IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS MONDAY, THE 9TH DAY OF NOVEMBER, 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CR/154/17

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA …COMPLAINANT/RESPONDENT

AND

ALIYU JIWO NDALOLO ….……DEFENDANT/APPLICANT

RULING

The Defendant is standing trial on a one count charge of Culpable Homicide under **Section 221 (b) of the Penal Code**. The matter is part heard. The prosecution has already called three witnesses. However in the course of the testimony of the 4th Prosecution witness, the extra judicial statement made by defendant dated 22nd June, 2016 was sought to be tendered in evidence. The learned counsel to the defendant objected to the admissibility of the statement positing that it was not obtained voluntarily in compliance with the law. It therefore became necessary to conduct a trial within a trial. The Ruling is in respect of the said trial within trial.

A sole witness testified for the prosecution in the trial within trial. The said witness DSP John Otaigbe is a Police Officer with the Police Investigation Department of FCT Police Command, Abuja.

He stated that on 20th June, 2016, he was at the C.I.D Office when the case was transferred to the station along with the Defendant and two other ladies and it was assigned to his team made up himself, DSP Chris Otaigbe and one other officer.

He stated that he asked the defendant on the same date to explain what happened between defendant and his deceased mother which defendant did verbally. That after the explanation and as it was getting dark, he instructed that the defendant be taken back to his cell. That the following day been 21st June, 2016, he could not attend to the defendant because of other pressing matters or assignments until the 22nd June, 2016 when he directed the defendant to be brought from his cell and taken to where statements are taken and the statement of defendant was then taken.

PW1 testified that there were many people in the recording room, including other police men taking statements of other suspects. Further that junior officers also have their office there because of lack of office space and that the office can take more than forty people and that indeed there were more than forty people in the recording room on the day the statement of defendant in question was taken. PW1 further stated that there were even relatives of some suspects and complainants in the recording room.

He stated that because of the pathetic situation of defendant's case as it involved the killing of his mother, he asked him whether he could write his statement and he answered in the affirmative. He then cautioned him, which defendant understood. The defendant then signed the cautionary words. That defendant filled his personal particulars, signed and dated same and then wrote his statement without any interruption. He then signed the statement. PW1 said he then read the statement to defendant and it was signed by ASP Chris Otaigbe after the defendant signed. All these process PW1 said was done in the presence of ASP Chris Otaigbe and his other team member.

PW1 stated that after the statement was taken, he had to attend to other matters and even travelled out of Abuja and that when he came back on 22nd July, 2016, the case file was returned to him and he found that he had not endorsed the statement which he then endorsed on 22nd July, 2016 because it is a confessional statement.

PW1 testified that before he endorsed the statement, he had to bring the defendant from his cell and read the statement again to him and he asked him whether he was tortured, induced or anything done to him before the statement was obtained and that defendant said nothing was done to him, that the statement was obtained voluntarily. He then counter-signed.

PW1 said that the defendant was brought from his cell around 12 PM and that he started writing the statement around 3PM. He stated that ASP Chris Otaigbe has retired about three (3) years ago and that the other team member, one Agada, has been transferred but that he does know his location.

Under cross-examination by learned counsel to the defendant, the witness said the present statement relates to the same offence dealt with by Utako Police Station before it was transferred to the State C.I.D. That the complaint relates to the allegation that defendant allegedly killed his mother.

The witness further testified that there were many people in the recording room. That the defendant's lawyer was not there and there was nobody in the room representing defendant whether civilian or otherwise.

PW1 stated that he does not know the name of any lawyer or complainant in the recording room and that his endorsement on the statement of defendant was not super-imposed.

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

The defendant testified in his defence in the trial within trial and did not call any other witness. The defendant said that he heard the evidence of DSP John Otaigbe who said he and his team members recorded his statement and he said he does not know him. That the witness for the prosecution in the trial within trial was not among any of the officers who interrogated him at Utako Police Station or at the State C.I.D office. That the officers who interrogated him at Utako were also present when he made the statement at the C.I.D office with few others.

Cross-examined by the prosecution counsel, the defendant said he cannot remember the names of the officers that interrogated him. The defendant said he wrote the statement sought to be tendered. That it is the same writing he used in writing the earlier statement at Utako Police Station that he similarly used in writing the present statement at the C.I.D Office.

With the evidence of the defendant in the trial within trial, the defendant close his case.

