IN THE COURT OF APPEAL
ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON THURSDAY, THE 14TH DAY OF JUNE, 2018

BEFORE THEIR LORDSHIPS

MOJEED ADEKUNLE OWOADE (PJ)	JUSTICE, COURT OF APPEAL
HAMMA AKAWU BARKA	JUSTICE, COURT OF APPEAL
BOLOUKUROMO MOSES UGO	JUSTICE, COURT OF APPEAL

APPEAL NO. CA/A/11C/2018

BETWEEN:

A.V.M. OLUTAYO TADE OGUNTOYINBO ..... APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA (F.R.N.).... RESPONDENT

JUDGMENT

(DELIVERED BY MOJEED ADEKUNLE OWOADE, JCA)

This is an Interlocutory Appeal against the Ruling of the High Court of the Federal Capital Territory, Abuja delivered by His Lordship, the Honourable Justice Kayode ADENIYI on the 24th of November, 2017.

The Appellant was arraigned before the High Court of the Federal Capital Territory, Abuja on a One Count Charge bordering on **'corruptly'** accepting gift in the sum of **One Hundred and Sixty-Six Million Naira (₦166,000,000.00)** from a Company called Societe D' Equipments Internationaux Nig. Ltd a contractor with the Nigerian Air force in the performance of his official act contrary to Section 17(a) of the Independent Corrupt Practices and Other Related Offences Act, 2000 and punishable under Section 17(c) of the same Act. The Appellant pleaded not guilty to the one count charge and trial commenced with the prosecution opening its case. During the course of trial specifically when **PW3** Junaid Sa'id, one of the EFCC Investigators was testifying, the prosecution sought to tender the alleged confessional statements of the Appellant obtained during

investigation but the Appellant through his Counsel raised an objection to the admissibility of the said statements on the ground that they were obtained involuntarily and through oppression.

Consequently, the learned trial Judge ordered that a trial within trial be conducted so as to determine the voluntariness of these statements.

The Respondent/Prosecution called three witnesses in an effort to prove its case in the trial within trial (TWT). The Appellant Defendant called two witnesses to prove that his statement was not voluntarily made.

In admitting the statements made by the Appellant, the learned trial Judge concluded his Ruling at Pages 186 – 187 of the Record of Appeal as follows:-

> **"In totality, my finding and conclusion is that the prosecution has proved beyond reasonable doubt that the extra-judicial confessional statements made by the Defendant to the EFCC Investigators at the material period were not tainted either by**

oppression or by anything said or done to him that could have rendered the statements unreliable or inadmissible. Accordingly, I hereby overrule the objection and the statements are hereby admitted in evidence as Exhibits P9, P9^{A}, P9^{B} and P9^{C} respectively".

Dissatisfied with the said Ruling, the Appellant on 04/12/2017 filed a Notice of Appeal containing six (6) Grounds of Appeal, into this Court.

The relevant Briefs of Argument for the Appeal are as follows:-

1. **Appellant's Brief of Argument dated and filed on 25/01/2018. It is settled by J. B. DAUDU, SAN.**
2. **Respondent's Brief of Argument (incorporating preliminary objection) dated 26/02/2018 was filed on 01/03/2018. It is settled by Francis A. JIRBO, PDS, EFCC.**
3. **Appellant's Reply Brief dated 09/04/2018 was filed on the same day. It is settled by J. B, DAUDU, SAN.**
4. **List of Additional Authorities dated and filed on 11/04/2018. It is filed by Arome ABU, Esq.**

Learned Senior Counsel for the Appellant nominated two Issues for determination. They are:

- **Whether or not from the evidence led by the Respondent in the Trial Within Trial (TWT) the Respondent was able to prove beyond reasonable doubt that Exhibits TWT1, TWT1A, TWT1B and TWT1C were statements obtained voluntarily from the Appellant? (GROUNDS 1, 3, 4 and 6) (ISSUE No. 1).**
- **Whether the learned trial Judge was not in grave error when he considered the truthfulness or otherwise of the contents of Exhibits TWT1, TWT1A, TWT1B and TWT1C in a Trial within Trial (TWT)? (GROUNDS 2 and 5) (ISSUE No. 2).**

Learned Counsel for the Respondent on the other hand, formulated a sole Issue for determination namely:-

- **Whether the learned trial Judge was right to have admitted the confessional statements of the Appellant in the face of the evidence adduced before him in the trial within trial?**

On 12/04/2018, this Honourable Court granted leave to the Appellant amongst others to appeal on grounds of mixed law and

facts thus rendering unnecessary the Respondent's Notice of Preliminary Objection on the ground that the Appellant's Appeal required leave of Court under Section 242(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

On Issue One, learned Senior Counsel for the Appellant submitted that the issue takes its root from **Grounds 1, 3, 4 and 6.** That from the evidence led by the prosecution in the trial within trial, it is clear that the Respondent failed to demonstrate that the Appellant's statement was obtained voluntarily.

He submitted that in a trial within trial proceedings the onus is on the prosecution to prove that the statement was free and voluntary before it can be admissible. In other words, it must be affirmatively proved that the confession was free and voluntary.

He referred to the case of **EMEKA VS. THE STATE (2001) 14 NWLR (PT. 734) 666** and submitted that at this stage what is required to be determined is not whether an accused person made the statement but whether the said statement was voluntarily made. After referring to the case of **LASISI VS. THE STATE (2013)**

LPELR 20183 (SC), he submitted that the relevant piece of evidence showing the undisguised promise of non-prosecution made to the Appellant by the Ag. Chairman of the EFCC is at Page 206 of the printed Record.

