IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT GWAGWALADA

THIS WEDNESDAY, THE 22ND DAY OF JANUARY 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CR/91/17

BETWEEN:

COMMISSIONER OF POLICE.....COMPLAINANT

AND

IBRAHIM SUNDAY.....DEFENDANT

RULING

The Defendant was charged under a one count charge of culpable homicide contrary to **Section 220** and Punishable under **Section 221 of the Penal Code.**

Hearing has commenced and the prosecution has so far called three witnesses. In the course of the testimony of PW3, DSP John Otache on 17th October, 2019, the statement of Defendant dated 23rd February, 2017 said to have been voluntarily obtained was tendered in evidence. An objection was raised on the basis that the statement was obtained contrary to **Section 29 of the Evidence Act,** *id est,* that it was not voluntarily obtained. A trial within trial was then conducted to determine the veracity of the allegation and this Ruling is in respect of the voluntariness or otherwise of the making of the said statement.

At the trial within trial, the prosecution called only one witness, DSP John Otache (PW2) who testified as PW1.

His evidence is that the confessional statement in question was obtained voluntarily and that the office where it was taken is an office that can take at least 40 people. That there were other Investigation Police Officers (IPOS), civilians

and lawyers who come to the said office for different cases. That there is no way you can torture anybody in such a public office.

Further, that after they recorded the first statement, he was detained as they were still in the process of investigation. That he was detained with other suspects in other cases in a cell with no more than 50 inmates because if he is released, that he may compromise or jeopardize the investigations.

PW1 stated that on 23rd February, 2017, he went to the station where Defendant was detained to see the welfare of some inmates when the Defendant saw him and told him to call the I.P.O that he had something to say.

That the Defendant had then made up his mind to confess to the killing of his son having spoken to some people. That he then directed the I.P.O to go and bring the Defendant to the officer in charge when the Defendant now confessed to killing the deceased. That he also stated that he had equally confessed to his brother that he killed his son. Finally, that the statement was obtained voluntarily without torture or inducement and that the I.P.O and Defendant signed the statement and he counter signed.

Under cross-examination, he agreed that the 1st statement of Defendant was taken on 3rd December 2016. That from 3rd December, 2016 to 23rd February, 2017, that Defendant was detained at SARS Police Section. That the SARS cell is used by all suspects in the F.C.T. Further that the taking of Defendant to SARS police cell was not for torture but for purposes of continuing investigations. That it is not correct that the 2nd statement was taken at the point of torture. That the I.P.O has no link with either Defendant or deceased to put Defendant in any fear.

He stated that their further investigations show that the Defendant killed his son

With the evidence of PW1, the prosecution closed their case in the trial within trial.

The defence elected not to call or lead evidence in the trial within trial.

The court then ordered for filing of addresses. The address of the prosecution is dated 29th November, 2019 and filed same date in the court's Registry. One(1) issue was raised as arising for determination to wit:
"Whether or not from the evidence led by the Prosecution in a trial within trail, the extra judicial statements of the Defendant was obtained voluntarily?

The address obviously forms part of the Record but the substance of the address is that the statement in question was obtained voluntarily in compliance with the law. That the evidence of PW1 in the trial within trial was clear and unshaken that the statement of Defendant was obtained in an open office at the F.C.T Police Command without any oppression or inducement.

Learned counsel then on his own raised the issue of the application of **Section 17(1) and (2) of ACJA 2015** and whether non-compliance renders the confessional statement inadmissible. Learned counsel contended that if the court is minded to look at the issue of ACJA, that the Courts of Appeal have given consideration to the issue. That in the cases of **Zhiya V The People of Lagos State (2016)LPELR 40562 and Akaeze Charles V. FRN,** the Court of Appeal in Lagos held that compliance with the provisions of **Section 15(4) and 17(2) & (4) of ACJA** is mandatory and that none-compliance renders the confessional statement inadmissible.

Counsel then contends that this position was overruled in a recent decision of the Court of Appeal in **CA/A/11C/2018**: **A.V.M Olutayo Tade Oguntoyinbo V. F.R.N.** That the current position as advanced by this case is that noncompliance with the extant provisions of ACJA are not mandatory. He urged this court to discountenance the earlier decisions and adopt the reasoning in olutayo T. Oguntoyinbo's case on the effect of noncompliance with the provisions of ACJA.

