



THE ADMISSIBILITY OF
Confessional Statements:
IMPERATIVES OF TRIAL WITHIN TRIAL

By

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The preliminary question I would posit from the onset is whether in the first place it is imperative to have a trial within trial in order to determine the voluntariness of a confessional statement? Are there other methods by which the voluntariness of a statement that qualifies as a confession can be admitted without the resort to the cumbersome and time wasting procedure of a trial within trial?

My discourse this morning is to examine the necessity of trial within trial, analyze the various challenges and problems that erupt from this procedure. I shall not leave my audience with just the problem, at a later part of my discourse I will proffer solutions to the problems and benchmark same against the procedures applicable in other jurisdictions.

It is my hope that at the end of my presentation I will have been able to trigger a new thinking in the procedure formally known as trial within trial, a thinking sufficient enough to compel its abrogation. That is my task. In any event, to borrow the words of Heraclitus of Greece; **“There is nothing permanent except change”**.

My first visit in this laborious process will be to **section 29 (2) (a) - (b) of the Evidence Act, 2011** which governs admissibility of confessional statements and sets out the circumstances under which statements qualifying as confessions will be admitted. Curiously, and interestingly Section 29, as with any other section of the entire Evidence Act makes no mention of the phrase “trial within trial”. I make bold to say that the phrase does not exist in our statutory lexicon. Rather it is a practice that has evolved over time to test the voluntariness of a statement qualifying as a confession.

My audience attention is invited to the weighty pronouncement in the case of **Michael v The State**¹ where erudite Law Lord, per Nnaemeka Agu JSC (as he then was) invoked a criticism of the concept in 1990 in the following immutable words:

“I must confess that I have my reservation about the continued need for a trial-within-a-trial in this country in which our judges are both judge and jury...”

¹(1990) 1 TLR (pt.1) 34 at page 45

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Also, the learned jurist, P.K Nwokedi (former Chief Judge of Anambra State) had offered subtle but direct criticism when he opined thus:

"Personally, I have often wondered what is the necessity of a trial within the trial before the admission of an alleged confessional statement in our courts."²

On account of the cumbersome nature of the trial within trial procedure for admitting confessional statements several issues bothering on its procedure has been brought before the courts for consideration. Such issues bother generally on (a) when will the conduct of a trial within trial be ordered in a proceeding?(b) at what point should a defence lawyer who intends to challenge a confessional statement raise objection to same to activate the conduct of a trial within trial?(c) on whom lies the onus/burden of proof in a trial within trial and on what standard of proof will the burden of proof be discharged? (d) what is the nature of evidence required by the defence counsel to establish the involuntariness of a confessional statement and conversely what is the nature of evidence required by the prosecution to establish that a confessional statement was made voluntarily? (e) what should the ruling of the trial judge arising from the trial within trial be focused on? and (f) what is the effect of the ruling of the trial judge on the entire conduct of the criminal proceedings.

A trial within trial being a proceeding where witnesses will be called, cross-examined, possibly re-examined with written addresses filed³ and the judge delivering a ruling obviously takes time and imposes an undue burden on the judge. An example in this regard can be seen in the case of **Akaze v FRN**⁴ where a trial within trial was ordered on the 19th of November, 2015 and concluded by a ruling delivered on the 15th of May, 2017 after a total of about five witness were called. Prior to the trial within trial two witnesses had been called by the prosecution. Sadly, the aftermath of the successful appeal against the ruling of the trial judge in the trial with trial was that the case be remitted to another judge for trial *denovo*.

² Unpublished paper titled "Admissibility of Confessional and other Statements" cited by Ogundare JSC in *Gbadamosi v The State* (1992)LPELR-1313(SC)

³ See the cases of *Jua v The State* (2007) LPELR-9759(CA), *Lateef v FRN* (2010) 37 WRN 85 and *Nsofor v The State* (2004) 18 NWLR (pt.905) 92.

⁴(2018) LPELR-43922(CA)

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The case of *Akazeze* at the time it was pending before the trial judge who took the trial within trial proceeding competed with other cases in the Court's docket and in the end the case was not finally determined by the Court.

From the onset the point must be made extremely loud that a confessional statement cannot on its own secure conviction. The purported confessional statement must be evaluated against several pieces of physical evidence and testimony before its veracity is accepted. This is what I am saying, a confessional statement by the decision in the case of **Nsofor & Anor v The State**⁵ requires corroboration to pass the test for due weight to be accorded to it. In fact it was stated by per Oguntade JSC in **Nsofor's case** that corroboration is one of the six tests a confessional statement must pass before the court can attach weight to it. In other words, it is still part of the intrinsic evidence that the court will consider. The question which then agitates the mind is why do we spend much time over one piece of evidence such that it takes almost two years as typified in *Akazeze's* case and many others, to determine its voluntariness or otherwise?.

With the quest for expeditious determination of cases which is the quintessence of the **Administration of Criminal Justice Act, 2015**⁶, which is to the effect that: "...the purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes ... speedy dispensation of justice"⁷, it has therefore become imperative to consider if the conduct of a trial within trial and the devotion of precious judicial time to same is still necessary.

Legal Jurisprudence behind the conduct of a Trial within Trial:

A confession has been described as the best evidence in criminal law. In it, the accused admits that he committed the offence for which he is charged. For this purpose, the accused is the figurative horse's mouth. He committed the offence and he confesses and admits the offence. He "enters a plea of guilty" at the investigative stage so to say. There cannot be "a better" evidence.⁸ This statement underscores the importance of confessions in a criminal trial. Law enforcement agencies (notably the police) therefore very often place undue weight on the need to secure confessions from an accused person, at the expense of a thorough investigation of

⁵ (2004) LPELR-2068(SC). See also: *Akpa v State* (2007) All FWLR (pt.351) 1560 at 1571-1572.

⁶ See Section 1(1) of the ACJA

⁷ See the case of *Charles Akazeze v FRN* (Supra)..

⁸ *Adebayo v A.G of Ogun State* (2008) LPELR-80(SC)

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crime. Consequently, the law in adversarial criminal law system, such as exists in Nigeria tries to formulate rules by which the temptation to use improper inducements and other similar tactics to obtain confessional statements are reduced to the barest minimum, if not entirely removed. Such rules are based upon two fundamentally important concepts to wit (a) the need to ensure the reliability of the statement and (b) the need to ensure fairness by guarding against improper coercion by the state. Thus, as a rule of evidence, any confessional statement found not to be voluntarily made will not be admitted in evidence.⁹

The practice inherited from the common law jury system through which the Courts in Nigeria consider the admissibility of confessional statements, when challenged as being involuntary is the conduct of a trial within trial. In the case of **Gbadamosi v The State**¹⁰, per Ogundare JSC in giving a historical perspective to the whole concept opined first that:

“A trial within the trial is an off-shoot of the jury system. In this country the jury system having been on in Lagos in the 1930's if not before that time.”

However, he concluded by questioning the wisdom behind the trial within trial when waxing poetically he said:

“As I said before, trial within the trial is firmly rooted in the jury system. Remove the jury, off goes trial within the trial.”

Interestingly, notwithstanding that the jury system no longer holds sway in Nigeria, the practice of conducting a trial within trial has not been discontinued. What then does a trial within trial entail?

