"SPEEDY TRIALS AS ENVISAGED BY THE ACJL OF EDO STATE 2018 AND TRIAL WITHIN TRIAL - A CRITIQUE OF THE DECISION IN

THE STATE V. SANI (2018) 280 LRCN 198"

BY

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AT

ONE DAY WORKSHOP OF

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ON

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HOLDEN

AT

UYI GRAND EVENT CENTER

BENIN CITY, EDO STATE

OPENING STATEMENT

> *"The purpose of this Law is to ensure that the system of administration of criminal justice in Edo State… promotes efficient management of criminal justice institutions, speedy dispensation of justice…"*[1]

It was in early July 2018 at the International Maritime Law Seminar which held at the Ladi Kwali Hall of the Sheraton Hotel that I first came into personal contact with the indefatigable Chief Judge of Edo State, the **Hon Justice Esohe Frances Ikponmwen** and over the days that followed I came to understand the burning passion for justice in my lord, the Hon. Chief Judge of Edo State. So it was that in early August my lord the Hon Chief Judge of Edo State had requested if I could write a paper on the need for speedy dispensation of justice for presentation to the Honourable Judges of the Edo State Judiciary and other Stakeholders in the administration of Criminal Justice in Edo State. I had readily accepted the honour to do so. This paper is thus the result of my fruitful meeting with my lord the Hon Chief Judge of Edo State at the Maritime Seminar in Abuja.

The topic: **"Speedy Trial as envisaged under the ACJL of Edo State and Trial within Trial – A critique of the decision in The State V. Sani"**[2] is indeed not only topical, going by the new wave of the system of administration of criminal justice sweeping through the Country like an hurricane, Edo State not excepted, but is also apt and underscores the overriding desire for a paradigm shift from the old drugged administration of criminal justice to the new 21st century digital system of administration of criminal justice in

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1. See Section 1(1) of the ACJL of Edo State 2017

2. (2018) 280 LRCN 198. Also reported in (2018) LPELR – 234 (SC)

which ójustice and expediencyô is now key! The utilitarian value of the new and innovative regime of administration of criminal justice to all involved in the administration of criminal justice, victims of crime and the offenders cannot be overemphasized bearing in mind the old ways of administration of criminal justice which was bereft of any utilitarian value either to the administrators, the courts, the victims and or the offenders. It is therefore, in the above sense I consider the first arm of the topic of discourse in this paper, dealing frontally with the real purposes for the new regime introduced by the Administration of Criminal Justice Law of Edo State, as timely, most welcomed and worthy of elucidation in the journey through this paper. Welcome on Board!

In this paper, while the focus of my attention will be the Administration of Criminal Justice Law of Edo State, 2018, I will be making references where necessary to the Administration of Criminal Justice Act 2015, as well as the Lagos State Administration of Criminal Justice Law 2011 (as amended) by which Lagos State pioneered the laudable reforms of the system of administration of criminal justice with its revolutionary Administration of Criminal Justice Law 2007, some provisions of which law I have been privileged to interpret in some of our decisions at the Lagos Division of the Court of Appeal.

ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA BEFORE 2015

Before 2015, when the Administration of Criminal Justice Act was passed into law to govern the administration of criminal justice at the Federal Level, there was a pathetic or dismal level of compliance to human rights considerations in the administration of criminal justice in the entire Federation of Nigeria, save in the trail blazing State of Lagos where the administration of criminal justice had assumed a phenomenal dimension with the coming into effect of the Administration of Criminal Justice Law 2007. However, with the advent of the new regime of administration of criminal justice in Lagos State in 2007 and the resultant seamless improvements and more effective administration of criminal justice in Lagos State, it still took the Federal Government another eight years to

key into the laudable initiative and innovation by the Lagos State Government when in 2015, the Administration of Criminal Justice Act 2015 was passed and signed into law and came into force at the Federal Level. Since then the doors seem to have been open for several other States in the Federation to join the queue to pass the respective Stateôs own version of the Administration of Criminal Justice Law. As at the last count, about 12 States in Nigeria have already passed the new regime of Administration of Criminal Justice Law in their various jurisdictions and these States are: Kaduna, Ondo, Ekiti, Lagos, Oyo, Rivers, Ogun, Edo, Anambra, Enugu, Cross-River and Akwa - Ibom. For this singular feat, I believe we all owe to Lagos State a great debt of gratitude to give honor to whom honor is due. It is in the backdrop of the above that Edo State, which had in 2018 passed and signed into law its own version of the Administration of Criminal Justice Law 2018, as well as the other 11 States, should all be highly commended.

SPEEDY TRIAL: AN ESSENTIAL ELEMENT OF EXPEDITIOUS DISPENSATION OF JUSTICE IN THE ADMINISTRATION OF CRIMINAL JUSTICE

Speedy dispensation of criminal justice is a direct result of the Constitutional requirement of trial ówithin a reasonable timeô within the provisions of Section 36(4) of the Constitution of Federal Republic of Nigeria 1999 (as amended), from which Section 396 (1) - (5) of ACJL of Edo State 2018 draws its inspiration and root. By that provision of the Constitution of Nigeria 1999 (as amended), that is Section 36 (4) thereof, whenever a person is charged with a criminal offence he shall be entitled to a fair hearing in public within a reasonable time by a Court or tribunal. This provision thus, in my view, clearly envisages and or contemplates that a criminal trial must take place and be concluded with within a reasonable time and therefore any unjustifiable breach of this provision in a criminal trial may result into nullity of such a criminal trial.[3]

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3. See The Criminal Procedure of the Southern States of Nigeria by Fidelis Nwadialo SAN @ p. 58. See also Mohammed V. Kano Native Authority (1968) All NLR 424 @ p. 426 per Ademola CJN.

It is this constitutional flavor with which the requirement of trial within a reasonable time is guaranteed and elevated in criminal trials that its breach carries with it a fundamental and devastating negative consequence on the entire trial of an offender. The ready and clear implication of this requirement is that criminal trial, in which the liberty of the citizen is at stake, is one which must be conducted and concluded with within a reasonable time to ensure the observance of the more fundamental right to fair hearing as guaranteed by the Constitution of Nigeria.[4]

The essence of requiring that a criminal trial, nay all trials, should be conducted and concluded within a reasonable time is underscored by the fact that it engenders speedy dispensation of justice, the key objective of the ACJL of Edo State 2018. It also ensures that decisions of the Court in criminal trials are reached when the facts, as presented by the parties, are still fresh in the mind and impression of the Court to avoid any miscarriage of justice that may result from loss of impression of the facts by the Court arising from undue delays between the commencement of trial, taking of evidence and the final determination of the matter. The greater the interval between these stages, contrary to the requirement of trial within a reasonable time, the less likely that justice would be done to the parties. In other words, but indeed conversely, the shorter the length of time spent within a reasonable time in a criminal trial the greater the prospect that justice would be done to the parties.[5]

Thus, undue delay in criminal trials is the very antithesis of speedy dispensation of justice as envisaged and clearly encouraged by the new regime of system of administration of criminal justice introduced by the ACJL of Edo State 2018. It is for this reason it is

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4. See Section 36 (1) of the Constitution of Nigeria 1999 (as amended)

5. A. Ariori & Ors V. M. B. O. Elemo & Ors (1983) I SC 13. See also Akpon V. Iguoniguo (1978) 2 SC 115; Kakana & Anon. V. Imonikhe (1974) I All NLR (Pt. l) 383; Ekeni V. Kimisede & Ors (1976) 1 NMLR 194..

hereby recommended that the Courts in Edo State must observe and also enforce the strict observance of these provisions requiring trial within a reasonable time by all the parties before it if the real essence and objective of the ACJL of Edo State 2017 is to be attained in the interest of the people of Edo State and all those who reside and carry on business therein. In **Ariori V. Elemo**[6] the term ógreasonable timeô was succinctly defined thus:

> ***"Reasonable time must mean the period of time which in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable person to be done."***

In interpreting the provisions of ACJL of Edo State 2018 therefore, the Courts must be purposive and constantly keep in mind the self avowed purposes and key objectives of the law.[7] In **Omoijahe V Umoru**[8] the Supreme Court succinctly observed inter alia thus:

> ***"It should be borne in mind that statutes are construed to promote the general purpose of the legislature, law maker and judges ought not to go by the letter of a statutes only but also by the spirit of enactment."***

In 2018, the Court of Appeal added its voice to the need for purposive interpretation of the provisions of the innovative administration of criminal justice legislations in **FRN V. Hon. Farouk M. Lawan**[9] when it opined inter alia thus:

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6. (Supra) @ p. 13 per Obaseki JSC.

7. See ANPP V. Goni (2012) FWLR (Pt.623) 1821. See also Ogbonna V. AG. Imo State (1992) 1 NWLR (Pt.220) 647

8. (1999) 8 NWLR (pt.614) 178, per Katsina - Alu JSC.

9. (2018) LPELR - I7I7 (CA) @ pp. 8 - 20 per Owoade JCA.

"It is important to give a background of the state of the criminal justice system in Nigeria before the enactment of the Administration of Criminal Justice Act 2015 (the ACJA). Before now, the administration of criminal justice was in a chaotic state, and the problem of incessant delay topped the list of the overall malfeasance in the system. There was undue delay in the prosecution of even the most important cases and sometimes the most serious offences. There were long and sometime inexcusable periods of adjournments, unpreparedness or un-tardiness in the calling of witnesses, transfer of Prosecutors, Magistrates and Judges without effective plans for the cases they are handling and indeed poor working attitudes of the various stake holders. It was in the light of the above background that the Administration of Criminal Justice Act 2015 (the ACJA) was enacted with a grand purpose in its Section 1 (1): "to ensure that system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy administration of justice, protection of the society from crime and protection of the right and interests of the suspect, the defendant and the victim."

PROVISIONS FOR SPEEDY TRIAL: ELIMINATING DELAYS IN CRIMINAL PROCEEDINGS IN EDO STATE:

HEARING FROM DAY TO DAY

By Section 396 (3) of the ACJL of Edo State 2018 upon arraignment the trial of the Defendant may proceed from day to day on working days until the conclusion of the trial. This may appear on the surface to be a significant milestone but with the use of the word ómayô, of which it can only be the word that can be used in this context and not the word óshallô taking into consideration the vagaries of the trial proceedings in the Courts, this provision becomes merely superfluous and unnecessary. This is so because even before the coming into effect of the ACJL of Edo State 2018 criminal trials do proceed on adjourned dates subject to the convenience of the Court. I would have thought that rather than a merely superfluous provision that brings nothing new to the table, the new law should have made provisions limiting the duration of every criminal trial, for example to

one year upon arraignment on information or six month for summary trials. This would have given more practical effect to the purpose and key objectives of the ACJL of Edo State 2017 than the present mere decorative and superfluous provision which by the use of the word ômayô made it entirely discretionary and thereby subjecting criminal trials to the same old ways in the courts of adjournment and adjournments without end. However, by Section 396 (4) - (5) of ACJL of Edo State 2018, adjournments have been pegged at not more than five adjournments at an interval of fourteen working days and upon exhaustion, adjournments shall be at an interval of seven days including weekends.

Now, the use of the word ñmayò which denotes a discretion as against the word ósshallô appears deliberate since it is practically impossible to conduct trial from day to day in view of the volume of work before the Court. However, this provision to be key to the realization of the objective of the ACJL of Edo State 2018.

INTERLOCUTORY APPEALS AND STAY OF PROCEEDINGS

By Section 306 of the ACJL of Edo State 2018 it is provided that subject to the provisions of the Constitution of the Federal Republic of Nigeria, an application for stay of proceedings in respect of any criminal matter brought before the court shall not be entertained until judgment is delivered. This is a laudable provision as it is a conscious effort at fast tracking criminal trials in Edo State, which is one of the key elements of the objectives of the ACJL of Edo State 2017. The intendment of the framers of the law would appear to be to bring to a deserved end the era of prolonged criminal trials on account of pending interlocutory appeals.

