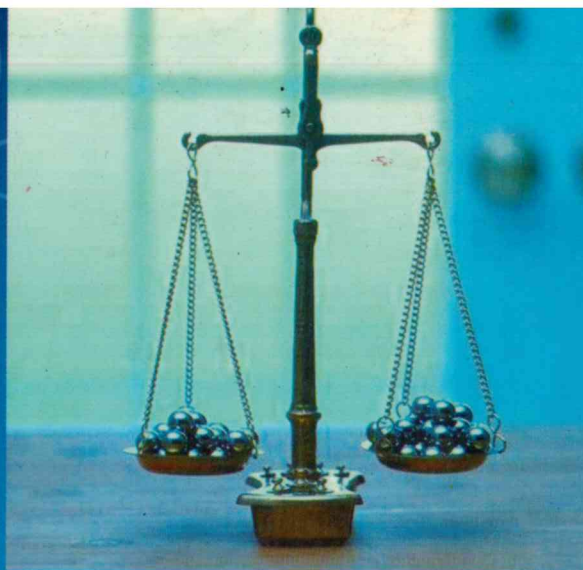




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THE EFFECT OF RETRACTED EXTRA-JUDICIAL STATEMENT OF WITNESSES IN NIGERIAN COURTS.

- Razaq Justice Adebimpe, Esq.*

I. Introduction

It is often found as a pattern, that an allegedly voluntary statement of a witness (including even that of an accused person) to the police before trial, conflicts with what he says on oath before the trial court. And more often than not, such a statement made when the matter in issue is very fresh in his memory did not contain any inference to his new version of the story. The statement cannot therefore be anything but inconsistent versions of the same story, mutually repugnant and contradictory.

This paper analysis the effect of the case of *R v Golder* where the statement of principle (*now described as the inconsistency rule or the rule*) was made in relation to the evidence of a witness to the prosecution (not the accused) in the case.

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1. (1960) 1 W L R 1169.

2. Ibid, in that case the evidence was that of one Mrs. Taylor on whom the prosecution relied to prove the offence of receiving of a gold watch against Mr. Golder. Before the committing Magistrate, Mrs. Taylor swore that on April 20, Mr. Golder had brought her a gold watch which was in fact part of the stolen property in respect of which they were standing trial; and allegedly stolen at New Market early on April, 19. At the trial she went back on her story. Learned counsel to the prosecution obtained leave to treat her as a hostile witness and have her cross-examined. Counsel did not succeed in extracting from Mrs. Taylor, an admission that her deposition was true, or that it was Mr. Golder who handed her the gold watch.

In summing up, the deputy chairman suggested to the jury that they could deal with the question of the watch and the conflicting testimony of Mrs. Taylor by acting on the evidence contained in her deposition notwithstanding her repudiation of it.

The Court of Criminal Appeal rejected this direction, on the ground that it is wrong in law. It was held that while previous statements may be put to a hostile witness to destroy her credit and to render her evidence at the trial negligible, such previous statement are not admissible evidence of the truth of the facts stated therein.

The paper examines the evolution, nature and scope of the inconsistency rule on the effect in law of inconsistency between the sworn oral testimony-in-court and the previous statement(s) made, and contending that notwithstanding that an accused person is a competent witness in every connotation of the proceedings, the rule was formulated to apply only to a retracted extra-judicial confession of an ordinary witness and not to be expanded to cover a retracted extra-judicial confession of accused persons. The paper argued further that the consequent of any expansion is to open the floodgate of retraction of confessions.

II. Meaning of *Inconsistent* in Relation to the Law of Evidence

Citing a judicial opinion in *Barry v City of Forth Worth*³, the learned author of the *Black's Law Dictionary*⁴ stated that two pieces of evidence are inconsistent when they are:

Mutually repugnant or contradictory, the one to the other so that both can not stand but the acceptance or establishment of the one implies the abrogation or abandonment of the other.

In other words, two pieces of evidence are inconsistent when they are in essence mutually exclusive such that if one is true the other must necessarily be false because they are essentially contradictory⁵. And this is the sense in which the word has been understood in many decisions of the Nigerian

Supreme Court⁶.

