

SUPREME COURT OF NIGERIA
FRIDAY 22ND FEBRUARY, 2013. SC. 157/2010
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, B. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC**

AUGUSTINE IBEME APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Confession - Trial within trial - Once objection is made against voluntariness of confession - Court must stop further proceedings - To conduct trial within trial (H1)

EVIDENCE - Confession - Meaning - By Evidence Act s. 28 - Confession is admission made at any time - By a person charged with crime - Suggesting the inference that he committed the crime (H2)

CRIMINAL PROCEDURE - Confession - Retraction - Where accused denies making a confession - Court shall admit the statement - Without holding trial within trial (H3)

APPEALS - Concurrent findings - Since appellant has not shown perversity - Or miscarriage of justice in the findings - Supreme Court cannot interfere (H4)

FACTS

Appellant along with two others have been arraigned on a three count charge of conspiracy, forgery and attempting to cheat before the High Court of Plateau State. The prosecution at the trial has sought to tender appellant's confessional statements through the investigating police officer (I.P.O.). Appellant raised an objection to the admissibility of the statements alleging that the same are not voluntary as they have been obtained by use of force exerted by the I.P.O. on the appellant.

A trial within trial therefore has to be conducted to determine the admissibility of the confessional statements as regards their voluntariness. Both parties called witnesses in support of their cases.

At the end of trial, the court overruled the objection on the ground that appellant merely retracted the statements. Hence, the retracted statements according to the court are admissible in evidence. Dissatisfied, appellant has appealed unsuccessfully to the Court of Appeal Jos Division. Thus, he has appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the lower court was right in affirming the decision of the trial without considering the evidence of the appellant and his witnesses as to the voluntariness or otherwise of the appellant’s statement to the police.

2. Whether the lower court was correct in holding that the appellant retracted his statement to the police in the trial within-trial.

3. Whether the learned justices of the court of Appeal were right in affirming or holding that the trial court properly and adequately evaluated the evidence adduced on record in reaching their decision to affirm the judgment of the trial court.”

HELD (Unanimously dismissing the appeal per

CHUKWUMA-ENEH JSC)

CRIMINAL PROCEDURE - Confession - Trial within trial

1. The appellant at the trial of this matter has challenged the tendering by the prosecution of the appellant’s confessional statements, later on admitted in evidence as Exhibits H1 and H2 for not having been made by the appellant to the I.P.O. voluntarily alleging the use of force to extract the confessional statements from him. It is trite that once the objection has been taken the trial court is bound to stop the proceedings in the substantive case to conduct a trial within trial to determine the voluntariness of the confessional statements as in this case allegedly made by the appellant. So that the instant trial within trial has been set in motion solely to determine the voluntariness of exhibits H1 and H2 meaning that the procedure has not otherwise been resorted to for any other cause or matter. (p. 387 A)

EVIDENCE - Confession - Meaning

2. And Whether or not a statement as the instant ones is a confession and the requirement of proving them for purposes of being admitted in evidence are governed by section 28 which has statutorily defined “confession” and section 29 of the Evidence Act 2011. I set them out as follows:

Section “28 - A confession is admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime’

Section 29(1) “In any proceeding’ a confession made by a defendant may be given in evidence against him or so far as it is relevant to any matter in issue on the proceedings and is not excluded by the court in pursuance of this section.

(2) If in any Proceeding

(a) by apprehension of the person who

(b) in consequence. (p. 390 A)

CRIMINAL PROCEDURE - Confession - Retraction

3. Quite clearly it follows from the foregoing that where a statement does not tantamount to a confession and is opposed as it is about to be tendered by the prosecution a trial within trial is not ordered by the trial court instead the court proceeds to take arguments on the objection from both sides of the case to rule on the admissibility of the statement. The trial court can proceed to admit the statement or not. The same is the case where the statement is a confession and it is challenged not on the ground of voluntariness but on such grounds that the accused is not the maker or for incorrectly recording the confession and there being no issue of voluntariness, it should be admitted without holding a trial within trial. It is then open to the aggrieved party to appeal against the decision overruling his objection. (p. 391 B)

APPEALS - Concurrent findings

4. Besides, there is a concurrent finding by the two lower courts, which the appellant as I have established above has not been able to displace on any of the settled grounds of being perverse or has not been founded on evidence before the

trial court or has occasioned a miscarriage of justice. Therefore, this court cannot interfere with the substantive finding in this matter by the two lower courts, which is also affirmed by this court and the appeal should be dismissed. (p. 396 G)

B NOTABLE POINTS OF INTEREST
CHUKWUMA-ENEH JSC

1. Proper procedure to secure voluntary confession

I must opine that the whole exercise of proving whether the state-
 C ments are voluntary or not is mainly procedural and the procedure
 must be seen to be done in the interest of justice. This is so as the
 court invariably insists on a proof beyond reasonable doubt that the
 statement has complied with the express provisions of Section 29(2)(a)
 and (b) supra and I may also mention here the guidance by the
 D Judge’s Rules to IPO (i.e. the police) and the courts in our adjudica-
 tive system as modified by our circumstances. I must however
 emphasise the commendable practice of having confessional state-
 ments being endorsed by a superior police officer on having been
 E satisfied on its voluntariness. These procedural safeguards are the
 most effective means to enable a trial court discover the truth of the
 matter as to the voluntariness or otherwise of an accused’s confes-
 sion. (p. 387 H)