Thus, while the right of appeal against interlocutory decisions of the High Court to the Court of Appeal still avails the parties, it will neither stall nor affect the continued trial of the case to conclusion even while the interlocutory appeal is pending. However, and this is very crucial to note, this provision does not and cannot derogate from the operation of the settled principle of hierarchy of courts in the land whereby the High Court is enjoined not to pronounce but to stay any judgment where an interlocutory appeal has been duly

entered in the Court of Appeal until the determination of the interlocutory appeal by the Court of Appeal as enjoined in Section 305 of the ACJL of Edo State 2018. Thus, this section while empowering the High Court of Edo State to proceed with a criminal trial to conclusion without considering any application for stay of proceedings pending an interlocutory appeal, the High Court is duty bound upon conclusion of the trial, and if an interlocutory appeal has been duly entered in the Court of Appeal, to postpone the delivery of its judgment until after the interlocutory appeal has been determined by the Court of Appeal. This is indeed a very salutary provision and would in great measure eliminate unnecessary delays in the conduct of criminal trials before the High Court while not derogating from the hierarchy of courts in the land. It follows therefore, that an application for stay of proceedings in respect of a criminal matter before a trial Court shall no longer be entertained.[10]

PLEA BARGAIN

Before 2015, plea bargain[10A] was strange to the system of administration of criminal justice in Nigeria save in Lagos State by virtue of the ACJL of Lagos State 2007. The concept of plea bargain is therefore, one of the most laudable innovations of the ACJL of Edo State 2018 wherein specific, extensive and detailed provisions were made to govern the application of plea bargain in criminal trials in Edo State. Ordinarily, plea bargain is a mutually negotiated agreement between the Prosecution and the Defendant but the minimum requirement is that it must involve both a conviction and at least some form of minimal custodial sentence to be imposed on the Defendant. It is not and should not become or be converted into a mere slap on the wrist of a Defender.

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10. See Olisa Metuh V. FRN (2017) 11 NWLR (Pt. 1575) 157 @ P. 179

10A. See Section 270 (1) - (17) of ACJL of Edo Stae 2018. See also Ogboka v. State (2016) LPELR – 616(CA); PML Nig. Ltd V. FRN (2014) LPELR -22767(CA); Black's Law Dictionary 8th Edition @ p. 1190; FRN V. Igbinedion 2 CLR (Pt.1444) 475 @ p. 522 Ogunwumiju JCA; Bando V. FRN (2016) All FWLR (Pt. 841) 1510

Be the above as it may at as it may, the concept of plea bargain if properly and proactively implemented would enhance and engender speedy dispensation of justice in criminal trials in Edo State, whereby only matters in which there is no agreement between the parties would proceed to full plenary trial. Thus, saving the time of both the Court and the parties in all those matters in which the plea bargain provisions are, on the mutual agreement of the parties, applied in criminal trials in Edo State.

ELEVATION OF JUDICIAL OFFICER FROM EDO STATE JUDICIARY TO THE COURT OF APPEAL

By Section 396(7) of the ACJL of Edo State 2018 it is provided that a Judge of the High Court of Edo State who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part - heard Criminal Matter pending before him at the time of his elevation and shall conclude the same within a reasonable time, provided that this provision shall not prevent him from assuming duty as a Justice of the Court of Appeal. Firstly, there can hardly be any judge who upon his elevation to the Court of Appeal has no single pending part - heard criminal matter in his court as a High Court Judge. Secondly, and at any rate, this sub - section is completely unnecessary and lacks any legitimacy being in the ACJL of Edo State 2018, a State law which upon the appointment and swearing into office of a judge as a Justice of the Court of Appeal ceases to have any effect on the office of the Justice so elevated. I would rather have thought and I so propose that this section be amended to provide for the relevant State Authority in Edo State to apply for the fiat of the President of the Court of Appeal to grant dispensation for such a Justice of the Court of Appeal to, while retaining his position as a Justice of the Court of Appeal, proceed to conclude matters that have reached advanced defense stage, not just all part - heard criminal matters, before his elevation to the Court of Appeal.

In practice however, upon elevation, a judicial officer may be sworn into office as a Justice of the Court of Appeal immediately or his swearing in may be postponed to a later date to enable him conclude some real advanced part - heard matters, particularly at

the defense stage. Before now, and there is at least one example of the this, in 2006 a judicial officer elevated to the Court of Appeal had his swearing in temporarily put on hold or postponed if you like, until he had completed some crucial election petitions he was handling as a Judge of the Election Tribunal as a Judge of the High Court and upon conclusion of which he was duly sworn into office as a Justice of the Court of Appeal. The disadvantage being his loss of seniority to those elevated with him but which palls, in my view, into insignificance when the greater sacrifice of service to the Nation is considered.

Generally before now, if a High Court judge hearing a criminal matter is elevated and sworn into office immediately as a Justice of the Court of Appeal, the hearing of all matters, including criminal matters even at advanced stage of defense, would have to start afresh before another judge. Thus, it is to remedy this situation that the ACJL of Edo State 2018 has in Section 396 (7) provided that a High Court judge elevated to the Court of Appeal shall continue to hear and conclude all part - heard criminal cases pending before him provided that this shall not prevent him from assuming duty as a Justice of the Court of Appeal. This provision on the surface appears to be a laudable one but is it so in reality? I do not think so and let me explain! In my view it could create some complications where for instance a judge had over 30 part - heard criminal cases, as it does happen in some jurisdictions in this country, at the time of his elevation, which is not impossible especially where that court is a specialized criminal court with several criminal cases. There could then be a situation where a Justice of the Court of Appeal could still be sitting as a High Court Judge one year after his elevation to the Court of Appeal, which is still within a reasonable time within the contemplation of Section 396 (3) - (5) of the ACJL of Edo State 2018.

Now, as laudable as these provisions may appear to be on the surface, I am not a fan of it. In so much as it has its own seemingly perceivable advantages, yet in a country were writing of all sorts of frivolous petitions is an art and where the judge stands adjudged or at least perceived guilty by the society even before his own side of the story is heard at

the appropriate quarters, it would not be out of place soon to find a judicial officer sworn into office as a Justice of the Court of Appeal being asked to retire or dismissed for one reason or the other before he could even carry out any serious duty as a Justice of the Court of Appeal to which he has been duly sworn in. At any rate from the date of his oath of office he ceases to be a judge of the High Court of Edo State and becomes a Justice of the Court of Appeal whose judgment and or decisions cannot and ought not to be reviewed by his peers on the bench of the Court of Appeal.

Assuming that the above reasons are not cogent enough against this seemingly innovative provision of the ACJL of Edo State 2018, then how about the fact that this provision seems to negate the very essence and purpose of the new regime of administration of criminal justice; a just, expeditious and effective dispensation of criminal justice in Nigeria. If the ACJL of Edo State 2018 is operated maximally by all strata of stakeholders and the unwanted issues of delays and other bottlenecks in the administration of criminal justice are removed, or ameliorated or overcome by the criminal justice system and cases are heard and determined expeditiously as intended, would there still be the need for a judicial officer already sworn into the office as a Justice of the Court of Appeal to be a given a fiat to continue to hear and conclude part - heard criminal matters, even if at defense stage, before the High Court when such matters would either have been concluded expeditiously or at worst would be heard and determined expeditiously by another judge of the High court.

Is it then being suggested that unless and until all part - heard criminal matters at advanced stage pending before the affected judicial officer are concluded with and determined by him he would for so long operate as an hybrid judge, with one leg in the High Court and the other leg in the Court of Appeal?

I certainly do not see this as a healthy development. I may be wrong in this view but it remains my strong view and I do fervently hope that this innovation would in the nearest future be given a second hard critical look at, perhaps when the gains of the other

innovative provisions of the ACJA 2015 as well as the ACJL of the various States of the Federation that have domesticated it begin to be felt in all the criminal justice system and sector in Nigeria.

COURTS TO EXPEDITIOUSLY DEAL WITH CRIMINAL MATTERS[11]

It is the requirement of the law, as earlier alluded to, that criminal matters must be expeditiously dealt with, that is speedily heard and determined. The duty to expeditiously deal with criminal matters, if properly discharged will instill public confidence in the administration of criminal justice. The old regime whereby every case must first of all travel on the preliminary issues from the trial Court up to the Supreme Court was a disservice to the administration of criminal justice system. Today, that is no longer possible in Edo State of 2018 and beyond by virtue of the coming into effect of the ACJL of Edo State 2018, which has unequivocally made commendable provisions to guarantee speedy dispensation of criminal justice, some of which include but is not limited to the following innovations in the ACJL of Edo State 2018.

TIME LIMIT TO RASING OBJCETIONS TO VALIDITY OF INFORMATION

One of the major reforms is the provision of Section 396 (2) of ACJL of Edo State 2018 which limits the time for raising objections bordering on the validity of a charge or information and thereby recommends day to day trial of all criminal cases filed before the Court after arraignment. The Defendant may raise any objection to the validity of the charge or information at any time before Judgment provided however, any such objection, except as it relates to the jurisdiction[12] shall only be considered along with the substantive issue and the ruling thereon made at the time of delivery of the

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11. For a detailed consideration, See 'Proper Judicial Approach to the interpretation and Application of the Administration of Criminal Justice and Other Related Matters Law of Ogun State 2017' by Rotimi Jacobs presented at the 2018 Ogun State Judges Conference at Abeokuta on 18/9/2018

12. See Fabian Obodo V. The State (2016) LPELR – 356(CA) per Ogunwunmiju JCA.

Judgment. It has also been made clear that objections shall not be taken or entertained by the Court during trial on the ground that the charge is imperfect or erroneous[13] in order to checkmate frivolous preliminary objections that had hitherto littered the paths of criminal trials with unwanted thorns. Thus, in support of and in aid of speedy trials of criminal matters no issue of sufficiency of prima fade case can be raised at the preliminary stage of the criminal trial as it can only be made at the closure of the Prosecutionôs case.[14]

DISPENSING WITH THE PRESENCE OF THE DEFENDANT

Generally, the basic rule of procedure in criminal trials in Nigeria is that the Defendant, previously referred to as the óAccusedô should be present in Court throughout the trial from arraignment to sentence if convicted[15] or discharged by the Court. However, by the provisions of Order 6 Rule (1) - (3) of the Practice Directions 2018 made by the Chief Judge of Edo State pursuant to Section 490 (9) of ACJL of Edo State 2018 the position of the law has been altered and is thus now radically different from the previous position under the old Section 210 of the Criminal Procedure Act. The Practice Directions 2018 now gives the discretion to the trial Court to conduct trial in the absence of the Defendant in appropriate and deserving cases. These may include the following:

a. The Defendant misconducts himself in such a manner as to render his continued presence impracticable or undesirable.

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13. See Section 221 of ACJL of Edo State 2018

14. See Alex V. FRN (2018) 7 NWLR (Pt. 1618) 228 @ p. 242 per Nweze JSC., inter alia thus: "As indicated earlier, the appellant was so anxious to filibuster the proceedings before the trial court that even before the prosecution opened its case, its counsel had taken up the question of the nondisclosure of a prima fade case. With respect, the appellant should exercise patience until the prosecution has opened and closed its case. The reason is simple Section 260(2) of the ACJL of Lagos State 2011 had altered the position under the old law…"

15. See Asakitikpi V. The State (1993) 5 NWLR (Pt.296). See also Adeoye V. State (1996) 6 NWLR (Pt.605) 74 and the old English case of Lawrence V. Rex (1933) A.C. 699

b. The Defendantôs presence is not necessary at the hearing of an interlocutory application.
c. The trial Court granted bail to the Defendant pending trial and he jumps bail and fails to appear or attend the Court without reasonable explanation, the trial Court is empowered to and shall continue the trial in his absence after two adjournments or as the trial Court may deem fit.