He submitted that the effect of this uncontroverted evidence is that the Acting Chairman of the EFCC who is a person in authority has by his promise of non-prosecution induced the Appellant into writing these statements the way and manner it was dictated to him by Junaid Sa'id. He submitted that the effect of a statement made as a result of inducement by a person in authority is that it is inadmissible.

Learned Senior Counsel for the Appellant referred to the cases of:

IGBONOVIA VS. THE STATE (1981) 2 S.C.; and

REX. VS. TODD (1901) 13 MAN. L.R. 364 at **376**

on the meaning of a **"person in authority"**.

He submitted that it was a wrong strategy for the prosecution to ignore the evidence of the Appellant on this point and that the

Respondent ought to have taken up the Appellant on this point during cross-examination or call the Ag. Chairman himself so that he could be cross-examined on the point.

He referred to the case of **AMERICAN CYANAMID COMPANY VS. VITALITY PHARMACEUTICALS LIMITED (1991) 2 SCNJ 42** at **51** for the proposition that such uncontroverted and unchallenged evidence is deemed admitted by the prosecution.

He submitted that having given evidence to the effect that the Acting Chairman induced the Appellant into making his statements coupled with the fact that **TWT3** reiterated what the Acting Chairman said before interviewing and obtaining his statements, the onus undoubtedly lies on the Respondent to call or not to call the Acting Chairman to the stand. He submitted that responsibility cannot by any stretch of imagination be shifted to the Appellant. In Criminal trial the burden is always on the prosecution to prove beyond reasonable doubt that the statements obtained were voluntarily made.

He submitted that it is in evidence that when the Appellant got to the Respondent's office on the 4th of February 2016 he did not start writing his statement until around 8pm even though he had arrived at the Commission at around 8am in the morning. It is also in evidence that at all material time before the Appellant started writing his statement there was an interactive session between the investigating officers and him, it was only after they had heard his story that they started obtaining his statements. He submitted that the time frame in taking of the statement is important in determining whether the statement was voluntarily made or not. He referred to the case of **BORISHADE VS. F.R.N. (2012) 18 NWLR (PART 1332) PG. 347** at **P. 392, PARAS. C-E; P.393 - 394, PARAS. G-D.**

The Appellant Defendant made these statements on the 4th, 5th, 8th and 12th of February 2016, while still in the custody of the Respondent. He submitted that the circumstances under which the purported confessional statements where obtained i.e. the oppressive treatments meted on the Defendant Appellant and the mental agony of waiting coupled with the promise of non-prosecution if he agrees

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to return the alleged gift of **₦166 Million Naira,** created an unhealthy circumstance from which inference of oppression or intimidation can be drawn. He submitted that statement received under such conditions cannot be said to have been made voluntarily in law.

He further submitted that it is in evidence that in the course of obtaining the Appellant's statement the respondent's investigating officers dictated to the Appellant what to write down. It is also in evidence that in the process of doing that there were material alterations which clearly indicated that **TWT3** dictated to the Appellant what to say. That at no point in time did the respondent controvert this piece of evidence. In the course of giving evidence the prosecution witnesses clearly testified to the effect that cancellations are not allowed but mistakes are allowed to be corrected and that it is also their practice to inform statement writers to put corrected statements in parenthesis. (Page 199 of the printed record). The Appellant at Page 209 of the printed record, said Counsel, gave evidence to the effect that:

the Respondent had all the opportunity to cross-examine the Appellant and clear all doubts but choose to be silent on the point. That the effect therefore is that the Appellant's evidence in this regard is uncontroverted. He submitted that positive evidence need not be adduced to prove any of the vitiating factors such as threat, oppression or inducement. It is enough if there exists the barest suspicion from the environment that the confession was obtained under threat or fear. The Appellant needs not during cross-examination, ask the prosecution witness if he did threaten the accused. He referred to **BORISHADE VS. F.R.N. (2012) 18 NWLR (PART 1332) PG. 347** at **392 – 394**.

He submitted that the learned trial Judge fundamentally erred in law by trivializing the effect of the exclusion of the Appellant's lawyers when he was giving his statement. That this exclusion is fundamental, and it affects the voluntariness or otherwise of the statement purportedly made by the Appellant. The fundamental question this raises is: Why did the investigators prevent his lawyers from staying with their client while he was giving his statement? That the only answer that can readily come to mind

> **"I also recall that on the 12th February 2016 when I was bringing the balance of the draft, whilst he was dictating to me what to write, he had a brief distraction and I wrote that "which was asked to refund" he came back and say what I wrote and he objected to it. He said I should circle "I was asked" and replaced it with "volunteered" just to show that he dictated the statements that was (sic) obtained from me. That was how my statements of 5th, 8th and 12th February 2016 were obtained".**

He submitted that it is crystal clear from this line of evidence that **TWT3** dictated to the Appellant what he should write in his statement. That the learned trial judge with due respect missed the point when he held that the witness was not cross-examined on this point. Apart from the fact that Counsel cross-examined the witness on this point, the onus lies on the prosecution to prove through credible evidence that the alteration was not a clear indication that the statement of the Appellant was dictated to him. He submitted that having raised it by the Appellant during his examination in chief

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is because the Respondents were up to a mischief that explains why they insisted that the Appellant needs not come in with his lawyers. That the right to be heard includes the right to Counsel of your choice. That by no stretch of legal imagination can the presence of a lawyer being with his client during the taking of his statement be permissive and not mandatory. And, that that provisions of Section 17(c) of the Administration of Criminal Justice cannot be read in isolation to the provisions of the Constitution. Section 36(6) (C) of the 1999 Constitution (as amended).

He submitted that the requirement of having a legal practitioner to be with an accused person while giving his statement is a mandatory requirement which is provided for not only under the Administration of Criminal Justice Act but also under the 1999 Constitution as amended. That if the presence of a legal practitioner is not mandatory the Section would not have qualified the importance and the role of a legal practitioner when an accused is giving his statement under Section 17(1).