Trial within Trial has been described by the Supreme Court, per Chukwuma-Eneh JSC in the case of **Augustine Ibeme v. The State**¹¹ as follows:

“...one aspect of dispensing equal justice and fairness under the Rule of Law. By this simple procedure it is

⁹ See the case of Jimoh v The State (2014) 10 NWLR (pt.1414) 105 and Asuquo v. The State (2016) LPELR-40597 (SC)

¹⁰ (1992) LPELR-1313(SC)

¹¹ (2013) LPELR-20138(SC).

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assured that statements of a person charged with a criminal offence obtained by a police officer or anyone in authority otherwise afflicted by any inducement, threats or promises being illegal at law are expunged from the mainstream of the prosecution case at the trial of his cause or matter; and the court is precluded from acting upon it in dealing with the case. The procedure of trial within trial is so much used to exclude involuntary statements of an accused person that is contrary to the law and it has stuck on for good reason..."

A seeming rationale for the conduct of trial within trial was succinctly offered by the Supreme Court in the case of **Kamila v. The State**¹² in the following words:

"It is because of the strategic position of a confessional statement that there is no getting away from it that once there is a challenge to the voluntariness of confessional statement that the trial Court faced with this challenge is bound to conduct a trial within trial to determine the voluntariness or otherwise."

It can therefore be safely deduced that trial within trial was necessitated by the prosecutorial ineptness and unreliability of police officers who fail in their duty to ensure that statements extracted from suspects in their custody are obtained without any form of oppression and in the absence of any circumstance that will render those statements unreliable.

Consequently, where a procedure that is fool proof against all forms of oppression in obtaining confessional statements and against all forms of inducement or such circumstance as would render a confessional statement unreliable is adopted, objections regarding the voluntariness of confessional statements will hardly be raised and overtime recourse will not be had to the conduct of a trial within trial. It is this problem that must have agitated the mind of the legislators when they specifically provided in **section 15(4) and 17(1) and (2) of the Administration of Criminal Justice Act, 2015 (ACJA)** as follows:

¹² (2018)LPELR-43603(SC)

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Section 15 (4)

“Where a suspect who is arrested with or without warrant volunteers to make confessional statement, the police officer shall ensure that the making and taking of the statement shall be in writing and may be recorded electronically on retrievable video compact disc or such other audio visual means”

Section 17 (1) and (2)

- (1) “Where a suspect is arrested on allegation of having committed an offence, his statement shall be taken, if he so wishes to make a statement.**
- (2) Such statement may be taken in the presence of a legal practitioner of his choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a Civil Society Organization or a Justice of the Peace or any other person of his choice. Provided that the Legal Practitioner or any other person mentioned in this subsection shall not interfere while the suspect is making his statement, except for the purpose of discharging his role as a legal practitioner.”¹³**

Similar provision in section 9(3) of the Administration of Criminal Justice Law of Lagos State provides that:

“Where any person who is arrested with or without warrant volunteers to make a Confessional Statement, the Police Officer shall ensure that the making and taking of such statement is recorded on video and the said recordings and copies if any may be produced at the trial provided that in the absence of video facility, the said statement shall be in writing in the presence of a legal practitioner of his choice”

¹³ Section 17 (1) – (5) of the ACJA.

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In the light of the foregoing robust procedure prescribed for extracting statements from any suspect, objections to the voluntariness of confessional statements ought to have reduced and recourse to the conduct of a trial within trial ought no longer be the case. I will come back to this shortly. Let us first examine the provision of **section 29 of the Evidence Act, 2011** and the process involved in conducting a trial within trial.

Section 29 of the Evidence Act:

Section 29 of the Evidence Act provides for the admissibility of confessional statement as follows:

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

Unlike the provision of **sections 27 and 28 of the Old Evidence Act**,¹⁴ which only speaks of the relevance of confessions to a proceeding and determines the relevance by how the confession was obtained, **section 29 (1) of the Evidence Act, 2011** clearly allows for the admissibility of confessional statements and attaches the relevance of same to the issue in controversy. By the provision of **section 29(1)** set out above, the admissibility of a confessional statement is predicated on two important factors to wit (a.) relevance to the particular proceedings, and (b) non exclusion by virtue of other provisions of section 29. Whilst the issue of relevance may be easily determined by reference to the charge and the contents of the confessional statement, the issue of the exclusion by other provisions of the section tend to be contentious. Let us therefore examine the other part of section 29 which may lead to the exclusion of confessional statement.

Section 29 (2): *if, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained-*

- (a) By oppression of the person who made it; or**

¹⁴Cap. E14, Laws of the Federation of Nigeria, 2004

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(b) In consequence of any said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.

The first observation from the provision of **section 29(2)** above is that just like its predecessor (the old Evidence Act) it prevents confessional statements obtained by oppression, inducement, promise and such other factors as would render a confession unreliable from being given in evidence. In other words only confessions made voluntarily shall be admitted in evidence. Interestingly and remarkably too, it did not provide for conduct of a trial within trial to determine whether a confession *proposed to be given in evidence* is voluntary but **simply states that the court shall not allow a confession vitiated by oppression and the likes to be given in evidence**. The question therefore is why have we restricted the determination of the voluntariness of a confessional statement to conduct of trial within trial?

Was trial within trial even contemplated at all by **section 29(2)**? I certainly do not think so. Firstly, it is my view that **section 29(2)** never prescribed that the defence should raise objection to the admissibility of a confessional statement **after** commencement of trial or **at the point of tendering** the document. It simply provides that if when the prosecution *proposes to give in evidence* a confession made by a defendant *it is represented to the Court* that it was obtained by oppression and inducement, the confession shall not be allowed to be given in evidence. At what point could it therefore be said that the Prosecution proposes to give a confession in evidence?

To answer this question, it is settled that in interpreting statutes, the Court must first of all construe the words of the statute in its natural and ordinary meaning.¹⁵ It is only when there is ambiguity in the natural and ordinary meaning of words used in a statute that recourse will be had to other means of interpretation.¹⁶ Let us examine the legal meaning of the operative word in **section 29(2) “proposes”**

¹⁵See the cases of *Animashaun v Ogundimu* (2015) LPELR-25979 (CA) and *A-G of Federation v A-G of Lagos State* (2013) LPELR-20974(SC)

¹⁶ See the case of *Noga Hotels Int’l S.A v NICON Hotels* (2008) All FWLR (Pt.411) 840 at 850.

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According to Oxford Learner's Dictionaries¹⁷, the word "propose" means:

"to suggest a plan, an idea, etc. for people to think about and decide on"

It is my view from the natural and ordinary meaning of the word *propose* as stated above, that the prosecution makes the suggestion or better still the proposal that it will rely on the confessional statement when the information or proof of evidence containing same is served on the defendant. Hence that should be the time when the defendant is to represent to the Court that the confessional statement contained in the proof of evidence is not voluntary and that an objection will be raised to its admission. Put differently, it is my view that the objection to the admissibility of confessional statement as being involuntary can be done immediately after arraignment but before taking of witnesses testimonies. To buttress my contention, my audience attention is invited to note that in the provision of **section 37(b) of the Evidence Act** where hearsay evidence was defined, the legislators were careful to use the word "**tendered in evidence**" and not "**proposed to be given in evidence**". Similarly in **section 203(1) of the Evidence Act**, the phrase "tender in evidence" was also used as opposed to "propose to give". This clearly shows that the legislature was careful in their choice of words and did not intend that the representation to the Court that a confession is not voluntary should of necessity be made at the point of tendering the confessional statement.

