

**SUPREME COURT OF NIGERIA**  
10TH SEPTEMBER, 1993 SC. 122/91  
**CORAM:- M. BELLO (C.J.N), A-G KARIBI-WHYTE,**  
**S. KAWU, S.M.A. BELGORE, A.B. WALI,**  
**O. OLATAWURA, I.L. KUTIGI, JJSC**

STANLEY IDIGUN EGBOGHONOME ..... APPELLANT

V

THE STATE

..... RESPONDENT

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**APPEALS** - Court of Appeal - where trial court by a slip of the pen records Pw4 instead of Pw3 - whether Court of Appeal can correct the slip.

**CONFESSIONS** - Where Appellant is seen in the vicinity of scene of crime-body of deceased found without its hunchback -Appellant going into hiding after the commission of the offence - whether these facts bear out Appellant's confession that he committed the crime.

**EVIDENCE** - Contradictions in evidence - which did not affect credibility - whether they can be ignored by the court.

**EVIDENCE** - Failure to call in evidence, the Superior Police Officer who attested to accused person's confession - whether fatal to conviction of the accused.

**EVIDENCE** - Where the extrajudicial confession of an accused person is inconsistent with his testimony - whether the court should disregard both.

**MEDICAL EVIDENCE** - Where identification of the body of the deceased is inconclusive due to absence of the identifier - where court can infer cause of death without medical evidence - whether absence of identifier is fatal to prosecution's case.

**SUPREME COURT** - Previous decision of the Supreme Court in *Oladejo v. The State* given per incuriam - whether supreme court can depart from or overrule it.

**FACTS**

The Appellant was convicted by the High Court of Bendel State of Murder and Conspiracy to commit murder. The deceased who had a hunch-back had on the fateful day gone to her farm but did not return home again. A search party later saw her body in a swampy water near her farm, pinned down with sticks and her hunch back cut off. The hunch back was never seen. A witness gave evidence of having seen the Appellant with other persons near the deceased person's farm and the Appellant had said that he was there to kill rabbits. The Appellant who lived in the same village with the deceased was not seen again until nearly ten months later when he was arrested in his hiding place by the police. He made a confessional statement to the effect that he killed the deceased and removed her hunch back for the purpose of money making medicine. At the trial, he retracted his confession but the trial judge after considering the evidence relied on the Appellant's confession and the circumstantial evidence in convicting him. His appeal to the Court of Appeal was dismissed. He then appealed to the Supreme Court entirely challenging the trial Courts decision convicting him on the strength of his extra judicial confession which he retracted before the trial Court.

**HELD** (unanimously dismissing the appeal)

1. Asanya's case supports the view that where an accused person makes a confession which is inconsistent with his testimony, the testimony is to be treated by the Court as unreliable while the confession is not regarded as evidence upon which the court can act. (P.28 L16)
2. It is trite law that the Supreme Court will depart from or over-rule its previous decision if the decision was made per incuriam or its application to future cases will perpetuate injustice (P.28 L36)
3. The extension (of the rule in R.v. Colder that where a witness makes a statement inconsistent with his testimony, both will be disregarded) to the extrajudicial confession of an accused person will occasion grave miscarriage of justice. It may perpetuate injustice to the society as murderers would be at large simply because after a second thought, they have retracted their confessions. Secondly, it will occasion grave injustice to the accused as it would result in depriving him of the right to due consideration of his defence. (P.29 L4)
4. The trial court was right to rely on the confession of the Appellant in convicting him of murder. Accordingly, the cases of Saka Oladejo v. State

(1987) 7 SC. 207 and *Asanya v. State* (1991) 3 NWLR (pt 180) 422 should be overruled and are hereby expressly over-ruled. (P. 30 L36)

5. Without the evidence of Johnson Akpughe (the person who identified the deceased to the doctor) the identification of the body to the doctor was inconclusive. As the doctor neither knew the deceased nor Johnson Akpughe his evidence is not covered by s.142 of the Evidence Act (fact especially within the knowledge of any person). However, non availability of Johnson's evidence is not fatal to prosecution's case, for this is a proper case where the court can infer the cause of death without medical evidence. (P.31 L11)

6. The practice of taking accused persons who confessed to the commission of serious offences before Superior Police Officers though not required by any rule of law or procedure, has been highly commended by the Supreme Court as it ensures fair play and justice to the accused. However, failure to call the attesting officer as a witness will not per se be fatal to a conviction. In the instant case, failure to call Mr. IgbinoBaro the attesting officer as witness would not vitiate the conviction. (P.32 L11)

7. The recording of the trial court that "Pw4" had seen the Appellant in the vicinity of the scene of the crime whereas it was "Pw3" that testified to that effect is a mere slip of the pen which the Court of Appeal has corrected. Also the evidence of Pw3 that she learnt of deceased's death on the day of her death contradicting the fact that her death was known the following day has been fully considered by the trial court which rightly concluded that the contradiction did not affect the credibility of the witness. (P.32 L22)

8. The Court of Appeal was right in affirming the conviction of the Appellant upon his confession which the trial court found to be true and voluntary, that the deceased was killed and her hunch back removed. The truth of the Appellant's confession is born out by the fact that Pw3 saw him in the vicinity of the scene of the crime, the body found without the hunchback and the fact that the Appellant went into hiding after the commission of the murder. (P. 32 L31)

### **REPRESENTATION**

Chief A. O. Akpedeye, for the Appellant.

V.N. Adaikpoh, Esq. A.G Delta State with G.E. Okirhienyefa, for the Respondent.

AMICICURIAE

1. Mr. Clement Akpamgbo, S.A.N. Hon. Attorney-General of the Federation, (Mrs. F.N. Molokwu, Deputy Director, Federal Ministry of Justice and Mr. Gabriel Fan, State Counsel)
- 5 2. Mr. Yemi Osikoya Hon. Attorney-General and Commissioner for Justice, Lagos State, Bode Rhodes-Vivour Esq. DPP, Lagos State Ministry of Justice.
3. Chief F.R.A. Williams, S.A.N. with J.I. Nweze Esq. and U.B. Anakwe
4. Dr. Mudiaga Odje, S.A.N. with Miss Carol Ajje
5. Wole Olanipekun, S.A.N., A-G Ondo State with Miss Gladis Dosumu, Legal
- 10 Officer.
6. Adegboyega Awomolo, S.A.N. A-G Osun State
7. Tinu Akomolafe - Wilson (Mrs.) Solicitor General, Edo State.
8. Chief Jide Oki.

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CASES REFERRED TO

1. Oladejo v. The State (1987)3 NWLR (pt.61)419
2. Asanya v. The State (1991)3 NWLR (pt. 180)422
- 20 3. R.V. Ukpong (1961) 1ANLR 26.
4. Jizurumba v. The State (1976)3 SC 89
5. Stephen v. State (1986)5 NWLR (pt.46)978
6. R.v. Colder (1960)1 WLR 1169
7. Mariagbe v. State (1977)3 SC. 47
- 25 8. Lori v. State (1980)8 - S.C. 81
9. Akpan v. State (1991)3 NWLR (pt.182)646
10. Ogunleye v. State (1991)2 NWLR pt (177)1
11. Opayeni v. State (1985)2 NWLR (pt.5)101
12. Rabi v. State (1980) FNCR 47
- 30 13. Duru v. Nwosu (1989)4 NWLR (pt. 113)24
14. Ulewuniueyi v. State (1989)4 NWLR (pt.1 14)131
15. Omaoba v. State (1988)3 NWLR (pt.83)460
16. R. v. Sykes (1913)8 C.A.R. 233
17. Queen v. Obiasa (1962)1 ALL NLR 651
- 35 18. Udo v. State (1972)6 - 9 SC. 234
19. Dawa v. State (1986) 8 -11 SC 236
20. R. v. Itule (1961)1 ANLR (pt.3) 462
21. Afolabi v. Police (1961)1 ANLR

<u>Egboghonome v. The State (1993)</u>	11	KLR	5
22. State v. Enabosi (1966)2 ANL	116		
23. Achabua v. State (1976)12 SC.	63		
24. Onochie v. The Republic (1966)NMLR.	307		
25. Kanu v. The King (1952)14 WACA	30		
26. Ndo v. The Queen (1953)14 WACA)			
27. Teal's case, 11 East	309 (2809)		5
28. Harris v. R. (1928)20 CAR.	144		
29. White v. R(1924)17 CAR.	60		
30. Onubogu v. State (1974)9 Sc.	1		
31. Duru v. The State (1993)3 NWLR (pt 281)	283		
32. Odi v. Osafire (1985)1 NWLR (pt 1)	17		10
33. Maclean v. Inlaks (1980)8 - 11 Sc.	1		
34. Johnson v. Lawanson (1971)1 NWLR	380		
35. Yesufu v. State (1976)6 SC	167		
36. R. v. Kanu	14 WACA;		
37. Mumini v. State (1975)1 ANLR	294		15
38. Agholor v. A.G. Bendel State (1990)6 NWLR (pt.155)	41		
39. R. v. Sullivan (1887)16 cox	347		
40. Aremu v. State (1991)7 NWLR (pt.201)	l		
41. Salawu v. State (1971) NMLR	241		
42. Yahaya v. State (1986)12 SC.	282		20
43. Kamau v. Republic (1965) E.A.	501(CA)		
44. Toyi S.O v. R. (1960) EA	760 CA		
45. Bamgboye A.G (1966) NMLR	266		
46. Ofori v. State (1963)2 GLR	402		
47. Kim v. State (1982)4 NNLR (pt.3)	470		25
48. Owie v. State (1985)1 NWLR (pt.3)	470		
49. Omogodo v. State (1981)5 Sc.	5		
50. Umani v. State (1988)19 NSCC (p.1)	137		
51. Mbenu v. State (1988)3 NWLR (pt.84)	615		
52. Gabriel v. The State (1989)5 NWLR (pt 122)	457		30
53. Udo v. The Queen (1964)1 ANLR,	21		
54. Akinfe v. State (1988)3 NWLR (pt85)	729		
55. Ikemson v. State (1989)3 NWLR (pt 110)	455		
56. Onwumere v. State (1991)4 NWLR (pt.186)	428		
57. Ejinima v. State (1991)6 NWLR (pt.200)	627		35
58. Aremu v. State (1991)7 NWLR (pt.201)	l		
59. Quinn v. Leathern (1901) AC.	506		
60. Driscoll v. The Queen (1977) 137 C.L.R.	517		
61. Mofayo v. C.P.	13 WACA 114		

62. Queen v. Igwe (1960)5 FSC 55
63. Queen v. Eguabor (1960) SCNLR 158
64. Ogbaru v. The Queen (1962)01 ANLR 287
65. Dcpasa v. Bendel State (1981)9 SC.7
- 5 66. Obidiozo v. State (1981)4 NWLR (pt.67)748
67. Gbadamosi v. State (1992)9 NWLR (pt.266) 465
68. Ibina v. The State (1989)5 NWLR (pt. 120)238
69. Maigida v. The State (1979) NSCC 234
70. Obosi v. The State (1965)NMLR 119.
- 10 71. Otufala v. The State (1968) NWLR 261
72. Durugo v. The State(1992)7 NWLR (pt.255)525
73. Birch v. R. (1926)1 CAR 26
74. Joshua v. The Queen (1964)1 ANLR 1.
75. Ajudahun v. State (1991)9 NWLR (pt. 213)36
- 15 76. Esau v. State (1976) NSCC 637
77. Ederemi v. State (1975)9 423
78. Ifenado v. State (1966) NSCC (Vol. 4) 331
79. Okpa v. State (1972)9 NSCC (Vol. 7)104
80. Njoku v. State (1972) NSCC (Vol.7)135
- 20 81. R. v. Knock (1877)14 COX C.C.I., 2
82. Enitan v. State (1986)3 N.M.L.R pt. 30 604
83. State v. Usor (1972) N.M.L.R. 211
84. Omisade v. Queen (1964)1 All NLR, 233
85. Kumo v. State (1968)NMLR 227
- 25 86. Yanor v. The State (1965) NMLR 337
87. R. v. Nwiboko 4 FSC. 101
88. R. v. Obiasa (1962)1 ANLR 651
89. Williams v. State (1975)9 - 11 SC. 139
90. Fallon v. Calvert (1960)1 ALL ER. 281
- 30 91. Donoghue v. Stevenson (1932)2 KB 606
92. Grant v. Australian Knitting Mills (1936) AC. 85
93. Heseldine v. Daw (1941)2 KB 343
94. Rylands v. Fletcher (1866) L.R. 1 Exch. 265
95. Randham Chemical Works Ltd. v. Belvedere Fish Guano C. (1921)2
- 35 AC.465
96. R. v. Omokaro 7 WACA 146
97. Ogoala v. The State (1991)2 NWLR (pt.175)509

**STATUTES REFERRED TO**

1. Criminal Code ss. 319(1), 324
2. Evidence Act ss. 27 s. 159(1)
3. Constitution of the Federal Republic of Nigeria 1979 - s. 33(1).