On this, learned Senior Counsel for the Appellant referred to the case of **ICAN VS. A-G., FEDERATION (2004) 3 NWLR (PT.**

859) 186 at **207 – 209** where the Court of Appeal per ***OGUNWUMIJU, JCA*** held that **"the word 'may'** can sometimes be construed as **"shall"** or **"must"** so that justice may not be a slave to grammar".

Appellant's Counsel submitted that the critical issue here about the prevention of Counsel from being with their client throughout the interrogation does not lie in the breach of Section 17(1) of the ACJA alone.

But, that Page 180 of the printed Record shows that the learned trial Judge held thus:

> **"Even though I also prefer as more credible, the more detailed testimony of the TWT-DW1 as against those of the prosecution witnesses, that the Defendant's legal representatives were not allowed to be present with him in the process of his writing his statements, I however, fail to see, from the evidence on record, how the non-presence of his lawyers tainted the voluntariness of the statements he made"**

From the perspective of the learned Senior Counsel for the Appellant "the effect of this passage is that once the learned trial Judge agreed with the Defence that the prosecution lied when they said that they allowed Defendant's lawyers to remain with him during interrogation and the taking of statements that should have been the end of the matter".....

He submitted that the entire TWT ought to have been determined on this finding as the resolution of such a critical issue in favour of the Appellant Defendant makes the entire case of the prosecution that the statements were voluntarily taken, a complete lie.

On the mandatory nature of the presence of Counsel of Defendant's choice during the taking of statements and/or interrogation, Appellant's Counsel referred to the cases of:

BAMISILE VS. OSASUYI (2007) 9 NWLR (PT. 1042) LPELR – 8221 (CA); and

AKAEZE CHARLES VS. F.R.N.(2018) LPELR – 43922 (CA)

unreported **Appeal No. CA/L/727^{A}/2017** (delivered by the Lagos Division of Court of Appeal per **Joseph E. Ekanem, JCA** on 19/03/2018).

He reiterated that the evidence of the Appellant to the effect that his lawyers were prevented to have access to him while writing his statement was not controverted by the prosecution under cross-examination. And, that what the trial Judge did in the circumstance was to shift the burden of proof on the Appellant rather than on the Respondent.

He further submitted that the effect of Section 15(4) of the Administration of Criminal Justice Act is that aside from writing the statement, the statement must also be recorded electronically. He added that by contending that the requirement of recording is not mandatory, the trial Court read into the Section what is not contained therein.

That issue of recording of statements goes to a very large extent in determining whether the statement of the Appellant was voluntarily made in the circumstance or not.

He submitted that the fact that the Appellant signed the disputed statements is not conclusive proof that the statements were obtained voluntarily. The onus still lies on the prosecution to show that the said statements were obtained voluntarily.

He referred to the case of **INUSA SAIDU VS. THE STATE (1982) LPELR – 2977 (SC)** and urged us to resolve the Issue in favour of the Appellant.

Learned Counsel for the Respondent in defence of the trial Judge's position on the allegations made against the duo of **Ibrahim Magu** and **Sharoof** as well on the allegations made by the Appellant against **TWT – P3 Junaid Sa'id** referred copiously to the findings of the learned trial Judge on Pages 19 and 20 of the Record of Appeal to wit that the Appellant would have ***subpoenaed*** Mr. Ibrahim Magu and Sharoof if he wanted them to testify in his favour as he (learned trial Judge) found it difficult to believe the Appellant on the alleged role that he claimed Ibrahim Magu and Sharoof played in the process leading to the writing of the statements.

Similarly, that the learned Senior Counsel for the Appellant Defendant did not cross-examine Junaidu Sa'id as **TWT – P3** on the role he allegedly play in the writing of the Appellant's statements.

Respondent's Counsel submitted that after the prosecution Respondent adduced unchallenged evidence to the voluntariness of Appellant's statements, the Appellant on his side merely made some allegations against the persons of Mr. Ibrahim Magu, the Ag. Chairman EFCC, Mr. Sharu and **TWT - P3** without any proof.

He referred to the provision of Section 29(1) (2) and (5) of the Evidence Act, 2011 (as amended) and submitted that to be admissible, a confessional statement must have been made voluntarily.

He added that the phrase "*If ... it is represented to the Court that the confession was or may have been obtained...*" in Section 29(2) of the Evidence Act 2011 imposes a duty of a sort on the defendant to, after the prosecution has made out a ***prima facie*** case of voluntariness as was done in this case, offer evidence to prove

that the confession was not voluntary. This, he said, the Appellant failed to do.

He urged us to affirm the decision of the trial Court.

In his Reply Brief, learned Senior Counsel for the Appellant submitted ***inter alia*** that the Appellant had done all that was legally required of him to do in a trial within trial proceedings where the burden of proof is unequivocally and undoubtedly on the prosecution to prove beyond reasonable doubt that the statements of an accused persons were obtained voluntarily.

He referred to the cases of:

IREGU VS. THE STATE (2013) 12 NWLR (1367) 92 at **100**;

THE STATE VS. OBOBOLO (2018) 4 NWLR (PT. 1610) 399;

THE STATE VS. MASIGA (2017) LPELR – 43474 (SC); and

C.O.P. VS. UDE (2011) 12 NWLR (PT. 1260) 189 at **198.**

It seems to me that the first part of the learned Senior Counsel's complaint on the admissibility of the Appellant's

confessional statements deal largely with the evaluation of the evidence of the Appellant vis-à-vis the prosecution Respondent's witnesses especially as regards the alleged role played by Mr. Ibrahim Magu, Sharoof and **TW-P3,** Junaid Sa'id in the process of taking the Appellant's confessional statements. It seems to me that the learned trial Judge had good reasons not to accept the Appellant's story on the allegations he (Appellant) levied against the trio of Ibrahim Magu, Sharoof and Junaid Sa'id **TWT - P3** in his evidence. One of such reasons by the learned trial Judge which is difficult to fault is that the Appellant had a choice in his evidence in defence to call any of these persons to testify in his defence in the trial within trial.

