# The Law and Practice of Trial within Trial in Nigerian Criminal Justice: An Appraisal

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***Abstract***

*It is trite that an accused is presumed innocent until proved guilty and where the guilt of an accused cannot be proved he will be entitled to a discharge and acquittal. The law is "he who asserts must prove." No citizen should be put through the rigors of a trial in a criminal proceeding unless available evidence points prima facie to his complicity in the commission of a crime. In proving the guilt, prosecutions often rely on confessional statement allegedly made by the accused. This paper seeks to discuss the law and practice of the procedure of trial within trial in criminal prosecution in Nigeria and also to examine judicial attitude to the procedure which has become part of our criminal justice system in spite of the absence of the Jury system in Nigeria. Attempt will be made to critically examine both the arguments for and against the continuous retention of the practice and procedure of trial within trial in our criminal jurisprudence.*

## 1. Criminal Trial and Prosecution

It is the duty of prosecution to prove the guilt of an accused person. Put differently it is not the duty of the accused to prove his innocence. The prosecution proves his case through any or all of the following means; direct evidence, circumstantial evidence, real evidence and confessional statement.

Circumstantial evidence is evidence of some facts not actually in issue, but relevant to a fact from which a fact in issue can be inferred. For circumstantial evidence to ground a conviction, it must lead only to one conclusion, namely, the guilt of the accused person. However, where there are other possibilities in the case than that it was the accused person who committed the offence and another person other than the accused had the opportunity of committing the offence with which the accused is presently charged, then it will not be accepted as a good circumstantial evidence.[1] Circumstantial evidence

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[1] See the cases of *Esai v State* (1976) 11 SC 39 *Adekunle v State* (2006) vol. 10, MJSC 107 at 121.

must not only be cogent it must be complete, unequivocal and positive. It must be compelling and irresistible. Circumstantial evidence is receivable both in criminal and civil cases. The justification for receiving circumstantial evidence in criminal cases is the challenge of proof especially in organized crime by direct and positive testimony of eyewitnesses or by conclusive documents and the secrecy usually associated with crimes.[2] The Supreme Court has reasoned that the provisions of the Evidence Act are enough to enable a court to accept the proof of even death by circumstantial evidence.[3] The court also held that circumstantial evidence is often the best evidence being evidence of surrounding circumstance, which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics.[4]

Direct evidence includes real evidence. It is evidence offered by a witness in proof of the truth of the fact asserted by him. It is the verbal assertion on oath of a witness offered in court as proof of that which is stated.[5] The evidence of a single witness if believed by the court can establish a criminal case.[6]It is otherwise called original or testimony because the person testified concerning those things or facts

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2 See for instances where the court has applied the evidence and accordingly convicted: *R v Sala Sati* (1938) 8 WACA 10. *Ogundipe and anor. v R* (1954)14 WACA 458. In this case, appellants were convicted of the murder of a person whose body was not found. The finding was based on circumstantial evidence showing that the alleged deceased was never seen again after he was attacked by the appellants and traces of human blood was found leading from where he was attacked to the foreshore of a lagoon where his body was established to have been carried.

4 See section 149, Evidence Act 2011, see the case of *Ijiofor v State* (2001) 9 NWLR (Pt.718) 371 see also for further reading on circumstantial evidence; E.B. Omoregie: "Application of Circumstantial Evidence in Criminal Trials in Nigeria – A Review," (2005) Vol. 3 *B.J.P.L.* 1 – 169 at 97 to 106.

5 See sections 76 – 77, Evidence Act 2011.

6 See the following cases *Sunday Effiong v State* (1998) 8 NWLR (Pt. 562) 362*, Alonge v IGP* (1959) SCNLR 516, *Onafowokan v State* (1987) 3 NWLR (Pt. 61), 538 at 552.

actually perceived, seen, touched, smelt, heard[7] and witnessed by him evidence of fact actually in issue.

Real evidence on the other hand refers to a material object other than documents produced for the inspection of the court as means of proof. For example, a gun used for robbery, stained clothes after rape, a stick or forged documents to prove a case before the court. Section 77(d) (ii) of the Evidence Act 2011 provides that real evidence may be movable or immovable. Where it is movable, the object is brought to court and tendered as exhibit. However, where it is not moveable, the court may visit the locus.[8] A visit to the locus is a visit to the place where the crime happened.