F ***2. Trial within trial – Rationale behind***

The foregoing abstract has amply captured the rationale behind insti-
 tuting the procedure of trial within trial to protect a person as the
 accused person here (particularly an illiterate person) from the over-
 bearing of some overzealous investigating police officers bent on se-
 G curing convictions in their matters at all costs by using all manner of
 inducements, threats or promises to obtain confessional statements
 in the prosecution of their cases. The principle of trial within trial is
 one aspect of dispensing equal justice and fairness under the Rule of
 Law. By this simple procedure it is assured that statements of a per-
 H son charged with a criminal offence obtained by a police officer or
 anyone in authority otherwise afflicted by any inducement, threats
 or promises being illegal at law are expunged from the mainstream
 of the prosecution case at the trial of his cause or matter; and the

court is precluded from acting upon it in dealing with the case. The procedure of trial within trial is so much used to exclude involuntary statements of an accused person that is contrary to the law and it has stuck in for good reason. It is in the light of the above dictum that the reliance on the procedure of trial within trial in our Criminal Justice System has to be judged. (p. 389 C) B

REPRESENTATION

D. I. Oguadinma with Moses John, for the Appellant
E. G. Pwajok, Attorney Central of Plateau State with G. D. Fwonyon C
DDPP, Plateau State Ministry of Justice, for the Respondent

CASES REFERRED TO

Obidiozo v. State (1987) 2 NSCC 1239
R. v. Igwe (1960) SCNLR 158 D
Queen v. Eguabor (1962) 1 ALL NLR 287
Maiguduri v. The State (1969) 1 NMLR 14
Saidu v. The State (1982) 1 NSCC 7
Gbadamosi v. The State (1992) 9 NWLR 465
Adekanbi v. A-G Western Nigeria (1966) 1 ALL NLR 47 E
Nwachukwu v. The State (2002) 2 NWLR (pt. 751) 366
Obisi v. Chief of Naval Staff (2002) (pt. 751) 400
Odeh v. FRN (2008) AFWLR (pt. 424) 1590
Ejinima v. The State (1991) 6 NWLR (pt. 200) 627 F
R. v. Anya Ugwuoga (1943) 9 WACA 73
R. v. Voisen (1918) 1 KB 531
Ozaki v. The State (1961) ANLR 654
Njovens v. The State (1973) 5 SC 71

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STATUTES REFERRED TO

Evidence Act 2011, ss. 28, 29
Penal Code, ss. 97, 322, 364

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

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In this appeal the appellant along with 2 (two) others have been arraigned on a three-count charge of conspiracy, forgery and attempting to cheat before the trial High Court. The prosecution at the trial has sought to tender the appellant's confessional statements

through the investigating police officer (I.P.O.). The appellant through his counsel has objected to the admissibility of the statements alleging that the statements are not voluntary as they have been obtained by use of force exerted by the witness (i.e. I.P.O.) on the appellant. A trial within trial therefore has to be conducted to determine the admissibility of the confessional statements in a word as regards their voluntariness. The prosecution has called three (3) witnesses to close its case. The appellant excluding himself called two witnesses to testify for the defence and has tendered one exhibit, for the defence to close its case. The trial court in overruling the objection has held as follows:

“...The accused persons have merely retracted the statements and this being the case the statements are admissible in evidence - Nwabuonu vs. The State (supra) 299. And has proceeded to admit the appellant’s statements marked as Exhibits H1 and H2.”

Dissatisfied with the decision the appellant has appealed unsuccessfully to the court below hence he has appealed to this court by a notice of appeal filed on 5/1/2010 containing four grounds of appeal from which he has identified 3 issues for determination in this appeal as contained in his brief of argument as follows:

“1. Whether the lower court was right in affirming the decision of the trial without considering the evidence of the appellant and his witnesses as to the voluntariness or otherwise of the appellant’s statement to the police.

2. Whether the lower court was correct in holding that the appellant retracted his statement to the police in the trial within-trial.

3. Whether the learned justices of the court of Appeal were right in affirming or holding that the trial court properly and adequately evaluated the evidence adduced on record in reaching their decision to affirm the judgment of the trial court.”

The respondent on its part has raised a sole issue for determination as follows:

“Whether the court below was right in affirming the decision of the trial court.”