Furthermore Sections 300(1) of the ACJA which contains similar provisions in sections 268 and 269 of the ACJL provides thus:

300. (1) After a plea of not guilty has been taken or no plea has been made, the prosecutor may open the case against the defendant stating shortly by what evidence he expects to prove the guilt of the defendant. Presentation of case for prosecution.

In my view, another opportunity is presented to the defence to make the required representation regarding the involuntariness of a confessional statement proposed to be given by the prosecution at the time the prosecution refers to same in its opening statement.

¹⁷<https://www.oxfordlearnersdictionaries.com/definition/english/propose> accessed on 17th September, 2019

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The concomitant effect of what I am saying is that the representation can be made to the Court upon receipt of proof of evidence (that is before trial) or when the prosecution make its opening statement (still before trial) and the issue of the voluntariness can be determined either by the conduct of a preliminary hearing as currently practised in the United Kingdom or by mandating the prosecution to lead evidence *ab initio* on how the confessional statement was extracted in which case the confessional statement can be provisionally admitted and the defence will also as part of its defence lead rebuttal evidence showing the confessional statement was obtained either by oppression or inducement. The Court would then consider same in its judgement and expunge the confessional statement where found to be involuntary or rely on same if found to be voluntary. Again I will come back to this shortly.

Furthermore, **section 29(2)** merely states that the prosecution should prove that the confessional statement was not obtained by oppression and inducement, no mention was made therein that the proof must be by way of leading oral evidence. The proof may in my considered view be by tendering the video recording of how it was extracted from the suspect and/or by the statement itself which bears words of caution at the beginning and validly signed by the suspect. This position was in fact upheld by the Supreme Court in the case of **Kamila v The State**¹⁸, where the prosecution did not call any witness in the trial within trial yet the confessional statement was admitted in evidence, nonetheless. In upholding the admission of the confessional statement, their law lords held definitively that:

“It is apposite to say, that this Court has over the years evolved some requirements which a confessional statement must meet in order to be relied on by trial Courts... From the look of the statement of the appellant Exhibit D, it is crystal clear that all the above requirements were met or complied with, hence I also hold the view, that the trial Court was right to accept and act on the extra-judicial statement of the appellant [Exhibit D].”

¹⁸2001) FWLR (pt.37) 1078

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Sadly however, **section 29(2)** places the burden on the prosecution to prove beyond reasonable doubt that the confessional statement was made voluntarily. Whilst placing the burden on the prosecution to prove that a statement was made voluntarily accords with existing law that he who asserts in the positive has the burden of proving his assertion, it is the view of some practitioners particularly prosecutors that placing the burden on the prosecution to prove the voluntariness of a confessional statement is unreasonable. The contention in this regard stems from the fact that firstly, the acts of the police officers in extracting the confessional statement is an official act which enjoys the presumption of regularity. See **Section 168(1) of the Evidence Act, 2011** which encapsulates the principle in the latin maxim "*Omnia praesumuntur rite esse acta*". See the cases of **Kanu v FRN**¹⁹ and **Ugwu v. State**.²⁰

It is therefore the person who seeks to rebut the presumption of regularity enjoyed by the police officers that should have the burden to lead rebuttal evidence in that regard. Similar position operates by virtue of **section 138 of the Evidence Act** which cast the burden of proving exceptions and qualifications to the provision of law creating an offence on the defendant notwithstanding that the burden of proof of the offence is on the prosecution. See **N.A.F v. Kamaldeen**²¹ where the Supreme Court held that where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption to the law lies on the defendant who is raising such exception or exemption. In respect of confessions, by **section 29(1) of the Evidence Act** the general rule is that confessional statement to the police where relevant is admissible. Exceptional circumstances under which such confessional statements will be rendered inadmissible is provided for under **section 29(2)**. Why then should the burden now rest on the prosecution to prove the absence of the exception and qualifications to the admissibility of confessional statements?

Aside the presumption of regularity, the acts of the police in recording the statement of a suspect also enjoy the presumption in **section 147 of the Evidence Act** that document produced before the Court as a record of evidence before any officer authorized by law to take the evidence are genuine, true and properly taken. This presumption by the clear words of the statute also applies to confessions.

¹⁹ (2017) LPELR-42385(CA)

²⁰ (2013) 6 S.C.M 231.

²¹(2007) ALL FWLR (pt.361) 1676 SC.

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Another striking feature of section 29 is that it allows a judge to of its own motion (whether or not a defendant raises any objection I dare say) require the prosecution to lead evidence on the voluntariness of confessional statements as follows:

Section 29(3):

In any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either subsection (2)(a) or (b) of this section.

According to Obla,²⁵ section 29(3) introduces a novelty in respect of confessional statements. This is rightly so as it has been consistently decided by the Courts prior to the new Evidence Act that a trial within trial will only be ordered where the defence objects to the tendering of a confessional statement and that a judge has no business to of its own motion order a trial within trial to be conducted.²⁶

Section 29(4) of the Evidence Act, 2011 provides to the effect that where more than one person is charged jointly, the confession of one shall not be used against the others unless the others adopt the confession. **Section 29(5)** defines what constitutes oppression as including torture, inhuman and degrading treatment and the use of threat or violence whether or not amounting to torture.

When will the conduct of a trial within trial be ordered in a proceeding/at whose instance will a trial within trial be ordered:

A lot of issues have come up over the years as to when a trial within trial can be ordered in a proceeding. May I invite the attention of my audience to the case of **Gbadamosi v. The State**²⁷ where it was held that:

“It is the law that it behooves on an accused person, especially one represented by counsel to raise the issue of voluntariness timeously, by way of an objection, at the time the statement is tendered by the

²⁵ Chief Godwin Obla; Trial within Trial, NIALS, 2012, found at www.oblaandco.com, accessed on 17th September. 2019.

²⁶See in this regard the cases of Okaroh v The State (1990) 1 S.C 169, Bassey v The State (2016) LPELR-41229(CA).

²⁷(2013) LPELR-22169(CA).

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prosecution. Where the court considers the grounds for the objection, it may order that the voluntariness of the statement shall be determined by way of a trial within trial. Accordingly, where no objection is raised at the time the statement is tendered, the trial court has no business ordering a trial within trial."

The thinking then was that it is the duty of the defence counsel to raise the question of voluntariness by objection at the point of tendering the confessional statement. This is notwithstanding the fact that even in the Old Evidence Act it was provided that confessional statement will not be admitted where it appears to the court to have been caused by inducement.²⁸ But can this be the case in our present day criminal procedure? It is my view as I said earlier that this question has been settled by **section 29(3) of the Evidence Act** that entitles a judge to *suo motu* order the prosecution to lead evidence on the voluntariness of a confessional statement sought to be tendered as follows:

"(3) In any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either subsection (2)(a) or (b) of this section."

I hesitate to state that section 29(3) has not imposed a burden on the Court because the words of section 29(3) are not mandatory but discretionary as the law makers have used the word "**may**" and not "**shall**". I have used the word hesitate deliberately because the lawmakers by the use of the word "may" have continued to uphold the position of the judge as an adjudicator and prevent him from jumping into the fray.