The adduction of evidence in the trial within trial having been concluded, counsel on both sides of the aisle prayed that the court should allow them to address orally. The court deferred and allowed counsel to address orally.

Learned counsel on both sides than addressed or made submissions on the admissibility of the said confessional statement which forms part of the Records of Court. The defence counsel prayed or urged on court to hold that the statement was inadmissible, while the prosecuting counsel urged on court to hold that the statement is admissible.

I have considered the evidence adduced in this trial within trial as well as the submissions of learned counsel. Parties on both sides are agreed on the essence of what a trial within trial is all about; which is to ascertain if the extra judicial statement sought to be tendered in evidence was made voluntarily so as to be admissible in law. I will however take liberty to slightly tinker with the issue in order to make the issue more precise and succinct. Apropos the foregoing, the sole issue on the basis of which I will resolve this trial within trial is:

Whether the Prosecution has discharged the onus of proving that the statement of the defendant dated 22nd June, 2016 taken at C.I.D Office, Abuja was made voluntarily?

Now, in the criminal trials, the prosecution has the onus of establishing the offence charged against an accused person beyond reasonable doubt. The easiest way to accomplish this and solve the crime is to get a confession. This is so because by **Section 29 (1) of the Evidence Act 2011**, a confession, if voluntary is a relevant fact against the person confessing. See **Ikemson V. State (1989) 3 NWLR (pt.110) 455 at 475 and Ihuebeka V State (2000) 13 WRN 150 at 176**. Furthermore, a free and voluntary confession of guilt made 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 truth of the confession. See **Yesufu V. State (1976) 6 SC 167 at 163 and Idowu V. State (2000) 7 SC (pt.905) 292.** This being so, the law has laid down requirements to govern the conduct of the police in obtaining statements in order to ensure that the statements are voluntary and not obtained in any of the circumstances stated in **Section 29 (2) of the Evidence Act, 2011.**

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. The 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) 5SCNJ 158 and Ihuebeka V. State (supra) at 176.** This onus never shifts. See **Nsofor V State (2005) All FWLR (pt.242) 397.**

It is also critical to situate the application of the provisions of **Sections 15 (4) and 17 (1) and (2) of the Administration of Criminal Justice Act, 2015** relating to the modalities for obtaining of confessional statement(s). Parties on both sides have given deferring opinion on the consequence of failure to adhere to these prescriptions of ACJA which I shall also address and see how it impacts on the outcome of the case.

Let us start by situating the evidence. In a bid to discharge this onus, imposed on it by law, the sole prosecution witness testified as to how the statement of the defendant was recorded which he said was voluntary as earlier highlighted in his evidence.

The evidence of this witness with respect to the critical elements relating to the modalities of how the statement was taken was not really challenged under cross-examination. Besides the questions relating to whether any lawyer or relation of defendant was present at the time the statement was taken which I will shortly address, nothing was really made out during cross-examination situating fact of oppression within the purview of **Section 29 (5)** or that anything was done by the police in the circumstances and existing that would render unreliable any confession which may have been made by the defendant.

It is true or correct that failure to cross-examine will not minimize the standard of proof on the prosecution to prove that the statement of defendant was voluntarily obtained according to the requirements of the law but the point that must not be glossed over is that where an adversary fails to cross-examine a witness upon a particular matter or material point as in the present situation, the implication is that he accepts the truth of the matter as led in evidence. Where the evidence of a witness is unchallenged under cross-examination, the court is not only entitled to act or accept such evidence but is bound to do so provided that such evidence by its very nature is not incredible. See **Iwunze V FRN (2013) 1 NWLR (pt.1334) 119; Ofortete V State (2000) 12 NWLR (pt.681) 415**.

The defendant in his evidence did not say anything in substance to derogate from the position made out by the prosecution on how the statement was taken. In his evidence, all he said was that he does not know ASP John Otaigbe who said he led the team that took the extant statement. Nothing was however creditably put forward for example to impugn the endorsement by the ASP John Otaigbe on the said statement or to show that he was not the officer who led the investigation in this case or indeed that he was not even part of the team that took the statement of defendant.

Most importantly, the defendant never said that his statement was a product of oppression of any kind and this for me is critical and indeed significant. Indeed under cross-examination, he agreed he wrote the statement. That the style of writing is the same one used in the earlier station he wrote at Utako Police Station before the transfer. The bottom line really within the purview of the clear and specific provision of **Section 29 (2)** and **(5)** is that there is nothing or put another way, there is no evidence from the defendant himself situating that his statement

was obtained in a manner contrary to the provisions of **Section 29 of the Evidence Act**.