At the hearing, counsel to the prosecution adopted the submissions in the address and urged the court to admit the confessional statement having been voluntarily obtained.

On the part of the Defendant, the address in the trial within trial is dated 13th November, 2019 and filed on 14th November, 2019. One(1) issue was also raised for determination as follows:

"Whether the confessional statement of the Defendant is voluntary and meets the requirement of the law for its admissibility?

The address which forms part of the record of court is that the statement was not obtained voluntarily in that the PW1 visited the detention cell at SARS and advised the Defendant to accept the killing of his son and that if he does that the police will temper justice with mercy after all, it was the death of his son and that the Government will not go far with the case. That this inducement violated the confessional statement and is thus not admissible.

At the hearing, learned counsel to the Defendant adopted the submissions in the written address and urged the court not to admit the statement as it was not obtained voluntarily.

I have carefully considered the evidence adduced in the trial within trial and the final addresses as well as the submissions of counsel to the prosecution with respect to the application of the provisions of **Sections 15(4) and 17(2) of ACJA 2015.** Let me quickly observe that I note that counsel to the Defendant did not respond at all on the import and application of the extant provisions of ACJA.

In this case, I have carefully again read the entire evidence led at the trial within trial, and there is no where any issue was raised or questions posed with respect to the application of the extant provision of **Sections 15(4) and 17(2) of ACJA.** The Defendant did not give evidence to say anything about compliance with the provisions and the I.P.O was equally not asked any question under cross-examination with respect to those provisions.

I am not sure that the provision can be applied in a vacuum or in the absence of facts and or evidence on the record that will provide basis to now interprete and apply the provisions of ACJA. See **Annabi V. State (2008)13 N.W.L.R (pt.1103)179 at 200-201 H-A.** As stated earlier, the Defendant did not give evidence in the trial within trial and his counsel did not address the issue at all perhaps because it has no bearing to the case they seek to make out in the trial within trial. The court therefore had no benefit of their views for the court to consider the import of the provisions of ACJA. The call of the prosecution to consider the said provisions of ACJA was equally non-committal. The call was if the court was "**minded**". Therefore in such fluid and unclear circumstances, there is no factual evidential basis to consider and apply the extant provisions of ACJA. I leave it at that.

Counsel here are all agreed on the essence of the critical issue for determination which is whether the statement of Defendant dated 3rd February, 2017 was made voluntarily to be admissible in law. That is the crux of the issue in this trial within trial.

Let me start by making some prefatory remarks. In criminal trials, it is now a settled principle of general application that the prosecution has the bounden duty of proving the essential constituent elements of the offence charged against an accused person beyond reasonable doubt. See **Obiakor V. State (2002)10 NWLR**

(pt.776)612. One of the ways to go about crossing this threshold is by obtaining a confession because by the relevant provision of **Section 29(1) of the Evidence Act 2011,** a confession, if voluntary is a relevant fact against the person confessing. See **Fatilewa V. State (2008)12 N.W.L.R (pt.1101)518; Nwachukwu V. State (2007)17 N.W.L.R (pt.1062)31, Adebayo V. A.G. Ogun State (2008)N.W.L.R (pt.1055)201.**

Furthermore, the authorities are legion that a free and voluntary confession of guilt by an accused person if direct or positive is sufficient to warrant his conviction without any corroborative evidence as long as the court is satisfied as to the further of the confession. See **Yesufu V. State (1976)6 SC 167; Adebayou V. A.G. Ogun State (supra)201; Idowu V. Sttae (2000)7 SC (pt.905)292.** This being so, the law has laid down clear guidelines to govern the obtaining of extra judicial statements from persons in order to ensure that they are voluntary and not obtained in any of the circumstances stated in **Section 29(2) of the Evidence Act.**

The word "voluntary" is not defined in the Evidence Act. However, **Section 29(2) of the Evidence Act 2011** provides a guide on when a confession is not voluntary. By the said stipulation, any confession obtained by oppression or in consequence of anything said or done which was likely in the circumstances existing at the time, to render unreliable any confession which might have been made in such a circumstance, shall not be allowed to be given in evidence. By **Section 29(5) of the Evidence Act 2011,** oppression is defined to include torture, inhuman or degrading treatment and the use or threat of violence whether or not amounting to torture.