3. Tex Civ App 110 SW 2nd 95, 103.

4. H O Black, *Black's Law Dictionary* (5th edn Paul Minn West Publishing Co., 1979) 689.

5. F Nwadiolo, *Modern Nigerian Law of Evidence*, (Ethiope Publishing Corporation, Benin 1989) 224. The two inconsistent statements cannot both be truth. The two diametrically opposed versions of the same story can hardly induce credibility in respect of both of them, the witness is either lying in court or lied in the previous statement, whichever is the case, the inconsistency has portrayed him as a person of doubtful veracity since he certainly told untruth in either of the two statements or at least in one.

6. *Isaac Stephen v The State* (1986) 5 NWLR (Pt 46) 978, 1000; *R v Ukpon* (No 1) (1961) 1 ALLN LR 25; (1961) 1 SCNLR 58; *Onubogu & Anor v The State* (1974) 9 SC1.

There is however a clear distinction between an allegation that a statement was involuntarily made and a retraction of same as if it were never made. In the case of a statement the voluntariness of which is being denied, a *trial within trial* will be held⁷, and once the statement is admitted, it form part of the proceedings and will be considered along with all the evidence led in the whole proceedings, even if it is subsequently retracted⁸.

III. The Competency of the Accused Persons

A witness means any person who has testified in the case or is legally competent to do so, and it is in this sense that *section 159(1) of the Evidence Act*⁹ defines an accused person as a *Competent Witness* even though not compellable¹⁰. It provides as follows:

...person charged with an offence shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person¹¹.

7. A confession to be admissible in law must be free and voluntary, it must neither be obtained by promise nor threat and duress or undue influence. Where the accused or his counsel objects to a statement on the ground that it was made involuntarily, that issue must be tried first. This is known as *Trial within Trial*: see *The Queen v Eguabor* (1962) 1 All NLR 287; *The Queen v Igwe* (1960) 5 F S C 55. See also generally E O Fakayode, *The Nigerian Criminal Code Companion* (Jero Melaiho and Associates Ltd 1985), 110.

And during the Trial within Trial, the burden is on the prosecution to prove that it is voluntary: *S. 138 & 139 Evidence Act*. See also generally J A Yakubu & A T Oyewo, *Criminal Law and Procedure in Nigeria* (Malt house Press Ltd Lagos 2002).

8. J A Yakubu & A T Oyewo (n5) 132. See also *Durugo v The State* (1992) 2 NWLR (Pt 255).

9. Cap E14, Laws of the Federation of Nigeria, 2004.

10. *Omisade v Queen* (1964) 1 ALL NLR 233.

11. *Section 159(1) Evidence Act*, Cap E14 LFN, 2004. See also section 158 of the same Act which provides that *Subject to the provision of this Act, in Criminal Cases the accused person, and his wife or husband, or any other person and the wife or husband of any person jointly charged with him and tried at the same time is competent to testify.*

See T A Aguda, *The Law of Evidence* (4th edn, Spectrum Books Ltd., Ibadan 1999) 306-311. See also A Aguda, *Law and Practice Relating to Evidence in Nigeria*, (2nd edn M I J Professional Publisher Ltd., Lagos 1998) 480; F Nwadialo (n5) 210-211.

Thus an accused person who testified in his own defence is regarded as a witness for the purpose, and his testimony is to be tested by relevant cross-examination to elicit from him evidence favourable to the prosecution and to disprove the case he is presenting as his defence. The cross-examination is also directed at establishing and testing the accuracy, veracity or credit of the witness, or to shake his credit. So as he is subjected to cross-examination in this manner, he is undoubtedly a witness in every connotation of the proceedings.

Origin of the Rule

The earliest recognition of the principle against inconsistency between an extra-judicial statement and the testimony made in court was first made in the English case of *Teal*¹², where it was held that:

If therefore, it appears that he has formerly said or written the contrary of that which he now sworn, (unless the reason of his having done so is satisfactorily accounted for) his evidence should not have much weight with a jury¹³, and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility¹⁴

The above statement, clearly provides for extra-judicial statements, which if contradicted under oath at the trial should be entitled to very little weight, unless the reason for the discrepancy is satisfactorily explained in the manner stated in *Onubogu v State*¹⁵. Where the earlier statement now being contradicted on oath, was itself on oath, the fact is conclusive against its credibility.¹⁶ The effect of contrary sworn evidence on a previous

12. (Reported in) 11 East 309 (2809).