The above Practice Directions, in my view, are very unequivocal and indeed self explanatory and seems to toe the line of the new trend even in advanced democracies of the World, including the United Kingdom. In **R V. Jonnes**[16] the Defendant was arraigned on a charge of conspiracy to rob and he pleaded not guilty. He was granted bail and his trial was fixed for 1/6/1998 but he failed to appear on that date to attend the Court for his trial. A warrant was issued for his arrest but he could not be located but the trial Court was persuaded to open his trial as well conclude his trial in his absence on the ground the Defendant had waived his right to be present in Court for his trial. On appeal, the House of Lords stated inter alia thus:

> ***"For very many years the law of England and Wales has recognized the right of a Defendant to attend his trial and, in trials on indictment, has imposed an obligation upon him so to do.....But, for many years, problems have arisen in cases where, although the Defendant is present at the beginning of the trial, it cannot be continued to the end in his presence. This may be because of genuine but intermittent illness of the Defendant...or misbehavior or because the Defendant has voluntarily absconded. In all these cases the Court has been recognized as having a discretion...whether to continue the trial or to order that the jury be discharged...The existence of such a discretion is well established but it is of course a discretion to be exercised with great caution and with close***

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16. (2002) 2 All ER 112,

regard to the overall fairness of the proceedings; a Defendant affected by involuntary illness or incapacity would have much stronger grounds for resisting the continuance of the trial over one who has voluntarily chosen to abscond."

I should think however, that great caution should be exercised in confining the application of these innovative provisions to very clear cases of willful refusal and or voluntary flight from facing justice by a Defendant for which there is no legally justifiable excuse for his absence from his trial.[17] The Courts must act as check to avoid possible abuses by the Prosecution. The attainment of speedy trial is not and cannot be at the expense of justice and such a decision determining a criminal matter in the absence of the Defendant if not well founded may be liable to be set aside on appeal.[18]

ELECTRONIC RECORDING OF PROCEEDINGS

The ACJL of Edo State has, in cognizance of the need to jettison manual recording whenever possible to engender smooth proceedings, made provisions for electronic recording of the proceedings of the Court.[19] This innovation, if properly implemented, would be a blessing to the Courts since one of the major causes of delay in criminal trials

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17. See State V. Joshua (2014) 1 OGSLR 150, where the Defendant was charged for murder, pleaded not guilty and was remanded in Prison custody and the matter proceeded to conclusion of the trial. However, at the time for adoption of written addresses of counsel, it was reported that the Defendant had escaped from the Prison custody. Upon invitation of counsel by the Trial to address it on the proprietary or otherwise of continuing with the trial in the absence of the Defendant, the trial Court per Ogunfowora J of the Ogun State High Court proceeded with the proceedings and delivered its judgment in the absence of the Defendant placing reliance on the earlier English case of R V. Jonnes (Supra).

18. See Wagbtasoma V. FRN (2018) LPELR - 348(CA). See also Ngadi V. FRN (2018) LPELR – 348(CA). In both decisions, the Court of Appeal held that the provision of Section 352 (4) of ACJA 2015 is inapplicable to the Lagos State High Court in the absence of an equivalent provision in the ACJL of Lagos State 2011

19. See Section 364(1) - (5)of the ACJL of Edo State 2018. See also Order 4 Rule 1 of Practice Directions 2018

is the cumbersome long hand manual recording of proceedings by the Courts.

However, where the proceedings are not recorded electronically, manual recording can be resorted to by the Court. The latter provision is very understandable in a clime where even if the Courts are equipped with electronic recorders, electricity supply to power them is still epileptic and far below per.

POWER TO TAKE DEPOSITION IN CERTAIN CASES

While the evidence in chief of a witness in a criminal trial cannot be taken vide his statement on oath as in civil proceedings, but by the provision of the new law the Courts are empowered to take deposition of witnesses in some clearly defined exceptional circumstances.[20]

However, it does appear that no justifiable reason has been given for the continued refusal to toe the line as in civil proceedings where the evidence in chief is now by a statement on oath and which is adopted by the witness who is then cross examined by the adversary. In my view this is a much surer way of expediting criminal trials in the Courts than the clinging unto oral evidence in Court and disposition on oath in very limited circumstances in criminal trials. Ironically, the severe limitations placed on depositions of evidence in criminal trials and thus restricting it to only those exceptional circumstances would, in my view, clearly and readily defeats the very need for speedy trials in criminal matters.

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20. See Section 360 of the ACJL of Edo State 2018, which provides thus: "In certain exceptional circumstances, where the evidence of a technical, professional or expert witness would not ordinarily be contentious as to require cross-examination, the Court may grant leave for the evidence to be taken in writing or by electronic recording device, on oath or affirmation of the witness, and the deposition shall form part of the record of the Court."

TIME LIMIT TO CONCLUDE TRIAL

There is now time limit prescribed by the Practice Directions 2018[21] made pursuant to the ACJL of Edo State 2018 for the hearing, conclusion and determination of criminal matters. By this innovation, criminal trials must be completed within 180 days of arraignment of the Defendant.

There are also provisions in the Practice Directions to enable the Chief Judge of Edo State to keep a track of all pending criminal cases in the Courts in Edo State Judiciary.[22] The advantage of this provision is that by its diligent implementation it would, under the strict supervision of the Chief Judge of the State, ensure that criminal matters are speedily dealt with; drastically reduce congestion of cases, particularly criminal cases in the Courts; reduce to the barest minimum the congestion of Prisons by speedy disposal of criminal matters and the consequent reduction in the high population of awaiting trial inmates in the Prisons

WITNESS PROTECTION

In the old ways under the former regime of administration of criminal justice one of the causes of delay is the unavailability of witnesses principally due to fear for their safety and or the desire to keep away from the public glare at open Court proceedings. This difficulty or constraint has been done away with in some specified criminal matters by the innovation under the new law which permits witnesses in some cases to be

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21. See Order 5 Rules 10 of the Practice Directions 2018 of Edo State

22. See Order 10 Rule 1 of the Practice Directions 2018 of Edo State

protected. Thus, the proceedings may not be conducted in open Court in criminal trials for sexual related offences; terrorism related offences and offences relating to trafficking in person.

NO MORE INCESSANT TRANSFER OF CRIMINAL CASES

By virtue of Section 98 of the ACJL of Edo State 2018 any application for transfer shall no longer be entertained if made after the Prosecution case had commenced unless in very deserving cases upon proper inquiry and an application for transfer will not under any circumstances operate as stay of proceedings vide Order 8 Rule 1 and Order 11 Rules (3) - (6) of the Practice Direction 2018.

LEAVE NO LONGER REQUIRED TO PREFER INFORMATION

Previously under the old regime of administration of criminal justice it was mandatory to obtain the leave of Court to prefer information against an accused person.[23] It was intended to show prima facie justification for the charge but led to delays as it could take months before the leave is eventually obtained due mostly to the congested list of the Courts. Under the new law[24] leave is no longer required and the time spent pursuing leave would now rather be utilized for the arraignment of the Defendant.

PROOF OF EVDIENCE AS ESSENTIAL FOR SPEEDY CRIMINAL TRIALS

This is one of the laudable aspects of the old regime brought forward into the new regime of administration of criminal justice in Edo State. By this provision[25] of the law, the

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23. See FRN V. Wabara (2013) LPELR - 20083(SC), where the Supreme Court held emphatically that leave of the High Court must be obtained before an indictable offence can be tried at the High Court where a preliminary inquiry was not held. See also Ugwu V. State (2013) LPELR - 20177(SC); Egigia V. State (2013) LPELR - 20754(CA); Bature V. State (1994) 1 NWLR (Pt. 320) 267.

24. See Section 381 of the ACJL of Edo State 2018

25. See Section379 of the ACJL of Edo State 2018

Information preferred before the Court against the Defendant must be supported by a proof of evidence, which must be served on the Defendant.

The system of frontloading, also observed in most States jurisdiction in Nigeria under the new regime of civil procedure rules, carries with it extensive obligations on the Prosecution and which are very critical to the right to fair hearing of the Defendant. It has been posited earlier in this paper that one of the very essence of the provision for ótrial within a reasonable timeô by the basic law of the land, the 1999 Constitution (as amended) is the guarantee of the right of the Defendant to both fair trial and its constituent part, fair hearing. With the proof of evidence[26] served on the Defendant, all the parties, on the one hand, and the Court, on the other hand would have a clearer picture of the case the Defendant is expected to meet at the trial and thereby eliminating as much as feasible all forms of delays associated with secrecy of the evidence at the disposal of the Prosecution. All these measures of frontloading of both the proof of evidence and the documents[27] to be relied upon at the trial of the Defendant and amounting in real terms to provision of adequate facilities[28], augurs well not only for speedy trials but also assists in

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26. See FRN V. Wabara (2013) 5 NWLR (Pt. 1347) 331@ p. 350, where the Supreme Court held inter alia thus: "It is worth the while to know that proof of evidence are not the same as the statements of the witnesses the Appellant would call at the trial. Proof of evidence are summaries of the statements of those witnesses to be called at the trial by the Appellant.

27. See Section 36(6) (b) of the Constitution of Nigeria 199 (as amended), which provides thus: (6) "Every person who is charged with a criminal offence shall be entitled to; (b) be given adequate time and facilities for the preparation of his defense."

28 See Okoye V. COP (2015) 17 NWLR (Pt. 1488) 276 @ p. 300 per Aka'ahs JSC., who stated inter alia thus: "The moment an accused person is facing a charge, his personal liberty is at stake and before that liberty is taken away, he must be afforded every opportunity to defend himself..If Order 3 Rules 2(1) of the High Court of Anambra State (Civil Procedure) Rules, 2006 provides for front - loading of documents to enable a Defendant know what the claim against him entails so as to enable him prepare for his defense, how much more is it expected of the Prosecution to provide the necessary facilities to a person accused of an offence to enable him prepare his defense."

the search for truth to ensure that justice is done to all persons and the State in all criminal matters and no miscarriage of justice is allowed to occur or fester or thrive in the system of administration of criminal justice in Edo State. It also eliminates the springing of surprises which are one sure bet for delayed proceedings by reasons of adjournments usually sought to counter the surprises.

ONE JUDGE CAN DELIVER THE WRITTEN JUDGMENT OF ANOTHER JUDGE

Under the new regime of administration of criminal justice in Edo State, once a Judge or Magistrate has concluded with a criminal trial and written and signed his judgment but is prevented from delivering the written and signed Judgment, either through illness or other unavoidable causes from delivering it or sentence, it may be delivered and pronounced in the Open Court by any other Judge or Magistrate in the presence of the Defendant as has been obtainable in the appellate Courts in Nigeria.[28]

The above innovation now extended to criminal trials in Edo State and in all those States in the Federation that has domesticated the ACJA 2015 will in no small measure obviate one cause of delays in criminal trial by way of trial de novo usually occasioned by inability of a Judge or Magistrate who had already written and signed his judgment to deliver the judgment due either to death or grave illness or any other unavoidable causes to be delivered by another Judge or Magistrate to bring the trial to a closure than a resort to a trial de novo of the Defendant as was hitherto the case.[29]

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28. See Section 315 of the ACJL of Edo State 2018. See also Order 5 Rule 21 of the Practice Directions 2018; AG. Fed. V. ANPP (2003) 5 NWLR (Pt.844) 600 @ p. 669; Dweye & Ors V. Iyomaha & Ors (1983) NSCC 393 @ p. 397, where Idigbe JSC who presided over the appeal died before judgment was delivered but his opinion was pronounced by Obaseki JSC; Apostolic Church V. Olowoleni (1990) 6 NWLR (Pt.158) 514; Animashaun V. Olojo (1990) 6 NWLR (Pt.154) 111; Atoyebi v. Odudu (1990) 6 NWLR (Pt.157) 384.