The whole essence of **Section 29** is targeted at ensuring whatever statement that is obtained from a defendant is a product of his freewill – no more. The Supreme Court in **State V Rabiu (2013) All FWLR (pt.684) 36 at 68** stated that the main object behind the conduct of a trial within trial is to ascertain whether the statement made by the accused person was made voluntarily. This really is the fundamental objective of trial within trial. Where there is however nothing shown or established vitiating this exercise of freewill, I incline to the view that the prosecution will have then done its job.

Where the voluntariness of a statement is in issue, the prosecution must adduce evidence as done here on how the statement was obtained before the evidential proof will shift to the defendant to lead evidence that will create even the slightest doubt in the mind of the Court. As already stated, while the standard of proof on the prosecution remains proof beyond reasonable doubt, the standard of proof on the defence is to raise doubt. See **Borishade V FRN (2012) 18 NWLR (pt.1332) 347**.

The prosecution at the risk of sounding prolix had adduced evidence on how the statement was obtained. The evidential burden shifted to defendant to create or raise doubt. On the evidence, the defendant has not been able to raise such doubt at all.

This now leads me to the consideration of the contentious provisions of **Section 15 (4) and 17 (1) and (2) of ACJA**. Learned counsel to the defendant contends that these provisions must be complied with and that where there is failure to adhere to the provisions as in the present situation, that the statement will be inadmissible. The case of **Akaeze Charles V FRN (2018) LPELR – 43922 (CA)** was cited.

Learned counsel to the prosecution however submitted to the contrary contending that the same Court of Appeal have changed their position on the issue to the effect that non-compliance with these provisions of ACJA will not automatically render the confessional statement impotent and inadmissible. The case of **AVM Olutayo Tade Oguntoyinbo V FRN (2018) LPELR – 45218 (CA)** was cited.

Before dealing with this very important point, let me quickly address the contention of learned counsel to the defendant that because the court had earlier ruled on 26th September, 2018 that the alleged confessional statement made by defendant dated 17th June, 2016 was inadmissible that the court is bound by the said decision and cannot give a different decision with respect to the extant confessional statement as they are rooted on the same complaint. The prosecution however argued to the contrary to the effect that the earlier ruling has no bearing on the present situation, since the statements are different and taken at different police stations.

Now it is true or settled principle that once a court gives a decision on a particular issue, or matter, it is said in popular legal parlance to be *functus officio* with no further power to review such order or decision. I however do not see how this principle has any application in this case. The Ruling of this court on 20th September, 2018 was in respect of a statement dated **17th June, 2016** taken at Utako Police Station. The Ruling was made after a trial within a trial was conducted.

Now the present trial within a trial is clearly in respect of a different statement dated **22nd June, 2016** taken at State C.I.D FCT Police Command by different officers after the transfer of the case file. It is therefore obvious that the court is dealing with two different statements even if they are rooted in the same primary complaint of investigations related to the dastardly murder of the defendant's mother.

There are lots of salutary reasons for transfer of cases from a Divisional Police Station as in this case to the Force Headquarters. It is not unusual that cases are transferred from one station to another station or the headquarters as in this case. It could be that the headquarters has the capacity in terms of manpower and necessary expertise to do a better investigation to unravel the mystery behind the murder that may not be obtainable at the divisional post. The point to underscore here is that when these cases are transferred, investigations start afresh and in my opinion rightly so.

If therefore an accused makes a statement at the divisional post for example, there is no law and none was cited that prevents him from making further statements

when a case is transferred and investigations start afresh. Each of these statements, if they are to be tendered must meet with the required legal threshold and indeed each such statement is treated on its merit. No more.

The bottom line is that there is no law or authority that donates the position than an Accused or Defendant cannot make more than one confessional statement. Indeed the authorities are even clear that where a defendant makes more than one confessional statement and they are to be tendered and the defendant objects to the admissibility of both on grounds that they were not obtained voluntarily, then trial within a trial should be conducted separately for each of them and not to be lumped together in one *voir dire*.