13. And in a non jury case the Court should direct itself likewise.

14. (n12).

15. (n6).

16. (1974) 9 S C 1.

statement on the same matter being generally to render the evidence of such witness negligible.

This phenomenon known as *Inconsistency rule* found its way into Nigerian Criminal Law

for the first time through the case of *Regina v Ukpong*¹⁷ where the Federal Supreme Court adopted the opinion of Lord Parker, C. J., in the case of *R v Golder*¹⁸. In that case, the learned Chief Justice of England held:

In the judgment of this Court, when a witness is shown to have made previous statement inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statement whether sworn or unsworn, do not constitute evidence upon which they can act¹⁹.

The rule was developed in the interest of justice, and formulated for the resolution of conflict between the later evidence and previous statement(s) of witness, be it for the prosecution or for the defense, to ensure that evidence received is credible. But was it formulated to cover inconsistency in the testimony of an accused person and his retracted extra-judicial confessions?

17. (1961) ALL N L R 25, (1961) 1 S C L R 53; *Joshua v The Queen* (1964) ALL N L R 25.

18. (n1); *Agwu & ors v The State* (1965) NMLR 18, Per Onyenama J S C at 20.

19. Subsequent to this, the Supreme Court held in several cases that where a witness had given a testimony in court which is inconsistent with a statement previously made by him, the Court of trial is entitled to treat both his testimony at the trial and the previous statement as of little or no probative value rather than choose to believe either: see *The State v Uzor* (1972) NMLR 211; *Obade & ors v The State* (1991) 6N WLR 435 CA.

For this rule to be applicable however, the inconsistency between the extra-judicial statement and the testimony in court must be on a material issue. A mere discrepancy will not operate to discredit the witness: See *Ubani & Ors v The State* (2003) 16 NSCQR 265 per Edozie, J S C at 282.

The rule it is submitted was neither formulated for the resolution of inconsistency in the evidence of an accused person and his extra-judicial confession, nor was it intended to be extended to cover a retracted confession. The rule as formulated in *R v Golder* (Supra) and considered in relevant cases particularly in *Jizurumba v The State* relates and limited to the statement of an ordinary witness and not an accused who testified. The case of an accused person is quite differently treated and the guiding principles are fully established and have been applied.

IV. Application of the Rule in Nigeria

It is pertinent to observe that since its adoption in Nigeria, the rule was for the first time in 1985 extended to the statement and evidence of an accused person. Earlier, in *Udu v The Queen*, the Supreme Court made it clear that the rule does not apply to the previous confession of an accused person and his evidence in court. The Court held:

The Judge, however, decided to ignore the statement, as not being legal evidence, and he cited the decision in *R v Golder* (1961) 1 W L R 1169, approved in this court in *R v Ukpung* (1961) 1 S C N L R 53; (1961) All N L R 25.

With respect, these cases deal with previous statements inconsistent with a witness's sworn evidence which are put to a witness in cross-examination in order to discredit his evidence. **They have no application to a confession made by an accused person.** A man's confession was always admissible in evidence against him at common law, and its admissibility remains unaffected by the fact that he is now competent to give evidence himself... (emphasis added).

20. (1976) 3 S C 89.

21. See *Owie v The State* (1985) N W L R (Pt 3) 470.

22. (1964) 1 ALL N L R 21.

23. Ibid 23-24 per Bret, J.S.C. several authorities to support the view that a Court may convict an accused on his extra-judicial confession, which is voluntary and true but inconsistent with his evidence in court are too numerous to reiterate. It is sufficient to mention only a few: *R v Kanu* (1952) 14 W A C A 30; *Queen v Itule* (1961) 2 S. C. N. L. R 182; *Queen v Obiasa* (1962) 2 S C N L R 402; *Mumuni v The State* (1975) 6 S C 79; *Aremu v State* (1991) 7 N W L R (Pt 201) 1; *Ejinima v State* (1991) 6 N W L R (pt 200) 637; *Akpan v The State* (1992) 6 N W L R (pt 248) 439; *Kim v State* (1992) 4 N W L R (pt 233) 17.