The visit may be at the request of the parties or by the court *suo motu*. During the visit, all parties, their counsels, and relevant witnesses are to be present. The visit may be at any time before judgment and it may even come after the final address.[9]

## 2. Confessions

Confession as a means of proof is the fulcrum of this paper. Confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.[10]It has been defined as a voluntary statement by a person charged with the commission of a crime or a misdemeanour communicated to another person, wherein he acknowledges himself to be guilty of the offence charged and disclose the circumstances of the act or the extent of his involvement.[11]

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7 See the case of *Eugene v State* (1992) 5 NWLR (Pt. 244) 642at 649 where it was settled that there may be sufficient identification of an accused person by voice.

8 For the procedure of the visit see section 207 Criminal Procedure Act (CPA), s. 234 Criminal Procedure Code (CPC), s. 77 (d) (ii), R *v Dogbe* (1947) WACA 184 *Ogundele v Fasu* (1999) 12 NWLR (Pt. 632), 662.

9 See generally on visit to locus, *Igwe v Kalu* (2002) 4, MJSC 1*; Oba Ipinlaiye 11 v Olukotun* (1996)6 SCNJ 74 at 93; *Olumolu v Islamic Trust of Nigeria* (1996)2 NWLR (Pt.430)253.

10 See section 27, Evidence Act Cap E14, Laws of the Federation of Nigeria (LFN), 2004.

11 See the case of *James Chinokwe v State* (2005)5 NWLR (Pt. 918) 424 at 427.

A confession may either be in writing or oral or a combination of both.[12] An oral confession may be a little more difficult to prove but where it is effectively proved; it does not carry lesser weight.[13] In all the substantive laws guiding criminal trial and prosecution in our courts, only the Evidence Act contains provisions relating to confession.[14] A confession may be made at any time and not necessarily during trial. It may be made before trial or during trial.[15] Confession made before the commission of an offence cannot be acceptable.[16]

In Nigerian criminal jurisprudence, there is no confession by proxy;[17] therefore confession through one's counsel, relatives, religious leader or co-accused among others is unknown to our law.[18]The law provides for the confession of an accused and effect of the same on a co-accused. Where more than one persons are charged jointly with a criminal offence and confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, the court, or a jury where the trial is one with a jury, shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted

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12 See the case of *Nwachukwu v State* (2002) 12 NWLR (Pt. 782) 543 at 572.

13 See the case of *Uche and Anor v State* (1964) 1 ALL NLR 195.

14 Others include Constitution of the federal republic of Nigeria, 1999, Criminal Procedure Act CAP C41, LFN 2004, Criminal Procedure Code, Penal Code, Criminal Code Act, and the various Rules of Courts.

15 The former is called extra judicial and; the latter is judicial confession which has been defined as admission of guilt in a judicial proceeding before a court of law or tribunal; see the following cases *Akpan v State* (2001) FWLR (Pt. 75) 428 at 443. *Yahaya v State* (2001) 10 NWLR (Pt. 721) 360.

16 See for instance, *R v Udo Eka Ebong* (1947) 12 WACA 139. It is however submitted that the mere fact that a confession was made before an accused is charged does not make it less than a confession if it is one in all senses.

17 See the case of *R v Asuquo Etim Inyang* (1931)10 NLR 33. *Ozaki v State* (1990) 1 NWLR (Pt. 124) 92. *Otufale v State* (1968) NMLR 262 *Omonga v State* (2006) ALL FWLR (Pt. 306) 930 AT 951.

18 Formal admission in civil proceeding may be as contained in pleadings, answer to interrogatories and by counsel. See the case of *Adewumi v Plastic Nig Ltd* (1986) 3 NWLR 767*, Mosheshe General Merchants Ltd v Nigeria Steel Products* (1987) 1 NWLR 100.

the said statement by words or conduct.[19] Confession is against only the maker in law.[20] The confessional statement of an accused person must be properly evaluated especially where it is disputed in the course of trial. The grounds for such evaluation may arise; firstly, the statement purportedly made and or signed by the accused is in reality not his statement at all. Secondly, the need for such evaluation may arise if the statement was truly made by the accused but the accused was in actual sense constrained to make the statement by threat, beating, inhuman treatment, inducement, promise of assistance in form of reducing the number of charges, lenient judge, granting of bail etc. The first possibility comes under retracted confessional statement[21] while the second possibility is under the category of involuntary confessional statement. Though the two scenarios are serious legal issues, it is the category of involuntary confessional statement that this paper seeks to critically examine especially the philosophical and underpinning justification and justiciability in light of statutory provisions, its relevance and continuous retention in our criminal justice system.