Generally, a confessional statement will not be admissible if it is obtained by operating on the hopes or fears of the accused person and in so doing, depriving him the freedom of will or self-control necessary to make a voluntary statement. Equally, the statement of an accused person must be free and voluntary, it must not be extracted by any sort of threat or violence or promise, however slight. A statement obtained from an accused person who had been threatened or otherwise violently dealt with cannot be admissible in evidence. Te same is also true of a confession obtained through coercion, and coercion can be mental as well as physical.

In a trial within trial, the onus is on the prosecution to prove that the confessional statement is voluntarily made. See **Effiong V. State (1998)5 SCNJ 158 and Ihuebeka V. State (supra) at 176.** This onus never shifts. See **Nsofor V. State (2005)All F.W.L.R (pt.242)397.**

In discharging this onus of proof, the prosecution called only one witness, the team leader who said he was present when the statement was taken freely without any harassment, beatings or promises.

His evidence was not in any manner seriously impugned or challenged under cross-examination. On the other side of the aisle, the Defendant as earlier stated elected not to lead evidence, the implication here is that he accepts the narration of prosecution with respect to the fact that the statement in question was obtained voluntarily. In law, it is generally settled principle that an accused person who at close of prosecution's case, decided to rest his case on that of the prosecution as presented against him only exposes himself to risk and gamble. By that choice, the accused would have decided as in the extant situation not to explain any fact in rebuttal of the case as made out by the prosecution on a particular issue or matter. See **Nwede V. State (1985)3 N.W.L.R (pt.13)444; Adamu V. the State (2014)10 N.W.L.R (pt.1416)441.**

It is therefore a strange gamble that the Defendant who claims he was tortured or induced refuses or declines to give evidence of the alleged torture or inducement and one then really wonders at what the court will use or rely on to hold that there was indeed torture or an inducement. The failure to lead by Defendant of any kind compromises or undermines any claims of torture and inducement completely.

I note that in the address of counsel to the Defendant, the point was made that the Defendant was induced by the I.P.O who visited him at his cell and told him to confess, that since it is his child, the Government will not be interested and further that he was "hanged head long" so that he will confess to the killing.

Unfortunately for counsel to the Defendant, there is no evidence on record to situate these submissions. The Defendant as stated earlier did not himself give evidence of what happened to him or the circumstance surrounding the recording of the confessional statement. The medium of address is no conduit to do so. It is trite principle of general application that counsels address no matter how well written or articulated is no substitute for critical evidence to support or disprove a contested assertion.

Furthermore, the cases relied on by counsel on the steps or test streamlined by superior counts in determining the veracity or other wise of a confessional statement has no application at this stage. What the court is dealing with now is the admissibility of the confessional statement. It is only when it is admitted and at

the stage of Judgment that these tests become relevant. Not now. It is therefore overtly premature to raise the question of application of these tests at the point.

On the whole, the only available evidence before me on the recording of Defendant's statement is that of the prosecution. That evidence remains unchallenged and unshaken. There is therefore nothing before me to provide a firm basis to lead to the irresistible *inference* that this statement was obtained under any sort of threat, violence or inducement however slight against the Defendant. The court cannot speculate or engage in any exercise of guess work or indeed manufacture facts or evidence to situate deprivation of the freedom of will or self control of Defendant which detracted from his ability to make a voluntary statement on a calm consideration of the unchallenged evidence of PW1 in the trial within trial. It is clear to me that extant statement was not caused by any inducement, threat and violence having reference to the charge against the Defendant and proceeding from a person in authority and sufficient in the opinion of the court to give the Defendant grounds which would appear to him reasonable for supposing that by making it, he would gain an advantage or avoid any evil of a temporary nature. See **Nwachukwu V. State (2002)2 N.W.L.R (pt.751)366 at 389.**

In conclusion, I hold that the prosecution has satisfactorily discharged the burden of proof thrust on it by **Section 29(2) of the Evidence Act.** The statement dated 23rd February, 2017 is admissible and is to be marked as **Exhibit P5.**

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Hon. Justice A. I. Kutigi