

## **VERACITY TEST OF CONFSSIONAL STATEMENT- OBLIGATORY PRACTICE AND PROCEDURE**

### **Abstract**

A Court is entitled to convict based on a confessional statement. However, this is subject to many obligatory procedural rituals one of which is that if the confession is voluntary, the Court must, in addition, conduct the veracity test to seek any other evidence even if slight, of circumstances which make it probable that the confession is true. Deploying the doctrinal research method, extant statutory provisions and nascent judicial decisions especially those handed down by both the apex Supreme Court and the Court of Appeal were critically examined to accentuate that conduct of veracity test is not a hollow ritual because where conviction is based solely on confessional statement, failure, refusal or neglect to carry out the veracity test by the trial Court can lead to disastrous consequences for the trial. Consequently, it was suggested among other things that a trial Court should feel compelled to carry out the veracity test of a confessional statement since confessional statement is the worst form of incriminating evidence.

**Keywords:** Veracity, Retraction, Confession, Admission and Guilt

### **1. Introduction**

There is confusion around the general rule that a confessional statement can ground conviction. Overtime, many trial lawyers including the trial *judex* do not understand that a confessional statement, whether or not retracted, must further be subjected to the veracity test before it can be deployed in the conviction of a defendant or accused. To worsen matters, what constitute the makeup of the veracity test are also least understood in legal circles. In order to ease understanding and streamline the practice and procedure on veracity test of confessional statement, this paper is divided into convenient segments beginning with exposition of general rule on confessional statement; explanation of what the veracity test connotes; consequences or effect of failure to carry out the veracity test; the time or circumstance when the issue of testing the veracity of a confessional statement will arise; and justification or *raison d'etre* for the veracity test.

### **2. General Rule on Confessional Statement**

In *Akpa v The State*,<sup>1</sup> the Supreme Court, per Tobi JSC had the following to say:

Confession in criminal procedure, like admission in civil procedure is the strongest evidence of guilt on the part of an accused person. It is stronger than the evidence of an eye witness because the evidence, borrowing from the daily axiom, comes out from the mouth of the horse, who is the accused person. What better evidence than that? He knows or knew what he did and he says or said it in court. Is there need for any further proof? I think not?

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<sup>1</sup> (2007) 2 NWLR (Pt. 1019) 500.

Confessional statements are governed by the provisions of sections 28 and 29 of the Evidence Act, 2011 (as amended).<sup>2</sup>Section 28 of the Evidence Act, 2011 (as amended) provides that ‘a confession is an admission made at any time by a person charged with the commission of a crime stating or suggesting the inference that he committed the crime.’ In *Edun v The State*,<sup>3</sup> it was held that under section 28 of the Evidence Act, 2011, a statement made by the accused will not be regarded as ‘confessional’ unless thereby the accused person admits his guilt and/or the commission of the offence he was charged with. A confessional statement proves the guilt, and not the defence or the innocence of the accused person.

The general rule is that an involuntary confessional statement is inadmissible and goes to no issue.<sup>4</sup> Hence, section 29(2) of the Evidence Act, 2011 (as amended) enacts that if, in any proceedings 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 section 29. This provision puts it beyond doubt that an involuntary confession is inadmissible.

However, when confessional statement has been proved to have been made voluntarily and it is positive, unequivocal and amounts to an admission of guilt, it is enough to sustain or base the conviction of an accused on it. The law is that it does not matter whether the maker retracted the statement in the course of the trial. Such a retraction does not necessarily make the confession inadmissible. This horn-book law is borne out in a long line of decided cases like *Egboghonome v State*,<sup>5</sup> *Bature v State*,<sup>6</sup> *Solola v State*,<sup>7</sup> *Edhigere v State*,<sup>8</sup> *Uluebeka v The State*,<sup>9</sup> *Idowu v State*,<sup>10</sup> and *Alarape v State*.<sup>11</sup>

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<sup>2</sup> See the Evidence (Amendment) Act, 2023. For further reading on the amendments made to the Evidence Act, 2011 by the Evidence (Amendment) Act, 2023, see N.O. Obiaraeri, *New Regime of Electronic Evidence under the Evidence (Amendment) Act, 2023* (Owerri, Imo State University Press, November 2023).

<sup>3</sup> (2019) LPELR-46947(SC).

<sup>4</sup> N.O. Obiaraeri, *Contemporary Law of Evidence in Nigeria* (Crayford Kent, United Kingdom, Whitmont Press Ltd, 2012) 94-100.

<sup>5</sup> (1993) 7 NWLR (Pt. 306) 383.