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19 See section 27(3) Evidence Act Fatilewa *v State* (2008) ALL FWLR PT 426 1856 *Emeka v State* (2001) 14 NWLR (Pt. 734), 666 at 679. *Kasa v State* (1994) 5 NWLR PT 344 2669 at 288. See for the effect of reiteration of such statement on oath from the witness box. Sec 178(1) Evidence Act, Sec 218, CPA and sec 161( 2) CPC *Akanbi Enitan and anor v State* ( 1986) 3NWLR (Pt. 30 604), at 611, *Hamuzat Badmos v COP* ( 1984) 12 WACA 432.

20 *Emeka v State* (2001) FWLR (Pt. 66) 682.

21 The confessional statement of accused persons can be evaluated by subjecting them to the six tests before any evidential weight can be attached to it. These tests are is the confession possible, is it corroborated, is there anything outside the confessional statement to show it is true, are the relevant statements made in it of facts as they can be tested, was the prisoner one who had the opportunity of committing the crime and is the confession consistent with other facts which have been ascertained and have been proved? See generally *Adeleke v State* (2012) 5 NWLR (pt.1292), *Obiasa v Queen* (1962) 2 SCNLR 402, *Nsofor v State* (2004) 18NWLR (Pt. 905) at 292, *Osetola v State* (2010) 36 WRN 177.

## 3. Defining Trial within Trial

Trial within trial is a mini trial otherwise called *voir dire dicere*; although it is a mini trial or a sub trial, it nevertheless takes all the features of the main trial. There is no procedure so called trial before trial and as such to refer to trial within trial as a trial before trial is a misnomer.[22]

## 4. Historical Background

A cursory look at the various statute books in our criminal jurisprudence shows no provision for the procedure. However Nigeria is a commonwealth country and as such with relics of colonial rule especially with received English law and Common Law principle,[23]the English procedure of trial within trial is one of such received principles from the Common Law.

Before now,[24] there were no direct or indirect statutory provisions on the procedure of trial within trial but notwithstanding the absence of any enabling law, it has long been established as a positive rule of law that has found a healthy place in our court:[25]

> Trial within trial is now very much part of our law, that it cannot be decreed in to illegality by the Court of Appeal… that the learned justices of the Court of Appeal were with respect very wrong to have done so in the face of decisions of this Court which has made this procedure mandatory and part of our law.[26]

## 5. Necessity of Trial within Trial

The procedure of trial within trial is necessary in criminal trial only where a confession is objected to on the ground that the confession is not made voluntarily and that the judge sitting alone should hear

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22 *Obisi v Chief of Naval Staff* (2002) 2 NWLR (Pt. 751) 400 at 406.

23 See s. 5(a) Evidence Act.

24 The new Evidence Act seems to make a reference to the procedure in a not satisfactory way and attempt will therefore be made to appraise the provision

25 See the case of *Gbadamosi v State* (1992) 23 NSCC (Pt. 3) 435.

26 *Gbadomosi v State*, *supra*.

evidence on the point and rule on its admissibility before receiving the confession in evidence[27]

Allegation of confession made voluntarily or involuntarily must be distinguished from retraction of such confessional statement. The former arises where the accused raised objection in the circumstance of section 28, Evidence Act, 2011. The latter arises where the accused alleges that he did not make the statement at all. Retraction does not occasion trial within trial and does not affect admissibility but only goes to the evidential weight to be attached to the statement.