The appellant in considering issues 1 and 2 together in his brief of argument submits that the aim of the trial within trial in this case is to determine the voluntariness of the appellant’s statements marked as Exhibits H1 and H2 for purposes of admitting them in

evidence and that it is the prosecution's duty to prove the statements. See: Obidiozo & ors. v. The State (1987) 2 NSCC 1239; (1987) 4 NWLR (Pt.67) 748 at 760 - 71, DAWA v- The State 8-9 SC 236, R. v. Igwe (1960) SCNLR 158, Queen v- Eguabor (1962) 1 ANLR 287, Maiguduri v. The State (1969) 1 NMLR 14, Saidu v. The State (1982) 1 NSCC 7, Gbadamosi v. The State (1992) 9 NWLR 465 and Adekanbi v. Attorney General Western Nigeria (1966) 1 ALL NLR 47. B

He has opined that the trial court wrongly has held that the appellant has retracted his statements and so that there is nothing else to determine in the trial within trial as misconceived. And has also attacked the finding that the appellant has retracted his statements as not having been made in vacuo as per the record. Even although he concedes (rightly, if I may interpolate here) that where a confessional statement is not being challenged on the ground of voluntariness but on the ground that the accused has never made it, all the same such a statement is receivable in evidence where it is sought to be tendered by the prosecution without conducting a trial within trial. See: sections 28 and 29 of the Evidence Act 2011 and Nwachukwu v. The State (2002) 2 NWLR Pt.751) 366 at 391 B - C. E

He strongly maintains that the primary duty before the trial court in these proceedings is narrowed to one question of whether or not the appellant's statements are voluntary and that by the nature of the cause it does not admit of any other determination (as has been wrongly decided in the said Ruling) by holding to the effect that the statements have been retracted as that question even more so could not have arisen from the evidence adduced before the trial court. See Chief Obisi v. Chief of Naval Staff (2002) (Pt.751) 400 at 418. And thus that the trial court's finding in the Ruling as affirmed by the lower court has also failed to consider the use of force to extract the statements from the appellant, which is a factor in constituting the trial within trial. F G

And finally, that to so hold in the trial within trial is clearly not supported by the evidence as per the record so also is the finding that the statements have been retracted as it is premature. Besides, such a finding ought to have been reached (on the question of retraction of his statements) after a full trial of the case against the background of the totality of the evidence adduced before the trial court. He has H

urged the court to resolve the 1st and 2nd issues taken together here in favour of the appellant.

The respondent in its brief of argument has correctly submitted that where the challenge of voluntariness of an accused confessional statement vis-a-vis his testimony in a trial within trial is hinged
 B on an outright denial of the statement sought to be tendered by the prosecution as here that it amounts to a retraction of the statement and that such a statement is otherwise admissible and reliable without the necessity of conducting a trial within trial (i.e. a mini trial) as
 C its voluntariness is not in issue. See: *Odeh v. FRN (2008) AFWLR (Pt.424) 1590 at 1618* paragraph 6. And further that the question of denial of the accused's confessional statements in other words in retracting the statements. - Exhibits H1 & H2 has arisen from the proper evaluation of the appellant's case in the trial within trial; as
 D nowhere in his testimony at the inquiry has he conceded making the statements - Exhibits H1 and H2.

In that regard all that the appellant according to him has done, has been to recopy the statements from a copy given to him by the I.P.O. In short, the appellant has not owned up the statements as his
 E even as he has said he has been forced to recopy them from a document handed to him by the I.P.O. He submits that the circumstances of the case does not call for a trial within trial as the issue of voluntariness of the statements cannot be in issue on the facts of the case. See: *Nwabuonu v. The State (supra)*, *Ejinima v. The State (1991)*
 F *6 NWLR (Pt.200) 627 at 651 - F-G.*

The respondent has had recourse to various abstracts from the record to establish that the appellant throughout his viva voce evidence at the trial within trial has not owned up the contents of Exhibits
 G H1 and H2 as his. In that regard the respondent submits that Exhibits H1 and H2 have been rightly admitted by the two lower courts as the objection raised on the ground of Voluntariness of the statements has totally been misconceived as the statements have been retracted' coming to the question of non-evaluation of the totality of
 H the evidence by the trial court by failing to examine the issue of voluntariness of the statements properly, the respondent has made references to the pertinent portions of the testimonies of the DW1, DW2 and DW3 on the backdrop of those of PW1, PW2 and PW3 as per the record to support the finding of the trial court that the appel-

lant has retracted his statements as affirmed by the lower court.

In the end, the respondent has urged this court to dismiss this appeal and affirm the decisions of the lower courts. The foregoing represents a resume of the cases of both sides in this appeal.

The appellant at the trial of this matter has challenged the tendering by the prosecution of the appellant's confessional statements, later on admitted in evidence as Exhibits H1 and H2 for not having been made by the appellant to the I.P.O. voluntarily alleging the use of force to extract the confessional statements from him. It is trite that once the objection has been taken the trial court is bound to stop the proceedings in the substantive case to conduct a trial within trial to determine the voluntariness of the confessional statements as in this case allegedly made by the appellant. So that the instant trial within trial has been set in motion solely to determine the voluntariness of exhibits H1 and H2 meaning that the procedure has not otherwise been resorted to for any other cause or matter.

A proposition the appellant has misconceived as although the sole issue in the matter it leaves the trial court with no other option than to hold the statements as either voluntarily or involuntarily made, thus precluding a finding as here of the appellant having retracted his statements. I will come back to expound on this question anon, even as I say that I do not buy the submission.