<sup>6</sup> (1994) 1 NWLR (Pt. 320) 267.

<sup>7</sup> (2005) 11 NWLR (Pt. 937) 460.

<sup>8</sup> (1996) 8 NWLR (Pt. 464) 1.

<sup>9</sup> (2000) 4 SC (Pt. 1) 303.

<sup>10</sup> (2000) 7 SC (Pt. 11) 50.

<sup>11</sup> (2001) 14 WRN 1.

The above general rule on conviction based on confessional statement is however subject to the confessional statement, whether or not retracted, passing the veracity test as will be vigorously discussed in the ensuing paragraphs.

### 3. Veracity Test- What Is It?

In order for the confessional statement to ground conviction, the law requires that the Court will look for evidence outside the statement that suggests that the statement is true, this in legal parlance means that the statement must pass the veracity test. In *Akininlola v. The State*<sup>12</sup> the apex Supreme Court held that it is well settled that once a statement is in compliance with the law and rules governing the method for taking it and it is tendered and admitted as an exhibit, then, it is good evidence and even if later retracted, the retraction will not vitiate its admission as a voluntary statement. The Supreme Court had in many cases spanning a long time handed down the conditions to examine the truth of a confessional statement and in the example of *Emmanuel Nwaebonyi v. The State*,<sup>13</sup> the apex Court stated as follows:

That to test the veracity of a confessional statement, the following should be evident:-

- (i) Is there anything outside the confession which shows that it may be true?
- (ii) Is it corroborated in any way?
- (iii) Are the relevant statement of facts made in it most likely true as far as they can be tested?
- (iv) Did the accused have the opportunity of committing the offence?
- (v) Is the confession possible?
- (vi) Is the alleged confession consistent with other facts which have been ascertained and established?<sup>14</sup>

Along the same line of thought, the same Supreme Court stated in *Alarape v The State*,<sup>15</sup> that the test in determining the veracity of a confessional statement is to seek 'any other evidence even if slight, of circumstances which make it probable that the confession is true.'

The importance of conducting veracity test was amply demonstrated in *Sale v The State*.<sup>16</sup> This appeal bordered on a conviction for the offence of culpable homicide punishable

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<sup>12</sup> (2016) 16 NWLR (Pt. 1537) 73.

<sup>13</sup> (1994) 5 NWLR (Pt.138) 150.

<sup>14</sup> The test, however, for determining the veracity or otherwise of a confessional statement is to look for any other evidence be it slight, or circumstances which make it probable that the confession is true. This veracity test was formulated in the leading English case of *R v Sykes* (1913) 8 CAR 233 at 236 by Ridley, J. He suggested those tests to be applied on an accused person's confessional statement in the determination of its veracity. Those tests have been accepted and consistently approved and applied by the Supreme Court of Nigeria and other Courts over a long period of time in a number of cases. See generally, *Ikpasa v Attorney-General of Bendel State* (1981) 9 SC 7; *Onochie v The Republic* (1966) NMLR 307; *Akpan v The State* (1992) 6 NWLR (Pt. 248) 439 at 460.

<sup>15</sup> (2001) 5 NWLR (Pt. 705) 79.

<sup>16</sup> (2022) LPELR-57190(CA) (pp. 30-31 paras. B).

with death under section 221 of the Penal Code, 1963.<sup>17</sup> In the judgment, the lower Court held that it was convinced beyond reasonable doubt that the prosecution had proved its case beyond reasonable doubt and the accused person was found guilty of the offence of culpable homicide punishable with death contrary to section 221 of the Penal Code and convicted and sentenced him to death accordingly. The appellant being unhappy with the decision of the lower Court, and in expressing his disaffection filed a Notice of Appeal. In dismissing the appeal, the Court of Appeal per Tobi, JCA, held that the Learned Trial Judge rightly applied the veracity test when it held thus:

The Appellant in Exhibits B and E admitted stabbing the deceased on his chest. Outside the confessional statement there are evidences before the Court to show that the confession is true. The evidence corroborates the confessional statement and by so doing the veracity test was applied and it passed. The evidence of PW2 and PW4, the eye witness to the offence gave clear evidence of what happened between the Appellant and the deceased. This evidence corroborates the confessional statement. The PW1, PW3, PW5, PW6 and PW7 all gave evidence that corroborated aspects of the confessional statement. On the strength of all that, I agree with the finding of the lower Court found at page 121 of the record when His Lordship held:

‘There is no better evidence than that of PWII and PWIV who are eye witnesses to the fight...Also in addition to the evidence of PWII and PWIV the confession of the accused person is well corroborated.’