**BOOKS**

1. Archbold, Pleading, Evidence and Practice in Criminal cases (35<sup>th</sup> ed)
2. Salmond on Jurisprudence.

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**LEAD JUDGMENT BY BELLO CJN**

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This appeal raises, inter alia, a very important question of law in the administration of criminal justice. The question arises from the principle of law stated in *Oladejo v. State* (1987) 3 NWLR (Pt.61) 419 at 427 by Nnamani, J.S.C:

*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."* 15

In *Asanya v. State* (1991) 3 NWLR (Pt.180) 422 at 451, the court sitting as a full court adopted the said principle of law and was not willing to depart from it in spite of the eloquent and well researched submission of learned counsel for the appellant in that case that the court should over-rule the line of cases in which the principle had been applied to the extra-judicial confession of an accused person which was inconsistent with his testimony. 20

The question now for determination is: Whether this principle of law is applicable to the extra-judicial confession of an accused person which he retracts at the trial? Because of the importance of the question we invited as amici curiae some Attorneys-General and some Senior Advocates of Nigeria to address the court on the question. At the conclusion of their addresses, the court expressed its appreciation for the useful assistance given to it by the amici curiae. The court is indeed grateful. 25

The appellant was convicted by the High Court of Bendel State of conspiracy to commit murder and of the murder of Utoro Akpughe punishable under sections 324 and 319(1) respectively of the Criminal Code of the State. He was sentenced to death for murder and the sentence for conspiracy was deferred. His co-accused one Charles Ogar, was acquitted and discharged. 35

The facts of the case as found by the trial Judge may be summarised:  
 On 10th October, 1984, the deceased, who had a hunch back, went to her farm  
 and when she did not return home, a search party went out to look for her. She  
 was not found that day but on the following day the search party found her  
 5 body pinned down with sticks in swampy water near her farm. Her hunch back  
 had been cut off from her body and the hunch back has never been found. The  
 doctor, who performed post mortem examination on her body, testified as  
 follows:

*"On examination I observed that the face of the corpse was puffy  
 10 with no abrasion. The corpse was dressed up in a Yoruba attire. There was a  
 total lesion of the vertebral column from the lumbar aspect upwards to the  
 cervical aspect posteriorly opening into abdominal cavity posteriorly. From  
 the opening of the corpse I could see the bowels, the spleen and the kidney.  
 The same opening extended to the thoracic cage showing six ribson each  
 15 hemelytrar amputated. The back bone was cut near the neck and the waist  
 and the back between these cuts along the back bone and part of the ribs  
 attached to the back bone was removed as a whole leaving a hole on the  
 back from which the inside of the corpse could be seen. In my opinion the  
 deceased died of traumatic amputation of vertebral column involving the  
 20 ribs, the internal and external hemorrhage and shock and the probable date  
 of death of deceased was 10/10/84."*

There was evidence that P.W.3 had seen the appellant with three  
 other persons in the vicinity of the farm of the deceased on the day she  
 25 disappeared; that the appellant told P.W.3 that he was there to kill rabbits, that  
 the appellant, who lived in the same village of the deceased, was not seen  
 again until on 10th July, 1985 when he was arrested at Ekiugbo village wherein  
 he had been hiding. He made a confessional statement to the Police after his  
 arrest, which was admitted in evidence as Exhibit B, that himself, Charles Ogar  
 30 who was his co-accused, one Agita and another person conspired together  
 and killed the deceased, cut off her hunch back and went away with it for the  
 purpose of money making medicine. In his testimony during the trial, the  
 appellant retracted the confession and denied making the statement, Exhibit  
 B, though he admitted signing it when it was blank. His defence was alibi.

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The trial Judge relied upon the confession and the circumstantial  
 evidence in convicting the appellant of the two offences.

The appellant, aggrieved by the decision of the trial court, appealed  
 to the Court of Appeal which dismissed his appeal and affirmed the convic



tion. He has now appealed to this court.

Learned counsel for the appellant has formulated five issues for determination. They are:

*"1. Whether the Court of Appeal was justified in affirming the decision of the trial court which convicted the appellant for conspiracy to murder and for murder mainly on the alleged extra-judicial statement of the appellant from which the appellant not only totally retracted but also contradicted in his testimony before the trial court.*

*2. Whether the Court of Appeal was right when it affirmed the decision of the trial court which convicted the appellant for conspiracy to murder and for murder when there was material contradiction in the evidence of the prosecution as to the identity of the deceased.*

*3. Whether after disregarding the alleged extra-judicial statement of the appellant, Exhibit 'B' and his testimony before the trial court, the circumstantial evidence left will be COGENT, COMPLETE AND IRRESISTIBLE enough to establish the guilt of the appellant.*

*4. Whether the Court of Appeal Was right in affirming the decision of the trial court when Mr. Igbinobaro, the superior police officer, alleged to have attested the alleged extra-judicial statement of the appellant was not called as a witness by the prosecution, but treated Exhibit B which he made as substitute for his evidence.*

*5. Whether the Court of Appeal was justified in affirming the decision of the trial court which was influenced by findings of fact NOT supported by evidence."*

The respondent conceded and adopted the five issues.

Learned counsel for the appellant dealt with issues No.1 and 3 together. He contended that the conviction was based mainly on the extra-judicial confession of the appellant which he retracted at the trial; that the appellant not only resiled from his confession, Exhibit B, but also contradicted it in his testimony by the defence of alibi. It is trite, he contended, that where a witness including an accused person has made a previous statement which is in conflict with his evidence in court, both the previous statement and evidence should be regarded as unreliable and do not constitute evidence upon which the court can act. He buttressed his contention that this has been the attitude of the Supreme Court with *Saka Oladejo v. State* (1987) 3 NWLR (Pt. 61) 419; (1987) 7 S.C. 207 at 224; *R v. Ukpong No.1* (1961) 1 SCNLR 53; (1961) 1 All NLR 26; *Jizurumbo v. State* (1976) 3 S.C. 89; *Stephen v. State* (1986) 5 NWLR (Pt.46) 978 at 1000 and *R. v. Golden* (1960) 1 WLR 1169. Learned counsel urged us to conclude that the Court of Appeal erred in law in uphold

ing the conviction based on the retracted confession of the appellant. Counsel for the appellant further submitted, whence the confession is disregarded the circumstantial evidence is not cogent, complete and irresistible to establish the guilt of the appellant as required by law; Okoro Mariagbe v. State  
5 (1977) 3 S.C. 47 at 52; Lori v. State (1980) 8 - 11 S.C. 81 at 86. He submitted that the evidence shows there were other persons who had motive and opportunity to kill the deceased. He particularly mentioned her relatives, P.W.1, P.W.3 and P.W.4 who were initially arrested as suspects, with whom she had a previous quarrel over her farm and generally, the villagers frequented the plantation near the swamp where her body was found. He argued that the circumstantial evidence is not conclusive and that it is unsafe and unreasonable to  
10 sustain the conviction.

The second issue relates to the conflict in the evidence of identification of the body of the deceased to the doctor, who testified that one Johnson  
15 Akpughe identified the body to him for post mortem examination, whereas P.W.1 claimed to have done so. Counsel submitted that the prosecution did not establish the identification beyond reasonable doubt.

It is the contention of learned counsel for appellant on issue No.4 that Mr. IgbinoBaro, the superior police officer who attested to the voluntariness  
20 of the confession, Exhibit B, was a material witness for the prosecution whose evidence would have tilted the scale of justice one way or the other if he had testified. He contended that the failure of the said police officer to testify vitiated the conviction. He referred to Akpan v. State (1991) 3 NWLR (Pt.182) 646; Ogunleye v. State (1991)3 NWLR (Pt. 177) 1 at 2-3; Opayemi v. State (1985)  
25 2 NWLR (Pt.5) 101 and Rabi v. State (1980) 1 NCR 47. Learned counsel submitted that the Court of Appeal was in serious error when it affirmed the decision of the trial court on the basis that Exhibits C, C1, C2 and D and the evidence of P.W.7 had substantially and sufficiently covered the evidence Mr. IgbinoBaro would have given.

30 In dealing with Issue No.5, counsel for the appellant pointed out that the finding of the trial court that P.W4 had seen the appellant in the vicinity of the deceased's farm at the material time was not supported by the evidence. He also contended there was no evidence to support the finding of the trial Judge that after P.W3 had left the plantation, where she had seen the appellant on the day the deceased  
35 went to the farm, and returned "home only to hear the news that evening that Utoro Akpughe died in the bush." In parenthesis, it may be pointed out that this is an obvious misdirection. There was only evidence of her disappearance that day. Her death became known the following day.

Referring to Duru v. Nwosu (1989) 4 NWLR(Pt.113)24 at 25 -26;

Ukwunnei v. State (1989)4 NWLR (Pt.114) 131 at 144; Stephen v. State (1986) 5 NWLR (Pt.46) 978 at 1005 and Omuoba v. State (1988) 3 NWLR (Pt.83) 460 at 475, learned counsel concluded that this court had held time and again that a judgment based on findings not supported by evidence was perverse and could not stand. He urged the court to allow the appeal.

The Attorney-General of Delta State for the respondent responded 5 that the Court of Appeal was right in affirming the conviction based on the confession notwithstanding its retraction and the testimony of the appellant contradicting the confession. He submitted that 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. He relied on R. v. Sykes (1913)8 C.A.R.233; Queen v. Obiasa (1962) 10 2 SCNLR 183; (1962) 1 All NLR 651 at 655; Udo v. State (1972) 6-9 S.C. 234; Dawa v. State (1980) 8-11 S.C. 236 at 268; R. v. Itule (1961) 1 All NLR (Pt.3) 462; Afolabi v. Police (1961) 2 SCNLR 307; (1961) 1 All NLR 654; The State v. Enabosi (1966) 2 All NLR 116. 15

Referring to the Queen v. Obiasa (supra) and Achabua v. State (1976) 12 S.C. 63, the learned Attorney-General submitted that an accused person may be convicted on his voluntary confession without any corroboration if the court is satisfied with its truth. However, he drew our attention to Onochie v. The Republic (1966) NMLR. 307; Kanu v. The King (1952)14 WACA 30 and 20 Ndo v. The Queen (1953) 14 WACA, wherein the court held that 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 will not be quashed merely because it is based entirely on the evidence of 25 confession of the appellant. In the present case, he contended that there is ample evidence of the prosecution witnesses corroborating the confession.

