PARADIGM SHIFT IN RECORDING OF CONFESSIONAL STATEMENT UNDER THE ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015- CASE LAW REVIEW OF *FRN v NNAJIOFOR*[1] [2]

Abstract

Before the landmark judgment of the Supreme Court delivered on Friday, the 1st day of March, 2024 in FRN v Nnajiofor (Suit No: SC.353C/2019), the provisions of section 15(4) and 17(2) of the ACJA, 2015 that mandate law enforcement agencies obtaining confessional statements to record them electronically and in the presence of the lawyer to the defendant were obeyed more in breach than observance. This worked hardship on defendants while objections to the voluntariness of confessional statements created undue delays in court proceedings leading to resort to trial-within-trial to determine voluntariness of confessional statements. This paper deployed the doctrinal research method to analyse the facts and arguments that led to the judgment of the Supreme Court in FRN v Nnajiofor that any confessional statement obtained without video or electronic recording and in the presence of the lawyer to the defendant or other named and authorised persons as enacted by the ACJA will be rejected and remain inadmissible in a Court of law. Consequently, it was recommended that law enforcement agencies, defence Counsel in criminal trials and the Courts should take note of this drastic but progressive change in the law in order do the needful as it respectively applies to them because the days of obtaining confessional statement in breach of the provisions of the law are over.

Keywords- Admissibility, Confession, Electronic Recording, Video, Voluntariness, Lawyer

1.0 Introduction

This case law review accentuates the paradigm shift with regard to recording of confessional statement following the recent decision of the Supreme Court in the case of *FRN v Nnajiofor*.[3] Contrary to the previous position, the judgment in the case under review has decisively settled the controversy whether it is a mandatory requirement that confessional statement must be obtained in strict compliance with the provision of the Administration of Criminal Justice Act, 2015.[4] To escalate this novel development, this paper undertakes a holistic discussion of the facts and arguments leading to the judgment of the apex Supreme Court that confessional statement obtained contrary to the provisions of the ACJA, 2015 will be rejected and remains inadmissible.

2.0 Provisions of the ACJA, 2015 relating to procedure for obtaining confessional statement

The two provisions of the ACJA, 2015 that fell for interpretation in FRN v Nnajiofor relating to procedure for obtaining confessional statement were *sections 15(4) and 17(2).* Specifically, *section 15(4)* of the ACJA, 2015 provides as follows

[1] (2024) LPELR-62599(SC).

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[3] (2024) LPELR-62599(SC).

[4] Hereinafter abbreviated and referred to as "ACJA".

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> Where a suspect who is arrested with or without a warrant volunteers to make a confessional statement, the police officer shall ensure that making and taking of the statement shall be in
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> writing and may be recorded electronically on a compact disc or some other audio virtual means.

Furthermore, *section 17(2)* of the ACJA, 2015 provides that

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

Discussion of the facts of the case of *FRN v Nnajiofor (supra)* in the ensuing paragraphs will be undertaken before examining the arguments of the parties and how the Supreme Court interpreted the above quoted provisions of the law.

3.0 Facts of the Case of *FRN v Nnajiofor (supra)*

The appeal bordered on non-compliance with the above quoted provisions of *sections 15(4) and 17(2)* of the ACJA, 2015 in recording confessional statement. The facts of the case were that the respondent and two other persons were arraigned before the trial Federal High Court, upon a two count charge of conspiracy and failure to declare the sum of One Hundred and Two Thousand Eight Hundred and Eighty-Five United States of America Dollars ($102,885) to the officers and men of the Nigerian Customs Service as required under the provisions of *section 2(3)* of the Money Laundering (Prohibition) Act, 2011 (as amended by Act No. 1 of 2012). The case progressed to trial. On May 20, 2016, the prosecution sought to tender the extra-judicial statement of the respondent vide the prosecution witness. This was vehemently objected by the defence (now respondents) on the ground that the statement sought to be admitted was a confessional statement which was made by the respondent involuntarily and without compliance with *sections 15(4) and 17(2)* of the ACJA, 2015. Following the respondent's objection, the the trial Court ordered a trial-within-trial. At the end of the trial-within-trial proceeding, the trial Court delivered a ruling on November 8, 2016, overruling the respondent's objection and admitting the extra-judicial statement in evidence. Dissatisfied with the ruling of the trial Court, the respondent appealed to the Court of Appeal, Lagos Judicial Division, which heard and allowed the Appeal No. CA/L/727C/2017 in a judgment delivered on March 19, 2018. The Court of Appeal held that that the word "may" in *sections 15(4) and 17(2)* of the ACJA, 2015 carries a mandatory meaning and remitted the case to the Chief Judge of the Federal High Court for assignment to another Judge for hearing and determination, hence this appeal by the appellant to the Supreme Court.