29. For more detailed discussions of speedy trials in criminal cases, See 'Proper Judicial Approach to the Interpretation and Application of the Administration of Criminal Justice and other Related Matters Laws of Ogun State 2017' by Rotimi Jacobs SAN delivered on 18th September 2018 at Abeokuta Ogu State.

THE RIGHT TO FAIR HEARING AS ESSENTIAL TO SPEEDY CRIMINAL TRIALS

In criminal trials a breach of the provision requiring trial ówithin a reasonable timeô would also occasion an unfair trial which encompasses lack of fair hearing to the Defendant. In all trials, a proceeding conducted or judgment reached in breach of the right to fair hearing of the Defendant is nullity. This is so because the principle of fair hearing is not only fundamental to adjudication but is a constitutional requirement which cannot be legally wished away. It is indeed a fundamental right of universal application[30]

However, in determining whether or not a proceeding of a Court was conducted in breach of the right to fair hearing of a party, the law is that each case of allegation of breach of the right to fair hearing must be decided on the peculiar facts and circumstances of each case. This is so because fair hearing is primarily a matter of fact and thus, it is only when the facts are ascertained that the law would be applied to the facts so established to see whether or not such established facts constituted a breach of the partyôs right to fair hearing.[31]

The term ófair hearingô is in most cases synonymous with fair trial and natural justice, an issue which clearly is at the threshold of our legal system and thus once there has been a denial of fair hearing the whole proceedings automatically becomes vitiated. A denial of fair hearing can ensure from the conduct of the Court in the hearing of a case. However, the true test of fair hearing is the impression of a reasonable person who was present at

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30. See J.O.E. Co. Ltd V. Skye Bank Plc (2009) 6 NWLR (Pt. 1138) @ p. 518. See also Ekpenetu V. Ofegobi (2012) 15 NWLR (Pt. 1323) 276; Amadi V. INEC (2013) 4 NWLR (Pt. 1345) 595; Ovunwo & Anor. V. Woko & Ors (2011) 17 NWLR (Pt. 1277) 522; Pan African Incorporation & Ors. V. Shoreline Lifeboat Ltd & Anor. 92010) All FWLR (Pt. 524) 56; Action Congress of Nigeria V. Sule Lamido & Ors (2012) 8 NWLR (Pt. 1303) 560 @ p. 593; Judicila Service Commission of Cross River State & Anor. V. Dr (Mrs) Asari Young (2013) 11 NWLR (Pt. 1364) 1; Robert Okafor & Ors V. AG. Anambra State (1991) 6 NWLR (PT. 200) 659

31. See Newswatch Communications Limited V. Alhaji Ibrahim Attah (2006) 12 NWLR (Pt. 993) 144 per Niki Tobi JSC.

the trial whether from the observation justice has been done in the case.[32]

Now, so fundamental is the right to fair hearing[33] that a failure by a Court, at whatever hierarchy, to observe it would invariably vitiate both the proceedings and judgment of such a Court, notwithstanding the merit or otherwise of the cases of the parties or indeed how meticulous the proceedings were conducted or even how sound the resultant judgment was on the merit. However, it must be pointed out at once that the issue of fair hearing should only be raised with all seriousness and in good faith and thus is never an issue to be raised in bad faith or merely intended as a red herring to raise a storm in a tea cup to delay the proceedings without any factual basis.[34]

The right to fair hearing is therefore, sine qua non for every criminal trial under the innovative provisions of the ACJL of Edo State 2017. It is a cardinal principle in the administration of justice that justice should not only be done but should manifestly and undoubtedly be seen to be done. This is very fundamental in the adversarial or accusatorial system or procedure practiced in Nigeria. Thus, a trial which does not conform to the tenets of the requirements of fair hearing cannot be said to have passed the litmus test for fair trial.[35]

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32. See Ofapo V. Sonmonu (1987) 2 NWLR (Pt. 58) 587. See also Wilson V. AG. Bendel State (1985) 1 NWLR (Pt. 4) 572; A. U. Amadi V. Thomas Aplin & Co Ltd (1972) All NLR 413; Mohammed Oladapo Ojengbede V. M.O. Esan & Anor (2001) 18 NWLR (Pt. 746) 771

33. The right to be fairly heard is believed to have originated from the Garden of Eden, See Genesis, Chapter 3:1-24. See also R V. Chancellor, University of Cambridge (Dr. Bentley's Case) [1723] 1 Str. 557; Garba V. University of Maiduguri [1986] 1 NWLR (Pt. 18) 550; Adigun v. AG. Oyo State [1987] 1 NWLR (Pt. 53) 678

34. See Agbogu V. Adiche (2003) 2 NWLR (Pt. 805) 509 @ p. 531. See also Agbapounwu V. Agbapuonwu (1991) 1 NWLR (Pt. 165) 33 @ p. 40; Adegbesin V. The State (2014) 9 NWLR (Pt. 1413) 609 @ pp. 641 - 642

35. For a detailed discussion on the right to fair hearing in criminal trials, See 'Fair Hearing: Sine Quo Non under Nigerian Criminal Justice Jurisprudence' by Enobong Mbang Akpambang, Lecturer in the Department of Public Law, Faculty of Law, Ekiti State University

The principle of fair hearing or fair trial as enshrined in Section 36 (1) and (4) of the Constitution of Nigeria 1999 (as amended) is often illustrated by the twin pillar of justice expressed in the Latin maxims: **nemo judex in causa sua and audi alterem partem**[36] which principles as expressed are indeed integral and inseparable part of the fair hearing requirements as guaranteed by the Constitution. It is of crucial importance to note that the rule of fair hearing is not a mere technical doctrine but rather one of substance capable of overriding all provisions to the contrary in any law, whether substantive or adjectival.

SALIENT ATTRIBUTES OF FAIR HEARING IN CRIMINAL TRIALS[37]

There are some salient provisions in the Constitution of Nigeria 1999 (as amended), which are the irreducible minimum requirements to safeguard fair trial, namely: The Right to publicity of criminal trial; The Right to presumption of innocence; The Right of information of offence committed; Right to adequate time and facilities to prepare for his case; Speedy trial not on the altar of sacrifice of justice; in **Gopka V. Inspector General of Police[38]** where the accused was brought to court under a bench warrant to stand trial for offences of stealing and fraudulent accounting, he applied for an adjournment to enable him retain the services of a counsel to defend him. A short adjournment was granted to him until later in the afternoon. At the resumed hearing, counsel was not in court. He was subsequently convicted. On appeal, there was evidence before the court that any available counsel would have had to travel to court from the nearest town, a distance of about twenty three miles to the Court hence, the short adjournment was inadequate. The appeal was allowed and it was held that the accused ought to have been granted a longer adjournment to enable him engage the services of a legal practitioner.

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36. 'nemo judex in causa sua' meaning 'no one can be a judge in his own cause; and 'audi alterem partem' meaning let the other party be heard'

37. For a detailed provisions encompassing these attributes, See Section 36 (1) - (12) of the Constitution of Nigeria 1999 (as amended)

38. (1961) 1 All NLR 423,

The Right to counsel of his own choice; in the English case of **R. v. Mary Kingston**[39] the English Court of Appeal held that the failure of counsel briefed for the defense to attend court thus leaving the appellant to be tried as an unrepresented person is tantamount to depriving the appellant of the right which she had to be defended by counsel. Consequently, her conviction was quashed even on that ground alone; The Right to examination of witnesses.[40]

The Right to the Assistance of an Interpreter; in **Ajayi V. Zaria Native Authority,**[41] where there was evidence that the appellant did not understand the Hausa language in which the proceedings were conducted and the sworn interpreters were incompetent. The conviction of the appellant was set aside on grounds that he was not accorded fair trial; The Entitlement to a copy of the Judgment; The Right not to be tried on retroactive legislation; The Right against double Jeopardy through the plea of ***autrefois acquit* or *autrefois convict;*** *The* Right to enjoyment of pardon; in **Falae V. Obasanjo**,[42] where it was pointed out that the effect of a pardon is to make the offender a new man, ***novus homo*****,** to acquit him of all corporal penalties and forfeitures annexed to the offence. The court went on further to point out that under the Nigerian law, a ñpardonò and ñfull pardonò has no distinction and that pardon is an act of grace by the appropriate authority which mitigates or obliterates the punishment the law demands for the offence and restores the rights and privileges forfeited on account of the offence.

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39. (1984) 31 CR. APP. R. 183

40. See Ayorinde V. Fayoyin (2001) FWLR (Pt. 75) 483 @ p. 499, where it was held that natural justice requires that a party to a case must be given opportunity to put forward his case fully and freely and to apply to the court to hear any material witness and consider relevant documentary evidence with a view to reaching a fair and just decision in the matter.

41. (1964)NNLR 61.See also Zaria Native Authority V. Bakari (1964) NNLR 25 at 29.

42. (1999) 4 NWLR (Pt. 599) 476 @p. 488

the Right to remain silent and the Right not to be tried for offence and penalty not known to law.[43] It has been amply demonstrated in the forgoing pages of this paper that while the need for speedy trials in criminal cases is a sine quo non for the attainment of the constitutional requirement of trial within a reasonable time, the most fundamental objective of criminal trials, as indeed in all other trials, is justice. Thus, justice must never be sacrificed on the altar of any other consideration in the legal process, including speedy trial. It has often been said and it is true that ójustice delayed isô already ójustice deniedô, yet the converse is also true that ójustice rushedô contrary to the constitutional safeguards for fair trial, ós justice crushed.ô It is therefore, in striking the right balance between these two extremes, neither slowing down nor rushing justice, that lies true justice as envisaged under th7e ACJL of Edo State 2018.

It follows therefore, to attain expeditious dispensation of criminal justice, all stakeholders, including the Courts, the Law Enforcement Agencies, the Legal Practitioners, Victims and the offenders, must be careful to observe and religiously implement all the enabling provisions of the ACJL of Edo State 2018 in the administration of criminal justice in Edo State. Indeed all the safeguards against delays to engender fair hearing must be scrupulously observed if the purposes and key objectives of the various innovations introduced in the new law is to be attained to redress the mischief under the old regime of administration of criminal justice. In sum, the overriding need for speedy trial within the frame work of fair trial as guaranteed by the due observance of the right to fair hearing of the Defendant cannot be overemphasized as it is the soul of the new regime brought into being by operation by the new law.

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43. See Aoko V. Fagbemi,(1962) All NLR 400, where the accused was tried and convicted of the crime of adultery. On appeal, it was held, reversing the trial court's decision, that adultery was not an offence or penalized under the law in Southern Nigeria. See also Faith Okafor V. Lagos State Government & Anor (2016) LPELR – 41066 (CA) @ pp. 44 - 50, where I had cause to denounce in unequivocal terms the conviction and sentence of the appellant for contravention of the directive of the Governor of Lagos on restriction of movement on Sanitation day in Lagos.

TRIAL WITHIN TRIAL WITHIN TRIAL UNDER ACJL OF EDO STATE 2018

The concept of trial within trial[44] though not affirmatively shown to be of any particular legislative origin has been with us for quite some time and operated at optimal rate under the old regime of administration of criminal justice in Nigeria.

In this paper I shall consider the concept of trial within trial under two broad perspectives. Firstly, I shall consider it under the old regime of administration of criminal justice as regards what then governs admissibility and potency of ócconfessional statementô and did necessitated the conduct of trial within trial in criminal proceedings. Secondly, I shall consider it under the new regime of administration of criminal justice as regards what now governs admissibility and potency of ócconfessional statementô and would warrant the conduct of trial within trial in criminal proceedings today.