With regard to the other issues, namely the identification of the body of the deceased, contradiction in the evidence of the prosecution witnesses and the failure of the prosecution to call the attesting police officer, it was 30 contended on behalf of the respondent that the lower courts adequately considered the issues and the decision of the Court of Appeal on them cannot be faulted.

Finally, the learned Attorney-General concluded that the principle of law stated in Asanya v. State (supra) was rather too wide. The principle ought not to apply to confession and extra judicial statement of an accused person. 35 I now proceed to state the submissions of the amici curiae. I have already indicated that they were invited to address the court on one issue only, to wit: whether the principle of law stated in Asanya's case applies to extra-judicial confession of an accused person which he retracts at his trial.

The Attorney-General of the Federation, as *amicus curiae*, prefaced his submission with the history of the principle under the law of England starting from the old case of *Teal* 11 East 309 (2809); *Leonard Harris v. R* (1928) 20 C.A.R 144; *Alfred White v. R.* (1924) 17 C.A.R. 60 and *R. v. Golder* (1960) 1 WLR 1169. He pointed out that the principle in *Asanya's* case (*supra*) derives support from *R. v. Golder* followed by the Supreme Court in *Regina v. Ukpong* (1961) 1 SCNLR. 53; *Stephen v. The State* (1986) 3 NWLR (Pt.46) 978 at 988, per *Karibi-Whyte, J.S.C.*; *Saka Oladejo v. The State* (1987)3 NWLR. (Pt.61) 419, 427 per *Nnamani, J.S.C.*; *Onubogu & Ors. v. The State* (1974) 9 S.C. 1 and *Augustine Duru v. The State* (1993) 3 NWLR (Pt.281) 283, 293, per *Wali, J.S.C.* to name a few. See also *Archbold, Pleading, Evidence and Practice in Criminal Cases* (35th ed.) paragraph 1352 under the heading 'veracity'.

He further indicated that *Asanya v. The State* (*supra*) had added another dimension to the principle of law enshrined in *Rex v. Golder* (*supra*) in that the full court stated that the principle applies to (i) witnesses for the prosecution and (ii) confessions of an accused person who testifies; See *Nnaemeka-Agu, J.S.C.* at p.450, *Karibi- Whyte, J.S.C.* at p.467 to 468 and *Olatawura, J.S.C.* at P.476. He contended that the principle of law stated in *Rex v. Golder* (*supra*) does not cover retracted extra-judicial confession.

The learned Attorney further contended that if *Asanya* case is applicable as a general principle without exception to all circumstances of extra judicial confessions once retracted in the course of trial the consequences would be implied over-ruling or reversal of several authoritative decisions of this court when this court has firmly established that it will not depart from its previous decisions unless it has been persuaded that the previous decisions were proved wrong or given *per incuriam* and adhering to those decisions will perpetuate injustice: *Odi v. Osafire* (1985)1 NWLR (Pt. 1) 17; *Bucknor-Maclean v. Inlaks* (1980) 8-11 SC 1 and *Johnson v. Lawanson* (1971) 1 NMLR 380.

The learned Attorney then proceeded to show that an accused person can be convicted on the evidence of his voluntary confession which is true: *Jimoh Yesufu v. State* (1976) 6 S.C. 167 at 173; *R. v. Kanu* (1952) 14 WACA 30; *R. v. Sykes* (*supra*) and *Mumini v. The State* (1975) 1 All NLR 294. Where a confession is consistent with other ascertained facts which have been proved the accused can also be convicted on the extra-judicial confession alone: *Agholor v. Attorney-General Bendel State* (1990) 6 NWLR (Pt.155) 141 at 154 and *R. v. Sullivan* (1887) 16 COX 347. However, referring to *Aremu v. The State* (1991) 7 NWLR (Pt.201) 1 at 15, the learned Attorney-General submitted that where a confessional statement is retracted, it is desirable to have some evidence

Egboghonome v. The State (1993) 11 KLR Bello CJN 13  
outside the confession which go to show the confession was probably true.  
He also cited Salawu v. The State (1971) 1 NMLR 249; Yahaya v. State (1986) 12 S.C.  
282 and Queen v. Itule (1961) 2 SCNLR 183; (1961) 1 All NLR 462.

The learned Attorney further contended that a trial court may warn  
itself of the danger of convicting upon a retracted confession in the absence  
of corroboration but it is not bound to do so if fully satisfied the confession  
must be true; Kamau v. Republic (1965) EA 501 (CA) at 505 and Toyi S/O v. R. 5  
(1960) EA 760 (CA).

Finally, it is the contention of the learned Attorney that the better  
approach to the issue for determination is to treat it as one of credibility and  
the court should approach it in a pragmatic manner so that the testimony of  
the accused and his previous confession may be assessed by the court. He 10  
referred to Bamgboye v. Attorney-General (1966) NMLR 266; Ofori v. State  
(1963) 2 GLR 402 at 455 and Kim v. State (1992) 4 NWLR (Pt.233) 17 at 47. He  
urged the Court to hold that the principle of law stated in Asanya's case  
should not apply to extra-judicial confession, which the accused retracted 15  
because a rigid application of the principle will occasion grave injustice to the  
accused if, after the rejection of the confession and his testimony", the court  
convicts on the unchallenged evidence of the prosecution and in the absence  
of any valid defence. In the alternative, it may cause injustice to the society if,  
after the said rejection, there is no other evidence linking the accused with the 20  
crime. He contended that a universal application of the principle in Asanya's  
case to an extra-judicial confession once retracted at the trial will add a new  
dimension to our criminal jurisprudence never contemplated in R. v. Golder  
(supra). Asanya's case lost sight of section 27 of the Evidence Act. It is not the  
law that once an extra-judicial confession is retracted during trial, the court 25  
should throw up its hands in despair.

In a very analytical and comprehensive Brief, the Attorney-General  
of Lagos State as amicus curiae examined the several cases relevant to the  
issue under three classifications. Firstly, he referred to ten cases which super-  
ficially tend to support the proposition that an extra-judicial confession which  
is retracted is no evidence on which a court can act and contended that on 30  
proper examination of the cases only two, to wit Owie v. The State (1985) 1  
NWLR (Pt.3) 470 and Oladejo v. The State (1987) 3 NWLR (Pt.61) 419; (1987) 2  
NSCC 1025 actually supported the proposition. He submitted that the previ-  
ous statements in Omogodo v. The State (1981) 5 S.C. 5 were not confession  
and moreover what Nnamani, J.S.C., said at pages 22 to 23 should be rejected 35  
was the evidence inconsistent with the previous statements and that view of  
Nnamani, J.S.C. was stated to be an obiter in Asanya's case at page 451.

He also referred to the judgment of Karibi- Whyte, J.S.C. which is not  
the lead judgment, in Stephen v. The State (1986) 5 NWLR (Pt.46) 978 wherein

the learned Justice appeared to have supported the proposal but close examination shows that he only stated the principle relating to inconsistency between the evidence of a witness and his previous statements and not the testimony of an accused and his previous confession. Furthermore, the cases cited in the judgment were related to witnesses and not to accused.

5 Again the learned Attorney-General contended both *Umani v. The State* (1988) 1 NWLR (Pt.70) 274; (1988) 19 NSCC (Pt.1)137 and *Mbenu v. The State* (1988) 3 NWLR (Pt.84) 615, wherein Nnamani, J.S.C. reiterated his view on the inconsistency rule dealt with the previous statements and testimony of witnesses and not of accused. The same consideration applies to *Gabriel v.*  
10 *The State* (1989) 5 NWLR (Pt.122) 457 at 462 per Belgore, J.S.C.

With regard to Asanya's case, the learned Attorney-General drew our attention to *Kim v. The State* (1992)4 NWLR (Pt.233) 17, where the very author of the lead judgment in Asanya's case amplified the said judgment that it did not decide that a confession is affected by the rule in *R. v. Golder* (supra).

15

Under his second classification, the learned Attorney-General of Lagos State listed eleven cases which, he contended, have firmly established that retracted confession is evidence upon which court can act and convict since time immemorial under the common law and under section 27 of the  
20 Evidence Act. They are: *R. v. Itule* (1961) 2 SCNLR 183; (1961) All NLR 481 at 484; *Udo v. The Queen* (1964) 1 All NLR 21 at 22; *Mumuni v. State* (supra); *Nwosu v. State* (supra); *Stephen v. State* (supra); *Akinfe v. State* (1988) 3 NWLR (Pt.85)729; *Ikemson v. State* (1989) 3 NWLR (Pt.110) 455 at 473; *Onwuere v. State* (1991) 4 NWLR (Pt.186) 428 at 440; *Ejinima v. State* (1991) 6 NWLR  
25 (Pt.200) 627; *Aremu v. State* (1991) 7 NWLR (Pt.201) 1 and *Kim v. State* (supra).

Finally, the Attorney-General submitted that the rule in *R. v. Golder* states the principle of the common law that extra judicial statement is not  
30 admissible as evidence of proof of its content but may be used to impeach the credit of the witness who made it; that the rule does not apply to extra judicial confession which has always been admissible in evidence under the common law and under s. 27 of our Evidence Act.

The learned Attorney invited the court to overrule *Owie v. State* (supra) and *Oladejo v. State* (supra).

35 The amicus curiae, Chief Williams, SAN approached the consideration of the inconsistency rule from its logical perspective and its application by this court and the courts of some common law countries. Chief Williams submitted that if one goes by reason and logic alone, there can be no doubt that the inconsistency rule as laid down in *Oladejo v. The State* (supra), the

question for determination in this appeal must be answered in the affirmative.

The conclusion he contended, is supported by the views of Karibi-Whyte, J.S.C. and Nnaemeka-Agu, J.S.C. in Asanya's case because neither learned Justice drew a distinction between confessional statements and admission made by a party on the one hand and statements not amounting to confessions or admissions of fact in issue on the other hand. However, referring to Oliver Wendell Holmes on Common Law p. 1, Quinn v. Leathem (1901) A.C. at p. 506 and Salmond on Jurisprudence, Chief Williams contended that the life of the law has not been logic but it covers all aspects of human life; that a case is only an authority for what it actually decides and it cannot be quoted for a proposition that may seem to follow logically from it.

Chief Williams pointed out that the inconsistency rule was first pronounced in Nigeria in Queen v. Ukpong (1961) SCNLR; (1961) 1 All NLR 25 which followed R. v. Golder (supra). He contended that both cases were concerned with the previous statements and testimonies of witnesses and not confession of accused persons; that when this court stated the rule in Oladejo v. The State and Onubogu v. The State, the court was not also concerned with extra-judicial confession and admission. Accordingly, continued the Senior Advocate, it ought to have been recognised that Asanya wherein confession was in issue was distinguishable from the earlier cases in which the rule was formulated.

It is the contention of Chief Williams that the Nigerian law has developed safeguards for ensuring that no miscarriage of justice results from the operation of the rule. He referred to Asanya v. The State (1974) 9 S.C. 1 showing the rule will not apply where the witness sufficiently explained the inconsistency. It appears in Driscoll v. The Queen (1977) Vol. 137 C.L.R. 517 at 537 that the rule is not also inflexible in Australia and Canada.