It cannot be said as the learned Senior Counsel for the Appellant seems to suggest that the learned trial Judge had thereby shifted the burden of proof of the voluntariness of the confession to the Appellant.

This is not so. As in many instances of proof, the ultimate burden of proving that a confessional statement is voluntarily obtained is on the prosecution Respondent. However, the evidential

burden of proof whether in criminal or civil cases shift from one party to another.

The decided authorities have variously demonstrated that a person who asserts existence of facts must prove same.

CHAIRMAN, EFCC VS. LITTLE CHILD (2016) 3 NWLR (PT. 1498) 72 (CA);

DURU VS. F. R. N. (2013) 6 NWLR (PT. 1351) 441; and

AL-MUSTAPHA VS. THE STATE (2013) 17 NWLR (PT. 1383) 350 (CA)

That in certain cases, an accused is required to make explanation of facts.

ALI VS. THE STATE (2012) 7 NWLR (PT. 1229) 209 (CA)

And, that after the prosecution has rendered ***prima facie*** proof, the burden of innocence shifts to the accused person.

NASIRU VS. THE STATE (1999) 2 NWLR (PT. 589) 87 at **89 (SC);** and

IMHANRIA VS. NIGERIAN ARMY (2007) 14 NWLR (PT. 1053) 76 (CA)

After, the prosecution Respondent had tendered evidence of the voluntariness of the Appellant's confessional statements; it was incumbent on the Appellant to prove rather than merely alleging that which is peculiarly within his knowledge that Ibrahim Magu and or Sharoof interfered with the process by which he wrote his confessional statements.

The learned trial Judge was therefore on firm grounds when he held at Pages 172 to 176 of the Record, first that:

> **"The question that necessarily follows is whether the Court could accept the Defendant's testimony as to the roles played by the Acting Chairman of the EFCC, Mr. Ibrahim Magu and Mr. Sharoof, in the process leading to the writing of his statements, which has a tendency of indicting them both without giving them an opportunity to be heard? My view is that the Defendant, who wanted the Court to believe that such an interaction took place and the statements ascribed to the Acting Chairman of the EFCC were indeed true and should be acted upon, ought to *subpoena***

the two persons to testify in this case so that they would have the fair opportunity to also explain their side of the story. This, the Defendant did not do. As such, the Court shall refrain from placing any probative value on the evidence of the Defendant with respect to the statements he ascribed to the Acting Chairman of the EFCC, to the extent that in the course of his interrogation on 04/02/2016, he was promised not to be prosecuted if he refunded monies given to him by Hima Aboubakar.

Second, that:

I have also noted the testimony of the Defendant to the extent that the TWT - P3, Mr. Junaid, dictated the statements he made particularly on the 5th, 8th and 12th February, 2016, to him.

I had carefully examined the statements, particularly the one made on 05/02/2016. I find it incredible to believe the testimony of the Defendant that such a statement was dictated to him. In the statement, the Defendant described the circumstances

under which he met Aboubakar Himma, in the office of the then Chief of Air Staff (CAS); and how the man was introduced to him by the CAS. He further stated how the said Aboubakar Himma later came to his office and he informed him that he has been transferred to Lagos as Air Officer Commanding, Logistics Command and how Himma expressed thanks for the warm receptions he (the Defendant) had accorded him (Himma) all the while that he had been coming to HQNAF and promised to send a gift to him (the Defendant).

In my view, the pieces of information contained in this statement are those ordinarily within the exclusive knowledge of the Defendant. As a matter of fact under cross-examination, the prosecution witness stated that he did not invite the said Aboubakar Himma for interrogation. As such, it could not have been the case that Junaid had obtained information as to how the Defendant met Aboubakar from an independent source and then dictated the

same to the Defendant to incriminate himself, as he alleged.

Again, the said Mr. Junaid was not cross-examined by the learned Senior Counsel for the Defendant on this very critical point when he was in the witness box.

My understanding of the position of the law is that where a party or witness is not cross-examined on a material fact in issue which directly connects to him; it will be wrong for the adverse party to later call independent evidence on the same issue after the other party had closed his case. See AGBONIFO VS. AIWEREOBA (1988) 1 NWLR (PT. 70) 325; OFORLETE VS. STATE (2000) 12 NWLR (PT. 681) 415 at **436**.

Clearly, the evaluation of relevant and material evidence before Court and the ascription of probative value to such evidence are the primary functions of the trial Court, which saw, heard and assessed the witnesses while they testified. Where the trial Court unquestionably evaluates the evidence and justifiably appraises the

facts, as in the instant case, it is not the business of the Appellate Court to substitute its own views for the views of the trial Court.

See:

BASHAYA VS. THE STATE (1998) 5 NWLR (PT. 550) 351 (SC);

THE STATE VS. AJIE (2000) 7 SC (PT. 1) 24; and

ADEDUMOLA VS. THE STATE (1988) 1 NWLR (PT. 73) 683

The other complaint by the Appellant on Issue One has to do with the relationship and effect of some of the provisions of the Administration of Criminal Justice Act (ACJA) vis-à-vis the provisions of the Evidence Act 2011 on the admissibility of confessional statements.

This, in my humble opinion, includes the complaint of the learned Senior Counsel for the Appellant on the views of the trial Judge contained on Page 180 of the printed Record that he could not see how the non-presence of the Appellant's lawyers taint the voluntariness of the statements he made.