TRIAL WITHIN TRIAL UNDER THE OLD REGIME

The concept of trial within trial was developed to test the validity of incriminating confessional statement in order to ensure that a suspect, who under the law is presumed innocent, is not incriminated by the desperate act of law enforcement officer into forcefully accepting and admitting to a crime he did not commit. It is for this reason the provisions of the Evidence Act 2011 have stipulated rules of extracting statement, which by nature amounts to confession by a suspect as a safeguard of the rights of a suspect while under lawful custody when making a statement. It has thus, become a practice in our criminal proceedings that where there are allegations that a statement which amounts to confession had not been obtained from a suspect voluntarily, a thorough and independent probe is conducted by the Court at the trial of the Defendant to ascertain the validity of such a confessional statement in line with the requirements of the Evidence

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44. See 'The Concept of Trial within Trial' by Chinedum Gregory Ike - Okafor @ www.academia.edu

Act 2011 to enable the Court to either admit same, if it is proved to have been made voluntarily, or reject it, if it is not proved to have been made voluntarily by the Defendant. It is thus to ensure that a Defendant who alleges that the statement sought to be tendered by the Prosecution, though made by him, was made under duress or other vitiating factors that negatives his free will that a mini trial, commonly referred to as ótrial within trialô is conducted by the Court as an independent arbiter.

Curiously, there seems not to be any provisions in the Evidence Act 2011 specifically providing for the conduct of trial within trial in criminal trials in Nigeria except that it may be implied from the provisions of the Evidence Act 2011.[45] However, it would appear that since one aspect of the laws received in this Country was the English Common Law, the English procedure of a trial within trial was amongst the received laws in Nigeria.[46] It is therefore, for this reason the Courts in Nigeria had over the years used the English Common law procedure whenever there was the allegation by a Defendant that a confessional statement ascribed to him was not made voluntarily by him.[47]

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45. See Section 29 (2) (a) - (b) Section 29 (a- b) Evidence Act, 2011, which provides thus: "If, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant it is represented to the court that the confession was or may have been obtained – (a) By oppression of the person who made it, or (b) In consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section."

46. See Auta V. The State (1975) 1 All NLR (Pt. 1)165. See also Owei V. The State (1985)1 NWLR. (Pt. 3) 470; Ogbodu V. The State (1986) 5 NWLR (Pt. 41)294; Okaroh V. The State (1988) 3 NWLR (Pt. 11) 214

47. For the origin of this concept of trial within trial in Lagos State, See The Jury Law, Cap.58 Laws of Lagos State of Nigeria, 1973, which by Section 67 provides thus: "Where an argument or certain evidence takes place or is likely, to be about to take place and the judge is of the opinion that the accused must be unfairly prejudiced if such argument is heard in the presence of the jury, the judge may direct the jury to retire to their room during evidence."

In real practice, the requirement of trial within trial is principally used to prove beyond reasonable doubt that a confessional statement was made out of the free - will of the Defendant. Thus, since the only issue that would call for the conduct of a trial within trial is the question of voluntariness or otherwise of the confessional statement of the Defendant,[48] contrary to the diverse ways and manners objections are raised to the admissibility of a confessional in criminal trials, there are well accepted circumstances in which such objections cannot lead to the conduct of trial within trial by the Court, namely: where the objection is that the statement was not read to the accused before he signed it; that the signature or thumb print of the Defendant is not that affixed on the confession; that the Defendant is not the maker of the statement or that the statement was written by the Police for which the Defendant merely signed it.[49]

In law therefore, it is only when it is found that a confessional statement was not made voluntarily by the Defendant that it becomes worthless and inadmissible in evidence in a criminal trial[50], otherwise the issue would only go to the weight of evidence and a trial within trial need not be conducted by the Court.

PROCEDURE IN TRIAL WITHIN TRIAL

During a trial where the Prosecution seeks to tender the statement ascribed to the Defendant and if the statement turns out to be confessional in nature and is objected to

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48 See R V. Kassi & Ors 5 WACA 154. See also R V. Onabanjo 3 WACA 43; R V. Igwe (1960) 5 FSC 55; Queen V. Eguabor (1962) 1 All NLR 287; Owie V. The State (1985) 3 NWLR (Pt. 3) 470; Mohammed V. The State (2007) 13 NWLR (Pt. 1050)186

49. See Omit V. The State (1985) 1 NWLR (Pt. 3) 470. See also Nwangeomu V. The State (1994) 2 NWLR (Pt. 327) 380

50. See Emmanuel Eke V. The State (2011) 1 - 2 SC (Pt. II) 219 @ p. 270, where the Supreme Court per Rhodes - Vivour JSC., had opined inter alia thus: "A confessional statement found not to have been voluntary is worthless."

by the Defendant on the ground that it was not made voluntarily, it is incumbent on the Court to order and conduct a mini trial, commonly referred to as ótrial within trialô to determine whether or not the confessional statement of the objecting Defendant was made voluntarily.

At that juncture, the main trial must be suspended and the trial within trial is convened in which the sole issue is the voluntariness or otherwise of the confessional statement of the Defendant. The initial burden of proof is on the Prosecution who asserts the positive that the questioned statement was made voluntarily by the Defendant and therefore, should be admitted in evidence by the Court. The Prosecution shall prove to the Court beyond reasonable doubt that the confessional statement, notwithstanding that it may be true, was not obtained in a manner contrary to the stipulations of Section 29 (2) of the Evidence Act 2011. However, it is only when the Prosecution leads sufficient evidence to show prima facie that the objected statement was made voluntarily beyond reasonable doubt, then and only then would the burden of proving reasonable doubt, but on a balance of probabilities, would be shifted unto the Defendant.[51]

Thus, it would improper and indeed wrong for the Court to call on the Defendant to commence the proceedings in trial within trial to substantiate his allegation that the statement was not made voluntarily by him, since in law the onus of proof of the guilt of the Defendant lies on the Prosecution and never shifts throughout the criminal trial of the Defendant.[52] In law, such a proceeding would not only be irregular but would also

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51. See Section 135 (1), (2) & (3) of the Evidence Act 2011. See also Section 137 of the Evidence Act 2011, which provides thus: "Where in any criminal proceeding the burden of proving the existence of any fact or matter has been placed upon a defendant by virtue of the provisions of any law, the burden shall be discharged on the balance of probabilities."

52. See Gbadamosi V. The State (1992) 3NSCC 439, where the Supreme Court per Uche Omo JSC., had opined inter alia thus: "The conduct of this 'trial within trial' was irregular. He called upon the Appellant to give evidence first instead of the Prosecution."

amount to unfair trial of the Defendant and be liable to be set aside on appeal.

The role of the Court in a trial within trial is only to convene the mini trial so that the Prosecution would have the opportunity to prove the voluntariness of the statement it ascribed to the Defendant and by so doing, through credible evidence, succeed in disproving the assertion of involuntariness by the Defendant.

THE EFFECT OF TRIAL WITHIN TRIAL

At the conclusion of the trial within trial, the Court must evaluate the totality of the evidence proffered by the opposing sides and deliver its ruling one way or the other, either finding that the statement was made voluntarily as asserted by the Prosecution or was made involuntarily as alleged by the Defendant.[53] Whichever specific way the Court rules on the issues would have its own result on the admissibility of the statement. Where the Court rules in favor of the Prosecution, then the statement is admitted in evidence, but where it finds in favor of the Defendant, the statement is rejected in evidence. The main trial is then subsequently reconvened, the interlocutory or mini trial having been concluded with, and taken to its logical legal conclusion with the judgment of the Court rendered according to law on the evidence by the parties before the Court.

In sum, the conduct of trial within trial under the old regime of administration of criminal justice is the direct result of the requirement of the law that a Court must act only on legally admissible evidence and therefore, every party desiring to have a decision of the Court in his favour must lead only legally admissible evidence. Thus, for the Prosecution in a criminal trial to put into evidence the statement of a Defendant, which by nature is voluntary, it can only do so if either there is no objection to its admissibility on ground of its having not been made voluntarily or its voluntariness is proved in a mini trial, the trial

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53. See Emmanuel Eke V. The State (Supra), where Rhodes - Vivour JSC., had expatiated inter alia thus: "At the end of the trial within trial if the court is satisfied that the confessional statement was not voluntary, the said statement would not be admissible in evidence as an exhibit and the trial judge should rule accordingly."

within trial. In law, therefore, the responsibility to lead only legally admissible evidence contemplates a perspective where the evidence so received from the Defendant by the Police was made out of pure desire on his part to tell the truth and not being one borne out of threats, fear, unjustified hopes, weakness or any other circumstances which may cast doubt on the reliability of the confessional statement[54]

SOME SALIENT PRINCIPLES OF TRIAL WITHIN TRIAL[55]

The question of inadmissibility of a confessional statement must be raised promptly as soon it is sought to be tendered by the Prosecution.[56] In raising objections to confessional statement, the Defendant must be specific in tenor or language of his objection.[57] A confessional statement is inadmissible if same was obtained from a "question and answer" session with the Police.[58] Where the Defendant merely denies authorship of the confessional statement, trial within trial should not be conducted as same is merely a retraction and it must be borne in mind that a trial within trial cannot be conducted in the absence of the Defendant.[59] When the Defendant contends that his confessional statement was not read all over to him at the police station, it does not warrant a trial within trial.[60]

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54. For further consideration of the concept of 'trial within trial,' See "Trial within Trial: A Discourse" by Chief Godwin Obla SAN a paper delivered at a workshop organised by the Institute of Advanced Legal Studies, Abuja on 13/12/2012 @ www.oblaandco.com

55. See "24 Salient Principles of 'trial within trial' in Criminal Proceedings in Nigeria"by Umoru Theophilus Ikoojo @ https://emmanuellawattroney.blogspot.com; See also https://thenigerianlawyer.com

56. See Obinah John V. State (2013) LPELR -22197(CA).

57. See Sanni Abdullahi V. The State (2013) Vol .223 LRCN (Pt.2)151.

58. See Jimoh Salawu V. The State (2009) LPELR -8867(CA).

59. See Lateef V. FRN (2010) All FWLR (Pt.539)1171 @ p. 1190. See also Mohammed & Anor V. State (2015) LPELR - 25694 (CA)

60. See Owie V. State (1985) 1NWLR (Pt. 3)470.

Also when the Defendant contends that confessional statement was written for him to copy, a trial within trial is uncalled for.[61] However, since confession binds only the maker only a maker of a confessional statement or his counsel can raise objection to its voluntariness.[62] Objection to the Voluntariness of a confessional statement cannot be raised by the Defendant during his defence to invoke a trial within trial.[63] Where the Defendant is merely disputing the correctness of the content of the confessional statement, trial within trial is not necessary. The statement is thus admissible but the Defendant or his counsel will have an opportunity to revisit the statement and discredit the incorrect content during his defence.[64] Allegation by the Defendant that the statement was not read to him in open court does not call for a trial within trial.[65] A latter statement made by the Defendant at the Police station confirming that an earlier statement was made voluntarily does not dispense with the need for a trial within trial on the earlier statement.[66] The fact that Defendant was in court during trial within trial, notwithstanding the requirement that intending witnesses be out of hearing, does not make him incompetent to testify in his defence in the trial within trial.[67] Allegation by the Defendant that he was not "himself" when he made the confessional statement is not a ground for a trial within trial. [68]

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61. See Augustine Ibeme V. State (2013) 10 NWLR (Pt. 1362) 333.