## 6. Procedure of the Trial

For a confessional statement to be useful to the prosecution, it must be tendered before the court and admitted in evidence at trial as an exhibit.[28] It is expected of an accused to raise objection promptly to the admissibility of the statement on the ground that it was not made in conformity with the provisions of law. The onus is on the prosecution to prove that the confessional statement was free and voluntary and as such it is the prosecution that should start leading evidence in trial within trial.[29]

The Supreme Court once validated a trial within trial wherein the trial judge allowed evidence as the accused alleged torture and beating during his testimony and the judge also allowed evidence in rebuttal.[30]

## 7. Burden of Proof

Strictly speaking, the Judge is expected to suspend the main trial and order a trial within trial. Prosecution opens his case by calling his witnesses especially the Investigating Police Officer who obtained the

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27 See per Agbaje JSC in *Obiozo v State* (1987) NSCC 1239 at 1246.

28 See *Edoho v State* (2003) FWLR (Pt. 173) 29 at 53; Esangbedo *v State* (1989) 4 NWLR (Pt. 113) 57.

29 See *Nwachukwu v State* (2002) 2 NWLR (Pt.751) 366.

30 See *maigida v State* ( 1980) 2 HCR 388; for contrary view see the case of *Nwachukwu v State*, *supra,* note 29, the Court held that since the confessional statement was already admitted in evidence as exhibit it could no longer be made the subject of any trial within trial.

statement to explain to the court how the statement was obtained. Prosecution bears the burden of proof because he is the one alleging the voluntariness of the statement. The argument that it is the defense that should bear the burden will not hold water because of the elementary principle of law that it is he who asserts that must prove the assertion. Since it is the prosecution that is tendering the statement he is the one impliedly asserting the voluntariness of the statement. Prosecution should therefore lead evidence of the manner and circumstances in which the confession was made.[31]

This paper humbly submits that the prosecution is not expected and must not be allowed to lead evidence on the truthfulness of the content of the statement as the trial is only about the condition of the making of the statement.[32]

## 8. Standard of Proof

The standard of proof expected of the prosecution in a trial within trial is proof beyond reasonable doubt.[33] It is the duty of the prosecution to establish the voluntariness of the statement beyond reasonable doubt and not beyond shadow of doubt. It is settled principle of law that while Nigerian adjectival law places on the prosecution the duty to prove a criminal case beyond reasonable doubt, the prosecution need not prove the case beyond all shadow of doubt.[34] While it is not necessary for the prosecution to call every evidence or witnesses to prove his case, it is incumbent on the prosecution to call vital witnesses such as the Investigatory Police Officer (IPO) and witnesses that witnessed the circumstances under which the statement is obtained. Therefore the evidence of the IPO will be material for

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31 See *Auta v State* (1975) NSCC 149; see also the provisions of 139(1) (a), Evidence Act 2011.

32 The only evidence admissible during trial within trial is strictly on the issue of voluntariness or otherwise.

33 See *Nwangbomu v State* (1994) 2 NWLR (Pt. 327) 380.

34 The latter in reality places a heavier burden on the prosecution and such is unknown to our law. See the cases of *Adeleke v State* (2012) 5 NWLR (Pt.1292), 127, *Ugo v C.O.*P. (1972) SC, 37.

resolution of the conflict.[35] It has been held that the Investigating Police Officer must be called as a witness otherwise the court may presume that the prosecution is withholding evidence from the court. In *State v Salawu*, it was held that:[36]

> None of the officers he named (accused) Adino, Dada and two others was called to the stand to disprove his story and show that exhibit 4 was voluntarily made, the prosecution did not explain the absence of the officers to give evidence in rebuttal. The court is entitled to hold that the evidence of the named policemen which could be but was not produced, would if produced, be unfavourable to the case of the prosecution…..

The prosecution thereafter will close his case and allow the accused to open his case. It has been held that where the prosecution fails to call an Investigating Police Officer against whom an accused person has made allegations of inducement and threat in respect of a confessional statement as a witness at trial within trial or at all during trial, the court will presume under section 149(d) of the Evidence Act, 2011 that the evidence of the IPO would not be favourable to the prosecution.[37] This is because it is expected that the accused can only impeach the evidence of the prosecution through cross examination. Additionally, it has been held that where a party does not accept the entire testimony or some part of the testimony of an opposing party's witness as true, but fail to cross examine the witness, a court is entitled to treat his failure to cross examine as acceptance that he does not dispute the testimony of the witness. Put differently, failure to cross-

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35 See *Odili v State* (1977) 4SC 1; *Oguonzee v State* (1998) 5NWLR (Pt.551) 521.