A Court may thus convict an accused based on his extra-judicial confession, which is voluntary and true but inconsistent with his evidence in court. *In Akinfe v The State*²⁴, the

Supreme Court, per Nnaemeka-Agu J. S. C. held:

*... of course where an extra-judicial confession has been proved to have been voluntarily made, and it is positive and not unequivocal, and amount to an admission of guilt, it may well suffice to ground a finding of guilt. The fact that the accused has retracted the confession may not necessarily make it inadmissible*²⁵.

In *Ejinima v The State*²⁶, Nnaemeka-Agu, JSC in a concurring judgment said:

*...the peculiar situation that has arisen in this case is that the Court can still admit and convict on such retracted confession if satisfied that the accused make the statement and as to the circumstances which give credibility to the contents of the confession, yet it is desirable that before conviction can be properly based on such a retracted confession, that there be some corroborated evidence outside the confession which would make it probable that the confession was true...*²⁷

In *Stephen v The State*²⁸ the appellant was convicted of murder. In his confession to the police he said he killed the deceased under provocation and self-defence.

At the trial, he testified that the killing was accidental, Kawu JSC²⁹ said:

...I am therefore satisfied that the trial Court and the Court of Appeal, in the light of the evidence before them, gave adequate consideration in their respective Judgments to the plea of provocation... and the plea of self defence.

24. (1988) 3 N W L R (Pt 85) 726.

25. Ibid, 746, See also *Onwumere v State* (1991) 4 N W L R (pt 186) 428, 440 & 442.

26. (1991) 6 N W L R (pt 200) 627, 655.

27. Ibid, 655.

28. See also (1984) 2 N S C C 1416.

29. Ibid, 1420.

Finally in his defense at the trial, the appellant said this happen when his gun exploded and the bullets accidentally hit the deceased. It is however pertinent to note that the plea of accident was never raised by the appellant in his confessional statement (Exhibit A) to the police which was made when the whole thing was fresh in his memory, and on which the learned trial judge substantially based his decision. I am of the view that the plea was nothing but an afterthought which was, in the circumstances, rightly ignored by the trial Court³⁰.

Accordingly, *Stephen v State*³¹ did not support the view that where the confession of the accused is inconsistent with his testimony, both should be rejected.

Since the adoption of the rule in Nigeria, its operation has been limited to the statement of ordinary witness and his inconsistent testimony. It was for the first time expanded to the statement and testimony of the accused in *Owie v State*³².

And in *Oladejo v The State*³³, Nnamani, J S C said:

Where a witness (here an accused person) makes a statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the Court can act.

In *Asanya v State*³⁴, the Court said that the principle applies to (i) witnesses for the prosecution and (ii) confession of an accused who testifies³⁵.

30. Ibid., See also the dissenting judgment of Karibi-Whyte J S C at 1431-1432 where though he appear to invoke the inconsistency rule, he did not in fact apply it to the case. He stated that the trial judge was right to reject the *Evidence* of the appellant and act as he did on the *confession* of the appellant, which was inconsistent with his evidence.

31 (n6).

32 (n21).

33 (1987) 3 N W L R (Pt.61) 419.

34 (1991) 3 N W L R (Pt.180) 422.

35 The Court was not willing to depart from it or to overrule the line of cases in which the rule had been applied to the extra-judicial confession of an accused person which was inconsistent with his testimony. See Nnaemeka-Agu, J S C at 450; Karibi-Whyte J S C at 467-8 and Olatawura J S C at 476.

V. A Critique of the Rule in *Oladejo v The State* (Supra)

The principle of law as stated in *Owie*, *Umani*, *Oladejo* and *Asanya's* cases where the rule was extended to the statement and testimony of the accused persons was rather too wide. It ought not to have been expanded as such, for the application of the rule would occasion grave injustice to an accused person who after the rejection of the confession and the testimony, the Court convicted on the unchallenged evidence of the prosecution and in the absence of any valid defence. It would thus be tantamount to not only depriving the accused of his right to fair hearing but also denial of the age-old principle that the defence of an accused should be given due consideration which has been made explicit in several decisions³⁶.