62. See FRN V. Babalola (2015) All FWLR (Pt.785) 227.

63. See Obinah John V. State (2013) LPELR - 22197(CA).

64. See Nnabo Vs State (1992) 2 NWLR (Pt. 226)716.

65. See Anthony Nwachukwu V. State (2004) All FWLR (Pt. 206) 526.

66. See State V. Ajayi (1997) 5 NWLR (Pt. 505)382.

67. See State V. Ajayi (Supra).

68. See Lt Commander Steve Obisi V. Chief of Army Staff (2004) All FWLR (Pt.215) 193.

In law, generally failure to cross examine a witness on crucial point of fact may amount to acceptance of such fact by the adversary as true and therefore, the failure of the Prosecution to cross examine a Defendant during a trial within trial will amount to an admission that the allegation of involuntariness of the statement by the Defendant was true and it was not freely and voluntarily made.[69] A trial within trial cannot be terminated half way and be ruled upon since a decision based on incomplete evidence cannot stand.[70] An objection to admissibility of confessional statement on grounds of involuntariness must be raised timely and thus cannot be raised at the address stage of the main trial though it can still be attacked if already admitted in evidence as to its weight but not for the purposes of giving rise to a trial within trial at that stage. However, a confessional statement need not be tendered through the Investigating Police Officer as same can be tendered through any witness for the Prosecution who witnessed when the Defendant made the statement.[71]

In criminal trial once an objection is raised against a confessional statement it is wrong for the Court to proceed to admit same either "provisionally" or "conditionally" pending final Judgment.[72] Thus, an objection to the admissibility of a confessional statement cannot be raised for the first time on appeal.[73] The Court acts on admissible evidence only, thus the failure of a Court to conduct a trial within trial where the issue of voluntariness is raised by the Defendant would render it inadmissible.[74]

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69. See Adelarin Lateef V. FRN (2010) All FWLR (Pt.539)1171.

70. See State V. Gwangwan (2015) 13 NWLR (Pt.1477)600.

71. See Lawrence Oguno V. State (2013)15 NWLR (Pt.1376)1.

72. See State V. Salawu (2011)8 NWLR (Pt.1279) 580.

73. See Oseni V. State (2012) 49 NSCQR 1190.

74. See Giki V. State (2018) LPELR - 43604 (SC). See also Obidiozo V. State (1987) 4 NWLR (Pt. 67) 48; Emeka V. The State (2001) 14 NWLR (Pt. 734) 666

In **Mohammed & Anor V. State.**[75] I had cause, in my contribution to the leading judgment by **Sankey JCA.,** to reiterate the finer principles of law governing admissibility of confessional statements, objection to its admissibility and conduct of trial within trial in criminal trials inter alia thus:

> ***"The Appellants' counsel had drawn the attention of this Court to the evidence of the Appellants before the court below indicating that they were tortured by the Police into making their statements and contended that such facts within the knowledge of their counsel ought to have warranted an appropriate objection on grounds that the statements were not obtained involuntarily as would have necessitated a trial within trial by the Court below. I think it needs to be pointed out at once that trials are not conducted in the minds of an accused or his counsel as trial Courts do base their decisions or actions on the facts and evidence brought their attention either on evidence or by information in the open Court. Indeed, there is no art to find the mind's construction on the fact. At the stage these statements were sought to be tendered by the Respondent, the Court below had no other means of knowing what was either in the minds of the Appellants or their counsel or what they had told their counsel other than the facts placed before it in the objection by their counsel on the ground that the statements were not made by the Appellants and no more. The issue of the statements not being made voluntarily by the Appellants was never raised by the Appellants' counsel and the Court below had no business either speculating so or making an order for trial within trial. In considering whether to admit a confessional statement of an accused person, the law is that it does not become inadmissible merely because the accused person denies making it, as in the instant case. See Alabi Shittu V. The State (1970) All NLR 233...However, where, as in the instant case the Appellants took the earliest opportunity at the trial when the statements were sought to be tendered in evidence to deny making them, the law is that such denial, which amounts to a retraction, though not affecting the admissibility of the statements in evidence, may lead weight to the denials by the Appellants, it is not enough reason for the Court below to ignore the confessional statements of the Appellants. See Solomon Akpan V. The State (1992) 1 NWLR (Pt.248) 1...A confession, under our criminal jurisprudence if voluntary is deemed to be relevant facts as against the person who makes it only. Accordingly, voluntary confession is admissible in evidence. A confession to be inadmissible, it must be shown not to be voluntarily made***

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75. (2015) LPELR - 25694 (CA) @ pp. 49 – 51 per Georgewill JCA.

made or caused by inducement, threat or promise from a person in authority. See Richard Igago V. The State (1999) 14 NWLR (Pt.637) 1...The position would have been different had the objection been grounded on the statements not being made voluntarily by the Appellants, which would have necessitated a trial within trial before the Court below. However, in so far as this latter scenario was not what played out before the Court below, the Court below was on very firm ground not to have ordered a trial within trial. See Adekanbi V. AG.Western Nigeria (1966) 1 All NLR 47...Procedurally, the proper stage to raise the issue of the statement of an accused person not being made voluntarily is at the stage it is sought to be tendered in evidence by the prosecution at the trial. It is not an objection to be raised either at the stage of the defense evidence or even on appeal for the first time. At those stages, it has become too late in the day to raise such a challenge to the admissibility of a confessional statement. It is akin to bolting a cage after the bird had flown away out of the cage. It is indeed an exercise in futility".

TRIAL WITHIN TRIAL UNDER THE NEW REGIME

Whereas what governs both admissibility and potency of ócconfessional statementô as would warrant the conduct of trial within trial are fairly defined under the old regime of administration of criminal justice on which the only determinant parameters are those set out in the Evidence Act 2011, it is not so any longer under the new regime of administration of criminal justice in Edo State today by virtue of the ACJL of Edo State 2018. Whilst admissibility of confessional statement under the new regime is still a function of the provisions of the Evidence Act 2011, being a Federal Legislation on an area within the exclusive legislative list, the issue of the potency of an admitted confessional statement is now governed by the new regime of administration of criminal justice.

Under the new regime it is envisaged that the prevalence of trial within trial, as it used to be under the old regime of administration of criminal justice, would greatly reduced. This is because under the new regime if the strict procedure prescribed for the taking of statement of suspect is scrupulously followed, it would obviate the need, in most cases, for trial within trial. There is a paradigm shift under the new regime requiring the presence of the legal practitioner of the suspectôs choice and or video recording of the making of the statement by the suspect which would allay and assuage the fears of

involuntary confessional statement that hitherto characterized the taking of statement of suspects under the old regime. Thus, in a criminal trial under the new regime where the Defendant does not raise the issue of involuntary confessional statement, as prevalent under the old regime, there would be no need to resort to a trial within trial.

However, under the new regime that would still not be the end of the matter as the confessional statement, though validly admitted, would still have to pass the stringent test of compliance with the provisions of Section 17(1) - (3) of the ACJL of Edo State 2018 as regards taking of statement of suspect by the Police and other law enforcement agencies to be of any potency in the overall assessment and evaluation of the totality of the evidence by the Court. In other words, where a Defendant admits to have voluntarily made a confessional statement, which is thereby admissible without any much ado and without any need for the conduct of trial within trial by the Court, if it turns out in the trial that the said confessional statement had been obtained in breach of the provisions of Section 1792) of the ACJL of Edo State 2018 requiring the presence of the legal practitioner of the suspect and or staff of the Legal Aid Council or of Civil Society Organization of a Justice of the Peace at the taking of the confessional statement, if he so elects under Section 17(3) of the ACJL of Edo State 2018 or where the Officer taking the statement fails to inform him of his right to so elect, then its potency would be greatly affected and it thus would indeed be rendered impotent. This has been the consistent view of the Court of Appeal while interpreting the equivalent provisions of the ACJL of Lagos State 2011 and, in my view, a consideration later in this paper of some of these decisions of the Court of Appeal would be apt and suffice to demonstrate this position of the law under the new regime of the administration of justice in Nigeria, including Edo State and all other States of the Federation where the ACJA 2015 has been domesticated.

At any rate, if the ultimate aim of any of the provisions of the ACJL of Edo State 2018 is to determine on different criteria the admissibility or otherwise of a ócconfessional statementô then it would be in direct conflict with the provisions of the Evidence Act 2011 as well as being ultra vires the powers and competence of the Edo State Legislature

and would therefore, be void both to the extent of the inconsistency and for the legislative incompetence of the Edo State Legislature.

PROPER JUDICIAL APPROACH TO CONFESSIONAL STATEMENT NOW

In the administration of criminal justice, one of the key steps in the investigation of crimes is the recording of statement of suspects. While the recording of statement of a suspect not amounting to confessional statement poses no difficulty as regards its admissibility, the recording of statement amounting to a confessional statement has always posed some difficulties to both the Police and the Courts. Thus, in a society were confessional statement seems to the easiest way out for investigating authorities rather than real spade work done in investigating all aspects of the case and arriving at the truth of the matter, care must be taken by the Courts to ensure that the strict provisions of the ACJL of Edo State 2018 prescribing minimum standards for taking statement of a suspect are scrupulously observed by the law enforcement agencies. The ACJL of Edo State has provisions[76] dealing exclusively with the issue of recording of statement of a suspect. However, under Section 9 (3) of ACJL of Lagos State 2011, the duty to video record confessional statement is on the Police, which provision, in my view, offers a more acceptable model for the protection of the suspect from the whims and caprices of the Police as it is intended to avoid contentions over admissibility of confessional statements

Thus, under the ACJL of Lagos State 2011 such a statement obtained against the salient provisions of the law are not inadmissible but of no potency and therefore, goes to no legal effect against the Defendant in a court of law even though admissible in evidence. These are no doubt very laudable innovations but they do not, in my view, offer any enforceable protection of the suspect against forced or contrived confession by the Police or other arresting authority as clearly and commendably offered by the provisions of

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76. See Section 17(1) - (3) of the ACJL of Edo State 2018

Section 9 (3) of the ACJL of Lagos State 2011, which provides as follows:

> ***"Where any person 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 such statement is recorded on video and the said recording and copies of it may be produced at the trial provided that in the absence of video facility, the said statement shall be in writing in the presence of a legal practitioner of his choice."***

In ***Mokelu V. Federal Commissioner for Works and Housing***[77] the ***Supreme Court per Madarikan JSC.,*** had interpreted the word ómayô to mean inter alia thus:

> ***"'May' is an enabling or permissive word, in the sense that it imposes or gives discretionary or enabling power. But where the object of the power is to effectuate a legal right, 'may' has been construed as compulsory or as imposing an obligatory duty."***

Thus, while under the ACJL of Edo State 2018 non compliance with the provisions of the relevant section would not negatively or adversely affect the potency of a confessional statement obtained by the Police or other arresting authorities in breach thereof, non compliance with the provisions of Section 9 (3) of the ACJL of Lagos State 2011 will render impotent and of no legal effect any such confessional statement obtained by the Police or other arresting authorities in breach thereof.