36 The court expounded on section 149 Evidence Act, 2001 and came to the conclusion drawn above.

37 See the case of *Amachree v Nigeria Army* (2003) 3 NWLR (Pt. 807) 256. The court in this instant case held that the failure of the prosecution to call the IPO whom appellant alleged made the inducement to and threat at him in respect of his confessional statement greatly prejudiced the prosecution's case.

examine a witness means acceptance in its entirety that the evidence of the witness is the truth.[38]

## 9. The Accused and His Defence

The accused opens his case by explaining how he was induced, tortured, threatened and promised a gain[39] to make a confession by a person of authority.[40] Failure of the accused to give evidence will make it difficult for the court to rule the confessional statement as involuntarily obtained, especially where the allegation rendering the statement involuntarily made can only be established by the accused person's evidence. The trial judge is expected to follow strictly the rule of fair hearing.

Where a confessional statement is admitted in evidence after trial within trial wherein the accused is not heard at all by the court, the trial is not fair as there is no hearing whatsoever. Thus the mere failure to hear the complaint of an accused on the voluntariness of a confession while the prosecution is allowed to state why the confession should be received in evidence sidetrack the definition of a proper trial.[41]

The accused person is not expected to call a particular number of witness(es) in order to prove his case. In reality, it is difficult to get witnesses if the statement is made in the police station as often is the case. The practice of "*espirit de corp*" may prevent available police officers from giving testimony against the IPO and invariably against the system. It is however not about quantity but quality of evidence that matters in a case and in appropriate circumstances a court may base its decision on the evidence of a single witness if his evidence has a strong probative value. The law does not prescribe any number of

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38 *Daggsh v Bulama* (2004) 14 NWLR (Pt. 892)144.

39 See the case of *Ozaki v State* (1990) 1 NWLR (Pt. 124) 92.

40 See for details on person of authority the case of *R v Wilson and another* (1967) 2Q.B 406; *Akinrolabu v State* (1971) N.M.L.R. 25.

41 *Buba v State* (1992) NWLR (Pt. 125) 434 at 435.

witnesses which a party should call in order to have judgment in his favour.[42]

As such the following are options opened to the defence in establishing that the statement was not made voluntarily:

**a. The defence's counsel may build his case through the instrumentality of good cross-examination and/or examination-in-chief**

The accused person's counsel As for cross examination, the defence's counsel may cross examine taking in to judicial consideration the following factors; whether there is Violation or otherwise of the rules of custodian interrogation. Although the judges rules is a rule of practice and not a rule of law and failure to comply with them does not render a confession that was voluntarily made inadmissible. It is submitted however that a confession in violation of the judge's rules may not enjoy judicial sentiment if the statement is disputed on whether or not it is voluntary.[43] Take for instance in the case of *State v Salawu*[44] the court held that since the IPO testified to have been instructed to "obtain" the statement; the court reasoned that the word obtain connotes a demand and the court concludes that a statement made by an accused on a demand by the police officer cannot be said to have been made voluntarily. The demand for the statement by the Investigating Police Officer dissipates the effect of the caution administered by the same police officer.

**b. Duration that the accused person stayed in prison custody and the condition of the prison in Nigeria**

It is a matter of judicial notice that prison condition, environment, feeding, health, facilities and amenities are nothing to write home about. If an accused person is made to stay beyond the

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42 See s. 173 Evidence Act; *Mogaji v Odofin* (1978) SC 91 at 94. *Omonua v State* (1991) 5 NWLR (Pt. 189) 36*; Onowhosa v Odiuzou* (1999) 1 NWLR (Pt. 586) 173.

43 See *Abubakar v State* (1969) NSCC Vol. 6 at 313.

44 (2011) 48 NSCQR 290

constitutional period,[45] it may constitute torture and emotional torment to confess. A delay in making a statement may also point to pressure especially where the suspect is denied bail. It is humbly submitted that even where the suspect is not tortured, induced or threatened, the dehumanizing conditions under which suspects are detained and or kept in police cells cannot guarantee voluntariness of statement made by the suspects.