On the other hand, it may cause injustice to the society where, after the rejection, there is no other evidence linking the accused with the crime, as it would be an escape route freely taken without any hindrance to escape from justice. It can not be in the interest of the society to have murderer who has confessed to his crime to walk out of court a freeman simply because after a second thought, he has retracted his confession which will wipe out the gains of a voluntary confession to the case of the prosecution. That would further create decline in public confidence in the administration of criminal justice, as the whole trial will be a mockery.

36. See *Opeyemi v State* (1985) 2 NWLR (Pt 5) 101 per Obaseki JSC at 112, (1989) 4 NWLR (Pt. 114) 131; *Ajidahun v State* (1991) 9 NWLR (Pt. 213) 36. In *Umani v State* (1988) 1 NWLR (Pt. 70) 274; (1988) 2 SC (Pt. 1) 38 at 39 Nnamani JSC applied the rule to the accused. It is submitted with respect that the dissenting judgments of Uwais and Craig JJSC in that case should be preferred. It is also submitted that Uwais, JCA (*as he then was*) correctly state the law relating to the rule in *Ibina v State* (1989) 5 NWLR (Pt. 122) that the decision of the Supreme Court in *Oladejo's case* was a departure from the long established principle relating to consideration of confession and its retraction established since *Udo v State* (1972) 6-9, 234, as far back as 1964 and several decisions of the Supreme Court thereafter up to *Kim v State* (n23) in 1992.

The universal application of the principle would be dangerous, as it would open the floodgate of retractions of confessions. And the rule being a Common Law rule is inferior to the provisions of section 27 Evidence Act³⁷ with which its application to confession would lost sight off and render nugatory. It is not the law that once an extra-judicial confession is retracted during trial, the Court should throw up its hands in despair³⁸, but with the extension of the rule, the Court will have no evidence upon which to act.

However, the Supreme Court did not accede to invitation in *Asanya v State* (*supra*) to overrule the extension in *Oladejo v State* (*Supra*) as being made *per incuriam*. But having

regards to the plethora of the authorities on the matter, the Court held in *Egbogbonome v The State* that its decisions in *Oladejo's* case was made *per incuriam* and that it erred in law by adopting same in *Asanya's* case.

37. Section 27 Evidence Act reads:

- (i) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime
- (ii) Confession if voluntary, are deemed to be relevant facts as against the person who make them only.

38. A Court can convict on the confession of an accused person made voluntarily whether retracted or not, if the confession is direct, positive and unequivocal as far as the charges are concerned: See *R v Sykes* (1913) 8 CAR 233; *Queen v Obiasa* (n23)183, (1962) 1 ALLNLR 651, 655; *Udo v State* (n36) 240; *Dawa v State* (1980) 8-11 SC 236, 268; *R v Itule* (1961) 1 ALLNLR (Pt.3) 463, 468; *Afolabi v Police* (1961) 2 SCNLR 307, (1961) 1 ALLNLR 654; *The State v Enabosi* (1966) 2 ALLNLR 116.

So a voluntary and true confession has always been acted upon by the Court: *Ifenedo v State* (1967) NMLR 200, (1966) NSCC (Vol 4) 331,334; *Okpa v State* (1972) NSCC (Vol 17) 104 and *Njoku v State* (1972) NSCC (Vol 7)135.

Even an accused may be convicted on his voluntary confession without corroboration if the Court is satisfied with its truth: See *Queen v Obiasa* (n23); See also *Achabua v State* (1976) 12 SC 63.

Although it is desirable in a case of murder particularly if the confession is subsequently retracted, to have some corroborative evidence outside the confession but a conviction would not be quashed merely because it is based entirely on the evidence of confession of the accused: see *Onochier v The Republic* (1966) NMLR 3007; *Kanu v The King* (1952) 14 WACA 30; *Ndo v The Queen* (1953) 14 WACA.

Therefore, the Court should not have extended the principle to a retracted extra-judicial confession.

39. (1993) 7 NWLR (Pt 306) 383.