Concluding his submission, Chief Williams urged the court not to depart from the inconsistency rule in so far as it is concerned with extra-judicial statements other than confessions and admissions as the safeguard formulated by the court meets the requirements of justice but to declare the rule does not apply to confessions and admissions. Referring to Asanya; Mofaya v. C.O.P. 13 WACA 114 and the Journal of Nigerian Law pages 31-32, he submitted the court has ample power to make the declaration having regard to the rule of practice relating to stare decisis.

Dr. Odje, SAN, another amicus curiae, starts his submission with reference to the practice and procedure for determining voluntariness of a confession and the truth of the denial of making it in that voluntariness is determined at a trial within the trial while a denial is directly admissible in

evidence to be determined at the conclusion of the trial: Queen v. Igwe (1960) SCNLR 158; (1960) 5 FSC 55 at 56; Queen v. Eguabor (1960) SCNLR 158 at 160; Ogbaru v. The Queen (1962) 1 All NLR 287 at 292; Ikpassa v. Bendel State (1981) 9 S.C. 7 at 28; Obidiozo v. The State (1987) 4 NWLR (Pt.67) 748 at 764 and  
 5 Gbadamosi v. State (1992) 9 NWLR (Pt.266) 465 at 498. He then pointed out that the confession in the present case was admitted in evidence at a trial within the trial.

With regard to the question in issue, Dr. Odje contended that a cursory glance at Asanya's case shows that a retracted confession and testimony of its maker have no evidential value on the authority of Oladejo v. The State (supra). He referred to the earlier decision of this court, Umani v. State (1988) 1 NWLR (Pt.70)274 at 283 and Mbenu v. The State (1988) 3 NWLR (Pt.84) 615 at 627, which supported the principle stated in Asanya's case but were not cited to the court.

15 The learned Senior Advocate referred the court to Ibina v. The State (1989) 5 NWLR (Pt. 120) 238 at 247, judgment of the Court of Appeal, and Ejinima v. State (1991) 6 NWLR (Pt.200)6237 at 655; Kim v. The State (supra) at 47; Akpan v. State (1992) 6 NWLR (Pt.248) 439 at 472 and Gbadamosi v. The State (supra) and submitted that the principle of Asanya's case is now open to  
 20 serious reservations. He particularly drew the court's attention to the dictum of Nnaemeka-Agu, J.S.C. on Kim's case at pp 47 and 105 that Asanya's case did not decide the question in issue in the present appeal.

The learned Senior Advocate contended that a court can act on a voluntary confession even if retracted provided there is some evidence outside the confession to show that it is true but the weight to be given to it is a  
 25 matter for the trial Judge R. v. Sykes (supra); Kanu v. King (supra); Maigida v. The State (1979) NSCC 234 at 348; Obosi v. The State (1965) NMLR 119 at 123; Otufala v. The State (1968) NMLR 261; Durugo v. The State (1992) 7 NWLR (Pt.255) 525 at 534 and Aremu v. State (1991) 7 NWLR (Pt.201) 1 at 15.

30 Continuing his submission, the Senior Advocate urged the court to depart from the inconsistency rule stated in Asanya's case and the three other cases associated with it because, firstly, the decisions in the four cases are in conflict with their cent decisions in Ejinima, Kim, Akpan and Gbadamosi. Secondly, the decisions would tantamount to not only depriving the accused  
 35 of the age-old principle that the defence of an accused person should be adequately considered but also of his right to fair hearing. It is also not in the interest of society to have murderers at large simply because after a second thought, they have retracted their confessions. He invited the court to hold that the inconsistency rule is inapplicable to extra judicial confession of an



accused person which he retracted at the trial.

The Attorney-General of Ondo state as *amicus curiae* stated in his Brief that inconsistency rule was applied to the evidence of prosecution witness in *R. v. Golder* (supra) but this court extended it to confessional statement of accused in Asanya's case, *Queen v. Ukpong* (supra), *Jiwrumba v. The State* (1976) 3 S.C. 89; *Stephen v. The State* (1986) 5 NWLR (Pt.46) 97 and *Oladejo v. The State* (supra). He further referred to *Queen v. Obiasa* (supra), *Ikemson v. The State* (1989) 3 NWLR (Pt.110) 455; (1989) 3 S.C. 41; *Akpan v. The State* (supra), *Yusuf v. The State* (1976) 6 S.C. 167, *Ejinima v. State* (supra) and s. 27 of the Evidence Act which shows that a person may be convicted on his voluntary extra judicial confession if it is true. 5 10

The learned Attorney-General advocated a 'proposition, which he stated appeared to be "novel", that a retracted confession that had been admitted in evidence at a trial within the trial, as in the present case, should be taken out of the inconsistency rule. He distinguished the present case from Asanya and Oladejo in neither of the cases was a trial within the trial conducted. Concluding, he submitted it would be dangerous to apply the inconsistency rule to confession as it would open the floodgate of retractions of confessions and result to failure of justice and the rule, being a common law rule, is inferior to the provisions of section 27 of the Evidence Act. 15 20

The Attorney-General of Osun State traced the history of the inconsistency rule from its root in England where it has been applied to witnesses only in *Birch v. R.* (1926) 1 CAR 26; *R. v. Harris* (1927) 20 CAR 144 and *R. v. Golder* (supra). In Nigeria the rule was applied to witnesses also in *Ukpong v. The Queen* (supra) and later in *Joshua v. The Queen* (1964) 1 All NLR 1 at 3 and *Onibogu v. The State* (1974) 9 S.C.1. It is the contention of the learned Attorney that the rule was for the first time applied to the statement of the accused which was inconsistent with his evidence in *Stephen v. The State* (supra) at 1001 which was subsequently followed by *Oladejo* and *Asanya*. He referred to several relevant dicta in the said cases. He contended that extension of the rule to accused persons would open the floodgate of abuses and miscarriage of justice and further create decline in public confidence in the administration 'of criminal justice. He urged the court to press for reforms in investigation procedure of capital offences by the police by introduction of sound and video tapes of confessions or confessions to be attested by Magistrates. 25 30 35

Mrs. Kalu, Solicitor-General of Edo State and *amicus curiae*, contended that inconsistency rule pronounced in *Golder's* case applied to witness only and not to accused and that its application to witnesses was qualified by *Onughogu v. State* (supra) in which it was held the evidence may be

relied on if sufficient reason is given for the inconsistency. Referring to *Oladejo v. State*, the learned Solicitor General submitted that the rule was applied to the extrajudicial statement of the accused and not to his confession. She supported her submission with *Kim case*. A court can convict on the retracted confession if it is voluntary and true: *Queen v. Obiasa* (supra) *Udo v. State* 5 (supra) and *Dawa v. State* (supra). She submitted that a strict application of inconsistency rule to confessional statements may not only inhibit the course of justice but will also lead to absurdity and render section 27 of the Evidence Act nugatory.

Mr. Oki, amicus curiae emphasized his contention that application of 10 the inconsistency rule to accused would tantamount to depriving him due consideration of his defence made explicit in *Opayemi v. State* (supra) per *Obaseki, J.S.C.* 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 S.C. (Pt.1) 38 at 15 89, *Nnamani, J.S.C.* applied the rule to the accused, learned counsel contended the dissenting judgments of *Uwais, J.S.C.* and *Craig, J.S.C.* in that case should be preferred. He submitted that *Uwaifo, J.C.A.* correctly stated the law relating to the rule in *Ibina v. State* (supra) at 247 and that if *Oladejo* is the correct law then it will be difficult to justify the decisions in *R. v. Itule* (supra) 20 *Bamgboye v. Attorney-General W.R.* (supra); *Akinfe v. State* (1988) 3 NWLR (Pt.85) 720 and *Aremu v. State* (supra).

In his Brief the Attorney-General of Kogi State stated that where a witness offers a good explanation of inconsistency, his evidence is not automatically discredited because of the inconsistency. He relied on *Jizurumba v. State* 25 (1976) 3 S.C. 89; (1976) NSCC (Vol.10) 156 at 162; *Esan v. State* (1976) 11 S.C. 39; (1976) NSCC 637 and *Aderemi v. State* (1975) (9-11) S.C. 115, (1975) NSCC Vol.9 423. He contended that a voluntary and true confession has always been acted upon by the court: *Ifenedo v. State* (1967) NMLR 200; (1966) NSCC (Vol. 4) 331 at 334; *Okpa v. State* (1972) NSCC (Vol.7) 104 and *Njoku v. State* (1972) 30 NSCC (Vol.7) 135. He urged the court not to endorse *Oladejo* and *Asanya*.

Now, it is the consensus of the Attorney-General for the respondent and all the amici curiae that the inconsistency rule was formulated for the resolution of conflict between the evidence and previous statement of a witness, whether for the prosecution or for the defence. The ratio in *R. v. Golder* 35 (supra), the cause celebre, was that the testimony of a prosecution witness which was inconsistent with her previous statement was treated as unreliable while the statement was regarded to be not evidence on which the court could act. At its formation, the rule appears to be rigid and mere inconsistency automatically renders both the testimony and the statement of a witness of no

evidential value. It is pertinent to emphasize that the rule was not formulated for the resolution of inconsistency in the evidence of an accused person and his extra-judicial confession.

Moreover, one may observe that since the adoption of the rule in Nigeria in *Queen v. Ukpogon*, it has not been an inflexible rule of law or practice. 5 The court has, for the purpose of ensuring that no miscarriage of justice has resulted from the operation of the rule, developed a safeguard that in addition to considering the totality of the evidence, the witness should be given opportunity while in the witness box to explain the inconsistency: *Onuhogu v. The State* (supra). In *Jizurumba v. The State*, Idigbe, J.S.C. stated at page 101: 10

*"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 and 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."* (Italics mine). 15

The observation of Gibbs, J. in *Driscoll v. The Queen* (supra) at p.537 shows the High Court of Australia and the Supreme Court of Canada have adopted a similar approach to that of our court.

It is also pertinent to the issue to observe that since its adoption in Nigeria, the operation of the inconsistency rule has been limited to the statement of a witness and his inconsistent testimony. It was for the first time in 1985 extended to the statement and evidence of the accused person in *Owie v. State* (supra). The judgment of this court in *Udo v. The Queen* (supra) delivered by Brett, J.S.C. made it clear that the rule did not apply to the previous confession of an accused person and his evidence in court. The learned Justice stated at pages 23 to 24: 25

*"The Judge, however, decided to ignore the statement, as not being legal evidence, and recited the decision in R. v. Golder (1960) NWLR 1169, approved in this court in R. v. Ukpogon (1961) 1 SCNLR 53; (1961) All NLR 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. The Judge was clearly mistaken in the view that the first statement, Exhibit B, was not legal evidence."* 35

Indeed, the several authorities cited by the learned Attorneys-General and

counsel in their submissions supporting the view that a court may convict an accused person on his extra judicial confession, which is voluntary and true but inconsistent with his evidence in court, are too numerous to reiterate. It is  
 5 sufficient to mention only a few: R. v. Kanu (supra); Queen v. Itule (supra); Queen v. Obiasa (supra); Mumuni v. State (supra); Aremu v. State (supra); Ejinima v. State (supra); Akpan v. State (supra); Kim v. State. It is appropriate to refer to some recent pronouncements of this court on the issue. In Akinfe v. The State (1988) 3 NWLR (pt.85) 729, in the lead judgment at page 746 E-G,  
 10 Nnaemeka-Agu, J.S.C. said as follows:

*"...of course where an extra-judicial confession has been proved to have been voluntarily made, and is positive and not equivocal, and amounts to an admission of guilt, it may well suffice to ground a finding of guilt. The  
 15 fact that the accused has retracted the confession may not necessarily make it inadmissible... But before a conviction can be properly founded on a such (sic) 'retracted confession', it is desirable to have some evidence outside the confession which would make it probable that the confession was true:.."*

20 In Onwumere v. State (1991) 4 NWLR (Pt.186) 428 at p.440 Akpata, J.S.C. said:

*"If the accused person resiles from his confessional statement, it is his function to explain to the court as part of his defence the reason for the  
 25 inconsistency. In such circumstances, if he is to be believed, the accused has to lead evidence to establish that his confessional statement could not be correct. It may be that he was unsettled in mind at the time the statement was made or that he was induced to do so. The explanation should come from him without prompting from the prosecution. It is in rare cases that a court  
 30 would attach credence to the evidence of an accused person as against his extrajudicial statement could not be correct."*

At page 442 he said:

35 *"In his judgment, the learned trial Judge made the point at page 37 that 'it is common ground that the accused beat the deceased several times with his walking stick.' The learned trial Judge rightly held, so did the Court of Appeal, that the confessional statement was freely and voluntarily made. The extra-judicial statement which forms a part of the prosecution's*

*case clearly established the gravity of the assault and the manner of the application of the stick on the deceased. ....*

.....