The learned trial Judge said in full at Page 180 of the Record that:

> **"Even though I also prefer as more credible, the more detailed testimony of the TWT - DW1 as against those of the prosecution witnesses, that the Defendant's legal representatives were not allowed to be present with him in the process of his writing his statements. I however fail to see, from the evidence on record, how the non-presence of his lawyers tainted the voluntariness of the statements he made"**

Another way of putting the above statement made by the learned trial Judge at Page 180 of the Record is that even if he believed the testimony of **TWT - DW1** that his lawyers were not allowed to be with him while he made the statements, this fact has nothing to do with the voluntariness and perhaps also admissibility of the statement which is governed by the Provisions of Sections 28 and 29 of the Evidence Act and not also the Provision of Section 17(2) of the ACJA as suggested by the learned Senior Counsel for the Appellant.

In the lines that followed the above statement of the learned trial Judge at Page 180 of the Record, he categorically explained:

> **"that the Provision of Section 17(2) of ACJA canvassed by the learned Senior Counsel for the Defendant, that requires a Suspect's Statement be taken in the presence of a Legal Practitioner of his choice, is also not a mandatory provision contrary to the contention of the learned Senior Counsel. My view is that the Provision is permissive and could be dispensed with depending on the exigencies of each particular case"**

On the above, I perfectly agree with the learned trial Judge not only on the permissiveness of the Provision of Section 17(2) but also the portion of Section 15(4) which says the taking of the statement which shall be in writing **"may be recorded electronically on a retrievable video compact disc or such other audio visual means"**

I think to his credit, the draftsman of the ACJA has carefully and deliberately use the words **"shall"** and **"may"** sometimes in the same text to pointedly make a distinction between

statements/sentences that are mandatory and those that are permissive. The ACJA being a teleological enterprise, its draftsman dexterously mixes the use of the command word **"shall"** and the permissive **"word" "may"** for textual accomplishment.

This is to my mind, recognition of the fact that the ACJA itself is largely a legislation in the realm of the ideal, containing provisions that are for now clearly enforceable and sometimes provisions that could only hope for enforceability in the nearest future. All however, to fulfill its grand purpose **"to ensure that the system of administration of 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".**

In any event, the traditional, commonly repeated rule is that **"shall"** is mandatory and **"may"** is permissive. Mandatory words impose a duty; permissive words grant discretion.

See: **NIGERIAN NAVY VS. LABINJO (2012) 17 NWLR (PT. 1328) 56 (SC).**

The above analysis is different and distinct from the idea that the Evidence Act being a specific Act on evidence including trials within trials and admissibility takes precedence over the ACJA in matters of admissibility of evidence.

In totality, I agree with the learned trial Judge on Issue One when he held first at Page 182 of the Record that:

> **"I fail to see, from the evidence led on the record, any act of oppression alleged by the Defendant against the Investigators or anyone else towards him, prior to or during the time he made his statements. The mere fact that he was detained overnight in the premises of the EFCC, as constitutionally allowed, cannot, in my view, constitute evidence of oppression"**

Second and finally at Page 186 of the Record that:

> **"In the instant case, the Defendant did not state that he was compelled or forced or cajoled or induced to sign the cautionary words before he proceeded to make his statements. In his own words, he more or less confirmed that he freely elected to make the statements. On this score also, I must find and hold that the statements were freely and voluntarily made"**

Issue One is resolved against the Appellant.

On Issue Two, learned Senior Counsel for the Appellant submitted that at the stage of trial within trial the learned trial Judge is not concerned with the truthfulness or otherwise of the confessional statement. The duty of the learned trial Judge at that stage is simply to determine whether the confessional statement was voluntarily made or not.

He submitted that by ambling into the area of the truthfulness or otherwise of the contents of the disputed statements, the learned

trial Judge exceeded the required parameters for the determination of voluntariness in a trial within trial.

That, in delving into the truthfulness or otherwise of the disputed confessional statements the trial Court at Page 174 – 175 of the printed Record held thus:

> **"I had carefully examined the statements, particularly the one made on 05/02/2016. I find it incredible to believe the testimony of the Defendant that such a statement was dictated to him. In the statement, the Defendant described the circumstances under which he met Aboubakar Himma, in the office of the then Chief of Air Staff (CAS); and how the man introduced to him by the CAS. He further stated how the said Aboubakar Himma later came to his office and he informed him that he has been transferred to Lagos as Air Officer Commanding, Logistics Command and how Himma expressed thanks for the warm receptions he (the Defendant) had accorded him (Himma) all the while that he had been coming to HQNAF and promised to send a gift to him (the Defendant). In my**

view, the pieces of information contained in this statement are those ordinarily within the exclusive knowledge of the Defendant. As a matter of fact, under cross-examination, the prosecution witness stated that he did not invite the said Aboubakar Himma for interrogation. As such, it could not have been the case that Junaid had obtained information as to how the Defendant met Aboubakar from an independent source and then dictated the same to the Defendant to incriminate himself, as he alleged'.

Appellant's Counsel submitted that what the learned trial Judge succeeded in doing in the circumstance is to determine the truthfulness or otherwise of the statement.

He submitted that the trial Judge is forbidden from doing that at this stage of the trial. That the contention of the Appellant is not that he did not make the statement but that the statement was involuntarily made.

He submitted that by delving into the content of the statement to determine whether the Appellant could have made such a

statement presupposes that the learned trial Judge had already drawn a conclusion about the truthfulness or otherwise of the offence charged by attaching weight to the statements. This, Counsel said is diametrically opposed to the procedural expectations of a trial within trial proceedings.