In **CA/L/581C/2016: Paul Eneche V. The People of Lagos**[78] I had cause to consider the equivalent provisions of Section 9 (3) of the ACJL of Lagos State 2011 and held inter alia thus:

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77. (1976) 3 SC 60 (Reprint)

78. Unreported judgment of the Court of Appeal, Lagos Division delivered on 20th April 2018,

"….the most crucial question for consideration under issue two is whether the court below was right to have accorded potency to Exhibit H on the face of the glaring non compliance with the provisions of Section 9(3) of the ACJL of Lagos State 2011? I shudder to think how such a mandatory provision of the law made to safeguard the right of the citizen, such as the Appellant, alleged to have voluntarily confessed to the commission of a crime as heinous as Armed Robbery and which upon conviction carries the death penalty, can be lightly ignored by a trial court as being merely technical and was not to be allowed to defeat the cause of justice? This statutory provision is clear and without any ambiguity. It is also both mandatory on the Police to comply with it and incumbent on the court below to give effect to it by the use of the word "shall" therein, which clearly underscores the compelling nature of the provision, as novel as it appears but in sync with what obtains in civilized and advanced criminal justice system in other climes, in the Administration of Criminal Justice Law of Lagos State 2011. See John V. Igbo - Etiti LGA (2013) 7 NWLR (Pt. 1352) 1 @ p. 15, on the use of the word "shall" in an enactment…Happily, the effect of non compliance with Section 9(3) of the ACJL of Lagos State had in recent times inundated this Division of this Court in several decided cases and this court has risen to the occasion in holding consistently that a breach of this mandatory provision, though not affecting the admissibility of such improperly obtained confessional statement since admissibility of evidence is the function and within the purview of the Evidence Act 2011, renders such an improperly obtained confessional statement of no potency or efficacy and thus carries no weight in the determination of the guilt or otherwise of an Accused person in a criminal trial in Lagos State. See Joseph Zhiya V. The People of Lagos State (2016) LPELR - 40562"

It is therefore, my candid opinion that under the new regime of the provisions of the Section 17(1) - (3) of the ACJL of Edo State 2018, the law is that while the issue of admissibility of a confession is and remains a subject of the relevant provisions of the Evidence Act 2011, the issue of its potency or efficacy is the subject of the relevant provisions of the ACJL of Edo State 2018. Thus, these provision being a pre - trial

procedural provision merely stipulates how a confession should be obtained from a suspect by the Police or other arresting authorities so as to be potent and consequently, a failure to comply with them would render a confessional statement so improperly obtained, which though still admissible in evidence if voluntary by virtue of Sections 27, 28 and 29 of the Evidence Act 2011, impotent, invalid and of no legal effect. I also hold the firm view that it was within the legislative competence of the Edo State House of Assembly to make procedural laws to foster expeditious adjudication in criminal proceedings in the State.[79] It follows therefore, that these provisions of the ACJL of Edo State 2018 do not conflict with the provisions of Sections 27, 28 and 29 of the Evidence Act 2011 since they do not affect admissibility of confessional statement.[80]

A calm look at the provisions of Section 17(1) - (3) of the ACJL of Edo State 2018, though it does not go far enough as in the equivalent provisions of Section 9(3) of the ACJL of Lagos State 2011, shows that it is so simple to be complied with by all concerned involved in the investigation and prosecution of persons for offences allegedly committed by them and therefore, every and any impartial law enforcement agency of the Government desirous of seeking only justice and not persecution of any person suspected of having committed an offence at all cost would find this salient provisions very easy to be complied with without making any fuss about it. It is a provision brought in to cure the mischief of involuntary confession being passed off as voluntary confession before the court. I therefore, have no difficulty suggesting an amendment to Section 17(2) - (3) of the ACJL 2018 of Edo State in line with Section 9(3) of the ACJL of Lagos State 2011.

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79. See Section 4 (7) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

80. See FRN V. Iweka (2012) 3 NWLR (Pt. 1341) 288 @ p. 316.

A CRITIQUE OF THE DECISION OF THE SUPREME COURT IN THE STATE V. SANI:[81] AN EMPHATIC RESTATEMENT OF THE SACROSANCT NATURE OF THE RIGHT TO FAIR HEARING, PARTICULARLY IN CRIMINAL TRIALS

I was also requested, going by the second arm of the topic of discourse in this paper, to do a critique on the decision of the Supreme Court in **The State V. Sani**[82] in relation to the issue of trial within trial within the context of speedy trial in the administration of criminal justice. I must confess that at first glance I had trepidation over the scope of critique intended or covered by the topic assigned to me to prepare and speak on. This is because being a Justice of the Court of Appeal, I am most unsuited to criticise a decision of the apex court, which a practising legal practitioner, of even one year post call or a law teacher of whatever standing, can so easily and readily do. It is thus, to ascertain what is really required of me that I took the first step of looking at the meaning and scope of the word ócritiqueô, which could easily pass for the word ócriticism.ô I had to take this first critical step because understandably while I consider myself in a safe position to offer a critique, if the word ócritiqueô does not connote any form of criticism and not amounting to impertinence, of a decision of the apex court in the land, with whose decisions I am absolutely bound without any exceptions. It is thus to avoid any misunderstanding arising from any misapprehension of the real intent and scope of the assignment thrust on me by reason of the second arm of the topic of discourse in this paper that I had made my first port of call the Dictionary meaning of the word ócritiqueô as opposed to the word ócriticismô ***ex abundandi cautela*** - for the avoidance of doubt!

The word ócritiqueô is commonly defined as a detailed analysis and assessment of something especially a literary, philosophical or political theory. It could also be defined either as a written examination and judgment of a situation or of a personôs work or idea

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81. (2018) 280 LRCN 198

82. Also reported in (2018) LPELR 43598 (SC)

or as an article or an essay criticizing a literary or other work detailed evaluation, review.[83] In all therefore, the word ócritiqueô is a method of disciplined systematic study of a written or oral discourse and truly involves merit recognition.

It is thus only in the sense of a detailed analysis involving merit recognition in the decision of the apex court that I intend, and am emboldened, to proceed to carry out a critique of the decision of the Supreme Court in **The State V. Sani**[84] as required of me going by the second arm of the topic for discourse in this paper.

A BRIEF STATEMENT OF THE FACTS

The Respondent as the 2nd Defendant was arraigned before the Katsina State High Court on two counts alleging that on or about the 22/7/2004 around 2:50 hours at Tsame quarters in Daura, Daura Local Government Area of Katsina State committed the offence of armed robbery by breaking into the house of one Salisu Lawal and Hadiza Salisu while armed with dangerous weapons, sticks, knives, sword, gun, attacked them, threatened to kill them and robbed them of their valuables and cash and thereby committed an offence punishable under Section 1(2)(a) of the Robbery and Firearms Act, Cap 398 Laws of the Federation of Nigeria 1990.

The facts as revealed in evidence were that Salisu Lawal, PW3 lives with his wife Hadiza Ibrahim, PW4 in Nasarawa Central in Daura. On 22/7/2004 at about 3am he was asleep with his wife at home and when they woke up they heard some persons who turned out to be robbers opening the door of their room. Five persons eventually entered the room armed with knives, sticks, gun and a sword.

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83. See English Oxford Dictionary; Collins English Dictionary; Dictionary.com.

84. (Supra)

They searched for valuables and carted away VCD, Video, Iron, Radio, N100, 000. 00 and proceeded to PW4ôs room where they stole two bundles of wrappers, lace, shoes, two

bottles of perfume and left without harming anyone. They spent about two hours ransacking PW3ôs home. They made their escape thereafter. The Respondent was not arrested at the scene of the crime neither were any of the robbers. The Respondent was arrested after the 1st Defendant implicated him as one of the armed robbers. The Respondent made a confessional statement.

The Respondent pleaded not guilty to both counts. In proof, the Prosecution opened its case on 27/7/2005 and called five witnesses. The Respondent gave evidence in his defense but did not call any witness. A trial within trial was conducted but a strange procedure was adopted by the learned trial judge. In a Ruling delivered on the trial within trial the Respondentôs statements were admitted as Exhibits F and F1. Aside from exhibits F and F1, Exhibit A, Stick, Exhibit B, Sword, Exhibit C, Stick and Exhibit D Hoe handle, Exhibit E and E1 statement of the 1st Defendant were tendered, but none of these were linked to the Respondent.

In a considered judgment delivered on 7/5/2007 the learned trial judge sentenced the Respondent and his co - accused to death. Dissatisfied with the judgment of the trial Court, the Respondent appealed to the Court of Appeal, which in its judgment delivered on 22/12/2010 allowed the appeal and set aside both the conviction and sentence of death passed on the Respondent. Consequently, the Respondent and his co accused were both acquitted and discharged. Dissatisfied with the judgment of the Court of Appeal, the State appealed to the Supreme Court.

THE DECISION OF THE SUPREME COURT

On 19/1/2018, the Supreme Court of Nigeria delivered its judgment and held, **per Rhodes - Vivour JSC.,** who delivered the leading judgment, inter alia thus:

> ***"…ISSUE 3: Whether the Hon Justices of the Court of Appeal were right when they held that the process/procedure adopted by the trial judge compromised the Respondent's right to fair hearing…The Court of Appeal agreed with the submission and said that:***

> ***óIn the instant case, it's quite evident from the record of appeal that the proceedings regarding both the trial within trial and this main trial were actually lumped together. The Appellants closed their defense on 27/12/2006. On 12/2/2007, both counsel informed the Court that they had filed their respective joint written address for both trial within trial and the main trial… By virtue of the totality of the evidence adduced in the irregular proceeding adopted by the learned trial judge, there's no doubt that the Appellants have been subjected to a great disadvantage, this compromising the well cherished fundamental right to fair hearing thereof…The circumstances surrounding the entire trial of the appellant have resulted in an unfortunate travesty of justice, and this outrageous…. Thus both issues 2 and 3 are hereby resolved in favor of the Appellant (respondent in this Court).' …….***

I must seriously comment on the conduct of a trial within trial (mini trial)…On 27/7/2005 Cpl Abu Musa gave evidence as PW1. The confessional statement of the 1st accused person was to be tendered through him when counsel for the 1st accused person objected on the ground that the statement was made after threat and intimidation. Mr. Sabi'u counsel for the prosecution applied for trial within trial. The learned trial judge ordered that trial within trial will be conducted on the next adjourned date. 'Mr. Sabi'u: I will stop this witness until the trial within trial is conducted then he will conclude his testimony.' The Court stopped hearing testimony from PW1 and started hearing testimony from PW2. PW2 concluded his testimony on 27/72005 and further hearing was adjourned to 26/9/2005 and again to 19/10/2005 with no evidence taken. On 19/10/2005 PW3 gave evidence. The trial was adjourned to 7/11/2005 for continuation of hearing in trial within trial. (It must be noted that trial within trial had not commenced). The first witness in the trial within trial gave evidence on 7/11/2005. It was Cpl Abu Musa, who gave evidence was PW1. He gave evidence in the trial within trial as PWA. After he gave evidence PWB, DSP Adamu A. Chibok also gave evidence on 7/11/2005 and concluded on the same day. The case was adjourned to 12/12/2005 for continuation of hearing. PW4 then testified and concluded his evidence. Thereafter the case dragged on beset with several adjournments due to absence of witnesses, absence of accused persons and or counsel. There were adjournments from 19/1/2006 to 14/2/2006, to 21/3/2006, to 17/4/2006, to 10/5/2006 and to 5/6/2006, to 10/7/2006, 27/9/2006, 4/10/2006, 18/10/2006 and then 22/11/2006

when PW5 was taken. It was he who took the statement of the appellant. In an attempt to tender the appellant's statement there was objection from appellant counsel that the statement was obtained under duress. Mr. Sabiu applied for trial within trial to determine the voluntariness or otherwise. He applied and was granted permission to take PW5 as first witness for trial within trial. PW5 gave evidence as PWA. PWB was then called on 18/12/2006. After he concluded evidence further hearing was adjourned to 27/12/2006. On that day Mr Sabi'u informed the Court that he had called his witnesses in the trial within trial and that he had only one witness to call in the main trial. The learned trial judge ordered the defense to open defense in trial within trial. The 1st accused person gave evidence as DWA. DWB (i.e the appellant gave evidence) DWC and DWD also gave evidence. At the end the learned trial judge ordered that the testimony of DWA, DWB, DWC and DWD be and is hereby adopted as the testimony of DW1, DW2, DW3 and DW4. Then DW4 was taken…after DW4 concluded her testimony this is what transpired. 'Court:- When do you wish to exchange your address for adoption.' There is no record of proceedings on 21/2/2007, 12/3/2007 and 19/3/2007, but on 20/4/2007 a Ruling on the no case submission was delivered. The penultimate paragraph reads:

> *'This Court will consider the said statement in the course of writing its judgment and that is when it will accord the said statements probative value if any. In the meantime they are hereby admitted in evidence as Exhibit E and E1 and exhibit F and F1 for the 1st accused Babangida Gambo and the 2nd accused Abdullahi Sani respectively.'…..*

After the Ruling was read, learned counsel for the prosecution, Mr. Sabi'u adopted his address in the main trial. Judgment in the main trial was delivered a week later, i.e. on 7/5/2007. The Court of Appeal condemned the procedure adopted by the trial Court for the trial within trial. It is very well settled practice in this country that where on the production of a confessional statement it is challenged on the ground that the accused person did not make it at all, the question of whether he made it or not is a matter to be decided by the learned trial judge in the course of preparing the judgment. In such circumstances objection made by counsel should be disregarded by the judge as such objection does not affect the admissibility of the statement and so the statement should be admitted as the issue of voluntariness of the statement does not arise for a decision.