**c. Whether the statement was retracted at the earliest opportunity or otherwise**

In a decided case, the accused person did not object to the admissibility of the statement at trial neither was there any allegation of torture and beating. The accused person during his address raised the issue of the involuntariness of the statement for the first time. It was held that the allegation will not hold water as the defense is raising it as afterthought.[46]

**d. Whether or not a lawyer was available during interrogation**

An accused has a right to insist on securing an attorney before putting down a statement. It is easier to intimidate an accused to confess where there is no counsel for the "helpless" accused person or if no any other person is present.

**e. The literacy level of the accused person may also be a factor in deciding the voluntariness or otherwise of a statement**

A statement from an illiterate accused is not expected to be a free flowing, consistent and well organized pattern of thought as compare to a literate person. If the content of the statement is compared and discovered to be disjointed as an answer to prompting questions and tele-guided answers during interrogations, it may be said that the statement is made involuntarily. Take for instance where the IPO decides to help a very literate suspect or an accused to write his confessional

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45 See s. 35, Constitution of the Federal Republic of Nigeria, 1999.

46 See the cases of *Ehighere v State* (1996) 9-10 SCNJ 36.

statement after a session of questions and answers may lead to doubt as to the voluntariness or otherwise of such statement.[47]

f. The duration between obtaining the statement and the time it is finally forwarded for confirmation is as well very important. Take for instance a statement of three pages obtained within a period of a week and confirmed after a period of one month will raise curiosity.[48]

g. The nature of incriminating evidence disclosed to the accused by the police before the confession was made especially where there is disclosure from a co-accused person[49] and the remorsefulness shown, self praise and any self defence may also be considered by the court in arriving at the justice of the case.

The usual words of caution have been held to be an inducement to speak to the police for the accused cannot be expected to keep mute after the caution[50]

## 10. Final Address

We humbly submit that parties are entitled to final address as trial within trial carries the features of main trial.[51] While it is appreciated that submissions of counsel no matter how brilliant and persuasive cannot be a substitute for evidence; it nevertheless can sway and persuade the court in one's favour.[52] The denial of a party's counsel where established and proved, of the opportunity of addressing the court is not a mere irregularity but a defect in proceeding which strikes

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47 See *Omisade v Queen* (1964) 1 All N.L.R. 233.

48 *Patrick Njovens v State* (1973) 5 S.C. 17.

49 Jide Bodede, *Criminal Evidence in Nigeria*, (1st ed.)(Lagos: Florence & Lambard, 2004), pp. 118-120. *Okonkwo v State* (1998) NWLR (Pt. 561) 210 at 260; *Namsoh v State* (1993) NWLR (Pt. 292) 129 at 144.

50 See the comment of N . S. Ngwuta JSC in the case *State v Salawu supra*, note ….. at 313. See further for similar view the cases of *Queen v Viaphonv* (1961) NNLR 47 at 47- 48 and *Onuobu v IGP* (1957) NNLR 25.

51 See for instance section 273 (2) ACJL, Okoebor v. Police Council (2003) FWLR (pt. 164) 189; section 258 (1) CFRN 1979 NOW section 294 (1) CFRN 1999 as amended.

52 *Chukwujekwu v Olalere* ( 1992) 2 NWLR (Pt. 221) 86 at 93

at the right of the party to fair hearing thereby rendering the proceedings a nullity.[53]

## 11. Ruling

The court is expected to deliver a ruling either admitting the statement or rejecting it in its entirety. Where the statement is found to be made involuntarily, the court will reject the statement.[54] This is in contrast to the plea of *non est factum* wherein the Court is expected to admit the confession but the issue will be the weight to be attached to such a document.[55] The Supreme Court has explained in a long line of cases that an accused person alleging that he did not make a statement should not be under an illusion that *non est factum* amounts to involuntariness.[56] Where however the statement is discovered to be made voluntarily, it will be admitted with full probative value.[57]

## 12. Argument against Trial within Trial in Nigerian Criminal Jurisprudence (Minority View)

The argument against the sustenance of the practice of trial within trial stems from the fact that it is time consuming and may occasion delay in the judicial process; coupled with the fact that our courts are already loaded with thousands of cases. Court congestion is a very serious challenge in the Nigerian legal system.