In **Darugbo V State (1992) 7 NWLR (pt.255) 525 at 535**, the Supreme Court stated as follows:

"Where an accused has made more than one statement to the police and objections are raised as to the admissibility of each of them, the trial court must try the admissibility of each of them separately. Where that is done, as in this case, any finding thereon cannot be successfully impeached on appeal." See also **Yinusa V State (2017) All FWLR (pt.909) 309 at 325**.

One more point. The submission of learned counsel to the defendant severely ignores the capacity of human introspection, empathy and critical self analysis. It is not unusual that a human being may after careful and thorough examination of his thoughts, feelings and reasons for behaving in a particular way may decide to come true on a particular matter or issue and have a change of mind. The accused may through this process make different statement(s) or shift or change positions. That is his prerogative.

The fact therefore that there was an earlier decision on a particular statement cannot fetter the right of the accused to make another statement and for the court to again look at this new statement and situate whether it has met the requirements of admissibility.

On the whole, this point that the earlier Ruling of 20th September, 2018 somehow forecloses the duty to consider whether the present statement of 22nd June, 2016 has met the requirement of admissibility is unavailing and discountenanced.

I now come back to the application of the provisions of **Sections 15 (4) and 17 (1) and (2) of ACJA** with respect to the modalities for obtaining confessional statements.

The provisions provide as follows:

"15(4) Where a suspect who is arrested with or without a warrant volunteers to make a confessional statement, the police officer shall ensure that the making and taking of the statement shall be in writing and may be recorded electronically on a retrievable video compact disc or such other audio visual means.

17(1) Where a suspect is arrested on allegation of having committed an offence, his statement shall be taken, if he so wishes to make a statement.

(2) Such statement may be taken in the presence of a legal practitioner of his choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a Civil Society Organisation or a Justice of the Peace or any other person of his choice. Provided that the Legal Practitioner or any other person mentioned in this subsection shall not interfere while the suspect is making his statement, except for the purpose of discharging his role as a legal practitioner."

A communal reading of the foregoing provisions shows the following position in regard to the statement of a suspect arrested with or without a warrant on an allegation of having committed a crime:

(i) where he volunteers to make a confessional statement;

(a) the police officer (this includes any officer of a law enforcement agency established by an Act of the National Assembly – Section 494(1) of the ACJA 2015) shall ensure that the making and taking of the confessional statement shall be in writing;

(b) such statement may be recorded electronically on retrievable video compact disc or such other audio visual means;

(c) the statement of a suspect, confessional or not, may be taken in the presence of a legal practitioner of his choice, or where he has no legal practitioner of his choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a Civil Society of a Civil Society Organisation or a Justice of the Peace r any other person of his choice.

It is not in contest that in the making and taking of the statement of the defendant, which are admittedly confessional in nature, the officers of the Nigerian Police did not record the same electronically on retrievable video compact disc or such other audio visual means and none was tendered during the trial-within-trial. It is also not in doubt that the statement of the defendant was not made and taken in the presence of legal practitioner. Equally none of the other persons listed in **Section 17(2) of the ACJA** was in attendance.

Now, what is the effect of the obvious non-compliance with the pertinent provision of 17 (2) in this case.

The Court of Appeal in **Akaeze Charles V FRN (2018) LPELR – 43922 (CA)** addressed this issue comprehensively and answered that failure to comply with these provisions is fatal and that the effect of non compliance is that the confessional statement is inadmissible.

It would however appear that the same Superior Court of Appeal in recent decisions have completely shifted from the position in **Akaeze Charles (supra)** and in the process altered the dynamics on the effect of non-compliance with these contentious provisions of ACJA.

In **AVM Olutayo Tade Oguntoyinbo V FRN (supra)**, the Court of Appeal donated the position clearly that the provisions of **Sections 17 (2) and 15 (4)** are not mandatory provisions but permissive and that non-compliance without more will not make the confessional statement inadmissible.

Indeed, in the said decision, the Court of Appeal introduced a fundamental and distinguishing dynamic to the debate to the effect that the Evidence Act being a specific Act on Evidence including trial within trial and admissibility takes precedence over the **ACJA** in matters of admissibility.

This later decision of **Oguntoyinbo** will appear to have gained more traction and acceptability in the following decision of the Court of Appeal.