But where the admissibility of the statement in evidence is objected to on the ground that it was not voluntary in that the confession was beaten out of the accused person, what is attacked is the admissibility in evidence of the confessional statement and a trial within trial or mini trial must be held….The sole purpose of a trial within the main trial is to test whether the confessional statement to be tendered by the prosecution was made voluntarily by the accused person or whether he was forced or induced to make it. Once a trial within trial is ordered by the trial judge the main trial is suspended until the conclusion of the trial within trial. The trial within trial commences with the state calling witnesses, usually police officers who would be examined under oath by the state and cross - examined by the defense. The witnesses for the state are to satisfy the Court that the accused person made the confessional statement voluntarily while the defense counsel is to show the contrary i.e that the accused person was forced or induced to make the statement. After the state concludes its evidence the accused person goes into the witness box to explain to the Court how he was forced, or induced to make the statement. He may call witnesses, but they can only be called after he has given evidence. I have reproduced extracts from proceedings in the trial Court on the mini trial. It is so clear that the learned trial judge made no attempt to follow well laid down procedure in conducting the trial within trial. It was wrong for proceedings in the trial within trial and the main trial to be taken together, and allowing the accused person no time whatsoever after the Ruling on the trial within trial was delivered before delivery of judgment in the main trial. Such a procedure is unknown to criminal procedure and prejudicial to the accused person even if his counsel consents to such strange procedure. The overall interest of justice is clearly in question. Lumping the trial within trial with the main trial clearly compromised the respondent's right to a fair hearing as he was denied the opportunity after the Ruling to decide how to go about his defense before judgment was delivered. The accused person should not be denied that right even if his counsel acquiesced to this irregular procedure. This is premised on the position of the law that fair hearing in a criminal trial cannot be waived. It must never be forgotten that this is a criminal trial that carries the death penalty. Substantial justice must be seen to be done. Reliance on technicalities would definitely lead to injustice. An accused person must always be

given the benefit of the doubt when there are blunders in the case of the prosecution. None compliance with well laid down procedure would never result in the Court achieving substantial justice. We are not satisfied with the procedure adopted by the learned trial judge in the conduct of the trial within trial. The trial within trial is accordingly declared a nullity. Exhibits F and F1 which were admitted in evidence in the trial within trial were wrongly admitted as the procedure adopted was wrong. After considering all the arguments we think that the Court of Appeal could have come to no other conclusion, and that the appeal must be dismissed. This appeal is hereby dismissed. The judgment of the Court of Appeal is allowed. This in effect means that the appellant is acquitted on both counts and discharged from Court."[85]

THE STATE V. SANI[86]: AN EMPHATIC RESTATEMENT OF THE SACROSANCT NATURE OF THE RIGHT TO FAIR HEARING, PARTICULARLY IN CRIMINAL TRIALS

Having carefully read through the facts of this case and studied the decision of the apex Court, I am of the humble view that the judgment was a clear and emphatic restatement of the well settled principles of law governing the admissibility and inadmissibility of statements obtained from a Defendant in which there is an admission of guilt of the offence alleged. The apex Court meticulously went through the very peculiar facts of this case, the proceedings adopted by the trial Court, considered the views of the Court of Appeal and in its unquestionable repository of wisdom, in so far as the position of the law under Nigerian Law and jurisprudence is concerned, and emphatically restated and reiterated on when trial within trial is necessary, the proper procedure for its conduct and the effect of its outcome on the substantive criminal trial.

This decision is the most recent of all the decisions of the apex Court, just baked fresh from the oven, on the place of trial within trial in the administration of criminal justice in Nigeria. It is to be carefully studied by all Courts lower in the rung of the hierarchy of Courts in the land to be faithfully and scrupulously applied under the time tested doctrine of stare decisis. A trial within trial, as emphasized by the apex Court in this judgment,

being a mini trial, cannot be conducted alongside or side by side with the main or substantive trial of the Defendant. The latter must await the conclusion of the former. It would thus be incongruous and amounting to gross irregularity to conduct a trial within trial alongside the substantive trial.

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85. Per Rhodes - Vivour in The State V.Sani (2018) LPELR – 43598 (SC)

86. (2018) LPELR - 43598 (SC)

The above scenario would arise, as amply demonstrated in the judgment, where the Defendant while supposedly giving evidence in the trial within trial is also taken as giving evidence at the same time in his defense in the main trial. This is because by its very purport and purpose a trial within trial, for determining whether a confessional statement of the Defendant was made voluntarily and ought to be admitted in evidence or was made involuntarily and ought to be rejected in evidence, must come to its legal conclusion of a finding one way or the other by a ruling of the trial Court before the main trial, which must be temporarily put on hold, is revived for continuation of the substantive trial of the Defendant.

Thus, a failure to observe this stringent procedure culminating into a wrongful admission of the confessional statement of the Defendant would, as held by the apex Court and with which I am bound, result into a nullity of the entire proceedings in the trial within trial, which will ultimately affect the outcome of the substantive trial itself and thereby render as nullity the entire trial and conviction of the Defendant. Indeed, this is too costly for trial Courts to indulge in after all the efforts of conducting a trial from arraignment to hearing to judgment, all amounting to a nullity and an otherwise guilty Defendant goes scot free for having been denied of his right to a fair trial, which is well rooted in the observance of the sacrosanct right to fair hearing of the Defendant as constitutionally guaranteed to him by the Constitution. óA wordô it is often said ósis enough for the wise

and prudent judge.ô The apex Court has spoken once and twice I have heard that trial within trial is a very stringent procedure that must be scrupulously observed to safeguard the enshrined rights of the Defendant to both fair trial and fair hearing in criminal trials in Nigeria.

However, assuming, notwithstanding the bungling of the trial within trial procedure, the trial Court had found the Defendant not guilty and had discharged and acquitted him and it was the Prosecution that had appealed against the acquittal, complaining against amongst others, the bungled trial within trial, would the result still be the same, that is would the trial still stand nullified? In other words, is the Prosecutor also equally entitled to the protection of the law as regards the right to fair hearing as the Defendant? Does Section 36 (1) of the Constitution offer any protection to the Prosecution? How about Section 36(4) of the Constitution, does it offer any guarantee to the Prosecution in criminal trials? I think Section 36(4) of the Constitution clearly does not! This is so because the very tenor of the provision is about a person standing trial and not the Prosecution. However, as to the applicability of Section 36(1) of the Constitution, I hold the view that, it does afford protection to both the Defendant and the Prosecution and a breach of it either way would render the trial a nullity at the behest of any of the parties whose right to fair hearing is breached by the Court.

Most importantly, I find the all the statements of law in this judgment on all facets of the concept and application of trial within trial under the Nigerian Criminal Law jurisprudence as very profound and all encompassing as it laid to rest some misconceptions in the procedures for conducting a trial within trial in criminal proceedings in Nigeria as brilliantly demonstrated in the decision of the Supreme Court in **The State V. Sani.**[87]

SENSITIZATION AND ENLIGHTENMENT OF ALL STAKEHOLDERS

> ***"And thou shall teach them diligently unto thy children***
> ***and shall talk of them when thou sittest in thine house,***

and when thou walkest by the way, and when thou liest down, and when thou risest up" [88]

The consensus is that the ACJL of Edo State 2017 is a laudable innovation to the hitherto moribund and retrogressive system of administration of criminal justice in Edo State. The common hope is that these innovations would achieve the cardinal objectives of the new

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87. (2018) LPELR - 43598 (SC)

88. See Deuteronomy 6: 7 (KJV)

regime introduced by the new law. Yet, a lot of what can be achieved and how soon will depend largely on how the law is understood, embraced, applied and implemented by all the relevant stakeholders in the administration of criminal justice in Edo State.

To accomplish the above, the very first step is an all out sensitization and enlightenment campaign to all strata of stakeholders and the general populace on the provisions and workings of the ACJL of Edo State 2018 so that they can own its observation, implementation and effectiveness in the society. The Executive, the Legislature, the Judiciary, the Nigerian Bar Association, the Police, the DSS, the EFCC, the ICPC, the Prisons and all other Security Agencies, the Non Governmental Organisations and the general public must all join hands together to consciously ensure strict observance and compliance with the provisions of the ACJL of Edo State 2018 and then and only then can I see everything turning around for the good in the administration of criminal justice sector in Edo State.

The people of Edo State must know their rights under both the Constitution of the Federal Republic of Nigeria and the ACJL of Edo State 2018 and they must be encouraged and be allowed to insist on the strict observance of these rights by the relevant authorities and agents of Government. The Courts must be firm and be purposive in the interpretation of the provisions of the ACJL of Edo State 2018 for it to make any meaningful impact and

ensure an effective and efficient administration of criminal justice in Edo State brought about by the innovative provisions of the ACJL of Edo State 2018 vide Section 493 thereof by which the Criminal Procedure Law, Laws of Bendel State 1976 as applicable in Edo State was repealed and brought to an end.

THE MOST RADICAL PROVISION OF ACJL OF EDO STATE 2018

In bringing this paper to a close, I cannot but pause to observe that one of the most radical, which perhaps is being introduced for the first time into the Nigerian Criminal Law jurisprudence, is the provision of Section 402(1) of the ACJL of Edo State 2018 by which the punishment of death by lethal injection has been introduced for conviction on capital offences. It is hope that the administrators of the system of administration of criminal justice in Edo State would take time to under study societies where this form of capital punishment is being carried out to understand the challenges inherent in the application of this radical provision of the law. I shall say no more on this!

APPRECIATION

I have within the time I was requested to prepare and present this paper attempted to express my personal thoughts and my understanding of the topic I was requested to prepare in the most humble way I can. I have in the course of preparing this paper taken time to read various articles and papers by several authors and I express my gratitude to all those authors and also hereby duly acknowledge all of them. However, I take full responsibility for all shortcomings in this paper. Yet, I do hope I have in my little way kept the faith in line with the high expectations of the Organizers of this One Day Workshop on the ACJL of Edo State in inviting me to address this grand gathering of distinguished men and women of the Bench and the Bar and other critical stakeholders in the criminal justice sector in Edo State and beyond.

I do not claim or pretend to have covered the field on the topic of discourse for this One Day Workshop as such a task is certainly beyond the scope and time available to me to prepare and Present this paper. However, if I have in these few pages of this paper

stimulated the interest, aroused curiosity and wetted the appetite of participants on the legal issues involved in this paper as could lead to a lively and well informed discussions, purposive interpretation and focused implementation of the ACJL of Edo State 2017 within the length and breadth of Edo State, then on my part the task, which at first seem herculean, has been faithfully and humbly discharged.

I therefore, appreciate the Chief Judge of Edo State, **Hon Justice Esohe Frances Ikponmwen, FCJEI.,** for personally inviting me to prepare and present this paper and to all my lords, the Hon Judges of the High Court of Edo State, their Worships, the Magistrates of the Edo State Magistracy, their Honours, the Presidents of the Customary Courts of Edo State and all other Stakeholders in the Administration of Criminal Justice Sector, do accept my deepest appreciation for your presence and for your patience throughout my presentation of this paper.

Above all, I give all thanks and praise to the one and only Supreme God, by whose grace and mercy we are all alive to see this day and to participate in this One Day Workshop here in the ancient and sprawling Benin City! I am done!

Sir Biobele Abraham Georgewill, JCA, DSSRS, KSC.

Justice, Court of Appeal of Nigeria,

Lagos Division, 26th Day of October 2018