I am of the view that rather than impose a burden **section 29(3)** only compliments the authority of the judge to order a trial within trial upon an application made to it. Therefore, I submit that **Gbadamosi v The State** remains good law.

²⁸See the provision of section 28 of the Old Evidence Act.

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It has been settled beyond peradventure that it is at the instance of the defence that a trial within trial is ordered and this is triggered when the defence lawyer objects to the admissibility of the confessional statement.²⁹ The question that now comes to mind at this point is whether it is every objection taken to the admissibility of a confessional statement that will activate the Court's jurisdiction to conduct a trial within trial. In answer to this question, it was held in the case of **Jimoh v. The State**³⁰ that:

"Where an accused person objects to the tendering of his statement because it was not made by him and that the signature thereto is not his own, this denial being without an allegation that any of the vitiating factors of confession as contained in Section 28 of the Evidence Act was applied to him to extract the statement, there will be no need for a trial within trial."

Thus it is only an objection raised to the voluntariness of a confessional statement that can ignite the court to conduct a trial within trial. The next question which then follows is at what stage should an objection on the voluntariness of a confessional statement be raised? This issue came up for determination in the case of **Pilla v. The State**³¹ where the defence raised the issue of the voluntariness of a confessional statement after it had been admitted in evidence. In resolving the issue the Supreme Court held that:

"The appropriate time in a criminal trial to raise the issue of involuntariness of a confessional statement is when the prosecution applies to tender the statement in evidence. When that is done the trial Court would then conduct a trial within trial to determine the issue of the voluntariness of the statement. Where there is no such objection at that stage and the statement is admitted in evidence, the issue of the voluntariness of the statement is settled and cannot be re-opened. It would amount to an afterthought, as in this instance, for the accused person to raise the issue of voluntariness of the same statement in his defence. A trial-within-trial will not be conducted in such a circumstance."

²⁹See the cases of *Sule v The State* (2014) LPELR-24044(CA) and *Lasisi v The State* (2013) LPELR-20183(SC).

³⁰(2014) LPELR-22464(SC). See also *Giki v The State* (2014) LPELR-22722(CA) and *Achama v The State* (2015) LPELR-46416(CA).

³¹(2018) LPELR-44245(CA)

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It is however my view that the position that the defence should raise the objection at the point of tendering the confessional statement should be reviewed and replaced with a time friendly approach whereby the judge exercises its powers pursuant to **section 29(3) of the Evidence Act** to order by way of case management and prior to trial that the prosecution seeking to rely on a confessional statement should lead evidence as to how it was extracted from the accused person such that the statement may then be provisionally admitted in evidence and the defence may where it desires to challenge the voluntariness of the confession adduce evidence in his defence on the circumstances from which he wants the court to infer that the confession was not voluntarily made. The judge may then in its judgment expunge the statement if found to be involuntary and/or rely on same where found to be voluntary. This suggestion will in fact obviate the need for conducting a trial within trial and save precious judicial time.

What is the nature of the evidence required by the prosecution and the defence in Trial within Trial:

The issue of the nature of the evidence required by either party in a trial within trial proceeding is circumscribed to the determination of the voluntariness of the confession statement. Hence in the case of **Hassan v The State**³², the Supreme Court, per Rhodes Vivour JSC held that:

“...Since the voluntariness of the confession is challenged the onus is on the prosecution to show that the confessional statement was voluntarily made by the accused person. So the prosecution leads evidence to show that such was the case. Thereafter, the accused person gives evidence to show that he was beaten up etc before he made the statement. And to prove that he was beaten up he would do well to call witnesses to support his case, and a medical doctor is usually a good witness.”

By the foregoing apt position, the prosecution is obliged to lead evidence as regards how the confession was extracted and this must be in line with the provision of **section 17 of the ACJA** which prescribes a fool proof procedure. It is desirable in this regard that all police officers be mandated to have video recording of the confession which should also be tendered along with the statement to show the circumstances under which the confession was extracted.

³² (2016)LPELR-42554(SC)

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For the defendant, he is to lead rebuttal evidence to demonstrate that the circumstances under which he made the confessional statement is such that would make the confession unreliable. In this regard, the defendant/accused person is expected to testify first as to how the confession was extracted by him and likely corroborate same with other piece of evidence that may show oppression, force or inducement. Thus in the case of **Emeka v The State**³³ it was held that the accused person is a competent witness to lead evidence himself on how the confession was extracted from him. Also, the basis upon which an accused person can impeach a confessional statement was outlined in the case of **Ibrahim Yahaya v the State**³⁴ as follows:

“The law is that an accused person who desires to impeach his statement is duty bound to establish that his earlier confessional statement cannot be true by showing any of the following (i) that he did not in fact make any such statement as presented; or (ii) that he was not correctly recorded; or (iii) that he was unsettled in mind at the time he made the statement; or (iv) that he was induced to make the statement.”

In the case of **Olajide v The State**³⁵, the accused person led cogent evidence of torture and degrading treatment prior to the making of the confessional statement. On the strength of evidence of the accused person, the confessional statement was rejected. Conversely in the case of **Terver & Ors v The State**³⁶, the evidence of the accused as to the use of force was rejected on the strength of the evidence of the prosecution as to how the evidence was extracted from the accused person.

Nature of Ruling to be delivered by the Trial Judge/Effect of the Ruling

A trial within trial proceeding is by its nature limited to the determination of the voluntariness or otherwise of the confessional statement sought to be tendered. In that regard, the only ruling which a learned trial judge is obliged to deliver in a trial within trial proceeding is a ruling on the voluntariness of the statement and would either admit the confessional statement where found to be voluntarily made, or reject it, where it is found that the confessional statement was involuntarily made.

³³ (2001) 32 WRN 37 at 51

³⁴ (2016) LPELR-40254(CA).

³⁵ (2016)LPELR-41633(CA)

³⁶ (2013)LPELR-20783(CA)

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It must be stated that a trial Judge is not allowed to within the confines of a trial within trial proceeding determine issues bothering on the truthfulness or otherwise of the confession or that will prejudice the substantive trial. See in this regard the case of **Nnajofo v FRN**³⁷ where it was stated that:

"trial within trial.... is not held for the purpose of testing the truthfulness of the content of the statement.. The law is that a Court must be cautious in its ruling at an interlocutory stage not to make any pronouncement or observation on the facts which might appear to determine the main issue/s or tend to prejudice the main issue... It is my view that this position of the law applies to a trial Court's ruling in a trial-within-trial. The trial Court must ensure that it makes no pronouncement or observation which might appear to determine the yet to be concluded substantive trial or any issue that will arise thereat no matter how much the parties by their evidence and the addresses of their counsel tempt it to do so."

In the case of **Akaeze Charles v FRN**,³⁸ the trial judge in his ruling on the trial within trial was unmindful of his duty not to make pronouncement bordering on the issue to be determined in the substantive charge. Consequently, the ruling of the trial judge was set aside on appeal.

The effect of the ruling of the trial Judge on the suspended criminal trial is to disregard all reference made to the confessional statement and not rely on same where the confessional statement has been found to be made involuntarily. On the other hand, where the confession is admitted as being voluntarily made, the trial Judge can safely rely on same to convict or find the accused person guilty of the offence charged. In the case of **Olajide v The State**³⁹, the learned trial judge after rejecting a confessional statement at the trial within trial as being involuntary fell into the error of relying on same in the final judgment. The judgment was consequently set aside on appeal.