In **Nneoyi Itam Enang V The State (2019) LPELR – 48682 (CA)**, the Court of Appeal while construing similar provisions of the Administrative of Criminal Justice law of Cross River State similar to that in ACJA stated instructively as follows and I will quote the noble law lords in extenso thus:

"I have painstakingly examined the decisions of this Court in Joseph Zhiya V The People of Lagos State (2016) LPELR – 40562, Charles V FRN (2018) 13 NWLR (pt.1635) 50 and Nnajiofor V FRN (2019) 2 NWLR (pt.1655) 157 as regards the effect of failure to record confessional statement in the presence of the accused legal practitioner as contained in Section 9 (3) of the ACJL, of Lagos State, 2007 as well as 15 (4) and 17 (2) of the ACJA. In these decisions, this Court has found that non-compliance with the said provisions automatically rendered such statements impotent and inadmissible. In arriving at these decisions, the court did not in my view recognise the fact that the ACJA or ACJL as the case may be, are largely legislation in the realm of the ideal containing provisions that are for now clearly not enforceable and sometimes provisions that could only hope for enforceability in the nearest future. Section 1 (i) of the ACJA, 2015 for instance, states in clear terms that he purpose of the Act is to ensure that the system of Administration of Criminal Justice in Nigeria promotes efficient management of Criminal Justice Institutions, speedy dispensation of justice, protection of society from crime and protection of the rights and interest of the suspect, defendant and victim.

In any event, the above decisions did not as well take cognizance of the fact that Evidence is listed as Item 23 of the Exclusive Legislative List, part 1, 2nd schedule to the 1999 Constitution (as amended). Also, the Evidence Act being a specific Act on evidence including admissibility takes precedence over the ACJA in matters of admissibility. See AVM Olutayo Tade Oguntouinbo V FRN (unreported) Appeal No: CA/a/11c/2018 delivered on 14th June, 2018. Had this court considered and taken into account the hierarchical superiority of the Evidence Act over the ACJA in the cases of Joseph Zhiya V The People of Lagos State, Charles V FRN and Nnajiofor V FRN (supra), they would

have come to a different conclusion. In other words, the ACJA or ACJL prescribes procedural rules to be observed while recording the statement of the accused defendant, but the Evidence Act, specifically regulates the rules of the admissibility of such statement."

Similarly in **Lawal Wilson Olusegun V FRN (2019) LPELR – 49432 (CA)**, the Court of Appeal stated as follows:

"Learned Counsel for the Appellant has also argued that the confessional statements were not recorded in compliance with Section 17 of the ACJA, 2015 in that it was not made in presence of the Appellant's Legal Counsel. I have read the provisions of Section 17 (1) and (2) of the ACJA, 2015. The operative word in sub-section (1) of Section 17 of the Act is "shall" which denotes a word of command or mandatorinees. That provision therefore creates an obligation on the police to record the statement of any person arrested on allegation of having committed an offence (if the person decides to make a statement). However, the operative word in subsection (2) is "may" which means a permissive or enabling expression. It means that the authority which has the power to do the act has an option either to do it or not to do it. It gives a modicum of discretion. The word "may" may also acquire a mandatory meaning if the context of the statute in which it was used demands so. It all depends on the circumstances of the case. See Edewor V Uwegba & Ors (1987) 1 NWLR (pt.50) 313; Bakare V A.G of the Federation (1990) 5 NWLR (pt.152) 516 and UniIlorin & Anor V. Oluwadare (2006) 14 NWLR (pt.1000) 751.

I have carefully read the case of Owhoruke V. C.O.P (supra) and Charles V FRN (supra). I do not understand that case to mean that the Supreme Court has laid it down that, any confessional statement not made in the presence of a Legal Practitioner must be rejected. Of course, where the accused person has made serious allegations against the police as to the voluntariness of the making of the statement, the court should take the fact of absence of counsel at the time of recording the statement into consideration in determining the weight to attach to such a statement. However to argue as learned counsel for the Appellant seems to do, that in all cases where the statement of an accused person is recorded in the absence of a legal practitioner, such statement

should be rejected, would lead to absurdity, as an accused person who had consciously and voluntarily confessed to a crime will turn around at the trial, to retract the confession on the claim that his counsel was absent when he made the statement. I think therefore, that the facts and circumstances of each case, would determine whether or not the absence of a legal practitioner at the recording session of the confession, should be admitted r not. In any case, the Supreme Court, in my view has put the matter to rest in the case of Ajiboye V FRN (2018) 13 NWLR (pt.1637) 430 at 452 – 453 paragraphs H-B per Sanusi, JSC as follows:

"… On the alleged absence of counsel when it was recorded, I think that reason is not cogent as it is not incumbent upon the prosecution to record an accused statement only in the presence of his defence counsel. The important and essential thing is that the words of caution must be administered to the accused person to his understanding and to endorse same before he decides to make the statement. Evidence abounds that the words of caution were duly administered in the exhibits before they were duly signed. It is also noted by me, that the second confessional statement Exhibit "21" was made by the Appellant to his employers. Same was also recorded under words of caution and it was also subjected to a trial-within-trial, conducted by the trial court before it was admitted in evidence by the trial court which later found that it was also voluntarily made by the accused/appellant."