He referred to the case of **THE STATE VS. JAMES GWANGWAN (2015) LPELR -- 24837 (SC)** and submitted that the question of weight of evidence is always decided at the end of the trial in relation to the totality of evidence before the Court.

He submitted further that the effect of considering the truthfulness or otherwise of the statement at this stage presupposes that the learned trial Judge had prejudged the statements as confessional and incriminating the defendant Appellant.

He referred to the cases of:

ORJI VS. ZARIA INDUSTRIES LIMITED (1992) LPELR 2768; and

PDP VS. ABUBAKAR (2007) 3 NWLR (PART 1022).

and submitted that what the trial Court has done in the circumstance amounts to determining the merit or otherwise of the substantive suit during a trial within trial proceedings which he (Counsel) considers an aberration in criminal trial.

He concluded that where the trial Judge falls into the error of determining the substantive issue at an interlocutory stage, the result is that he loses his power to further adjudicate on the matter as he has prejudged certain critical aspects of the case. He urged us to resolve Issue Two in favour of the Appellant.

In deciding Issue Two, I do not agree that the finding of the learned trial Judge referred to by the learned Senior Counsel for the Appellant amounted to delving into the veracity or truthfulness of the disputed confessional statements at the stage of trial within trial. Rather, I think the learned trial Judge sought to examine the document qua document not to assess the truthfulness or veracity of the statement but to assess the evidence of the Appellant vis-à-vis the voluntariness of the statement. This to my mind are two different things.

For the same reason, the suggestion by the learned Counsel that the trial Judge considered the weight of evidence before the end of the trial does not arise.

In any event, I do not see how the finding/statement by the learned trial Judge occasioned a miscarriage of justice in the circumstances of the case.

Issue Two is resolved against the Appellant.

Having resolved the Two Issues in this Appeal against the Appellant, **the Appeal lacks merit and it is accordingly dismissed.**

The **Ruling/decision of Olukayode A. ADENIYI, J.** delivered on **24/11/2017 in Charge No. CR/183/2016 is accordingly affirmed.**

MOJEED ADEKUNLE OWOADE
JUSTICE, COURT OF APPEAL

COUNSEL/APPEARANCES:

Joseph Bodunrin DAUDU, SAN with him
Adedayo ADEDEJI, Esq.;
I. C. OKONJI, Esq.;
F. AL-MUSTAPHA, Esq.;
Arome ABU, Esq.;
Meka DAUDU, Esq.;
E. A. ONI, Esq.;
K. NDUBA, Esq. and
M. J. SULE, Esq.
— for the **Appellant**

Slyvanus TAHIR, Esq. with him
Raheematu USMAN, Esq.; and
Victor UBAKA, Esq.;
— for the **Respondent**

APPEAL NO:- CA/A/11^{c}/2018
HAMMA AKAWU BARKA, JCA

I had the singular opportunity of having read in advance the judgment just delivered by my learned brother **MOJEED ADEKUNLE OWOADE JCA.**

I have no hesitation whatsoever agreeing with the reasoning and the conclusion reached therein, which I adopt as mine. I too would dismiss the appeal upon the cogent and lucid reasons advanced in the lead judgment.

Appeal is dismissed.

HAMMA AKAWU BARKA
JUSTICE, COURT OF APPEAL.

APPEAL NO:- CA/A/11C/2018
BOLOUKUROMO MOSES UGO J.C.A.

JUDGMENT (Dissent)

(Delivered by BOLOUKUROMO MOSES UGO, JCA)

I had the privilege of reading in draft the lead judgment of my learned brother Mojeed Adeunle Owoade, JCA, and much as I tried, I could not succeed in convincing myself into agreeing with my learned and revered brother that the learned trial judge was right in admitting in evidence the disputed statements as confessions of the appellant voluntarily made, especially after the trial judge himself had made a definite finding that he found 'more credible' the version of appellant and his counsel, as against that of respondents' witnesses, that appellant's lawyers were not allowed to be with him during the process of interrogation and writing of his statements.

In giving my reasons for this decision, I shall adopt the facts of the case and the arguments of counsel as admirably set out by my learned brother Owoade, J.C.A., in the lead judgment. I have to do so especially as my departure from my brother is on

a rather narrow, albeit very important, area of the law regarding taking of statements from suspects and the revolutionary innovations introduced by the Administration of Criminal Justice Act 2015 (hereinafter referred to as ACJA) into our criminal justice administration system.

Appellant's contention before the trial court, which he still maintains here in issue 1 of his two issues, is that his statements to the prosecution, which were marked Exhibit TWT1, TWT1A, TWT1B and TWT1C by the trial judge in the trial-within-trial and later admitted in evidence as Exhibits P9, P9A, P9B and P9C, were not voluntarily made by him but on torture, inhuman treatment and on inducement by the prosecution. To prove his assertion of involuntariness of the making of the said statements, appellant relied amongst others on the fact that his lawyers, including one Mr. Cephas Gadzama, a retired Commissioner of Police, who accompanied him to respondent's Economic and Financial Crimes Commission (EFCC) office for his interrogation, were prevented by the prosecution witnesses from being present with him

during the taking of his said statements. The prosecution joined issues with him on this assertion by insisting that the said statements were made voluntarily by appellant and in the presence of his lawyers. That necessitated the conduct of the trial-within-trial pursuant to Section 29 of the Evidence Act 2011 which states that:

29(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.

(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

(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 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. (Emphasis mine.)

