the court to reject the extra judicial confessional statement of the 1st Defendant as the Prosecution had failed to prove beyond reasonable doubt that same was made voluntarily.

Further, that the provisions of Section 17(2) Administration of Criminal Justice Act 2015 were not complied with.

Authorities were cited in support of his submissions including **OWHORUKE V COP (2015)LPELR- 24820 (SC)** decided on Friday the 26th day of June 2015.

In his written address in the trial within trial in response to Mr OlusojiOmowaye, Femi David Ikotun Esq, the learned Prosecutor submitted that the 1st Defendant having retracted his confessional statement by maintaining in the trial within trial that the confessional statement was not his, there was no need for the trial within trial and that the retraction does not make the statement inadmissible. Therefore he urged the court to admit the confessional statement citing**AUGUSTINE IBEME V THE STATE (2013) 10 NWLR (PT 1362) PG 333.**

He further urged that contrary to the assertions of learned counsel to the 1st Defendant, that the presence of a legal practitioner is not mandatory for the taking of the statement of an accused person, but rather the word of caution is mandatory, citing **STANLEY UGOALA V THE STATE OF LAGOS (2021) 3 NWLR (PART 1763) 263** decided on Section 9(3) Administration of Criminal Justice Law of Lagos State which is imparimateria with the provision of Section 17 (a) of the Administration of Criminal Justice Act 2015. See also **ADEYINKA AJIBOYE V FEDERAL REPUBLIC OF NIGERIA (2018) 13 NWLR (PT 1637) AT 452-453 PARA H-B.**

Finally he urged that the confessional statement in question was made on 21st July 2014, before theAdministration of Criminal Justice Act came into force and that it is the Evidence Act and not the Administration of Criminal Justice Act that governs admissibility of evidence. See **OGUNTOYINBO V FRN (2018) LPELR- 45218 (CA).**

The learned Prosecutor urged the court to admit the 1st Defendant's confessional statement in evidence and decide what weight to be attached to it at the conclusion of trial.

In the written address of Prof. Agbo J. Madaki argued by M.P. AnunduEsq. for the 2nd Defendant, it was also submitted that the provisions of Section 17 of the Administration of Criminal Justice Act were not complied with. That the evidence of PW1 in the trial within trial was contradictory and unreliable while that of PW2 was hearsay. He urged that the 2nd Defendant's purported confessional statement be rejected in evidence as same was not voluntarily made.

Authorites were relied upon including **ONUOHA V THE STATE (1989) LPELR-2704 (SC).**

The Prosecution in his written address in response to the 2nd Defendant relied on his earlier submissions on record. He further argued that the evidence of PW2 is not hearsay as the Judges Rules were the applicable rules to the taking of the statement of the Defendants and not the Administration of Criminal Justice Act 2015 which was not in operation then. Therefore PW2 in the trial within trial did not need to be present for the taking of the statement of the 2nd Defendant. He urged that the court to find the evidence of torture of the 2nd Defendant too outlandish to be credible. He urged the 2nd Defendant's confessional statement be admitted in evidence and the weight to be attached to it be determined at the conclusion of trial.

I have considered the evidence adduced at the trial within trial and the written and oral submissions of learned counsel for the 1st and 2nd Defendants and the learned Prosecutor.

The essence of a trial within trial is to test the voluntariness or otherwise of a confessional statement of a defendant. To activate the process for a trial within trial, the defendant must as a matter of necessity, own up to the confessional statement as his and then challenge the voluntariness of the confessional statement.