Secondly, those against trial within trial argued that there are no enabling statutory provisions for it, thus it should be jettisoned.[58] As earlier stated, there is no provision for the procedure in our various

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53 See the case *Ofoyekan v Akinirinwa* (1996) 7 NWLR (Pt. 459) at 128, *Obodo v Olowu* (1987)3 NWLR (Pt. 59) at 111*; Onajobi v Olanipekun* (1985) 1 SC.

54 See the case of *Madaki v State* (1996) 2 NWLR (Pt.429) 171.

55 *Queen v Nwango Igwe* (1960) 5 FSC 55.

56 *Ikpase v A.G. Bendel* (1981)9 SC 7 at 28.

57 See the case of *Igbinovia v State* (1981)2 S.C. 12.

58 This argument seems not be absolutely correct in the light of the provision of the new Evidence Act section 29 (2) thereof.

criminal laws. The minority further reinforced their argument with the fact that the jury system is absent in our criminal trial.[59]

## 13. Argument in Support of Trial within Trial (Majority View)

The importance of trial within trial cannot be over emphasized in criminal justice. The most powerful argument against the practice is the time factor and the delay. It is our view that delay may be bad but denial of justice is worse, incurably bad. It has been held that the need not to delay justice must be balanced with the issue of denial of justice. Denial of justice is worse and outrageous. The denial inflicts pains, grieves, sufferings and untold hardships. It has been held by our appellate courts that it is an error to sacrifice the need for justice on the altar of speed.[60]

As once adumbrated by our apex court, justice is not one or two ways traffic but three ways traffic- justice for the appellant accused of heinous crime of murder, justice for the deceased whose blood is crying to heaven for vengeance and finally justice for the society at large whose social norms and values had been desecrated and broken by the criminal act.[61]

The society must balance cost with the protection of the inviolability principle of the accused right and presumption of innocence. The fundamental principle of our criminal justice is that the accused is presumed to be innocent until it is otherwise proved beyond reasonable doubt; the burden of which is on the prosecution. Any lingering doubt must be resolved in favour of the accused persons.[62]

Another reason again is the fact that the Nigerian police place too much reliance on confessional statement instead of thorough investigation. The approach of Nigerian police to investigation has

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59 See, Lokulo-Sodipe: "The Admissibility of Confession and Trials within Trials", *Judicial Voice Law and Practice Journal*, March 1999, p. 1. The procedure of trial within trial is a relic of the Jury system

60 See the case of *Wakwah v Ossai* (2002) 2 NWLR (Pt. 752) 548 at 552.

61 See par Oputa J.S.C. in *Godwin Josiah v State* (1985)1 NWLR (Pt. 1)125.

62 *Oghor v State* (1990) 3 NWLR (Pt.139), 184; *Aliyu v State* ( 2000) 2 NWLR Pt. 644, 78.

been condemned by the Supreme Court. In *Onuchukwu v State*[63] the court held that the wiping out of entire family was wicked, unlawful and unjustified and no effort should have been spared in the investigation and prosecution of the culprits. The appellants might have committed the offence for which they were charged but the investigation was most unsatisfactory.

There is no doubt about the fact that law enforcement agencies go sometime outside the scope of law to obtain evidence by which an alleged offence may be proved knowing full well the fact that a confessional statement if properly admitted by court is sufficient means of proof.

A trial where the court failed to go for trial within trial will amount to mistrial[64]and a breach of fair hearing. Any law which deprives a party of fair hearing contrary to the provisions of the constitution will be to the extent of its inconsistency, void.[65] Even where there are several accused persons, the court is still enjoined to hold trial within trial for as many of the accused persons that raise involuntariness in the confessional statements[66]

A critical appraisal of the argument of the minority view is also very important. While we appreciate that there are no provisions in the Evidence Act, Criminal Procedure Code and Act supporting the procedure for trial within trial; it legality cannot be questioned.[67] The

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63 See the dictum of per Ogwuegbu J.S.C. in *Onuchukwu v State* (1998) 4NWLR (Pt. 547) 600.

64 A mistrial is a trial which is vitiated by some fundamental errors or with procedurally wrong. See the case of *Okaroh v State* (1990) 1 NWLR (Pt. 125) 131.