(3) In any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own 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 deem it necessary to pause here to re-emphasize the fact that the purpose of a trial-within-trial is not to ascertain if a confession was true; it is rather a trial for the prosecution to prove to the court, beyond reasonable doubt, that the confession in issue was actually made voluntarily by a person

accused of a crime. In that inquest, I repeat, it is immaterial that what is contained in the said confessional statement may be or is even true, the focus of the court should be solely on whether the prosecution proved *beyond reasonable doubt*, emphasis again on that phrase, that the accused person actually made the said confession voluntarily. Of course, any doubt has to be resolved in favour of the accused person. That is the clear purport of Section 29 above and particularly the phrase in Section 29(2) (b) that '**notwithstanding that it may be true**'. The issue of whether the statement is or may be true is only relevant where the accused person asserts that he did not make the statement at all, in which case his *biodata* and other necessary information usually contained in the statement, if proved to be correct, will become useful in determining the correctness of his denial. That, exercise, however, does not touch the admissibility of a confessional statement on grounds of involuntariness and therefore not the subject of a trial-within-trial; it is an exercise for the main trial: see *Lasisi v. The State (2013) LPELR 20183 (SC).*

Coming back to the issue at hand, the learned trial judge in his ruling on the trial-within-trial made a definite finding of fact that appellant's lawyers were not allowed by the prosecution to be with him during his interrogation and the taking of the disputed 'confessional' statements. His Lordship actually used the revered phrase 'more credible' in describing appellant's lawyer's contention on that issue vis-a–vis the denial by the prosecution. This is what His Lordship said on it in his judgment as recorded at page 180 of the Records of appeal:

> "..... I also prefer as ***more credible***, the more detailed testimony of the TWT-DW1 [lawyer Cephas Gadzama] as against those of the prosecution witness, *that the defendant's legal representatives were not all present with him in the process of his writing his statements...."*

His Lordship then went to add that:

"I however fail to see, from the evidence on record, how the non-presence of his lawyers tainted the voluntariness of the statements he made."

The evidence of the TWT-DW1 [lawyer Cephas Gadzama] which His Lordship said he found 'more credible' is not that he and other lawyers of appellant elected to stay away from the interrogation. No! What TWT-DW1 said was that the EFCC operatives prevented them. This is what TWT-DW1 Mr. Cephas Gadzama said in evidence-in-chief which the trial judge found more credible:

"I remember the 4th of February 2016. In the course of my performing my duties as a lawyer to him, we accompanied the defendant to the EFCC with Mr. Tunde Onamusi. On reaching EFCC, we were received by Sharoof, head of STF1. After introductions, he asked us to wait at the waiting room, that whenever the defendant required our attention, he will call us. We did just that as he said. We got there at about 8.am. We attempted to go and find out what was delaying the defendant but we

were not allowed to enter. The defendant was kept in the Sharoof's office all this while"

"After a long period of time, Sharoof brought the defendant out and handed him over to the STF2 headed by Ibrahim Musa. This was in the afternoon. We accompanied them to the conference room, but again, we were not allowed to stay with the defendant at the conference room, we were requested to go and wait at the waiting room. The waiting room is different from the conference room, on a different floor in the building.

"We waited throughout the day. They did not finish with the defendant until around 10 pm., when he came out. He told us what kept him so long, when he came out. He told us that he was asked to undertake to refund N166 Million which he refused. There and then the defendant was detained in the EFCC cell. We the lawyers then had to leave the EFCC that night.

"The following day, 5/2/16 we came again to the EFCC, around 10 am. Before we came, the defendant was already with the detectives in the conference room. We attempted on two occasions to see him, but we were prevented. We were again asked to stay at the waiting room, which took us again up till around 8.pm before they finished with the defendant that day. When we came out, the defendant

explained to us that he has opted to make the undertaking to pay N166 Million on the condition given to him that he will not be prosecuted."

The questions that arise from this 'more credible' evidence of appellant's lawyer are legion. One may ask, for instance, whether a confession obtained in such opaque conditions can be seriously described as one truly proved beyond reasonable doubt to have been made voluntarily as required by section 29(3) of the Evidence Act. What were EFCC and its operatives preventing appellant's lawyers from witnessing if they, EFCC, were not up to some mischief in the statement taking exercise? That is also where the provisions of the Administration of Criminal Justice Act 2015 (ACJA) become relevant. Section 17(1) and (2) of ACJA states as follows:

17(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 Officer 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.*

It is noteworthy that the last clause of this subsection even recognizes that the legal practitioner to a suspect may even have a role to play in the statement taking exercise.

Now, while I recognize and concede that, the fact that the lawmaker employed both 'May' and 'Shall' in this provision suggests that the words are in the first place intended to take their ordinary meanings of discretionary for 'May' and mandatory for 'shall', which also translates to the effect that it is not the intention of the lawmaker that in no circumstance can the statement of a suspect or accused person be taken if a

lawyer or the other persons mentioned in the subsection are not available, I am unable to agree with the trial Judge that these provisions permit investigating authorities to at their whims prevent a lawyer to an accused person or any of the persons mentioned in the section even where such lawyer or other persons are available and willing to be present during the statement taking exercise. The reasoning of the learned trial judge is even the more inconceivable in this case where it is not suggested that appellant's lawyers misbehaved themselves or were likely to interfere with the statement taking exercise.

The clear aim of the ACJA, which we must read harmoniously and globally rather than in parts, is to revolutionize the administration of criminal justice in Nigeria and bring it immediately in line with international best practices. That is why parliament in enacting ACJA went so far in Section 493 to even repeal the Criminal Procedure Act, CAP C41 Laws of the Federation of Nigeria, 2004 and the Criminal Repeal Procedure (Northern States) Act CAP. C42, Laws of the Federation of Nigeria, 2004 and replaced them with the ACJA. This intention

is further captured first in section 1(1) of the same ACJA stating that:

> S. 1(1) 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.
>
> (Emphasis mine)

Subsection 2 of the same section 1 of ACJA goes further to demonstrate that the provisions of ACJA are not fanciful but intended to bite and be immediately enforceable. This it does by imposing not only on law enforcement agencies like EFCC and so forth but also the courts, too, a duty to ensure compliance with its provisions including its section 17 in issue

in realizing the purpose of the ACJA. Subsection 2 of section 1 reads:

S. 1(2) **The Courts**, *law enforcement agencies and other authorities involved in criminal justice* **shall** ***ensure compliance with the provisions of this Act for the realization of its purposes***. (Emphasis mine)

It is noteworthy that the lawmaker carefully employed the mandatory 'shall' in imposing this duty.