In *Muhammed v State*,<sup>18</sup> the Supreme Court, per Aboki, JSC (as he then was) reiterated the tests for determining the truth or weight to attach to a confessional statement as established in the English case of *R v Sykes (supra)* by Ridley, J, and that the safeguard is to look for any other evidence be it slight, or circumstances which make it probable that the confession is true which was satisfied in this case.<sup>19</sup> The apex Court held that from the evidence of the prosecution witnesses on record, the deceased was last seen with the appellant. PW1 had testified that the deceased answered a call in his presence wherein she agreed to meet up with the Appellant and travel with him. When PW1 asked her where she and the Appellant were going, she said he did not tell her, but that he will tell her later. In the appellant's confessional statement, Exhibit A, the appellant stated *inter alia*:

... on 1/4/2013... I met her (deceased) in the motor park of same address. I called her and she came to me. I told her to accompany me one place, I did not tell her where we are going so she agreed and I convey her on my motorcycle Jincheng with her child backing to outskirts of Kazaure... I stopped and parked my

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<sup>17</sup> Cap 89, Laws of Northern Nigeria, 1963.

<sup>18</sup> (2022) LPELR-58929(SC).

<sup>19</sup> The veracity test was also approved in *Dawa v The State* (1980) 8 - 11 SC 236; *Akindipe v The State* (2016) 15 NWLR (Pt. 1536) 470.

motorcycle. I asked her to come down. I questioned her why she said that this child is my child. She answered that it is after she have going round looking for the father of the baby all of them refused to accept, later she brought the child to me that I am responsible for the baby... On hearing this, I slapped with my hand at her face, she retaliated, I slapped her again, she fell down on the ground and she was seriously injured on her head because at the scene there were stones all over. I strangled her with her veil (hijab) to death. After I killed her, I left the corpse and the child crying. I did not touch or beat the baby. This happened at about 2030 hours. I killed her, Jamila Sule F because she said I am the one responsible for the baby while I know that I am not the only person that committed fornication with her.

In dismissing the appeal against the decision of the Court of Appeal, the Supreme Court held that as is manifest from the Record, there is abundant evidence, in corroboration of the Exhibit A, as held by the two Courts below. The concurrent findings of facts therefore, by the two Courts below are legally sound and do not merit any interference by this Court. Without any clear evidence of errors in law or fact leading to or occasioning miscarriage of justice, this Court will not interfere with the concurrent findings.

Conclusively and at the risk of sounding repetitive, it has to be pointed out even where the accused has made a confessional statement or one that has the semblance of such, the Court before embarking on a conviction solely on that must test the truth or veracity of the confession and in doing so the Court must seek any other evidence of circumstances which make it probable that the confession is true and the test includes the following:

- (i) Whether there was anything outside the confession to show that it is true;
- (ii) Whether the statement is corroborated, no matter how slightly;
- (iii) Whether the facts contained therein so far as can be tested, is true;
- (iv) Whether the accused person had the opportunity of committing the offence;
- (v) Whether the confession of the accused person was possible;
- (vi) Whether the confession was consistent with other facts which had been ascertained and proved in the matter.<sup>20</sup>

#### **4. Justification or *Raison d'être* for the Veracity Test**

The Supreme Court profoundly explained the reason for the veracity test in the case of *Ahmed v State*<sup>21</sup> when it held among other things that a person charged for a criminal offence if found guilty will lose his right of human dignity and freedom of movement as most times he will be sentenced to a term of years imprisonment or like in the case on appeal, he will be sentenced to death if the offence is a capital offence. In view of what is at stake, the Court must be double sure that the accused indeed committed the offence

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<sup>20</sup>*Edun v Federal Republic of Nigeria* (2019) LPELR-46947(SC); *Ogedengbe v State* (2014) All FWLR (Pt. 752) 1724 at 1746-1747; *Mohammed v State* (2014) All FWLR (Pt. 747) 663 at 686; *Fabiya v State* (2015) All FWLR (Pt.797) 77 at 790; *Adeyemi v State* (2012) All FWLR (Pt.606) 492 at 509.

<sup>21</sup> (2001) LPELR-262 (SC).

before convicting and sentencing him to death. Conviction cannot be based on suspicion no matter how strong the suspicion.