The crucial findings by the trial court as affirmed by the court that the appellant has retracted the statements and leading to receiving the statements in evidence as Exhibits H1 and H2 are the issues in the storms eve in this appeal. And the appellant's challenge of the same has remained the main focus in this appeal. In other words it is the appellant's contention that the admission of exhibits H1 and H2 has been unsatisfactory having been done without considering the case of the appellant as to whether or not the statements have been proved to be voluntary or involuntary to warrant their admissibility or not. The contention goes to how the statements have been obtained in this case by the I.P.O. otherwise known as proving the statements, a question within the duty of the prosecution.

I must opine that the whole exercise of proving whether the statements are voluntary or not is mainly procedural and the proce-

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dure must be seen to be done in the interest of justice. This is so as the court invariably insists on a proof beyond reasonable doubt that the statement has complied with the express provisions of Section 29(2)(a) and (b) *supra* and I may also mention here the guidance by the Judge's Rules to IPO (i.e. the police) and the courts in our adjudicative system as modified by our circumstances. See: *R. v. Anya Ugwuoga* (1943) 9 WACA 73 applying the decision in *R. v. Voisen* (1918) 1 KB 531 as to their application in this country. I must however emphasise the commendable practice of having confessional statements being endorsed by a superior police officer on having been satisfied on its voluntariness. These procedural safeguards are the most effective means to enable a trial court discover the truth of the matter as to the voluntariness or otherwise of an accused's confession.

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Notwithstanding the appellant's ostensible misconception of this principle and its implications it is a commendable procedure adopted to make for fairness and regularity in the dispensation of justice in our courts vis-a-vis the principle that an accused person is presumed innocent until the crime against him is proved beyond reasonable doubt. It is one process to safeguard the liberty of a Person charged with a crime.

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In the context of the appellant's case here it is interesting to note that he has conceded in paragraph 3.7 of his brief that where a confessional statement is sought to be tendered and it is objected to on the ground that the accused person is not the maker of that statement or that the statement has been incorrectly recorded' that notwithstanding the statement can still be tendered and received in evidence without holding a trial within trial in that case there is no issue of the statements being voluntary or not. He relies on *Nwachukwu v. The State* (*supra*). To make this assertion is self defeating in the circumstances of the appellant's case in this appeal as what has happened here is fairly similar to the proposition as per his submission above.

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The trial court on having found that the appellant has retracted his statements in the trial within trial and so the question of voluntariness of the statements is no longer in issue. It has rightly in my view, proceeded to admit these statements in evidence as Exhibits H1 and H2. And as observed by Justice Douglas on this all-impor-

tant issue of procedure in our jurisprudence particularly so where as in this instance the procedure has been structured to weed out statements obtained in an oppressive manner in our criminal Justice System as eloquently provided by sections 28 and 29 (supra). He has said and I quote:

"It is procedure that spells much of the difference between the Rule of law and the Rule of whim or whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law." See: 367 U.S. at 901 - 902; 81 S/C. at 1752.

The foregoing abstract has amply captured the rationale behind instituting the procedure of trial within trial to protect a person as the accused person here (particularly an illiterate person) from the overbearing of some overzealous investigating police officers bent on securing convictions in their matters at all costs by using all manner of inducements, threats or promises to obtain confessional statements in the prosecution of their cases. The principle of trial within trial is one aspect of dispensing equal justice and fairness under the Rule of Law. By this simple procedure it is assured that statements of a person charged with a criminal offence obtained by a police officer or anyone in authority otherwise afflicted by any inducement, threats or promises being illegal at law are expunged from the mainstream of the prosecution case at the trial of his cause or matter; and the court is precluded from acting upon it in dealing with the case. The procedure of trial within trial is so much used to exclude involuntary statements of an accused person that is contrary to the law and it has stuck in for good reason. It is in the light of the above dictum that the reliance on the procedure of trial within trial in our Criminal Justice System has to be judged.

The appellant through his Counsel as I have said earlier on has at the time his confessional statements exhibits H1 and H2 are about to be tendered raised an objection that that statements have been procured by the I.P.O. by use of force. An objection in this context in its fullness goes to voluntariness of the appellant's confessional statements. And so the trial court rightly has to stop any further proceedings in the substantive matter to determine first and foremost the voluntariness of the statements that is as to the admissibility in evidence of the alleged confessional statements and the onus of proving

the statements is squarely on the prosecution who is asserting their voluntariness.

And Whether or not a statement as the instant ones is a confession and the requirement of proving them for purposes of being admitted in evidence are governed by section 28 which has statutorily defined “confession” and section 29 of the Evidence Act 2011. I set them out as follows:

Section “28 - A confession is admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime’

Section 29(1) “In any proceeding’ a confession made by a defendant may be given in evidence against him or so far as it is relevant to any matter in issue on the proceedings and is not excluded by the court in pursuance of this section.

(2) If in any Proceeding

(a) by apprehension of the person who

(b) in consequence.

The above provisions of the Evidence Act 2011 are not ambiguous and have been interpreted in too many cases of this court; it has become trite that a confession to be voluntary has to be direct and positive as to state or suggest the inference that the accused person committed the offence in question; although it is proper to add here that the innate attributes of a “confession” are not in issue at this stage of trial within trial.