Thus, it has now been firmly laid down that the rule should be confined to the case of an ordinary witness and not to a retraction in court of confessional statement made by accused persons to the police in which case the Court is free to believe either of the two statements.

VI. Preventing Miscarriage of Justice under the Rule in Nigerian Courts

One may observe that since the adoption of the rule in *Queen v Ukpon*⁴¹, it has not been an inflexible rule of law or practice. Indeed the Courts have always, for the purpose of ensuring that no miscarriage of justice is occasioned from the operation of the rule, developed a safeguard that in addition to considering the totality of the evidence (other facts outside the confession which renders its probable that it is true) the witness either for the prosecution or the defence or the accused himself should be given opportunity while in the witness box, of explaining the inconsistency⁴². In *Jizurumba v The State*⁴³, Idigbe J S C said:

A witness may have a good explanation for the inconsistency between his previous unsworn statement and his evidence in court, or the inconsistency may indeed, be minor or unsubstantial (as in the case in hand with regard to the evidence of P.W. 4 and exhibit 3) in which case the inconsistency may fail to discredit his **entire** testimony (emphasis added)⁴⁴.

40. See also *Stephen Emoga v The State* (1997) 9 N W L R (pt. 25) S C.
41. (n6).

42. See *Asuquo Williams v The State* (1975) 9-11 S C 139; *Asanya v State* (n34) 449; and *Onubogu v The State* (n6).

43. (n20).

44. Ibid. 101; *R v John Williams* (1913) C A R 113; *F Nwadiakor* (n5) 226; *Aguda, Law and Practice Relating to Evidence in Nigeria* (Sweet & Maxwell, London 1980) 384.

It follows therefore that the Courts have not been applying the rule where a witness sufficiently explained the inconsistency.

VII. Conclusion

This paper discussed extensively the evolution and scope of the inconsistency rule. So far it has been established that the rule was formulated for an ordinary witness and not to a retraction in court of confessional statement made by an accused person to the police. The paper shows that the extension of the rule to cover extra-judicial confession was a development of the law in the wrong direction and that it was a departure, not an extension of the rule to cover situation not hitherto envisaged.

It is suggested that Courts should not depart from the rule in so far as it relates to extra-judicial statements other than confessions and admissions since the safeguard formulated meets the requirement of justice but should further declare that rule was neither intended to apply to confession nor to the evidence of accused persons.

A confession should not be treated as just any other statement. True, a confession is a statement, but it is a statement of a special kind. *The Evidence Act*⁴⁶ as well as *rationess decidendi* of numerous cases has usually treated confessions as being in a different category from ordinary statements.

-
45. See *Jizurumba v State* (n20); see also *Esan v State* (1976) 11 SC 39, (1976) NSCC 637; and *Aderemi v State* (1975) 9-11 SC 115, (1975) NSCC Vol 9, 423.
It appears from the observation of Gibbs, J. in *Driscolls v The Queen* (1977) Vol 137 C L 517, 537, that the rule is also not inflexible in Australia and Canada. As the High Court of Australia and Canada in *Deacon v The King* (1947) 3 D L R 776 respectively have remained loyal to the rule as formulated in *R v Golder* (n1).
46. SS. 27-32 discussed above.

A confession and testimony of accused persons should be evaluated and assessed by the trial judge together with the totality of the evidence in order to reach a just decision.

The confusion bedeviling the implications of retracted extra-judicial statement be it that of an ordinary witness or of an accused who testifies in his own case is one area of the law of evidence where statutory intervention is urgently needed in Nigeria to deal with the situation. In this regard therefore, a legislative intervention by way of codification in line with the decisions in *Egbogbonome's case* is by this paper recommended. And it ought to be effected at the earliest opportunity.

It is believed that if this recommendation is taken seriously and reflected in the Evidence Act, it will go along way in solving the difficulties arising from conflicting judicial decisions which our Courts have been facing in the past.

2 *Corfu Channel case (United Kingdom V. Albania)* [1949] A.C. 869, 119 I.L.C. 1, Rep. 4 at 22 (& April). Every State's obligation not to allow its territory to be used contrary to the rights of other;