.....

.....

5

*In most cases, a free and voluntary extra-judicial confession provides the most satisfactory evidence of guilt. It attracts invariably the highest credit because it is presumed to be prompted by the strongest sense of guilt.*

*The presumption, which is generally accepted, is that a rational being will not make admissions prejudicial to his interest and safety if the facts confessed are not true.*

*I have already alluded to the fact that no scintilla of evidence was proffered by the appellant to explain why he had to make a confessional statement if in fact it was not true. The trial court and the Court of Appeal, in my view rightly acted on it. In the circumstance, the trial Judge was right when he held that 'the fact that the accused in the witness box tried to detract from his statement Exhibit A is immaterial.' The learned trial Judge was satisfied that the confessional statement supported the prosecution's case and was also satisfied of the truth of it...."*

Furthermore, in Ejiminima v. The State (1991) 6 NWLR (Pt.200) 627 at p.655, Nnaemeka-Agu, J.S.C., although not reading the lead judgment, said:

*"But the peculiar situation that has arisen in this case is that the confession was retracted at the trial. I believe the law is that though the court can still admit and convict on such a retracted confession, if satisfied that the accused person made 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 corroborative evidence outside the confession which would make it probable that the confession was true....."*

30

On the premise, the Attorney-General for the respondent and all the amici unanimously invited the court to examine with a view to overruling the decisions of this court in Asanya's case and Oladejo's case, upon which the former was based, and all other decisions that appeared to have applied the inconsistency rule to confession and inconsistent testimony of the accused. I entirely agree with learned counsel that the need for such close examination is imperative. It is axiomatic that extension of the rule to confession would tantamount to over-ruling all the decisions in the cases I have mentioned in the preceding paragraph and many others.

In *Stephen v. State* (1986) 5 NWLR (Pt.46) 978; (1986) 2 NSCC 1416, 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. In the lead judgment, with which Aniagolu, Coker, and (1993) 7 NWLR Egboghonome v. State (Bello, C.J.N.) 413 Oputa, JJ.S.C. agreed, Kawu, J.S.C. at page 1420 stated:

*"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.*

*Finally, in his defence at the trial, appellant said that the killing of the deceased was accidental. He said that this happened when his gun exploded and the bullets accidentally hit the deceased. It is, however, pertinent to note that this 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 court."*

In his judgment, Karibi-Whyte, J.S.C., among other reasons stated at pages 1431 to 1432:

*"I now return to the difficulties of considering the defences of accident, provocation and self-defence in one case. On principle a defence of death resulting from accident is clearly inconsistent with a defence resulting from provocation or self-defence. Whereas a defence of self-defence can merge in provocation and vice, versa (see sections 236, 237 Criminal Code), the defence of accident is completely different and is inconsistent - See also R. v. Knock (1877) 14 Cox C.C.1 at p.2. where the defences raised before the court are different, inconsistent and irreconcilable as in this case, the trial Judge is entitled to disbelieve the testimony of the accused setting up such defences and rely on the evidence of the prosecution. The principle has been unequivocally enunciated in R. v. Ukpong (1961) 1 SCNLR 53; (1961) All NLR 25 that when a witness is shown to have made a statement inconsistent with his evidence at his trial, the court is entitled to disregard not only the evidence at his trial, but the previous inconsistent statement. See also Regina v. Golder (1960) 1 WLR 1169 at p.1172. The principle applies mutatis mutandis to the evidence of a person charged with an offence. In this case, the subsequent defence of accident is clearly different, inconsistent and irreconcilable with the earlier defence of provocation and self-defence. The trial*

*Judge was therefore entitled to disbelieve and reject the defences of the appellant. Having so rejected the defences only the case of the prosecution without a defence was before the court. The Court of Appeal was right to have held that on the totality of the evidence before the court, and particularly the free and voluntary confession of the appellant, the trial Judge rightly convicted the appellant. No alternative verdict of manslaughter was on the evidence possible."*

It should be noted that although Karibi-Whyte, J.S.C. appeared 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 to act; as he did, on the confession of the appellant, which was inconsistent with his evidence.

Accordingly, Stephen v. State cannot be said to have laid down that where the confession of the accused is inconsistent with his testimony, both should be rejected and have no evidential value.

In Owie v. State (supra) a security guard was convicted of murder. In his statement to police he said a person had come to the gate of the school and when he challenged the person the person took to his heels and the guard fired at him and it was after he had fallen down that the guard knew he was a student. At the trial, he put up the defence of accident which the trial Judge did not believe. The Court affirmed the conviction on the totality of the evidence including his confession. In his judgment, Karibi-Whyte, J.S.C. referred to the inconsistency rule to justify the rejection of the defence of accident by the trial Judge. Accordingly, the Court did not decide the question in issue in this appeal. Oladejo's case was indeed unique. A confession on oath was treated unreliable simply because it was inconsistent with extra-judicial statement that the deceased died accidentally. Delivering the lead judgment, Nnamani, J.S.C. at p. 427 stated:

*"It seems very obvious that there is serious conflict in the material portion of the two statements. In Exhibit B, the appellant said the deceased fell with a knife in his hand and later died. In his testimony in court, the appellant gave a dramatic picture of the encounter. The deceased not only cut him with Exhibit E on his hand and head, but held his private part. He then stabbed the deceased with the broken part of Exhibit F. As the deceased was rolling on the ground he, appellant made sure he was dead. Contrary to the conclusion of the learned trial Judge, the law is rather that 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."*

5 He relied on R. v. Golder and three Nigerian cases which, except Stephen v. State (supra), were concerned with the statements and testimonies of witnesses, and treated the judicial confession and the statement unreliable. The other members of the panel agreed. However, there was no miscarriage of  
10 justice as the conviction was upheld on the evidence of the prosecution witnesses. With all respect to learned Nnamani, J.S.C., I have shown Stephen v. State did not establish the principle relied upon by the learned Justice. Upon the proper perusal of Mbenu v. State (supra), its ratio decidendi is to the effect that the trial Judge erred in law by relying on extra-judicial statement of  
15 a hostile witness in convicting the accused. Nnamani, J.S.C. stated at page 627:

*"This conclusion does not however apply to the other issue which Chief Akinyemi referred this court to - i.e. whether the P.W.2 mentioned the names of the accused persons that fateful morning when she was wailing about the  
20 brutal murder of her brother. Incidentally the only witness who stated that she indeed mentioned them was D.W.2 - John Mbenu, the elder brother of 1st accused.*

*But this was in his statement to the Police (Exhibit F) which had to be tendered when he was treated as a hostile witness. Mr. Mbenu had re-  
25 tracted that evidence when he gave evidence in court. It is settled that when an accused person makes a statement to police and in his evidence in court gives something contrary to it, such testimony is usually treated as unreliable and is therefore ignored. See Oladejo v. State (1987)3 NWLR (Pt.61) 419 at 427. This principle applies to any other witness in a criminal trial.  
30 See also Onubogu v. The State (1974) 9 S.C.1 and Enitan v. State (1986) 3 NWLR (Pt.30) 604. The learned trial Judge was in serious error when he relied on this statement (Exhibit F) as one of the grounds for holding that the guilt of the accused persons had been established. Perhaps, I should also add that the learned trial Judge equally erroneously relied on the so-called  
35 statement of D.W.2 that the accused persons were not among the sympathizers who came out on the morning of 8th July, 1981. If this was all the evidence against the accused persons, my decision on this appeal would have been obvious. But it was not all as I shall show later."*



It is clear the case is not direct authority on resolving conflict between the

confession of the accused and his retracted testimony. I have already commented on Oladeja's case.

The appellant, in *Umani v. State* (1988) 1 NWLR (Pt.70) 274; (1988) 1 NSCC 137, was convicted of murder by beating the deceased with sticks and iron to death. In his statement to the police, he stated that the supporters of the old village head "attacked us" with sticks and "we retaliated and" I was beaten... and became unconscious". He put up a defence of alibi at the trial. In his judgment, with which Belgore and Wali, J.S.C. agreed, Nnamani, J.S.C. wrote:

*"In his testimony in Court the appellant completely changed his story. Although he admitted that there was indeed a fight between the supporters of the new and past village head, he claimed that he was neither at the installation ceremony of the new village head nor was he at the fight. He said he was in his farm and it was only when he was returning from the farm that someone hit him. He did not see the person. There was thus a clear conflict between the appellant's statement to the Police and his testimony in court. That is not evidence from which possible defences of provocation and self defence could be considered, for it is well settled that where such a conflict as occurred here exists, the learned Judge can ignore both the statement to the Police and the testimony in court. There is hardly any probative value in such statement or testimony. The State v. Uzor (1972) NMLR 208; R. v. Harris (1977) 20 Cr. App. R. 148, 149."*

He also referred to his judgment in *Oladejo v. State* (supra) at page 427. However, the learned Justice did not reject the defence of alibi outright because it was inconsistent with his statement. He considered it fully before setting aside the conviction because of the weakness of the case for the prosecution. In their respective dissenting judgments, both Uwais and Craig, JJ.S.C., also fully dealt with the defence of alibi before dismissing the appeal. Neither Justice resorted to the inconsistency rule to reject his admission that he was at the scene of the crime. On the contrary, both learned Justices took the admission into account in dismissing the appeal.

In the case of *Ikemson v. State* (supra), the appellants were convicted of armed robbery. In their statements to the police they confessed having committed the offence but in their evidence at the trial they retracted from the confessions and pleaded alibi. After having considered the alibi, the trial Judge rejected it and acted upon the confessions and other prosecution evidence in convicting them. On appeal, this court held that the trial Judge

was right to have acted on the confessions as they had probative value. None

of the Justices invoked the inconsistency rule in *R. v. Golder* that the confessions ought to have been rejected by the trial Judge because they were inconsistent with the defence of alibi.