Section 29 on the other hand, a collary to Section 28, is an exclusionary provision that has set out the limiting parameters of voluntariness of a confession by providing the vitiating factors to acknowledging of voluntary statements. The implication arising from construing the two sections together is that where an accused person challenges a confessional statement apparently made by him (i.e. where he has owned it up as his) then and only then does it become necessary for a court to order to determine the voluntariness of the statement before admitting the statement. This process is conducted by a trial within trial (a mini trial) to enable the prosecution to prove beyond reasonable doubt that the statement is voluntary. See: *Ozaki v. The State* (1961) ANLR 654, *Patrick Njovens & ors. v. The State* (1973) 5 SC 71 *Seberu v. The State* (2010) 1 NWLR (Pt.1176) 494 at 449, *Ogudo v- The State* (2011) 2 OR LRCN 8, *R v. Omokaro* 7

WACA 146 and Gbadamosi v. The State (1992) 11 - 12 SCNJ 269. It is my view that in that regard the appellant has to own up that the statement is his; all the same, as he is alleging a vitiating factor(s) making it illegal at law as for example inducements' threats or promises as affecting the making of the statements and their having been extracted by the I.P.O. or a person in authority. B

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

There lies one of the immediate differences between the procedure in the foregoing instances as against the procedure as has played itself out 25 applying in this matter based on its peculiar facts which concerns the alleged confessional statements of the appellant. More importantly, what I am trying to say is that to determine whether a statement as the instant ones has been voluntarily made and so to ignite a trial within trial has to be predicated on an accused person firstly acknowledging the statement as his statement otherwise any inquiry by way of a trial within trial is being conducted in vacuo, on apparently a statement the accused person has disowned as his as here. And such a confessional statement (thus creating a situation of denial of the statement does not come within the ambit of the provisions of sections 28 (Supra) and 29 (Supra) for purposes of conducting a trial within trial. F G H

I must emphasise that the function of a court in trial within trial is narrowed down to determining solely the question of voluntariness of the statement in issue and not on whether or not the statement is that of the accused person or improperly recorded. It boils down to

the proposition that there is no way an accused person who has not acknowledged his alleged confessional statement sought to be tendered by the prosecution in a trial within trial can come round to object to its voluntariness. The absence of his locus to otherwise so contend is indisputable.

B Having stated the above general principles that are applicable to this case, I now turn to the appellant's case in this appeal, which amounts to taking exception to the finding that he has retracted his statements; according to him a finding that has not been supported by evidence in the light that the trial court has failed in its primary
C duty of making a finding as to whether or not the statements are voluntary, coupled with the fact that the evidence before the trial court does not admit of the conclusion that the statements have been retracted. There can be no doubt material within trial has to be conducted in order to determine the voluntariness of an accused's confessional statement but in raising the objection to its voluntariness he has firstly to acknowledge the statements as his as it is on this important premise that the whole exercise of a trial within trial is rested. In this case the appellant counsel has simply objected to the statements
E going in as evidence saying they have been obtained by force. Thus prima facie putting in issue the voluntariness of the statement and this has led to the trial court ordering a trial within trial and taking evidence from the prosecution and defence witnesses to determine the voluntariness of the statements without the appellant having even
F owned up the statements as his.

In the appellant's testimony for the defence at the trial within trial the appellant has clearly denied making the statements exhibits H1 and H2 - in short he has retracted his statements. This has raised
G an absurd situation meaning as I have reasoned above that the trial within trial should never have been ordered in the first place as the central basis that the statements have been made by the appellant himself to sustain the proceedings appears not to have been in place in the case from the beginning. And the finding of the trial court to
H that effect is at page 75 of the record and it reads as follows:

"The D2 had said he was made to recopy the statement under consideration and was not taken before any superior officer for the endorsement of the statements, he is in effect denying the contents of the statements and at the same time saying that the statements

ascribed to him which were endorsed by a superior police officer is different from the statement he was made to recopy. The only conclusion to be reached is that the statements were not his."

By this finding the accused person has retracted his statements. This conclusion follows irresistibly from the appellant's case at the trial within trial. The finding is flawless and attacking it is misconceived. B The foregoing finding of the trial court has rightly been affirmed by the lower court and I say unequivocally that I see no grounds for differing from it as it is not perverse and is amply supported by the evidence before the trial court and also has not occasioned a miscarriage of justice' See: Kenon v. Takam (2001) 39 WRN at 10, Okulate v. Adesanya (supra). Besides it is the trial court that makes the primary findings. The appellant has nonetheless challenged the finding for not having been supported by evidence; and as he perceives it, that the finding has been given outside the two alternative findings D that are open to the trial court in matters of this nature that is to say either the statements are voluntarily made or not. The appellant has maintained in this appeal that any finding outside either of this narrow ambit is wrong. I have perused the record to find that the submission is totally misconceived as the following extracts from the record E have in my opinion established beyond reasonable doubt that the appellant has disowned the statements exhibits H1 and H2 as his thus destroying practically whatever any foundation there is for a trial within trial. This is evident as at page 15 lines 13-17 of the record F wherefore the appellant in his testimony viva voce at the trial within trial has said:

"It was the PW1 that brought out the paper and another one which something was written and said I should copy, that in the sheet of paper word for word. That if I added one word I will be dead." G

At page 16 lines 13 - 18 of the record he has gone on to say:

"I had a bang on my door, I came out of my bedroom opened the door then Yemi, Ali bedroom and one other police dragged me out and took me straight to Lamingo and brought another paper and told me to do that I have done by copying a statement or I will H not go back alive but if I recopied they will let me go home. I believed them. I then copied what they gave me to copy and I signed at them on the following day 19/8/99. This is the statement I recopied on 19/8/99."