³⁷ (2018) LPELR-43925(CA). See also Mbang v state (2013) 7 NWLR (pt. 1352) 48.

³⁸(Supra)

³⁹ (Supra)

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Pitfalls of the Trial within Trial Procedure:

There are several problems associated with the conduct of trial within trial. We shall consider some of the obvious problems below:

1. Trial within Trial takes time:

An obvious problem associated with the conduct of trial within trial is the fact it takes too much time in the judicial process. For starters it is a full judicial proceeding in itself. The parties take turn to call witnesses and exercise their right to cross-examine the witnesses of each other. They also file written addresses and the judge is obliged to consider the entirety of the evidence adduced and deliver a ruling. In the case **Akaeze Charles v FRN**⁴⁰, the trial within trial as revealed from the report was ordered on the 19th of November, 2015 when the prosecution attempted to tender the confessional statement through its second witness and the ruling on same which went on appeal was delivered on the 15th May, 2017 (a period of one year and six months). A total of five witnesses were called in the trial within trial. More intriguing is the fact that by the appeal the case file was remitted to another judge who would have to commence trial *denovo*. This is so disheartening particularly as the ruling arising from the proceeding is not such that will determine the whole proceeding but only decides the issue regarding voluntariness of the making of an “exhibit”.

The delay occasioned in this regard is more compounded by the fact that most defence and prosecutorial counsel fail to appreciate the purport and intendment of trial within trial. Often time they ask ridiculous question tending to disprove or confirm the truthfulness of the contents of the confessional statement.

Is the delay occasioned by trial within trial not against the current yearning of the society at large for expeditious determination of cases and even current judicial trend across the world? Is it not high time we opted for a more time friendly approach to our judicial process and do away with the practice of conducting a trial within trial?

⁴⁰.(Supra)

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2. **Unnecessary burden on Judges:**

Judges are accountable to the National Judicial Council (NJC) for finished cases both in criminal and civil. Reporting rulings on trial within trial and not finished or concluded cases may be viewed negatively. The energy dissipated in writing and evaluating witnesses of a trial within trial can be better utilized for the trial such that at least the case will be concluded at the High Court level.

A judge in a proceeding in which a trial within trial is conducted literally conducts two trials. The first being a mini trial (trial within trial) and the second the substantive trial. Most times, before the prosecution even seek to tender the confessional statement other witnesses may have been called. By suspending the main proceedings to conduct a trial within trial the judge might have even lost the benefit of his observations of the testimonies earlier adduced and all other issues bothering on the demeanour of the witnesses and the impression from such evidence which should ordinarily remain fresh in the mind of the judge. Can this be the intendment of sections **15(4) and 17 of the ACJA and section 9(3) of the ACJL** against the backdrop of the admonition in the case of **Coca Cola (Nig.) Ltd v Akinsanya**⁴¹ to the effect that:

“Courts are to adopt construction that would bring out the purpose of legislation.”

3. **Likelihood of Bias from a Trial within Trial proceeding:**

Another thorny issue often associated with the conduct of trial within trial particularly against the defence is the perception or prejudice which the judge may have of the defendant where it is found that the confession was voluntarily made. This is on account of the fact that it is the same judge who conducts the trial within trial that also determines the substantive trial and may on the basis of the perception formed in the process of the trial within trial form certain opinion prejudicial to either of the party (most times against the defendant) and will consider the case of that party from the opinion

⁴¹(2017) 17 NWLR (pt.1593) 74 at 123.

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formed by him. In fact, under the common law jury system the jury must not be informed of the reasons for the decision of the judge in respect of a confessional statement. This point was succinctly captured in the case of **Mitchell v R**⁴² where it was held that:

“there is also no practical reason why the jury need to be informed of the judge’s decision...Moreover...the knowledge by the jury that the judge has believed the police and disbelieved the defendant creates the potentiality of prejudice. A jury of laymen, or some of them, might be forgiven for saying: “well the judge did not believe the defendant, why should we believe him?””

This point is not academic or theoretical but real. Little wonder the English have separated the determination of the admissibility by the judge from the determination of the guilt of the defendant by the jury. The dichotomy is without doubt to prevent any prejudice that may arise after listening to the evidence of the voluntariness or otherwise of confessional statements. Can we then truly say that there will be no prejudice or negative perception where the same judge decides both issues? Is it even possible to dichotomize any prejudice which can in fact be sublime rather than apparent or spoken?

4. Poses hardship on the Defendant and Co-Defendants not admitted to bail:

A defendant who is not admitted to bail may on account of the conduct of trial within trial spend more time in custody whilst awaiting the determination of the charge against him. This problem is even more severe where there are Co-defendants also not admitted to bail and against whom no confessional statement is sought to be tendered. Those Co-defendants will obviously have to abide the outcome of the trial within trial proceedings before they know their own fate and would in the circumstance unfairly spend more time in custody when they are in fact presumed innocent until proven guilty. See the case of **Terver & Ors v The State**⁴³ where only one of the defendants objected to the admissibility of his statement and a trial within trial spanning almost three years inclusive of the appeal was spent. The co-accused remained in custody all through the period.

⁴² (1998) 2 WLR 839, 845-846.

⁴³ *Supra*.

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5. **Likelihood that the Judge may prejudge the issues in the main trial:**

The likelihood of prejudging the main trial is high in a proceeding involving a trial within trial and the simple reason is that in some cases the witness whom the party may call in the trial within trial proceedings may also be same witnesses to be called in the main trial. So if the judge disbelieved their evidence during the trial within trial it is difficult for the same judge to believe their evidence in the main trial. There is also the temptation for the judge to make pronouncement on the truthfulness of the defendant's confession and that may just have made out the case for the prosecution even before trial is concluded. Typically, from the ruling following a trial within trial, the decision of the judge can be predicted. This scenario played out in the case of **Akazeze Charles v. FRN**⁴⁴ where an innocuous statement "*leaves much to be desired*" resulted in the upturn of the ruling and a trial *denovo*. In setting aside the ruling of the trial judge on appeal it was held that:

"The trial judge posed a rhetorical question as to the credibility of the story of the 2nd defendant that he had never met appellant before then. After posing another question as to the motivation of the 2nd defendant in seeking to see appellant, he stated that:

"This and other questions leave much to be desired. The above puzzles are meant for the Defendant at their leisure time for their sober reflections."

The Phrase "leave much to be desired" is an idiomatic expression which shows something "to be bad or unacceptable" Oxford Advanced Learner's Dictionary 7th Ed. Page 396. That leaves the impression that the trial judge had already made up his mind that the story of the 2nd defendant that he had never met the appellant before then was bad or unacceptable. The observation of the trial Judge and his posers appear to bear on the count of conspiracy which is to be determined in the main suit. No wonder respondent's counsel, in an understatement, described it as "curious observation" at paragraph 4.11, page 7 of his brief of argument."

⁴⁴ Supra

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Even more alarming was the decision in the case of **State v Sani**⁴⁵ where the judge was carried away by the proceeding in the trial within trial and failed to carry out any subsequent trial but convicted the accused person on the strength of the evidence adduced in the trial within trial. The conviction of the accused person was set aside on appeal.

Is the conduct of Trial within Trial still desirable?