Furthermore, in criminal trials, the duty to prove criminal liability rests squarely on the prosecution, this duty does not shift. As held by the Supreme Court in *Musa Abdulmumini v FRN*,<sup>22</sup> this duty is squarely on the shoulders of the prosecution and it does not shift. The standard of proof required is beyond reasonable doubt meaning that the evidence which will satisfy this standard of proof is such that it is a very high probability that the offence was committed by the appellant. Using the eyes of the reasonable man, once it is highly probable that the accused committed the offence, the offence would have been proved beyond reasonable doubt. This requires that the ingredient of the offence must be proved beyond reasonable doubt. What will determine liability is the ingredient of the offence and nothing more because if the prosecution is unable to establish the ingredients of the offence, the accused will be discharged and acquitted.<sup>23</sup> Under our criminal system, an accused person is presumed innocent until the prosecution proves his guilt beyond reasonable doubt. Thus, the prosecution is duty bound to establish the guilt of the accused by cogent and credible evidence adduced before the Court. The prosecution can discharge the onus placed on it through :- (a) Direct evidence of witnesses; (b) Circumstantial evidence; or c) Reliance on a confessional statement of an accused person voluntarily made as held in *Alade v State*.<sup>24</sup> It is trite law that for a confessional statement to be so acclaimed and utilized, it must be direct, positive and unequivocal of facts that satisfy the ingredients of the offence(s) accused person confessed to have committed. This was the kernel of the decision in the case of *Edun v Federal Republic of Nigeria*.<sup>25</sup>

##### **5. When the Issue of Testing the Veracity of a Confessional Statement Will Arise?**

It is when the statement is correctly a confessional one that the issue of the tests to its veracity necessitating the application of the rules propounded in the English case of *R v Sykes (supra)* and approved by the Nigerian Supreme Court in the cases of *Ikpo v The State*<sup>26</sup> and *Daniel Nsofor Anor v State*<sup>27</sup> would come into play. There is no application of the principles for testing the veracity to a statement that is not confessional. In the case of *In Alade v State (supra)*, the appellant and two other persons were charged for the offences of conspiracy, attempted armed robbery, house breaking, stealing and being a member of a secret cult. The appellant, as his co-accused, pleaded not guilty to all the counts of the information when they were arraigned. At the trial the prosecution called three (3) witnesses at the close of which the appellant testified in his own defence. The prosecution's case was that the accused/appellant and two others on 6/12/2016 at Azikoro

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<sup>22</sup> (2017) 12 SC (Pt. 1) 37.

<sup>23</sup> *Mohammed Ibrahim v The State* (2015) 11 NWLR (Pt. 1469) 164.

<sup>24</sup> (2022) LPELR-58614(CA).

<sup>25</sup> 2019) LPELR-46947(SC).

<sup>26</sup> (1995) 9 NWLR (Pt.421) 540.

<sup>27</sup> (2004) 18 NWLR (Pt. 905) 292.

community, Yenagoa, conspired and attempted to rob the homes of PW1, Deputy Superintendent of Police, Lawrence Umokoro Kelani and PW3 - Mrs. Linda Ozims. The prosecution called three (3) witnesses and relied on the alleged confessional/extra-judicial statement of the Appellant, Exhibit B tendered through PW2 - Inspector Ubong Emmanuel, the Investigating Police Officer (IPO). The Appellant testified for himself without calling any witness, denied committing the offences and retracted his alleged confessional statement, Exhibit B claiming that he did not make the alleged confessional statement. In his testimony in Court, he stated that on his way to his welding work early in the morning of 6/12/2016, he was stopped at Best Man Street, Yenagoa by the PW1, who informed him that there was a robbery incident the previous night on his street and he was out arresting any person as a possible suspect. He added that he introduced himself to PW1 that he was a welder and the person previously seen in the company of his (PW1's) daughter; whereupon PW1 got angry and accused him of being the person that usually sleeps with his daughter in his house when he is not at home. He ordered the appellant to accompany him to his house for possible identification by his neighbours as the person who has the alleged amorous relationship with his daughter. Appellant claimed that he refused to follow PW1 as ordered whereupon PW1 threatened and actually shot him on his foot and left him there. As he was there screaming for help, a tricycle driver helped to convey him to Azikoro Police Station where they narrated the incident. The DPO at the Azikoro ordered him to be taken to a hospital. He was taken to the Federal Medical Centre where he was refused treatment because of absence of Police Report. Appellant was then taken to Anti-Vice, but they were on parade and then driven to SARS where he explained what had happened and his written statement was taken by a policeman known to Appellant as 'Tallest' which he thumb printed. It was Tallest that called PW2- Inspector Ubong, being the Team Leader who intervened to stop the initial order of arrest of the PW1 by 'Tallest'. It was later that PW1 was invited and he then made the false allegation against him that he was one of the robbers that allegedly attempted to rob his home and he shot him. In its judgement, the High Court found the appellant together with the other two defendants guilty and sentenced them accordingly. Dissatisfied with the decision, the appellant appealed to the Court of Appeal.