To compound the appellant's case the co-accused D3 - the wife of D2 in the trial within trial has at page 19 of the record has said as follows:

B "...I can write and read. I don't know if the 1st accused discovered the house to belong him in 1987. I did not make any statement to the police, PW1 gave me sheets of paper to re-copy what he had written. The PW1 did not allow me to read what was in the sheets of paper. I did not make any statement. It was not my handwriting which I use to recopy, the writing or statement I now say I recopied the statement in my handwriting. I did not sign any of the sheets of paper, the PW1 did not tell me to sign. The documents you have shown me is not in any handwriting. I did not make any statement to the police at all."

D To further compound the appellant's case D3 (co-accused) still as the appellant's witness in the trial within trial at page 20 lines 2 - 5 of the record has said:

"These statements you are showing me are not in the handwriting of the 1st accused and it is not also his signature on them."

E The trial court has evaluated the statements and has showed no hesitation in holding that the appellant has denied making Exhibits H1 and H2 - that he has truly retracted the statements' which finding has rightly been affirmed by the lower court. From the foregoing abstracts the appellant as a first requirement has clearly not admitted making exhibits H1 and H2 as his, all he has done has been F to recopy from a copy that has been given to him by the I.P.O. to copy from. There is even no admission of the contents of the statements he copied as well and so the issue of determining the voluntariness or involuntariness of the statements, that is, exhibits H1 G and H2 on the backdrop of the use of force by the I.P.O. to extract the confession that has provoked ordering of the instant trial within trial cannot be sustained on a clear outright denial of the statements as his appellant.

H However the trial court after considering the totality of the evidence in the matter has come to hold as per the above abstract to the effect that the appellant has retracted his statements accordingly. And I entirely agree as the foregoing extracts of the defence case do admit of no other conclusion. I therefore affirm the lower court's findings in this regard. The voluntariness of the statements as challenged must

be predicated on the appellant having firstly owned up as the maker of the confessional statements as otherwise the inquiry could be on another person's statements. The recorded statements Exhibits H1 and H2 are all the same admissible in evidence even though the appellant has objected to their admissibility; as the issue of having retracted them, will come to be considered more fully when the trial court is considering the weight to be attached to Exhibits H1 and H2, that is to say when considering the totality of evidence before it at the conclusion of the cases on both sides. B

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

I must comment on the misconceived submission by the appellant in this matter that the trial court is strictly confined to deciding whether or not the statements are voluntary or involuntary as the only two options open to the trial court arising from the facts of this case and that it is not open to the trial court to really arrive at any other conclusion outside either of these two options in the matter. In other words that it is not open to the trial court on the facts of this case to find that the appellant has retracted his statements with regard to the statements being sought to be tendered by the prosecution in the trial within trial. Not only is this submission bizarre in its novelty and misconceived and baseless in all circumstances of this case, it is even more so that the appellant has failed to support such obtuse submissions with any authority or a comparable one for that matter. Counsel for the appellant should have desisted from making such random and casual submissions as I find no limiting factors either statutory or by precedents in place to support his weird submissions delimiting the jurisdiction of the trial court, in this cause in this respect. E F G H

I now come back to my opinion on issues 1 and 2 above, it is my conclusion that the appellant has failed when raising the instant objection to own up or not as a first condition as regards the maker

of the statements (exhibits H1 and H2) at the trial within trial and so in his appeal to this court the maker of the statements exhibits H1 and H2 vis-a-vis their voluntariness is still at large. In the premises, it is not the business of the trial court to engage in such a trial within trial that would otherwise result in making orders in vacuo particularly so in this matter where the appellant on the facts of the case has nowhere acknowledged that the statements exhibits H1 and H2 as his but that he has not made them voluntarily. In the face of the finding by the trial court in this matter that the appellant has avowedly denied the statements exhibits H1 and H2 as his; the trial court bound not to have embarked in the first place on a futile inquiry under a trial within trial to test the voluntariness of the said Exhibits as counsel for the appellant has put the trial court unto an unnecessary voyage of inquiry.

It can be seen that the instant trial within trial has degenerated into a farce as the issue of voluntariness of the appellant's confessional statements is not really in issue ab initio. Even so the trial court has not shirked its primary duty as it, all the same, has evaluated and assessed the evidence of PW1, PW2 and PW3 on the backdrop of the evidence as adduced by DW1, DW2, and DW3 as I have established herein before coming to the only conclusion that the appellant has retracted his statements marked exhibits H1 and H2. It therefore follows conclusively that the contention by counsel for the appellant, in the circumstances that the statements are involuntary having been obtained by use of force cannot hold as it is totally misconceived. In this vein, the finding that the confessional statements have been retracted cannot be faulted as Exhibits H1 and H2 have been retracted by the appellant.