Can it be said that the conduct of a trial within trial is no longer necessary? Gentlemen of the Bench and Bar, I will not stand on the fence. Firstly, aside being a matter of practice, there is no law permitting and/or providing for the conduct of a trial within trial. **The Evidence Act which governs admissibility of evidence such as confessions states only the conditions under which a confessional statement should not be admitted. The Evidence Act did not state that a trial within trial must be conducted and it has not been established that prejudice will be suffered if the confessional statement is admitted pending the close of evidence in which case the trial judge is entitled to from the totality of the evidence led by parties deliver its judgment and in same expunge the confessional statement from its records were found to be involuntarily made and/or act on same if found to be voluntarily made. This would save precious judicial time and would in fact be beneficial to the defendant who will have his fate decided on time. Trial within trial being foreign to our existing non-jury system law and having contributed immensely to the delay in justice delivery in criminal matters ought not to be conducted anymore in our legal system.** Similar suggestion has been made by **Hon. Justice P.K Nwokedi**, the Chief Judge of the Anambra State High Court (as he then was) in the unpublished paper titled "**Admissibility of Confessional and other Statements**" enthused thus:

"Personally, I have often wondered what is the necessity of a trial within the trial before the admission of an alleged confessional statement in our courts. In England, where trial is by jury, it may be said that the jury may be prejudiced by the controversy as to whether the same had been made voluntarily or not. In this country, where the court is the Judge and jury, it seems to me that the Judge can as well

⁴⁵(2018) LPELR-43598(SC).

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resolve the issue as to voluntariness, with other issues, in his judgment. The prosecution if challenged as to the voluntary nature of a confession should lead all evidence at its disposal to establish same. The accused in his defence may lead refutal evidence. The Judge makes his findings at the conclusion of evidence. The same judge, who conducts the mini-trial, conducts the main trial. The issue of being prejudiced would not arise. Even of wrongfully admitted, the same may be expunged from the record while writing the judgment. The issue of mini-trial as far as this country is concerned, is an unnecessary, and at the same time, cumbersome adjunct to our criminal trial. It is carry-over form the English legal system which operates under a different background."⁴⁶

Furthermore, one of the main objectives of the ACJA, 2015 is to encourage expeditious determination of criminal cases. Thus it provides as follows:

"The purpose of this Act is to ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim."⁴⁷

In furtherance of the afore set out objectives of the ACJA, the procedure for recording the statement of a suspect was provided for in **sections 15(4) and 17 of the ACJA** and **Section 9(3) of the ACJL**.

It is my contention that if the above procedure is strictly adhered to, will that not phenomenally reduce the objections on the voluntariness of confessional statements? I think so.

⁴⁶ Cited by Ogundare JSC (as he then was) in *Gbadamosi v The State* (Supra)

⁴⁷ Section 1(1) of the ACJA.

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The Position in Other Jurisdictions:

India:

In India, recognizing the fact that the police officers often extract confessions from suspect in a manner as would render the confession unreliable, a statement made by a suspect to police officers is generally not admissible in evidence. According to Sakar;

“Confessional statements by the accused to the police are absolutely excluded under S.25, Evidence Act. All statements by the witnesses to the police are also shut out by S.162 except for the strictly limited purpose of contradiction of prosecution witnesses during trial. These rules of law have the origin because of the unreliability of the police and their tendency to adopt third degree methods of extorting statements.”⁴⁸

Police officers are therefore by necessary implication excluded from extracting confessional statement from an accused person by virtue of **sections 25 and 162 of the Indian Evidence Act, 1873**. Hence it was recommended by Mack J in **Sitramayya v R⁴⁹** as follows:

“the police would do well to take the accused person before a Magistrate whether he makes a confession or not, and have a statement recorded under S.164, so that the accused person can be fixed to one explanation when placed in a position which becomes incriminating unless he can offer a satisfactory explanation for his behavior,”

However, because of the importance of confessions, ample provision was made in the **Indian Code of Criminal Procedure, 1975 (as Amended)** for a fool proof process of extracting such statement which is to be done before a Magistrate. To this effect **section 164 (1) and (2) of the Indian C.P Code** provides as follows:

⁴⁸ Sakar, The law of Criminal Procedure, 9th Edition, Vol. 1, page 634, LexisNexis Butterworths.

⁴⁹AIR 1951 M 61, 63.

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“(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording such confession, explain to the person making it that he is not bound to make a confession and that if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

By the foregoing provisions confessional statement of a suspect is usually recorded before a Magistrate who prior to recording same must have cautioned the suspect accordingly and observed his demeanour to decipher whether the confession is not motivated by any form of oppression or inducement.⁵⁰The accused person is also to be brought before the magistrate unfettered. The Police or other persons who may have any influence or hold over the accused are ordered out so that a free atmosphere may be created and all fear and suspicion may be allayed. In the case of **Tandra Rani v State of A.P.**,⁵¹ statement of an accused though recorded in the presence of a Magistrate but not in the manner provided under section 164 was held not admissible in evidence.

The suspect must also be taken before the Magistrate within three months of an indication of willingness to make a confession and when the offence is still fresh in his mind.

⁵⁰Lalhirpuria v State of Mizorum 2004(3) Gau LR 196.

⁵¹2001 CrLJ 4048.

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Section 164 (4) of the Indian C.P Code, provides that the Magistrate is to make a memorandum at the foot of the statement that he has duly administered caution on the suspect.⁵² The memorandum accompanies the confessional statement when sought to be tendered (this is akin to the Certificate of Identification required under **section 84 of the Nigerian Evidence Act**). Where the memorandum does not accompany the confessional statement or does not contain the proper endorsement, the confessional statement will not be admitted in evidence. See the case of **Chandra v State of Tamil Nadu**⁵³ where the word “*hope*” was used by the Magistrate instead of “*believe*” and it was held to be involuntary.

As a further safeguard to ensure that confession is voluntary, **section 164(3)** prohibits a remand to police custody of a person expressing unwillingness to make confession. Also, after making a confessional statement, the accused is sent to the judicial lock-up and on no account will the accused be returned to police custody.

The provisions of **section 164 of the Indian C.P Code** are therefore mandatorily observed in India such that where the police officers fail to comply with the procedure or even the Magistrate fails in the obligation to record the confession in the manner prescribed, the confessional statement will not be admitted in evidence. See **sections 25 and 162 of the Indian Evidence Act and section 164 of the Indian C.P Code**.⁵⁴

By the strict compliance placed on **section 164 of the Indian C.P Code**, the need for the conduct of trial within trial is completely obviated and it in fact has no place in the legal jurisprudence of India as far ago as early 19th Century.

The United Kingdom:

The provision of our **section 29 of the Evidence Act, 2011** appears to have been extracted from the provision of **section 76(2) of the Police and Criminal Evidence Act, 1984 (PACE)** notwithstanding that a jury system does not exist in Nigeria. **Section 76(2) of PACE, 1984** provides as follows:

“If, in any proceeding where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the Court that the confession was or may have been obtained –

⁵²Deendra Pradhan v State of Orissa 1996 CrLJ 326.

⁵³AIR 1978 SC.

⁵⁴See Hemant Kumar v The State 1991 All WC 555.

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- (a) by oppression of the person who made it;
or
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof.