It is therefore apparent that a confessional statement which was fully proved to have been voluntarily made by the accused person cannot be rejected on the ground that it was not made in the presence of a Legal Practitioner."

Finally on this point, in the more recent case of **FRN V AVM Alkali Mohammadu Manu (2020) LPELR – 50293 (CA)**, the Court of Appeal restated the position in **Oguntoyinbo V FRN (supra)** and added as follows:

"**It is trite that the handling of evidence in any adjudication is primarily covered by the Evidence Act; any other legislation which makes provision for issues touching on evidence must take its subsidiary position to the Evidence Act. The ACJA is principally a procedural law and cannot therefore over ride the Evidence Act."**

I think the issue of the application of the provisions of **Section 15 (4) and 17 (1) and (2) of ACJA** on the basis of these decisions is now settled.

What perhaps I need to say even if not directly material or relevant now is that as at the time this court delivered its Ruling on the earlier statement of defendant on 20th September, 2018, it was only the **Akaeze Charles** decision that was relied on and the court had no option but to kowtow to same been a binding decision of a Superior Court. The above later decisions as demonstrated have now radically altered the trajectory of the narrative with respect to the effect, import and application of the extant provisions of ACJA and similar provisions.

The law is settled that where there are apparently conflicting decisions of a Superior Court, the lower court is bound to be guided by the later decision(s).

As I round up, learned counsel to the defendant has drawn my attention to the case of **Owhoruke V COP (2015) 13 NWLR (pt.1483) 557** and particularly the dictum of Rhodes Vivour JSC as follows:

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

The case of **Olusegun V FRN (supra)** earlier cited dealt with this pronouncement. The point to perhaps add is that while the value of this pronouncement cannot in the least be understated but the obvious fact is that the decision never dealt with the application of the extant provisions of ACJA. The above pronouncement may give an indication as to the way the noble law lords may construe the provisions in the event the application of the provisions gets to the Apex Court but for now it is certainly no authority with respect to the import and application of the extant provisions of ACJA.

Perhaps adding another interesting context to the issue, the Apex Court in **Ajiboye V FRN (2018) LPELR – 44468 (SC)** in which the respected Rhodes Vivour JSC was part of the panel that decided the appeal stated thus:

"… on the alleged absence of his counsel when it was recorded, I think that reason is not cogent as it is not incumbent upon the prosecution to record an accused statement only in the presence of his defence counsel. The important and essential thing is that words of caution must be administered to the accused person to his understanding and to endorse same before he decides to make the statement. Evidence abounds that the words of caution were duly administered in the exhibits before they were duly signed. It is also noted by me, that the second confessional statement Exhibit 21, was made by the appellant to his employers. Same was also recorded under words of caution and it was also subjected to a trial within trial, conducted by the trial court before it was admitted in evidence by the trial court which later found that it was also voluntarily made by the accused/appellant."

The above pronouncement is very clear.

For me, the moral of the above pronouncements is simply to emphasise the need for the voluntary making of a confessional statement and that the facts and circumstances of each case should dictate or determine the admissibility of a confessional statement notwithstanding the absence of a legal practitioner at the recording session of the confession. I leave it at that.

If here, the defendant did not make any complaints that his statement was a product of oppression or that he was forced to make the statement, then it appears to me the absence of his counsel won't be a decisive or vitiating element in such circumstances.

On the whole, 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 22nd June, 2016 is admissible and is to be marked as **Exhibit P6.**

……
Hon. Justice. A.I. Kutigi

<u>Appearances</u>:

1. **Y.A. Cole (Mrs.) for the Complainant.**

2. **Mohammed Ndayoko Esq., Dr. M.N. Mohammed, Michael Eleyinmi Esq. and I.C. Onyezubelu Esq. for the Defendant.**