5 I now come to Asanya' s case wherein Nnaemeka-Agu, J.S.C. gave the impression that the rule in *R. v. Golder* is applicable to extra-judicial confession and inconsistent testimony of the maker and the rule renders both valueless. The learned Justices took the opportunity in *Kim v.State (supra)* to erase the impression. He stated at pp. 47 and 48:

10 *"Learned counsel further pointed out that in the case of Francis Asanya v. The State (1991) 3 NWLR (Pt. 180) 422 at p. 451, this Court came to the conclusion that the principle applied to both witnesses called by the prosecution and those called by the defence, including an accused person, where he testified on his own behalf. He therefore submitted that as the same*  
 15 *principle applies to witnesses called by both sides, including an accused person, the learned trial Judge could not have used the statements to convict the appellant and later used them to discredit his defences. The case of the Queen v. Itule (1961) 2 SCNLR 163; (1961) 1 All NLR 462 was relied upon.*

20 *I must pause here to make an observation. My lead judgment in the case of Asanya v. The State (supra) does not support the submissions of counsel in this case. What it decided had clearly nothing to do with inconsistency between the oral and previous written statements of the accused person as such. It rather dealt with the fact that where an accused person*  
 25 *testified, his testimony ought to be treated like that of any other witness.*

*Learned counsel for the appellant was therefore in error when he submitted that the principle on inconsistency between evidence in court and a previous written statement was pronounced upon in Asanya's case. In my respectful opinion, learned counsel for the appellant missed the point by*  
 30 *treating a confession as just any other statement. True, a confession is a statement, but it is a statement of a special kind. Sections 27 to 32 of the Evidence Act as well as rationes decidendi of numerous cases have usually treated confessions as being in a different category from ordinary statements in the matter under consideration."*

35 It appears clear from the judgment of Nnaemeka-Agu, J.S.C. in the Asanya case, with which Bello, C.J.N. and Obaseki, J.S.C. agreed, the courts below did not reject the extra-judicial confession of appellant but only treated his inconsistent evidence of insanity unreliable. He stated at p. 452 as follows:  
*"As I have stated that the courts below were right to have held that the extra-*

*judicial statement and the appellant's testimonies were inconsistent and to have treated his evidence as unreliable it becomes quite unnecessary to go*

*further into this. For that completely knocks the bottom out of the defence of insanity which was raised in his testimony in court. As that was part of the evidence which, as I have held, was rightly held to be unreliable, it follows that, as that was the only defence, apart from bare denial which was rightly rejected, appellant had no defence to the charge. Indeed a similar situation arose in the case of Oladejo v. State (supra), Nnamani, J.S.C.. of blessed memory Stated at p. 428 thus:*

*"In such cases the trial court would be entitled to reject the inconsistent defences and rely on the evidence adduced by the prosecution. So it is in this case."*  
*So it is in this case".*

I may add that confession is part of the evidence adduced by the prosecution. In his judgment at page 467, Karibi-Whyte, J.S.C. stated that the principle in R. v. Golder is wide enough to cover the statement and evidence of an accused person but confessions which are consistent with subsequent oral testimony are not affected. It applies to previous statement of the accused, whether confession or not, which is inconsistent with his oral testimony at the trial. He emphasised at the end of page 468 that in a situation where the previous confession of the accused is inconsistent with his evidence the proper course for a Judge is to disregard both.

Although Belgore, J.S.C. was in full agreement with the reasons stated by Nnaemeka-Agu J.S.C., he added that the appellant in that appeal had made a voluntary statement which was at variance with his own testimony and having failed to explain the inconsistency, his testimony remains unreliable. Had the learned Justice stopped here, there would have been no conjecture that unreliability was limited to the testimony only. But he proceeded to state:

*"This appeal, with the greatest respect, has been based on a misconception of the state of decisions on inconsistent statements in our Courts. Once statements in respect of the same issue are totally at variance, unless they are explained to the satisfaction of the court, no court will rely on such statements."*

It is reasonable to infer from this dictum that the previous statement or confession ought not to have been relied upon by the court.

In dealing with the contention of learned counsel that inconsistency rule which applies to witnesses should not be applied to an accused because

it will encourage an accused person who made a previous confession to nullify it in his evidence and by so doing defeat the justice of the case, Olatawura, J.S.C. stated:

5  
*"The proposition made by learned counsel in an attempt to differentiate between a witness and an accused is to encourage an accused person who gives evidence in his own defence to disown his previous statement without any reason notwithstanding that the earlier statement was made*  
 10 *voluntarily. I fail to find a single instance, and learned counsel has not drawn our attention to any where this court made such a distinction. An accused person who decides to give evidence is a witness in respect of his defence to the charge. The combined effect of sections 154 and 159 of the Evidence Act shows that an accused person is a competent witness even*  
 15 *though not compellable: Omisade v. The Queen (1964) 1 All NLR. 233."*

It seems from the foregoing that Asanya's case supports the view that where an accused person makes a confession which is inconsistent with his testimony, the testimony is to be treated by the court as unreliable while  
 20 the confession is not regarded as evidence upon which the court can act. Of all the cases I have examined in this judgment, only Oladejo's and Asanya's cases support this view. In Oladejo's case confession evidence was treated unreliable while in Asanya's case, it was the extra-judicial confession the court decided should not be relied on.

25 Learned counsel for appellant in Asanya's case had contended that the decision in Oladejo's case was per incuriam and invited the full court to overrule it. The court did not accede to his invitation but it approved the decision and followed it. We did not have then the advantage of the forceful submissions of the learned amici.

30 Having regard to the plethora of the authorities on the matter, I am now convinced that the decision of the court in Oladejo's case was made per incuriam and the court erred in law in adopting it in Asanya's case. The learned amici and counsel have urged the court to depart from and over-rule the decisions in the said two cases because they were not only made per incuriam  
 35 but also their continuous operation will perpetuate substantial miscarriage of justice.

It is trite law that this court will depart from or overrule its previous decision if the decision was made per incuriam or its application to future cases will perpetuate injustice: Odi v. Osafire (supra); Asanya v. State (supra)

and the other authorities cited therein. It is obvious that the decisions in

Oladejo and Asanya were undoubtedly a departure from the long established principle laid down in Udo v. State since 1964 and the several decisions of this court thereafter that inconsistency does not apply to retracted extra-judicial confession of an accused person. The application of the rule in R. v. Golder to retracted confessions will tantamount to overruling by implication all the relevant decisions of this court from Udo v. State in 1964 to Kim v. State in 1992.

In my considered view, grave miscarriage of justice would also be occasioned by the extension. It may perpetuate injustice to the society as murderers would be at large simply because after a second thought, they have retracted their confessions. It would also negate the provision of section 27 of the Evidence Act which reads:

*"27. (1) 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.*

*(2) Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only."*

Moreover, the extension would occasion grave injustice to the accused as it would result to depriving him of the right to due consideration of his defence: Opayemi v. State (supra) and Ajudahun v. State (1991) 9 NWLR (Pt.213) 33. The observation of Uwaifo, J.C.A. in Ibina v. The State (1989) 5 NWLR (Pt.12)238 at 247 on the decision of this court in Oladejo v. State (supra) is apt:

*"I must say, with due respect, that Saka Oladejo v. The State (supra) represents a departure from the principle well laid down as to how to treat the statement and evidence of an accused. I have always understood the principle in R. v. Golder (supra) which was considered in relevant cases particularly Jizurumba v. The State (supra) to relate to the ordinary witness and not an accused who testifies. The case of an accused person is quite differently treated and the guiding principles are fully established and have been applied before and after Saka Oladejo's case. In R. v. Itule (1961) 2 SCNLR 163; (1961) All NLR. 462, the appellant retracted his confessional statement as a result of which the trial Judge did not consider it, and convicted him on other evidence of murder. The statement contained some facts of provocation. The Federal Court held that to have failed to consider that evidence because the statement was excluded from consideration amounted to substantial miscarriage of justice."*

The writer in the JOURNAL OF NIGERIAN LAW published for July,

1992 was in the same vein with Uwaifo, J.C.A. where he wrote at pages 31-32:

"Now for a court to reject the confessional statement and oral testimony  
5 because the latter is in conflict with the fanner may lead to injustice. A court  
can convict on confessional statement alone. But this could now cease to be  
the case in many trials as an accused may escape conviction on his other-  
wise sufficient confessional statement by the simple ploy of deliberately con-  
10 contradicting that statement by oral testimony in court. What explanation of the  
contradiction could be expected from him or from the prosecution?"

Confessions are generally made 'at the earliest opportunity, and  
probably where the conscience was most pricked' *Achabua v. The State*  
(1976) 12 S.C.63. A retraction is often made 'at the trial after the appellants  
15 had reconsidered their positions and framed plausible answers' *Ikemson &*  
*Ors v. The State* (1989) 3 NWLR (Pt.455) 476. As between the two, from the  
circumstances of each case, one may be accepted as truthful by the trial  
court, while rejecting the other. Both the confessional statement and the  
retracting testimony need not be jettisoned because of the contradiction  
20 between them."

In his lead judgment in Asanya's case, with which I agreed, Nnaemeka-  
Agu, J.S.C. reacted to the view of Uwaifo, J.C.A. thus:

"With greatest respect to the eminent Justice of Court of Appeal, it  
is my view that he missed the point in *Itule's* case. In my respectful opinion  
25 the decisive point in *Itule's* case was not the inconsistency between the oral  
and written statements of the appellant as such. It was the omission of the  
learned trial Judge to consider the defence of provocation raised in the  
written statement of appellant."

30 I am now convinced by the forceful submissions of amici curiae that  
Uwaifo, J.C.A. correctly stated the law. He was right that the decision of this  
court in *Oladejo's* case was a departure from the long established principle  
relating to consideration of confession and its retraction. Confession and  
testimony of the accused person shall be evaluated and assessed by the trial  
35 Judge together with the totality of the evidence in order to reach a just deci-  
sion.

For the fore going reasons, I conclude that the decisions in *Oladejo*  
and *Asanya* should be overruled and are hereby overruled. Accordingly, the  
trial court was right to rely on the confession of the appellant in convicting

him of murder. The Court of Appeal was also right in affirming that the trial

Judge was entitled to act on the confession.

The other issues may be summarily disposed of. The second issue is concerned with the identification of the body of the deceased to the doctor who stated that one Johnson Akpughe identified it to him while P.W.1 claimed 5 to have done so. The evidence shows Johnson Akpughe was deceased's son and he died before the trial. In dealing with the issue of identification in the Court of Appeal, Ejiwunmi J.C.A. who delivered the lead judgment, stated that the trial Judge rightly held that the evidence which Johnson Akpughe would have given had substantially and sufficiently been given by the doctor: 10 Musdapher and Edozie, JJ.C.A. agreed.

With all due respect to the learned Justices of the Court of Appeal, without the evidence of Johnson Akpughe, the identification of the body to the doctor was inconclusive. The doctor neither knew the deceased nor 15 Johnson Akpughe. Hence his evidence is not covered by section 142 of the Evidence Act, which provides:

*"When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."* However, non-availability of Johnson's evidence is not fatal to the prosecution's case. This is a proper case 20 where the court may infer the cause of death without medical evidence: Kumo v. State (1968) NMLR 227 and Lori v. State (1980) 8-11 S.C. 81 at 87. The fact that the deceased left her house hale and hearty to her farm and her body was found immersed in swamp pinned down with sticks and her hunch-back cut off clearly established that she was murdered.