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid"

Interestingly, in the United Kingdom, though a *voir dire* proceeding is still conducted in the crown courts on account of the jury system but recourse is rarely had to same because by the criminal procedure in the United Kingdom, preliminary hearings are usually conducted prior to trial for the purpose of determining objections which the defendant may have to the evidence of the prosecution (such as confessional statements).

The procedure applicable in the United Kingdom is sufficiently explained in **Blackstone's Criminal Practice**⁵⁵. Summarily put, the procedure is as follows:

- (a.) Defence counsel informs prosecution counsel of the objection before the latter opens his case to the jury.
- (b.) At the point which the admissibility falls to be considered, the jury will withdraw to allow the matter to be resolved by the judge alone.
- (c.) If the admissibility of the disputed evidence raises collateral factual issues as to how it was obtained, evidence will be adduced before the judge in the absence of the jury. This is known as trial on 'the *voir dire*'. Both prosecution and defence are entitled to call witnesses at this stage.

⁵⁵Blackstone's Criminal Practice 2010, 20th Ed., page 1683, Oxford University Press 2009

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or**
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⁵⁵Blackstone’s Criminal Practice 2010, 20th Ed., page 1683, Oxford University Press 2009

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Worthy also of consideration from the procedure in the United Kingdom is the possibility of (1) determining the issue of the voluntariness of the confessional statement without leading oral evidence or a *voir dire* proceeding as it were and (2) determining both the admissibility and the trial proper together at judgment.

RECOMMENDATIONS:

According to Saint Augustine,⁵⁸

“Right is right even if no one is doing it; wrong is wrong even if everyone is doing it. A wrong can never become a right by longevity of existence”

Intervention by the Bar:

Members of the bar definitely have a role to play in ensuring that the objectives of the ACJA and ACJL in protecting the rights of the accused and preventing delays in criminal trials are achieved as it relates to confessional statements. In this regard it must be emphasized that **section 29 of the Evidence Act** did not provide for a trial within another trial to determine admissibility. Also, no particular time for raising objection to voluntariness of confessional statement was stated in section 29 rather mention was made to *representation* of involuntariness when the Prosecution *proposes* to give confession as evidence.

- (a) **The Prosecution Counsel:** The prosecutorial counsel has a duty to ensure that the video recording of how a confessional statement was extracted from a defendant accompanies the proof of evidence. This will enable the defence counsel to appraise its stance on possible objection to the admissibility of confessional statements upon receipt of the proof of evidence. This point cannot be overemphasized as the Courts have consistently admonished that litigation is not a game of hide and seek. See the cases of **Chedi v A-G Federation**⁵⁹ and **Chief of Air Staff v. Iyen**.⁶⁰ This admonition

⁵⁸Confessions of Saint Augustine.

⁵⁹(2008) 1 NWLR (pt. 1067) 166 at 182, paras. A-B.

⁶⁰(2005) 6 NWLR (pt.922) 496.

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applies to criminal cases in same manner as it applies to civil proceedings. Should the prosecution effectively carry out this duty, objections to admissibility of confessional statements will reduce, I think so.

- (b.) **The Defence:** The Defence counsel in same way has a corresponding duty to notify or inform the Prosecution of the objection intended to be raised to the admissibility of confessional statements upon receipt of the proof of evidence.

In summary, there must be “equality of arms” and the frontloading concept which has come to stay in civil proceedings must in similar manner be applicable to criminal litigation involving confessional statements. This is the practice in the United Kingdom from whom we borrowed the whole idea of conducting a trial within trial in the first place.

Judicial Intervention:

- (a.) **Judicial Activism:**

Our courts have been able to salvage situations in which there has been lacuna in our laws in the past through judicial activism. The decisions of the Courts through judicial activism often results in legislative amendments codifying the position advanced by the Courts. Such scenario played out in respect of the admissibility of computer generated evidence under the old Evidence Act which makes no provision for computer generated documents. In the case of **FRN v Femi Fani Kayode**⁶¹ the Court of Appeal employed judicial activism and construed the definition of documents in the old Evidence Act to include computer generated evidence. Also in **Amaechi v INEC**⁶², to prevent a situation where a wrong will be allowed to exist without a remedy, judicial activism was employed to declare the real winner of a political party primary election as the Governor of Rivers State even though he did not participate in the general election.

In similar manner, judicial activism is required to prevent further delay of criminal cases by the conduct of trial within trial. The judicial activism should be employed as follows:

⁶¹(2010) 14 NWLR (Pt 1214) 481

⁶² (2008)5 NWLR (Pt. 1080) p. 227

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1. **Ensure strict compliance with sections 15(4) and 17 of the ACJA and section 9 (3) of the ACJL:**

The Court must make it mandatory that all confessional statements to be tendered in evidence must have attached to it and forwarded along with the proof of evidence video recording of how the confessions were extracted from the accused person or at best an affidavit in lieu of the video recording where not available. This will greatly reduce the possibility of tenuous objections to the voluntariness of confessional statements. This was exactly what the Court of Appeal did in the case of **Akazeze Charles v FRN**⁶³ where per Eyo Ekanem JCA applied the mischief rule in interpreting the provisions of **sections 15(4) and 17 of the ACJA** and expunging confessional statements admitted in evidence without complying with those sections as follows:

“... Given the foregoing, to hold that the word "may" in the said provisions carry a discretionary or permissive meaning would not suppress the mischief the provisions are aimed at curing nor would it advance the remedy for it. It would also not add force and life to the cure; rather it would add strength to the mischief and that would not be pro bono publico. Given the objective of the provisions, to give a permissive colouration to the provisions would mean that the Legislature gave a cure to the mischief with one hand and also took away the cure with the other hand. That would reduce the provisions to futility and defeat their purpose. Courts are to adopt construction that would bring out the purpose of legislation...Sections 15 (7) and 17(2) of the ACJA, 2015 are procedural rules for the benefit of a suspect and therefore must be construed as being imperative.”

⁶³ Supra

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2. **Defence Counsel should be mandated to indicate their objections to confessional statements before Trial:**

Whilst it appears that there is no law sanctioning this practice it may be employed as a Case Management direction by the judge to ensure a smooth trial without the rigors of suspending the main trial for the purpose of conducting a mini trial. It will prevent a situation whereby the judge will lose touch of the evidence earlier adduced by the prosecution. Similar practice takes place in the United Kingdom where it has been advised in the case of **Mitchell v R**⁶⁴ that:

“It is primarily the responsibility of the defence counsel to inform the prosecution and the judge in advance and in the absence of the jury of an intended objection to the admissibility of statements of a defendant...”

3. **Prosecution to be directed to lead evidence on voluntariness of confessional statement proposed to be tendered:**

The direction in this regard can be made by a judge to which the case is assigned pursuant to the provision of section **29(3) of the Evidence Act, 2011**. By this practice, it is immaterial whether objection has been raised by the defence counsel but will in essence allow for the admission of the confessional statement provisionally whilst the defence will lead evidence to indicate that the confession was involuntarily made and the judge will in its judgment either expunge the voluntary statement if found to be involuntary or rely on same where found to be voluntary. Prejudice or bias that may result from the conduct of trial within trial may be prevented this way.

⁶⁴ Supra.