The Court of Appeal allowed the appeal and set aside the decision of the High Court. Consequently, the appellant was discharged and acquitted. The Court of Appeal held that a proper reading of the lower Courts judgment on records, disclosed that the learned trial Judge relied mainly on the confessional statement of the appellant and only alluded to aspects of the prosecution's evidence (direct and circumstantial) that appear to corroborate the alleged confessional statement.

#### **6. Consequences or Effect of Failure to Carry out the Veracity Test**

The law is settled that a free and voluntary confessional statement if positive and direct is sufficient to sustain a conviction once the Court is satisfied of the truth of the confession even if the accused person retracted or resiled from the statement. However, where an

accused retracts his statement or resiles from it, the Court is enjoined to look for evidence outside the statement to confirm the truth of the statement. Failure to do so will be fatal to the conviction. In *Asa v State*,<sup>28</sup> this was an appeal against the judgment of the High Court of Enugu State delivered on 11/12/2017 in Charge No. E/14C/2015. The Respondent had preferred a one count charge against the appellant to wit; murder contrary to section 274(1) of the Criminal Code, Cap.30 Vol. 12, Revised Laws of Enugu State, 2004. The appellant pleaded not guilty to the charge. The prosecution called 3 witnesses and tendered exhibits. The appellant testified in his defence but did not call any witness. At the conclusion of the trial, the trial Court found the appellant guilty of the charge of murder and sentenced him to death accordingly. The appellant was aggrieved by the judgement hence this appeal. The Court of Appeal determined the appeal on the following lone issue for determination: ‘whether the trial Court was right in convicting the appellant for an offence of murder based on his confessional statement.’ In conclusion, the appeal was held to be meritorious and was allowed. The appellant was thereby discharged and acquitted. It was reiterated by the Court of Appeal that the apex Supreme Court and the Court of Appeal have remained consistent in requiring that all confessional statements must be subjected to the veracity tests set out in the cases of *Alao v State*,<sup>29</sup> *State v Isah & Ors*,<sup>30</sup> and *Abdullahi v State to wit*:

- (i) Whether there is anything outside the confession to show that it is true;
- (ii) Whether the statement is corroborated, no matter how slight;
- (iii) Whether the facts contained therein, so far as can be tested, are true;
- (iv) Whether the accused person had the opportunity of committing the offence;
- (v) Whether the confession was consistent with other facts which have been ascertained and proved in the matter; and
- (vi) Whether the confession of the accused person was possible.

Since the statement upon which appellant was convicted cannot be said to have passed any of the above tests, the conviction cannot stand. The appeal succeeded and the judgment of the High Court of Enugu State delivered on 11th December, 2017 in Charge No. E/14C/2015 was set aside. The conviction of the Appellant and the sentence of death passed on him were set aside. The Appellant was discharged and acquitted.

Further, the Administration of Criminal Justice Act, 2015 has laid down the procedure for the interrogation of an accused person. Where these procedures are not observed, a trial court has no obligation to countenance any confessional statement.<sup>31</sup>

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<sup>28</sup> (2020) LPELR-49937(CA).

<sup>29</sup> (2019) LPELR-47856 SC.

<sup>30</sup> (2012) LPELR-15519 SC.

<sup>31</sup> For further reading, see N.O. Obiaraeri, *Impact of Administration of Criminal Justice Act, 2015 and the Police Act, 2020 on Confessions- A Restatement of the Preeminence of the Evidence Act, 2011* (Owerri, Imo State University Press, August 2022).

## **7. Conclusion**

It has been amply demonstrated that the veracity tests to be applied on an accused person's confessional statement as originally formulated in the notorious English case of *R v Sykes* by Ridley, J have been accepted and consistently applied by Nigerian Courts and especially the apex Supreme Court and the Court of Appeal over a long period of time in a number of cases. The need to seek any other evidence even if slight, of circumstances which make it probable that the confession is true cannot be overemphasised. Therefore, in the determination of the veracity of a confessional statement, the Court is obligated to carry out this test as confessional statement is the most incriminating evidence and a court can convict on it so long as it is free and voluntary and it is direct, positive and properly proved. The Court should not, however, act on the confession without first testing the truth thereof.<sup>32</sup>

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<sup>32</sup>*Kushimo v State* (2021) LPELR-54999(SC) (Pp. 40-41 paras. F).