Issue No. 4 deals with the failure of Mr. Igbinobaro, the senior police 25 officer, who attested to the voluntariness of the confession to give evidence. He attested to it at Benin City and was later transferred to Guyuk in Gongola State. Although prosecution sent three radio messages, Exhibit C, C1 and C2 inviting him to court to testify, he did not respond. In this respect, Court of 30 Appeal stated in the lead judgment:

*"On the failure of the prosecution to call Mr. Igbinobaro, the learned trial Judge duly considered the relevant authority on the failure to call witnesses by the prosecution: Yanor and Anor. v. The State (1965) NMLR 337 at page 340, before holding that the absence of the witness has been 35 explained by the evidence of the 7th prosecution witness and Exhibits 'C' - C2. Also the learned trial Judge held, rightly in my view, that the evidence which Mr. Igbinobaro, the superior police officer, would have given in this case has substantially and sufficiently been given by the 7th prosecution*

*witness, the accused person and in Exhibits '8' and 'D'."*

The investigating police officer, P.W.7, who recorded Exhibit B testified that  
 5 he had taken the appellant to Mr. Igbinobaro who after having been satisfied  
 from the appellant's answers to his questions that the confession was free and  
 voluntary, he attested it in Exhibit D. P.W.7 said the appellant also signed the  
 attestation. In his evidence the appellant admitted being taken before Mr.  
 Igbinobaro and signing Exhibit D thereat though he said he had not read it.  
 10 Under the circumstances, I do not think Mr. Igbinobaro was an essential  
 witness for the prosecution whose absence would vitiate the conviction. This  
 is, particularly so because the practice of taking accused persons, who con-  
 fessed to the commission of serious offences, before superior police officers  
 for confirmation of the voluntariness of the confession is not required by any  
 15 rule of law or procedure. The practice was developed by the police and has  
 been highly commended by this Court as it ensures fair play and justice to the  
 accused. However, failure to call the attesting officer as a witness will not per  
 se be fatal to a conviction: R. v. Nwigboke (1959) SCNLR 248; (1959) 4 FSC 101.  
 The authorities cited by counsel for the appellant in this respect, namely  
 20 Akpan v. State (supra); Ogunleye v. State (supra) and Opayemi v. State (su-  
 pra) laid down the duty of the prosecution to call material witnesses and not a  
 host or multiple of witnesses.

In issue No.5 counsel for the appellant complained of misdirection  
 where in his judgment, the trial Judge stated "P.W.4" had seen the appellant in the  
 25 vicinity of the scene of the crime whereas it was P.W.3 who testified to that effect. I  
 consider this to be a mere slip of the pen which the Court of Appeal has corrected. He  
 also pointed out the evidence of P.W.3 who said when she returned home on the  
 day the deceased disappeared she heard the news of her death and submitted  
 that this contradicts the fact that her death was known the following day. The  
 30 lower court fully considered the evidence of P.W.3 and concluded that the  
 contradiction did not affect the credibility of the witness.

Finally, in my view the Court of Appeal was right in affirming the  
 conviction of the appellant upon his confession, which the courts below  
 found to be true and voluntary, that they killed the deceased and removed her  
 35 hunch-back. The truth of the confession is supported by the evidence of  
 P.W.3 who saw the appellant in the vicinity of the scene of the crime: the fact  
 that the body was found without the hunch-back and that the appellant went  
 into hiding after the commission of the murder. I find no merits in the appeal  
 and it is dismissed. The conviction is affirmed.



**KARIBI-WHYTE.JSC**

This is an appeal by appellant to this Court against the dismissal by the court below of his appeal against his conviction for conspiracy to murder and for murder punishable under sections 324. 319 of the Criminal Code in the High Court of Bendel State at Orerokpe. 5

An important issue for consideration in this appeal and for which this court has invited all the Attorneys-General of the country and eminent senior counsel as amici curiae, is for a determination whether the decisions in *Oladejo v. State* (1987) 3 NWLR (Pt.61) 419 and *Asanya v. State* (1991) 3 NWLR (Pt.180) 422 in so far as they have decided on the effect of a retracted confession are consistent with the principle in *R. v. Golder* as applied in *R. v. Ukpong*. We have been invited to overrule these decisions of the full court. The rule sought to be preserved is that in *R. v. Ukpong* (1961) 1 SCNLR 53; (1961) All NLR. 25, where the Federal Supreme Court, cited and adopted the statement of principle in the decision of the Court of Criminal Appeal in England, In *R. v. Golder* (1960) NWLR. 1169, where Lord Parker C.J. laid down the principle now described as the inconsistency rule. The Lord Chief Justice said: 15

20

*"In the judgment of this court, when a witness is shown to have made previous statements inconsistent with that 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 statements whether sworn or unsworn, do not constitute evidence upon which they can act."* 25

These rules have also been applied in *Oladejo v. The State*, and *Asanya v. The State*. In *Oladejo v. State* (supra) at p.427, Nnamani, J.S.C. applying this same principle stated it as follows: 30

*"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"* 35

In *Asanya v. State* (supra) a full panel of this court adopted and applied the same principle in a situation different on the facts from *Oladejo* and declined an invitation of learned counsel to depart from the decision in *Oladejo* and to overrule the line of cases in which the principle had been

applied to the extra judicial confession of an accused person, where inconsistent with his testimony at his trial.

The contention is that Oladejo (supra), and Asanya (supra) have departed from the rule in Ukong (supra) to include extrajudicial confession of an accused person. This is not consistent with the ratio decidendi in Ukong  
 5 (supra), and the principle of law on which the ratio decidendi was based. In their reaction to the invitation as amici curiae, the Attorneys-General, and Senior Counsel who participated submitted very well researched and excellent briefs and have made very useful contributions to the resolution of the issue.

As the facts of this case are not necessary in the resolution of this  
 10 issue, I will not refer to them. I will however discuss the issue in its different facets. I shall start from its source in England.

The earliest recognition of the principle is in the reported English case of Teal reported in 11 East 309 (2809) where the following statement appears-

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

20 This above statement, which is a little more complex than what we now have clearly provides for extra judicial statements, which if contradicted under oath at the trial should be entitle to very little weight, unless the reason for the discrepancy is satisfactorily explained in the manner stated in Onubogu.  
 25 Where the earlier statement now being contradicted on oath, was itself on oath, the fact is conclusive against this credibility. These principles were approved and applied in Harris v. R. (1928) 20 Cr. App. R.144, White v. R. (1924) 17 Cr. App R. 60. Generally, the effect of a contrary sworn evidence on a previous statement on the same matter is to render the evidence of such  
 30 witness negligible.

The principle which is now followed somewhat unrefecting was stated as I have already observed in the English case of R. v. Golder (1960) 3 All ER at p.459. This statement of principle was made in relation to the evidence of a witness to the prosecution in the case. The evidence was that of Mrs. Taylor  
 35 on who the prosecution relied to prove the offence of receiving of a gold watch against Mr. Golder. Before the committing Magistrates, Mrs. Taylor swore that on April 20, Mr. Golder who she knew "Chuck" 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.

Egboghonome v. The State (1993) 11 KLR Karibi-Whyte JSC 35  
At the trial she went back on her story. Learned Counsel to the prosecution obtained leave to treat her as a hostile witness and 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 his summing up the Deputy Chairman suggested to the jury that they could deal with the question of the watch and the conflicting testimony or Mrs. Taylor by acting on the evidence contained in her deposition notwithstanding her repudiation of it. 5

The Court of Criminal Appeal rejected this direction, on the ground that it is wrong in law. It is well settled that while previous statements may be put to a hostile witness to destroy his credit and to render his evidence at the trial negligible, such previous statements are not admissible evidence of the truth of the facts stated therein - See R v. Harris (1927) 20 Cr. App. R.144. 10

That was the position when the Federal Supreme Court in R v. Ukpong (supra) adopted the common law principle. The principle was adopted without the qualification. Like Golder, the evidence under consideration in Ukpong was that of a witness for the prosecution, (the mother of the accused) not the accused. 15

Appellant was charged and convicted of the murder of the deceased. The trial Judge relied for his decision on the evidence of eye witnesses. Appellant's mother made a statement to the Police. At the trial she gave evidence which contradicted the previous statement she made to Police. The prosecutor sought and was granted leave to treat her as a hostile witness. 20

In his judgment the learned trial Judge stated that he was satisfied with the evidence of the eye witnesses to the commission of the offence, and that his findings would have been the same even if the statement of the appellant's mother was not admitted in evidence. This was rejected by the Federal Supreme Court on appeal, which nevertheless dismissed the appeal since it did not result in any miscarriage of justice. 25

In Joshua v. The Queen (1964) 1 All NLR 1, the Supreme Court was faced with the same situation as in Golder. Appellant, a Customary Court President, was charged with the offence of demanding, and with receiving money to favour a litigant. A witness for the prosecution when first testifying before a Magistrate, denied the alleged corruption. Subsequently after prosecution was begun against him for making a false statement to the Police, he testified against the appellant. The trial Judge treated the witness and the complainant as accomplices, warned himself on the treatment of accomplice evidence, accepted their evidence as true, and convicted the appellant. The written statement of the witness was not in evidence. On appeal, the Supreme Court allowed the appeal and set aside the conviction. 30 35

This Court observed that the evidence before the Magistrate at the preliminary investigation was on oath and the strongest consideration must be given by the trial Judge as to what reliance ought to be placed on the evidence of such a witness. The Court then stated,

5 "In the case of a witness who had made previous statements inconsistent with the evidence given at the trial, the Court has been slow to act on the evidence of such a witness."

It is important observe that the two evidence under consideration, 10 and which are contradictory were under oath. The principle in Regina v. Golder (supra) was cited and relied upon. Up to this point the principle has been confined and applied to the evidence of witnesses to the prosecution. It is therefore necessary to consider the scope of this principle. It is useful and pertinent to isolate the following effect of the application of the principle.

15

- The rule governs (a) the evidence of witnesses
- (b) who have made previous statements - sworn or unsworn,
- (c) which are contradictory with evidence given at a trial.

The consequences are that

20 (i) the previous statements do not constitute evidence on which the court can act

(ii) evidence given at the trial should be regarded as unreliable.

25 It is necessary to emphasis that the rule is concerned with the weight and probative value of admitted evidence, if is not concerned with admissibility of evidence. This is because if does not operate until inconsistency arises on the evidence at the trial.

This now leads us to consider the criticism that the principle is limited and confined to the evidence of witnesses to the prosecution, and that-extension to cover other witnesses is a departure from the principle. It is 30 conceded that the principle at inception was formulated to ensure the credibility of prosecution witnesses on admission in evidence. But to so limit the meaning of the word "witness" is to give it an artificial and very narrow meaning. It is not in the least arguable that the word cannot be so limited and means any person who has testified in the case or is legally competent to do so. It is 35 in this sense that sections 159(1) of the Evidence Act defines an accused person as a competent witness. It provides as follows -

*"Every 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 person..."*

Similarly, section 158 of the same Act

*"Subject to the provisions of this Part, in criminal cases the accused person, and his or her wife or husband, and any person and the wife or husband of any person jointly charged with him and tried at the same time, is competent to testify."*

An accused person has an inalienable constitutional right to be heard in his own defence - See S.33(1).

An accused person who invariably is a witness in the case therefore comes within the rule formulated in *R. v. Ukpung*. So is a witness in his own defence. Accordingly, where the previous statements of an accused person before his trial, is found to be inconsistent with his evidence at his trial, it is difficult both in logic and commonsense to see why either of the statements should enjoy any credibility and for a different rule to apply. This principle has been followed in *Umani v. The State (1988) 1 NWLR (Pt.70) 274*. In *Mbenu & anor. v. The State (1988) 3 NWLR (Pt.84) 615*, the rule was applied to the evidence of witness for the accused. *Mbenu & anor v. The State (1988) 3 NWLR (Pt.84) 615*, is another case where the principle was applied to the evidence of the witness for the accused. The issue in this circumstance was whether P.W.2 mentioned the names of the accused persons when she was wailing that morning about the brutal murder of her brother. The only witness who mentioned that she did was D.W.2 John Mbenu, the elder brother of 1st accused. This was in his statement to the Police Exhibit F, tendered when he was treated as a hostile witness and cross-examined to contradict his retraction of that statement in his testimony at the trial. The learned trial Judge nevertheless relied on the Statement in Exhibit F as one of the grounds establishing the guilt of the accused.