This discourse has covered issue 3 as raised by the appellant that I see no need in discussing it without being agonizingly repetitive. And so, I hold that all the issues in this matter are resolved against the appellant.

Besides, there is a concurrent finding by the two lower courts, which the appellant as I have established above has not been able to displace on any of the settled grounds of being perverse or has not been founded on evidence before the trial court or has occasioned a miscarriage of justice. See: Okulate v. Adesanya (supra). Therefore, this court cannot inter-

fere with the substantive finding in this matter by the two lower courts, which is also affirmed by this court and the appeal should be dismissed.

This matter is remitted to the trial court to be continued from where it is stopped before being unduly interrupted by the instant baseless objection in this matter leading to this appeal. This appeal in its entirety is bereft of any merits whatsoever as the purpose it has set out to achieve is, with respect, grounded on a misconceived appellant's case in regard to the involuntariness of the appellant's alleged confessional statement, thus unnecessarily procrastinating the final determination of this matter since July 2006 of the Ruling appealed from in this matter. It is a sheer waste of the valuable time of the court and the appellant's counsel should have known better not to have advised appealing in this matter. This appeal is dismissed.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother, CHUKWUMA-ENEH JSC just delivered.

I agree with his reasoning and conclusion that the appeal is devoid of merit and should be dismissed. I therefore order accordingly.

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment of my learned brother, Chukwuma-Eneh, J.S.C. I am in full agreement with it. I intend to add a few paragraphs of my own.

The appellant and two others are standing trial before a Plaque State High Court on an amended charge for the offences of conspiracy, forgery, and Attempt to cheat contrary to Sections 97, 364 and 322 of the Penal Code. The appellant and the two others entered not guilty pleas. During trial the investigating Police Officer (IPO) sought to tender confessional statements of the appellant (extra judicial statements). There was objection on the ground that the statements were not made voluntarily, so the learned trial judge quite rightly ordered a trial within trial (a mini trial). Two witnesses testified for the prosecution, while the appellant testified, called one witness

and tendered an exhibit. During the trial within trial the appellant denied making the statement. That is to say he retracted his statements.

In a Ruling delivered on the 3rd of July 2006 the learned trial judge admitted the appellants' statement as exhibit H1 and H2. His lordship reasoned thus:

"...I agree with him that a trial within trial is only conducted to establish the voluntariness or otherwise of a confessional statement. The accused persons have merely retracted their statement, and this being the case the statements are admissible in evidence..."

The Court of Appeal agreed with the learned trial judge. That court remarked.

"...the trial judge was right in the circumstances to have upheld the submission of the prosecution that the accused persons have retracted their statements. Such a statement in the circumstances becomes admissible..."

A trial within trial, a mini trial ensures that an accused person is treated fairly in a criminal trial. The procedure guarantees equality in the criminal justice system thereby keeping the streams of justice pure. Where the prosecution seeks to tender an extra judicial confessional statement of an accused person and it is challenged on the ground that it was not made voluntary, a trial within trial is conducted for the sole purpose of finding out if the statement was made voluntary or whether the confessions were beaten out of the accused person. If at the end of a trial within trial the trial judge is satisfied that the confessional statement was not voluntary, such a statement is not admissible in evidence. If on the other hand the statement was made voluntary it is admitted in evidence. In both cases the judge should rule accordingly and that brings the trial within trial to an end. The main trial then continues. See *R. v. Kassi* & 6 ors 5 WACA p.154, *R. v. Igwe* 1960 5 FSC p.55, *Queen v. Eguabor* 1962 1 SCNLR p.409, *Obidior v. State* 1987 4 NWLR p.748.

Where the confessional statement is challenged on the ground that the accused person did not make it, that is he denies it as in the appeal in hand the trial judge should admit the statement in evidence and not bother himself with whether the accused person made the statement. This is a matter that is decided at the end of trial after the judge must have taken into consideration all the circumstances. It is

only then that a decision can be properly made as to whether or not the accused person did make the statement.

My lords, on the tendering of the extra-judicial confessional statements of the appellant, it was challenged by the appellant on the ground that it was not made voluntary. The learned trial judge was correct to order a trial within trial to test the voluntariness of the statements. During the trial within trial the appellant denied making the statements. There was at that stage no longer any need to test the voluntariness of the statements. B

The learned trial judge was correct with the turn of events to admit the statements as exhibit H1 and H2 and the Court of Appeal was also correct to affirm the Ruling of the learned trial judge on the mini trial. C

For this, and the reasoning in the leading judgment the appeal is dismissed. D

OGUNBIYI JSC

I have read in draft the lead judgment of my brother Chukwuma-Eneh, JSC and I agree that this appeal is devoid of any merit and should be dismissed. E

The appellant herein of the trial within trial gave evidence on his own behalf and particularly denied making the two statements in issue. He stated that he made only one statement to the Police. He alleges also that the statements in issue were brought to him by the police in another paper and he was asked to copy and sign same. He denied knowing or making the contents of what he was asked to copy. The learned trial court judge after evaluation of evidence admitted the said statements in evidence and marked them as Exhibits H1 and H2. The trial court further held that the failure of the appellant to own up to the statements amounted to a retraction. F

The appellant was aggrieved with the trial court's ruling and hence lodged an appeal before the Court of Appeal, Jos Division which affirmed the decision of the trial court. It is against this affirmation that the appellant has now again appealed to this court. The main grouse of the appellant's complaint as properly captured is:- H

Whether the court below acted properly in affirming the decision of the trial court.