In **IBEME V THE STATE (2013) LPELR-20138 (SC) AT 15-16 PARAS B-F**, cited by the learned Prosecutor, the Supreme Court per Chukwuma-Eneh JSC in consideration of Sections 28 and 29 of the Evidence Act 2011, held that:-

> "The implication arising from construing the two sections together is that where an accused person challenges a confessional statement

apparently made by him (i.ewhere he has owned it up as his) then and only then does it become necessary for a court to order to determine the voluntariness of the statement before admitting the statement. This process is conducted by a trial within trial (a mini trial) to enable the Prosecution to prove beyond reasonable doubt that the statement is voluntary. See **OZAKI V THE STATE (1961) ANLR 654, PATRICK NJOVENS & ORS V THE STATE (1973) 5 SC 71, SEBERU V THE STATE (2010) 1 NWLR (PT 1176) 494 AT 449, OGUDO V THE STATE (2011) 2 OR LRCN 8, R V OMOKARO 7 WACA 146 and GBADAMOSI V THE STATE (1992) 11-12 SCNJ 269**. It is my view that in that regard the Appellant has to own up that the statement is his; all the same, as he is alleging a vitiating factor(s) making it illegal at law as for example inducements, threats or promises as affecting the making of the statements and then having been extractedby the I.P.O or person in authority.

Quite clearly it follows from the foregoing that where a statement does not tantamount to a confession and is opposed as it is about to be tendered by the prosecution a trial within trial is not ordered by the trial court instead the court proceeds to take arguments on the objection from both sides of the case to rule on the admissibility of the statement.The trial court can proceed to admit the statement or not. The same is the case where the statement is a confession and it is challenged not on the ground of voluntariness but on such grounds that the accused is not the maker or for incorrectly recording the confession and there being no issue of voluntariness, it should be admitted without holding a trial within trial. It is then open to the aggrieved party to appeal against the decision overruling his objection."

Seealso **LASISI V THE STATE (2013) LPELR 20183 (SC) PG 29 PARAS A-B.**

In other words, to determine whether a statement is voluntary to necessitate a trial within trial, the accused/defendant must first acknowledge the statement as his statement, as otherwise a trial within trial will be conducted on a statement the defendant has disowned.

In the instant case, Mr Omowaye and Mr Momoh (late) for the 1st and 2nd Defendants respectively had objected to the admissibility of the extra judicial confessional statements of the 1st and 2nd Defendants on the ground that they were not voluntarily made.

However in their evidence in chief and in cross examination in the trial within trial, the 1st and 2nd Defendants maintained that they were forced to copy statements already prepared by the officers of the Department of State Security and Amodu Solomon. They categorically denied the statements weretheirs.

There was no re-examination of both Defendants in the trial within trial. It is clear that the objection of the 1st and 2nd Defendants had shifted from "it is my statement but I was forced to make it" to "it is not my statement at all", a totally different manner of objection. In other words, the 1st and 2nd Defendants have retracted their confessional statement in the trial within trial.

A defendant who has not acknowledged his statement has no locus to contest its voluntariness.

In **IBEME V STATE** supra, the Appellant had said in the trial within trial that he was made to recopy the statement under consideration and was not taken before a superior police officer for the endorsement of the statement. In other words that he was denying the contents of the statement and at the same time

saying that the statement ascribed to him and endorsed by a superior police officer was different from the statement he was made to recopy.

The conclusion of the trial court that the statement was not his and that the accused had retracted his statement was affirmed by both the Court of Appeal and the Supreme Court. At page 24-25 paragraph E-A the court held:-

> **"**This case has brought to the fore the need to be vigilant where an accused is objecting to tendering of his confessional statement so as to warrant a trial within trial. In that regard he has made it abundantly certain at the time of raising the objection to the statement's admissibility in evidence, that he also owns up the statement as his, otherwise the trial court labours in vain where as in this case it has been disowned belatedly at the hearing in trial within trial.**"**

This is precisely what has happened in the instant case.
The 1st and 2nd Defendants having belatedly disowned their extra judicial confessional statements in the trial within trial, there was no premise for the trial within trial.

Accordingly I agree with the Prosecution that the only option open to the court is to admit the statements in evidence and decide what value to attach to them at the end of the trial.

Just in case I am wrong in my finding above, I have nonetheless proceeded to examine the evidence in the trial within trial. The Prosecution witnesses in the trial within trial testified there was no harassment of the Defendants in taking their statements. They were not confronted with the evidence of the torture allegedly meted out to the 1st and 2nd Defendants during the making of their

confessional statements. Particularly PW1 who DW1 mentioned by name as having tortured him, was not confronted with this issue in cross examination. Neither was PW2 who testified in the trial within trial that he saw both Defendants who looked normal and were coherent at the time they were brought before him the same day their statements were made. PW2's evidence is therefore not hearsay.