It is with all these at the back of my mind that I find it difficult to agree with the learned trial judge when he said in his judgment (at p.180 - 181 of the records) that:

> "I must further note that the provision of section 17(2) of ACJA canvassed by learned senior counsel for defendant, that requires a suspect's statement be taken in the presence of a legal practitioner of his choice, is not a mandatory provision, contrary to the contention of the learned senior counsel. My view is that the provision is

system of criminal justice administration by law enforcement agents in our country prior to the enactment of the ACJA. Here I find very inspiring the observation/advice of Rhodes-Vivour, JSC, (with the concurrence of His brethren Muntaka-Coomassie, Ngwuta, Ogunbiyi and Aka'ahs JJ.SC) in *Harrison Owhoruke v. C.O.P.* (2015) 15 NWLR (PT 1483) 557 @ 576 where His Lordship (Rhodes-Vivour, JSC) said that:

> **"Confessional statements are most times beaten out of suspects and the courts usually admit such statements as counsel and the accused are unable to prove that the statement was not made voluntarily. A fair trial presupposes that police investigation of crime for which the accused stands trial was transparent. In that regard, it is time for safeguards to be put in place to guarantee transparency. It is seriously recommended that confessional statements should only be taken from suspect if, and only if his counsel is present, or in the presence of a legal practitioner. Where this is not done such a**

confessional statement should be rejected by the court."

There can be no better example of the safeguard His Lordship had in mind than Section 17(2) of ACJA in issue here. Incidentally, as at 26th June 2015 when this pronouncement was being made, ACJA had already been passed into law a month earlier on 13th May 2015, apparently unknown to His Lordship.

In conclusion, I hold the strong view and here reassert that once there is a complaint that a confessional statement was not made voluntarily and it is shown to the court that section 17(2) of ACJA was breached, rather than enforced by law enforcement agents as required by section 1 of the same statute, in the sense that where the persons mentioned in section 17(2) are available and willing to be present in the statement taking exercise but yet prevented by law enforcement agents, the court ought to, and should as a matter of course, rule such disputed confessional statement to have been made involuntarily and therefore inadmissible in evidence.

It does not seem to me a matter that the court has a further discretion as the trial Judge reasoned in his judgment.

Now, I am not unmindful of the fact that the conduct of a trial-within-trial ordinarily borders on credibility of witnesses, on which the trial judge enjoys a pre-eminent position. But even in that case the belief of the trial judge must not appear to be based on inference, for if it is based on inference it will be open to an appellate court to scrutinize the grounds on which such inference was drawn: see *Nnamdi Osuagwu v. The State* (2013) LPELR-19623 (S.C) pages 29 - 30 (Rhodes-Vivour, JSC). In appropriate cases it may also necessitate testing the trial judge's belief against the probabilities of the case as shown by the circumstances under which the event in issue is said to have occurred: see *Onuoha v. The State* (1989) 2 NWLR (pt 101) 23 @ 32 and *Bozin v. The State* (1985) 2 NWLR (PT 8) 465 (S.C). Here the issue is no longer about the trial judge's right to believe witnesses, it is rather that he had already believed appellant on an important issue and made a crucial finding in his favour on the sole issue in the trial-within-trial,

which should attract the legal consequences spelt out by parliament, the law maker. A corollary to that is whether His Lordship even drew proper inferences from his own finding discussed here and whether that finding was not one that ought to seriously tilt the scales in favour of appellant on the voluntariness of the statements. Both questions I have answered and will answer again in appellant's favour. His Lordship, I agree with Mr. Daudu S.A.N. for appellant, trivialized the issue of prevention of appellant's lawyers by EFCC. I am also in complete agreement with learned senior counsel that the issue of the voluntariness of appellant's statement should have ended on His Lordship's finding of the 'more credible' evidence of Lawyer Cephas Gadzama.

I am of the strong view that His Lordship's decision declaring the said so-called confessional statements of appellant admissible was, with all due respect, wrong. For this reason I hold that there is merit in issue 1 of the appeal and the said statements which were tendered in the trial within trial as Exhibits TWT1, TWT1A, TWT1B and TWT1C remained

inadmissible in evidence. I accordingly allow the appeal on this issue and order the said statements rejected in evidence and to be marked Rejects P1, P9A, P9B and P9C respectively.

I should however put it on record that I am not persuaded that there is any weight in Issue 2 where appellant complained that the trial judge by his pronouncements cited by counsel in argument under that issue prejudged issues which can only be determined at the substantive trial. Nevertheless, given His Lordship's decision on the admissibility of the said four statements, fair trial/hearing demands that His Lordship, O. A. Adeniyi J., hands-off the case. Accordingly, I hereby order that this case be re-assigned by the Honourable Chief Judge of the High Court of the Federal Capital Territory to a different Judge for hearing and determination.

BOLOUKUROMO MOSES UGO
JUSTICE, COURT OF APPEAL.

Counsel

J.B. Daudu S.A.N. (with him Adedayo Adeoje) Esq. I. C. Okonji Esq., Arome Abu Esq. and N.J. Sule Esq.) for Appellant.

Sylvanus Tahir Esq. (with him Funke Durojaiye Esq., Raheematu Usman Esq., and Victor Ubaka Esq.) for Respondent.