The sole aim and reason for a trial within trial in this context is for the purpose of determining the voluntaries of the statements objected to by the accused/appellant. The law is trite and well settled that for an accused person's statement to be admitted in evidence, the prosecution has the duty of ensuring and establishing that it was made voluntarily. The decision of this court in the case of Dawa Vs. State 8-11 SC 236 is in point.

Before a trial court can adopt or embark upon the procedure for a trial within trial, the process in obtaining the statement being challenged must be objected to by the accused person. In other words the sole aim is to find out for purpose of ensuring whether in obtaining the statement being challenged the accused was coerced, induced, threatened, deceived or forced by means of any unnatural intervening factors which would have influenced the making of the statement in question. See the authorities in the cases of R. Vs. Igwe (1960) SC NLR 158; Maiduguri Vs. State (1969) 1 NMLR 14; Saidu Vs. State 1982 1 NSCC 70 and Gbadamosi Vs. State (1992) 9 NWLR 465. Where an accused person disowns a statement in question there can be no trial within trial.

It is pertinent to restate that the learned trial court judge at pages 34, 35 and 36 of the record was very emphatic and clear cut in his judgment when he held and said:-

"As I have pointed out earlier, it was the counsel to the accused persons who raised objection to the admissibility of the statements of the 1st and 2nd accused to the police on the ground that the statements were nor voluntarily made. This made the court to embark on a trial within trial to investigate and determine whether or not the statements were voluntarily made. This is because it is the position of the law that when an accused person contends that a confessional statement sought to be tendered in evidence was not made by him voluntarily, it is the duty of the Judge to test the confessional statement by conducting a trial within trial in order to determine whether in fact the statement was voluntarily made." OBIDIOZO v. STATE (1987) 4 NWLR (Pt.67) 48 EMEKA VS. STATE supra.

The prosecution in order to show that the statements were voluntarily made called two witnesses. When it came to the turn of the accused persons to testify, they each said they did not make any statement of all. They each said they were under threat to their life

compelled to copy the statements being sought to be tendered by the police from what the police had already written. The D.W3 or the second accused was blunt under cross-examination, that she did not make the statements in question or any statement. While in her evidence in chief, she had said she was forced to copy from an already written document, she denied making any statement to the police (sic) under cross-examination, this is what she said: B

"I did not make any statement to the police, P.W.1 gave me sheets of paper to re-copy what he had written. The P.W.1 did not allow me to read what was in the sheets of paper. I did not make any statement. It was not my hand writing which I used to re-copy the writing or statements. I now say I re-copy the statements in my hand writing. I did not sign any of the sheets of paper, the P.W.1 did not tell me to sign. The documents you have shown me is not in my hand writing. I did not make any statement to the police of all." C D

From the evidence of the accused persons, it is clear they are disowning the statements being sought to be tendered in evidence. They have not said the statements are theirs but that the statements were not/voluntarily made. Thus the issues raised by the prosecution are pertinent. I agree with the prosecution that for a trial within trial to be conducted, the accused must first of all own the statement. That the accused person must own being the author of the statements, but that they did not make them voluntarily. I agree with the prosecution that the accused persons from their evidence on oath in the trial within trial have not owned to making the statements in question. I agree with him that a trial within trial is only conducted to establish the volunturiness or otherwise of a confessional statement. The accused persons have merely retracted the statements, and this being the case the statements are admissible in evidence - NWABUONU VS. STATE. E F G

Following from the foregoing deductions, it is as rightly reviewed by the lower court Justices that the learned trial judge properly evaluated the evidence that was before him. The lower court, contrary to the submission by the appellant's counsel, could not be faulted in refraining to interfere with the conclusion arrived at. H

Furthermore and on the one hand, the totality of the testimony of D.W.2 was a denial of the contents of the statement ascribed to him while also of the same time alleging that the statements which

were endorsed by a superior police officer are different from those statement he was made to copy. On the other hand, D.W. 3 had categorically stated that the statement ascribed to her was not hers of all. The purpose and aim of a trial within is to establish the voluntariness or otherwise of a confessional statement ascribed to the accused person. The accused/appellant in the case at hand had out rightly rejected making the statement of any time of all. The trial court was therefore right in holding that the accused persons have retracted their statements and therefore admitted same in evidence. The lower court in the circumstance cannot also be faulted in endorsing the conclusion arrived of by the trial court. We on our part and of this level have no reason why we should also depart from the well reasoned conclusion arrived of by the two lower courts.

My brother Chukwuma-Eneh, JSC had adequately dealt with the appeal and I agree in total that it is devoid of any merit. I also dismiss same in terms of the lead judgment.

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