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(b.) **Practice Direction:**

By virtue of **section 274 of the 1999 Constitution (as Amended)**, the Chief Judge of a State is entitled to make rules or Practice Direction that will regulate the procedure of the Court. This power has been exercised to regulate the procedure of Courts in Nigeria particularly where there is a lacuna in respect of the procedure to be applied by statute. An example is the Supreme Court and Court of Appeal Practice Directions on Election Appeals which was made by the Chief Justice of Nigeria and the President of the Court of Appeal to regulate how appeals lodged before the Courts in election matters will be determined. The power of the Court to so do has been upheld in the case of **Buhari v. INEC**.⁶⁵ Similarly, the Former Chief Judge of Lagos State also exercised powers pursuant to **section 274 of the 1999 Constitution** to make Practice Direction on Backlog matters and on Pre-Action Protocol.

In view of the delays occasioned by the conduct of trial within trial, it has become imperative to issue Practice Directions with a view to introducing a better and time friendly procedure for admitting confessional statement. I am not alone in this call as the same view has been expressed by the former Attorney-General of Bayelsa State, Kemasuode Wodu in an unpublished paper titled **“Trial within Trial: Regulation by Means of Practice Direction”**⁶⁶ where he opined as follows:

“Obviously the reason for the proposed Practice Direction is to eliminate the delay occasioned by trial within trial and enhance speedy determination of criminal trials. This infact is the main reason for the making of Practice Directions.”

The Practice Direction to be made in this regard should direct that objections to admissibility of confessional statements be taken by another judge other than the judge that will determine the main charge. A time frame of three months should also be prescribed for the determination of the objection.

⁶⁵(2008) 19 NWLR (PART 1120) PAGE 246

⁶⁶<http://edojudiciary.gov.ng/wp-content/uploads/2019/05/SEVENTH-SESSION-Trial-Within-Trial-Regulation-by-Means-of-Practice-Direction.pdf> accessed on 17th September, 2019

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It is further suggested that to ease the burden of judges on account of the congestion of the Courts, retired judges appointed for the purpose and/or a panel consisting of senior lawyers appointed on the recommendation of the Nigerian Bar Association for the purpose should take such objections and upon determination of the question of admissibility of the confessional statement return the case file to the Chief Judge. This will require an amendment of **section 6 of the 1999 Constitution (as altered)** to vest judicial functions on such persons other than judges of our courts of record.

Furthermore, the Practice Direction should also stipulate that where defence counsel is desirous of objecting to a confessional statement, the Defence shall within 14 days of the service of the information or proof of evidence as the case may be notify the Prosecution of the objection. Where the Defence fails to do so, the Court will not entertain any subsequent objection to the admissibility of the confessional statement. Also, where the defence has notified the Prosecution of his intention to object to a confessional statement, the case file should be assigned to a judge different from the judge assigned to take the substantive charge to determine.

The directions recommended here is similar to the practice in the United Kingdom in which a *voir dire* proceeding is conducted in the absence of the jury and before the main trial.

Legislative Intervention:

1. **Amendment of the Provision of section 9(3) of the ACJL and section 17 of the ACJA:**

The provisions of **section 9(3) of the ACJL** and **section 17 of the ACJA** as regards the procedure for recording the statement of a suspect must be amended and completely overhauled. It is my view that to ensure a more transparent and fool proof system, against the used of oppression and inducement obtainable in India should be adopted. Such that once a suspect indicates his desire to make a confessional statement to the police officers, the suspect should be immediately (and not later than three months) taken before a Magistrate unfettered. The Magistrate should at the point the suspect his brought before him observe the demeanour of the suspect to ascertain if any form of force has been applied to him and thereafter order the police officers out of the proceedings. The Magistrate should thereafter administer caution on the suspect and record the confessional statement which the suspect may

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make. Thereafter, the Magistrate should sign a memorandum stating how the confessional statement was recorded and remand the suspect in judicial custody and not to the police. Where the confessional statement is sought to be tendered in evidence, in same way a Certificate must accompany a computer generated evidence before it can be admissible, the Memorandum signed by the Magistrate must be tendered along with the confessional statement.

This practise as currently operates in India as far back as 1975 has totally obviated the need to conduct trial within trial and will no doubt do same here.

2. Amendment of Section 29 of the Evidence Act, 2011

Section 29 of the Evidence Act, 2011 should be amended to proscribe the admissibility of confessional statements recorded by police officers. This is necessary because it has become practically impossible to ensure that law enforcement agents in Nigeria comply with the provisions of the ACJA and ACJL in extracting confessional statements from suspects. This was the same scenario that played out in India and resulted in the complete proscription of confessional statements recorded by police officers.

Additionally, a subsection should be introduced to section 29 of the Evidence to prescribe that all confessional statements made voluntarily and recorded before a Magistrate must be tendered along with the Memorandum signed by the Magistrate before same can be admitted in evidence. The subsection should also specify that video recording of how the confession was extracted from the suspect must also be tendered.

Alternatively, new subsections as to the time when objections to admissibility of confessional statements are to be made must be introduced and same should specify that the Defence must notify the prosecution in writing within 14 days of being served an information or proof of evidence of any likely objection to be raised to the confessional statements proposed to be given in evidence.

A further subsection should also be introduced to specify that upon being notified of such objection to the admissibility of a confessional statement, a preliminary hearing should be conducted by a judge other than the judge assigned to take the main trial for the purpose of determining the admissibility of the confessional statement.

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CONCLUSION:

There is no gainsaying the fact that the practice of conducting a trial within trial has outlived its purpose in our judicial system and it is time to jettison the practice. Legendary Nnaemeka Agu J.SC (as he then was) was quite prophetic and visionary when as far back as the year 1990 in the case of **Michael v The State**⁶⁷ he opined as follows:

“I must confess that I have my reservation about the continued need for a trial-within-a-trial in this country in which our judges are both judge and jury. In England where judges and jurors are different, there is always need to prevent jurors from being influenced by arguments (which may mention some of the contents of an inadmissible statement) as to whether or not a particular statement was obtained under duress or the like. In the country in which it is not possible to shield the judge being judged and jury, from any part of the proceedings. I doubt whether the duplication of the hearing by conducting a trial within a trial is anything but a cosmetic mimicry.”

Another law lord, renowned Honourable Justice Ogundare JSC (as he then was) was even more forceful when in the case of **Gbadamosi v. The State**⁶⁸ he enthused thus:

“Do we need a statute here to abolish it when it was just a matter of practice and not law adopted by our Judges in the days when English Law & Practice held sway in our land?”

Recall that the eminent jurist P.K Nwokedi (former Chief Judge of Anambra State) has similarly derided the conduct of trial when in the unpublished paper he enthused:

“The issue of mini-trial as far as this country is concerned, is an unnecessary, and at the same time, cumbersome adjunct to our criminal trial. It is carry-over form the English legal system which operates under a different background.”

⁶⁷ Supra

⁶⁸ Supra

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Sadly, thirty years after we have ignored their admonitions. Even those we borrowed the practice from have evolved beyond same. We have continued to fuse the judge and the jury system into our system with the calamitous effect of the delays we are suffering.

In view of the foregoing analysis and arguments advanced I now return to the question “Admissibility of Confessional Statements; Imperatives of trial within trial?” and now ask my distinguished audience is a trial *within* trial imperative in the determination of the admissibility of a confessional statement?

“Those who cannot change their minds cannot change anything” .⁶⁹

Thank you for the privilege.

⁶⁹ George Bernard Shaw.