4.0 Issue, argument of the parties and judgment of the Supreme Court

One issue relevant to the present inquiry which the Supreme Court considered was whether having regard to the provision and intendment of *sections 1, 15(4) and 17(2)* of ACJA, 2015, the lower Court (Court of

Appeal) was not right in interpreting the word "may" to be mandatory. On its part, the appellant submitted that the Court of Appeal erred in law when it jettisoned the use of the literal rule of interpretation of statute and rather adopted the mischief rule in interpreting the provision of *sections 15(4) and 17(2)* of ACJA, 2015 in the absence of any manifest absurdity or ambiguity citing *Amaechi v INEC*[5] in support and that the word "May" used in *sections 15(4) and 17(2)* of ACJA is not mandatory but permissive or discretionary. Consequently, the appellant vigorously contended that failure to comply with *sections 15(4) and 17(2)* of the ACJA, 2015 cannot result in the rejection of the confessional statements, thus, it should not be treated as misconduct by the appropriate authority under *section 491* of the ACJA, 2015. It was further submitted that *sections 15(4) and 17(2)* of the ACJA, 2015 do not contain a provision on admissibility or inadmissibility, as such cannot be the basis of determining admissibility or otherwise as was done by the Court below in the instant case.

Contrariwise, the respondent submitted that in view of the provision and intendment of *sections 1, 15(4) and 17(2)* of ACJA, 2015 the Court of Appeal was right in interpreting the word "May" to be mandatory. That the provisions of *sections 15(4) and 17(2)* of ACJA, 2015 are not permissive as the sections require a legal practitioner or any officer of the Legal Aid Council of Nigeria among others to be present when a suspect is making a confessional statement. Therefore, the sections are a tool to ensure fairness and transparency in taking and recording of accused's statement. It is a rule or policy that is in tandem with modern administration of justice. The law has put in place safeguards to guarantee transparency in the taking and making of confessional statements citing the case of *Zhiya v The People of Lagos State*[6] in support.

Delivering judgment on the vexed question (whether having regard to the provisions and intendment of *sections 1, 15(4) and 17(2)* of the ACJA, 2015, the Court of Appeal was not right in interpreting the word "May" to be mandatory), the apex Supreme Court was disinclined to adopt the literal rule of interpretation of statute and rather adopted the mischief rule in interpreting the provision of *sections 15(4) and 17(2)* of ACJA, 2015. The Supreme Court agreed with the reasoning of the Court of Appeal that the Courts would interpret the word may as mandatory wherever it is used to impose a duty upon a public functionary to be carried out in a particular form or way for the benefit of a private citizen.[7] The Supreme Court, per Ogunwumiju, JSC, approved the reasoning of the Court of Appeal relying on the mischief rule of interpretation thus:

> ... to hold that the word may in the said provisions carries a discretionary or permissive meaning would not suppress the mischief the provisions are aimed at curing, nor would it advance the remedy for it. It would also not add force and life to the cure, rather, it would add strength to the mischief and that would not be *pro bono publico.* Given the objective of the provisions, to give a permissive colouration to the provisions

[5] (2008) LPELR-446 (SC), (2008) 5 NWLR (Pt. 1080) 227.
[6] (2016) LPELR-40562(CA).
[7] The following cases were cited in support namely: *R v Barlow* (1693) CARTH. 293 cited in *R v Bishop of Oxford* (1879) 4 O.B.D.245, 258; *Mokelu v Federal Commissioner of Works and Housing* (1976) 1 ALL NLR (Pt. 1) 276, 282, (1976) 3 SC 35; *Edewor v Uwegba* (1987) 1 NWLR (Pt. 50) 313, 339; *Ude v Nwara* (1993) 2 NWLR (Pt. 278) 638, 661; *Ogualaji v Attorney General of Rivers State* (1997) 6 NWLR(Pt. 508) 209, 233; *Adesola v Abidoye* (1999) 14 NWLR (Pt. 637) 28, 56; *John v Igbo-Etiti LGA* (2013) 7 NWLR (Pt. 1352) 1, 16; *Galaudu v Kamba* (2004) 15 NWLR (Pt. 895) 31, 52; and *Corporate Affairs Commission v The Registered Trustees of Celestial Church of Christ (Nigeria Diocese)* (2009) 11 NWLR (Pt. 1151) 40, 60.