I think the Defendants left it too late to only call such alleged evidence of torture during the testimony of DW1 and DW2 after the witnesses of the Prosecution had been discharged in the trial within trial.

Even when the PW1 had earlier testified that the 2nd Defendant defecated on himself upon sighting another of their alleged kidnap victims, PW1 was not cross examined to show that the 2nd Defendant defecated because he was tortured by the officers of the Department of State Security. The Defendants thus denied the court the opportunity of seeing the reaction of the PW1 and PW2 to these allegations.

I agree with the Prosecution that the evidence of the Defendants as to the alleged series of torture treatment meted out to them by the Department of State Security therefore is belated and now appears outlandish.

The Prosecution's witnesses were not confronted with allegation of torture particularly PW1 in the trial within trial.

In **GAJI & ORS V PAYE (2003) LPELR 1300 (SC)**Edoae JSC at Page 220 paragraph B on effect of failure to cross examine a witness on a material point had this to say:-

> "It has been said that the effect of failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness. **OFORLETE V STATE (2000) 12 NWLR (PT 681) 415 AT 436.** In the case of **AGBONIFO V AIWEREOBA (1988) 1 NWLR (PT. 70) 325; (1988) 2 SCNJ 146**, this court held that it is not proper for a defendant not to cross-examine a plaintiff's witness on a material point and to call evidence on the matter after the plaintiff had closed his case."

See also **SULEIMAN V STATE (2015) LPELR-25726 (CA) PP 28-29 PARA F.**

Therefore the evidence of the Prosecution was not challenged on the voluntariness of the confessional statements of the 1st and 2nd Defendants. In any event, the 1st and 2nd Defendants had retracted their confessional statements in court. Thus obviating the need for the trial within trial.

Finally, it has been raised by the defence that Section 17 (2) of the Administration of Criminal Justice Act 2015 was not complied with. I agree entirely with the Prosecution that the confessional statements in question were made on 21st July 2014 before the Administration of Criminal Justice Act 2015 came into force, therefore the provisions of Administration of Criminal Justice Act will not apply in the circumstances of this case, rather it is the Judges Rules and Evidence Act 2011 that will apply.

The strong recommendation of His Lordship, Rhodes Vivour JSC (as he then was) in **OWHORUKE'S CASE** cited by Mr Omowaye for the 1st Defendant, with all due respect, was only a recommendation and not a decision on the Administration of Criminal Justice Act 2015 which was not considered in the Owhoruke's case having been passed into law on the 13th May 2015, just over

a month before Owhoruke's casewas decided by the Supreme Court on 26th June 2015. I therefore find refuge in the Supreme Court case of **ADEYINKA AJIBOYE V FRN (2018) 13 NWLR (PT. 1637) AT PP 452-453 PARA H-B** cited by the learned Prosecutor that the absence of counsel when the confessional statement was recorded will not make same inadmissible.

Furthermore, in **KADIRI V THE STATE (2019) LPELR – 47714 (CA)** the Court of Appeal per Ogakwu JCA held that:-

> "The absence of a video recording of a confessional statement or the making of same in the absence of a legal practitioner does not make the statement inadmissible in evidence, rather they are factors to be considered along with other facts on which the court can determine the voluntariness or otherwise of the confessional statement."

In the instant case the 1st and 2nd Defendants denied their statements so the statements are admissible in evidence. The weight to be attached to them will be determined at the conclusion of trial. And should the trial within trial have been necessary, it is my view that the Prosecution proved beyond reasonable doubt that the confessional statements of the 1st and 2nd Defendants were voluntarily made.

The extra judicial confessional statements of the 1st and 2nd Defendants are therefore admitted in evidence and marked as - Exhibits P14 and P15 respectively. The objection of the Defendants are therefore overruled.

Hon. Judge