65 See the case of *Nwango v Aku* (1983)11 S.C.129 at 153.

66 See for instance the case of *Dawa v The State* (1980) NSCC 334*, Durugo v The State*(1992) NWLR (pt. 255) 525 at 535.

67 As far back as 1893, the procedure was adopted in England see *R v Thompson* (1893)2 QB 2. Prosecution must prove voluntariness to the satisfaction of the Court before tendering statement. This is also provided for in the Northern Nigeria Criminal Rules (statement to police officers) Rules 1960. Gazette No 47 Vol. 9 Dated 25th August, 1960.

Supreme Court settled with finality[68] the need for the procedure in a long line of decided cases.[69]

## 11. Trial within Trial in Civil Litigation

It has been held that the issue of confession and trial within trial are matters within the realm of criminal trials and must not be imported in to civil litigation.[70] This paper agrees with the decision and reasoning of the court. It is however submitted that the court must also appreciate and develop a cushion measures against statements purportedly made when parties were before the police and any terms of settlement drawn at the police station.

## 12. Altitude of Appellate Courts to trial conducted in non compliance with rule of trial within trial

Generally speaking, a trial conducted not in compliance with provisions especially where such provisions are mandatory either by statutes or practice is that the trial becomes a nullity.[71]

## 13. Conclusion

In our foregoing analysis, we have dealt extensively on the procedure of trial within trial in our criminal justice system. We have found also that there is no enabling statutory provision in respect of the procedure but that it has nevertheless become adjunct of our criminal jurisprudence even in the absence of the jury system. We have also examined critically the argument for and against the retention of the procedure.

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68 See *Atolagbe v Awumi* (1997)7 SCNJ 1; *Foreign Finance Corporation v L.S.D.P.C.* (1991)5 SCNJ 52. A lower court is bound by the decision of a higher court even when that decision was given erroneously; see for instance *African Newspapers v FRN* (1985) 2 NWLR (Pt. 6) 137. There are others procedures today in our judicial system which is strictly a product of judicial precedence as a source of law otherwise called case law.

69 See *Gbadamosi v State* (1992) NWLR (Pt. 266) ,465 at 480; *Saidu v State* (1982) NSCC 70 at 82.

70 See the case of *Chidolue v. EFCC* (2012)5 NWLR (Pt. 1292) 168.

71 See cases such as *Sanmabo v State* (1967) NMLR 314, *Gwonto v State* (1982) 2 NCLR 312, *Olonje v State* (1955-56) WRNLR 1. See also *Ebebi v Speaker, B.S.H.A* (2012) 5 NWLR (Pt.1292) 1

We are of the view that the procedure be continued especially in the face of police brutality and over reliance on confessional statement at the expense of thorough investigation, forensic and scientific psychoanalysis.

The only evidence admissible during trial within trial is strictly on the issue of voluntariness or otherwise of the statement allegedly made and this paper submits humbly that the prosecution is not expected and must not be allowed to lead evidence on the truthfulness of the content of the statement as the trial is only about the condition of the making of the statement.[72]

These writers therefore call for the amendment of the Evidence Act to reflect this procedure among other provisions relating to confessional statement. The below extract on trial within trial as contained in the new Evidence Act is grossly confusing, vague and may still generate controversy.

> 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(3)
>
> In any proceeding where the prosecution proposes to give 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, to prove that the confession was not obtained as mentioned in either subsection (2)(a) or (b) of this section

The idea of calling the accused person to prove the involuntariness of his statement by some Magistrates where criminal trials are bulky and undertaken by the police must be condemned especially in the light of overwhelming authorities from the appellate courts on the procedure.[73]

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72 The only evidence admissible during trial within trial is strictly on the issue of voluntariness or otherwise as to do otherwise will prejudice the mind of the court and further establish the guilt of the accused.

73 This argument is reinenforced by the practice of judicial precedent in Nigeria

The alternative proposition is that trial judge should resolve the issue of the voluntariness of the confessional statement at the end of the trial in the same way he resolves all other issues in the judgment which some argued to be neater and faster[74] but then these writers refuses to allude to that suggestion because of the argument and issues raised in this paper.

[74] See, Lokulo-Sodipe, above note 59 at 1.