> would mean that the Legislature gave a cure to the mischief with one hand and also took away the cure with the other hand. That would reduce the provisions to futility and defeat their purpose. Courts are to adopt construction that would bring out the purpose of legislation. See *Coca Cola (Nig.) Ltd. v Akinsanya* (2017) 17 NWLR (Pt. 1593) 74, 123.
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> The Court held that the use of the word may in those provisions are in those circumstances mandatory and not permissive and I could not have agreed more. I adopt the above brilliant reasoning as mine.[8]

Furthermore, the Supreme Court, per Saulawa, JSC, succinctly explained the preference for mischief rule of interpretation instead of literal rule of interpretation as follows-

> It is trite that term interpretation denotes the ascertainment of a texts meaning; the determination of how a text most fittingly applies to particular facts.
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> In the present case, in order to fully appreciate the meanings to be ascribed to the provisions of *Sections 15(4) and 17(2*) of ACJA, 2015 (supra), one ought to critically, albeit dispassionately, look at the history of the legislation. This Court aptly reiterated the trite fundamental doctrine in *Ugwu v Ararume* (2007) 12 NWLR (Pt. 1048) 365:
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> One of the most useful guidelines to interpretation is the mischief rule which considers the state of the law before the enactment, the defect which the statute sets out to remedy and/or prevent, the remedy adopted by the legislature to cure the mischief and the true reason of or behind the remedy.
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> Thus, the Judge has the onerous duty to adopt such appropriate interpretation that would facilitate the suppression of the mischief, and thereby promote the remedy within the purview of the contemplation, or intent of the statute. See *Savannah Bank of Nigeria Ltd. v Ajilo* (1989) 1 NWLR (Pt. 97) 305; *Ugwu v Ararume.*
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> In the case of *Ugwu v Ararume* (supra), this Court aptly held: 'To arrive at a reasonable construction of a statute, the Judge is entitled, following the *Rule in Heydons case*, to consider how the law stood when the statute was passed, what the mischief was for which the old law did not provide, and the remedy which the new law has provided to cure that mischief....'

[8] *FRN v Nnajiofor* (supra) (Pp. 28-34, paras. A-E).

> The combined effect of the provisions of *sections 1, 2, and 3* of the ACJA 2015 (supra) underscores the fundamental importance of preserving the sanctity of the life, dignity and property of persons under the rule of law.

The Supreme Court held therefore that undoubtedly, in the course of taking or recording the alleged confessional statement of the respondent herein, the officers of the EFCC did not deem it imperative or expedient to use electronically retrievable video compact disc, or such other visual or audiovisual means of recording as envisaged by the law. There is equally no doubt, that the purported respondents statements were not recorded in the presence of the respondents legal practitioner; even though he asked for a legal practitioner of his choice as guaranteed under the Constitution. In the instant case, as aptly found by the Court of Appeal, the provisions of *sections 15(4) and 17(2)* of ACJA, 2015 have strictly provided for a parrticular procedure of recording the statement of the defendant. Thus, there is no gainsaying the fact that failure to perform the act in accordance with the dictates of those provisions of the law would be deemed to be a flagrant non-compliance with the law. In such a situation, the Court would be entitled to invoke its interpretative jurisdiction to hold that the non-compliance with the law is against the recalcitrant party. The case of *Adesanoye v Adewole*[9] was cited in support. The Supreme Court affirmed the judgment of the Court of Appeal the appeal was dismissed.

5.0 Implications of and paradigm shifts brought about by the judgment

The following implications and paradigm shifts recorded by the judgment under review include but are not limited to the following:

(i) Confessional statement obtained contrary to the provisions of the *sections 15(4) and 17(2)* of the ACJA, 2015 are inadmissible and will be rejected at the trial.

(ii) The provision is a mandatory procedural law against infractions on the constitutional rights of a defendant as enshrined in *section 35(2)* of the CFRN, 1999 as amended. Any purported confessional statement recorded in breach of the said provision is of no effect. It is impotent and worthless.

(iii) By extension, confessional statements obtained contrary to the provisions of the ACJL of States remain inadmissible.[10] The provisions are for the benefit of private citizens who are suspected of committing crimes so that the enormous powers of the police or other law enforcement agencies may not be abused by intimidating them or bullying them in the course of taking their statements as held by the Supreme Court in *FRN v Nnajiofor* (supra).

(iv) *Sections 15(4) and 17(2)* of the ACJA, 2015 have taken the guarantee of the voluntariness of a confession beyond the Judges Rules that Courts apply permissively and the police in-house procedures which consist only of assurances by the same investigating and prosecuting officers that they complied with the Judges Rules and their in-house procedures in obtaining the confession of an arrested suspect.

[9] (2006) 14 NWLR (Pt. 1000) 242 @ 269 paragraphs C-E.

[10] For instance, see *Zhiya v People of Lagos State* (2016) LPELR-40562(CA) and *section 9(3)* of the Administration of Criminal Justice Law of Lagos State, 2011. In *Friday Charles v The State of Lagos* (2023) LPELR-60632(SC), it was held that the provisions of *section 9(3)* of the ACJL, of Lagos State, 2011 are p*ari materia* with *sections 17(2) and 15(4)* of the Administration of Criminal Justice Act 2015 notwithstanding that while the Lagos State Law applicable to this case uses the mandatory word shall, the ACJA, 2015 in *section 15(4)* uses the word may. Contrast with *Chijioke Ahukanna Emmanuel v FRN* (2018) CA/L/137/2016 @ 16 which stand overruled.

(v) There is no need for the cumbersome trial within trial procedure to determine the voluntariness of confessional statement. The essence of the requirement for electronic recording of extrajudicial statements which must be taken in the presence of a legal practitioner of the suspects choice as stipulated in *sections 15(4) and 17(2)* of the ACJA, 2015 is to give credibility to the course of criminal investigation, so as to obviate recurrent objections as per voluntariness of confessional statements by accused person.[11]

(vi) The police or any agency of the state in charge of arrest and investigation is duty bound to perform their responsibilities within the prescriptions of the ACJA, 2015 vis-a-vis the provision of *section 35(1)(c)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended. Furthermore, *section 3* of the ACJA, 2015 mandatorily requires that the suspect be arrested, investigated and tried in accordance with the ACJA.

(vii) Since the law has provided for a suspects extra-judicial statement to be electronically recorded and in the presence of a legal practitioner of his choice, it would amount to a violation of the law if that provision is not followed to the letter.[12]

(viii) The established case law across jurisdictions is that the purpose or objective or intendment of a legislative provision that vests a public duty on a public officer for the benefit of any person is to make the execution or performance of the duty mandatory, irrespective of whether it is a permissive or mandatory word that is used to impose the duty. So that where the permissive or discretionary word may is used to impose a duty on a public officer to observe or protect the right of an arrested suspect not to be forced to confess that he committed the offence he is suspected of committing, the Courts have consistently, over time, decided that the word may is legislatively intended to impose a mandatory duty to observe and protect the right of the arrested suspect against forced self-incrimination.[13]

6.0 Conclusion

Legal provisions must be strictly obeyed. It is heartwarming that the recent judgment of the apex Supreme Court in *FRN v Nnajiofor* has sanctioned the clear-cut, certain, and easily verifiable criteria under *section 15(4) and 17(2)* of the AJCA, 2015 which prescribe that confessions be video recorded and be taken in the presence of independent persons such as a legal practitioner of the suspects choice, officer of the Legal Aid Counsel, officer of a Civil Society Organization, a Justice of the Peace or any other person of the suspects choice. It remains for the law enforcement agencies to comply without hesitation, failing which such confession will be rejected as inadmissible in a Court of law.

[11] *FRN v Nnajiofor* (2024) LPELR-62599(SC) (Pp. 26 paras. B) per Okoro JSC. See *Charles v State of Lagos* (2023) LPELR-60632(SC), (2023) 13 NWLR (Pt. 1901) 213.
[12] See *Living Mitin v The C.O.P. Bayelsa State Command Yenagoa & Ors* (2022) LPELR-59029 (SC).
[13] Per Agim, JSC, in *FRN v Nnajiofor* (supra) at (Pp. 39-40, paras. B-C).