In this court Nnamani, J.S.C. rejecting this finding of the trial Judge as a serious error, held; citing and relying on *Oladejo v. State (1987) 3 NWLR (Pt.61) 419,427*,

*"It is settled that when an accused person makes a statement to the Police and in his evidence in court gives something contrary to it, such testimony is usually treated as unreliable and is therefore ignored."*

The learned Justice of the Supreme Court added:

*"This principle applies to any other witness in a criminal trial. See also Onubogu v. The State (1974) 9 S.C. 1 and Enitan v. State (1986) 3 NWLR (Pt. 30) 604."*

*testimony is usually treated as unreliable and is therefore ignored."*

The learned Justice of the Supreme Court added:

*"This principle applies to any other witness in a criminal trial. See also Onubogu v. The State (1974) 9 S.C. 1 and Enitan v. State (1986) 3 NWLR (Pt. 30) 604."*

This view that the rule could be extended to the accused was applied in  
 5 Stephen v. The State (1986) 5 NWLR (Pt.46) 978, where the fact was that the  
 accused had in his statement to the Police raised the defences of provocation  
 and self-defence. At his trial he set up the defence of accident. The trial Judge  
 rejected the defence and convicted the appellant. The Court of Appeal af-  
 firmed the conviction. On appeal this Court dismissed the appeal and held that  
 10 the learned trial Judge was entitled to disbelieve and reject the defence of the  
 appellant.

This Court said;

*defences raised before the Court are different, inconsistent and irreconcil-  
 able as in this case, the trial Judge is entitled to disbelieve the testimony of  
 15 the accused setting up such defence and rely on the evidence of the prosecu-  
 tion."*

In this case the two irreconcilable defences of provocation and acci-  
 dent were raised in the extrajudicial statement, and in the testimony at the trial,  
 respectively. In Oladejo v. The State (1987) 3 NWLR (Pt.61) 419, where the  
 20 statement of the appellant to the Police was a denial of the charge, but his  
 subsequent testimony at the trial would appear to suggest that the deceased  
 died as a result of the stab wound to his stomach, which is that he killed him.  
 The learned trial Judge admitted the testimony and convicted the appellant.  
 The Court of Appeal affirmed the conviction. On appeal to this Court, this  
 25 Court stated,

*"Contrary to the conclusions of the learned, trial Judge, the law is  
 rather that 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  
 30 court can act."*

Gabriel v. State (1989) 5 NWLR (Pt.122) 457, is another decision where  
 the principle was applied to the accused to reject both his extra-judicial state-  
 ments, and his testimony in court which are contradictory. In none of these  
 cases was extrajudicial confession in issue.

35 There is the question and that is the real issue here, whether the  
 principle in R v. Ukpong applies to confessions? The general view, supported  
 by several decided cases of our courts, is that an extra-judicial confession,  
 subsequently retracted in testimony at the trial is not governed by the effect  
 of the contradiction. This view is based on the principle that "..... a confes-

sion does not become inadmissible merely because the accused person denies making it....." See R v. Itule (1961) 2 SCNLR 183; (1961) All NLR 481. In Udo v. The Queen (1964) 1 All NLR. 21, this Court basing its decision on R. v. Ukpong (supra), held that "a man's confession was always admissible in evidence against him at common law and its admissibility remains unaffected by the fact he is now competent to give evidence himself." The learned trial Judge applying R v. Ukpong (supra) held that the first statement Exhibit B was not legal evidence. Exhibit C was not clearly proved to have been recorded or interpreted by the witness who produced it, and ought not to have been treated as evidence. The decisions of Mumuni & ors. v. The State ( 1975) 6 SC. 79 Nwosu v. State (1986) 4 NWLR (Pt.35) 348; Ikemson v. State (1989) 3 NWLR (Pt.110) 455; Onwumere v. State (1991) 4 NWLR (Pt.186) 428, Ejnima v. State (1991) 6 NWLR (Pt.200) 627; Aremu v. State (1991) 7 NWLR (Pt.201) 1, contain dicta in support of the contention that the rule in R v. Ukpong does not apply to retracted confessions. Thus holding that the principle could not be extended to extra-judicial confessions. Thus a confession once made cannot be retracted by any contradictory statements subsequent thereto.

On the other hand there are also decisions of this Court that the principle is applicable to extra-judicial confessions. The cases of Oladejo v. State (supra), Asanya v. The State (supra).

We have been invited to overrule these decisions on the grounds that they are productive of injustice as it results in depriving the accused of his right to have his defence considered by the court. I shall examine the basis of these cases to determine whether the criticism is justified.

Oladejo v. State (supra) does not seem to me on the facts to have been decided on the confession of the appellant. In fact Exhibit B, the extra-judicial statement raised a defence of accident. The testimony of the accused at the trial was a defence of self defence. There was therefore no confession. Stricto sensu a defence of accident in Exhibit B. and self-defence in his testimony are contradictory. The principle in R v. Ukpong (supra) was clearly applicable. This was what Nnamani, J.S.C. said, at p. 427.

*"It seems very obvious that there is a serious conflict in the material portion of the two statements. In Exhibit B. the deceased fell with a knife in his hand and later died. In his testimony in court, the appellant gave a dramatic picture of the encounter. The deceased not only cut him with Exhibit E on his hand and head, but held his private part. He then stabbed the deceased with the broken part of Exhibit F. As the deceased was rolling on*

*the ground he, appellant made sure he was dead."*

He then went to conclude as follows -

5      *"Contrary to the conclusion of the learned trial Judge, the law is rather that 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."*

10      He then went to cite the dictum of Lord Parker C.J. in *R v. Golder* (supra) and stated that it was followed by the Federal Supreme Court in *Queen v. Ukpong* (supra) and *Jizurumba v. State* (1976) 3 Sc. 89; *Williams v. The State* (1975) 9-11 S.C. 139 and *Stephen v. State* (1986) 5 NWLR (Pt.46) 978 and pointed out that:

15      *"In such cases the trial court would be entitled to reject the inconsistent defences and rely on the evidence adduced by the prosecution."*

He then concluded as follows at p. 428

20      *"In the face of the law as it stands it would not be open to the trial court to accept the statement of the accused person and then go to take portions of his testimony in court. To the extent that the Court of Appeal supported this, it seems to me they were all in error."*

25      *Asanya v. State* (1991) 3 NWLR (Pt. 180) 422, is different from *Oladejo v. The State* (supra). Here, appellant had in Exhibit A, a statement made to the Police four days after the alleged offence, stated,

30      *"The name of my wife is Theresa Asanya she born two children for me. On 26/10/83 I from where we drink at Ajede around 11 o'clock in the night I think the thing did not happen by empty hand, because we have no quarrel before. Whether is medicine we fight but I did not know when I use cutlass to fight with her. The cutlass is my own she died by our fight. I kill my wife with cutlass in the house."*

35      There is no doubt this statement in Exhibit A is a confession to the commission of the offence. As against Exhibit A, at the trial appellant raised a defence of insanity and stated in his testimony as follows -

*I had no quarrel with my wife whatsoever. I did not know the time I*



*did anything - any harm to my wife. I later knew at the Police Station, Akure that she was already dead and that I was the one who killed her. There was no reason for me to kill her at all."*

The inconsistency lies in the fact that in Exhibit A, appellant knew he killed his wife with cutlass, although he did not know why he did it (which is a confession). In his testimony at his trial, he said, he did not know the time he did anything - any harm to his wife. He later knew of her death at the Akure Police Station and that he killed her. He seems to be relying on a defence of insanity. In the strict sense the testimony at his trial is not a denial that he killed his wife. He was saying that he did not know when he did it. It is therefore arguable, there being no real contradiction the rule does not apply. However, it must be conceded that on application of the inconsistency rule, in its juridical purity, in Asanya the testimony of the appellant at his trial inconsistent with the confession in Exh. A, will be regarded as unreliable, and his confession in Exhibit A rejected on the ground that it is not evidence on which the court can act See R v. Ukpong (supra). The prosecution will now be confronted with proving the commission of the offence from evidence alluded.

The genesis of the formulation of the principle should not be ignored or forgotten. The inconsistency rule was developed in the interest of justice and to ensure that the evidence received is credible. It is for the same consideration that a confession should be governed by the same rules.

By section 27 (1) of the Evidence Act,

*"A confession is an admission made at any time by a person charged with a crime, stating or suggesting that he committed that crime.* 25

*(2) Confessions, if voluntary, are deemed to be relevant facts as against the persons who made them only."*

A plea of guilty to the offence charged is by itself a confession. We are here concerned with extra-judicial confessions which properly admitted during the trial constitutes an admission of the commission of the offence. Confessions are relevant and therefore admissible in evidence.

Confessions are evidence upon which the court can act once admitted in evidence even if subsequently retracted. See Obosi v. The State (1965) NMLR. 119; Durugo v. State (1992) 7 NWLR (Pt.255) 525; Ejinima v. State (1991) 6 35 NWLR (Pt.200) 637. A properly admitted extra-judicial confession is part of the case of the prosecution - See Ikemson & 2 ors. v. State (1989) 3 NWLR (Pt.110)

It would seem to me that where the extra-judicial confession of the accused is allowed to co-exist side by side with its retraction, the retraction of the confession casts doubt both on the veracity of the confession, and the credibility of the accused. This is because the existence of two inconsistent versions of the same story can hardly induce credibility in respect of any  
5 them. It is in this regard that the court will turn to other facts outside the confession rendering it probable that it is true - See *Ndo v. The Queen* (1953) 14 WACA.

It is my view that where the confession stands alone in grand isolation without any other corroborating facts outside it rendering it probable that  
10 it is true, it can hardly withstand the force of a persuasive retraction.

It has been submitted that the effect of the application of the inconsistency rule to extra-judicial confessions retracted at the trial is to leave the accused without a defence, and that the accused is entitled to have his defence considered however stupid it may be. That may well be the case. It must  
15 be appreciated that confession is not defence. It only strengthens the case of the prosecution, and in a proper case reduces the problems in establishing the guilt of the accused. Surely, the constitutional right to a defence is guaranteed all accused persons. It is also the responsibility of the accused not only to make his defence, if any, but also to put forward a coherent defence. I do not  
20 think the law requires the court to examine defences which by themselves are inconsistent. In my view the fact that the defences are inconsistent show that they constitute no defence at all. It is therefore not a denial of a fair trial to hold that the inconsistent defences put forward by the accused do not amount to any defence.

It is also argued that the extension of the rule to extra-judicial confessions would impose too much burden on the prosecution to prove offences in certain cases. Now, this appears to me a self-defeating argument. The fundamental principle of the administration of criminal justice is well settled. It is that an accused person is presumed innocent until proved guilty. This pre-  
25 sumption of innocence is enjoyed until the final determination of the case. Further, the onus on the prosecution is to prove the guilt of the accused beyond reasonable doubt. The accused is entitled to remain silent after his plea of not guilty if he so desires until the conclusion of the trial.

An accused person is entitled to change his plea from that of not  
30 guilty to guilty and vice versa. He is similarly entitled to make a confession or retract same. The function of the court is one of an unbiased umpire who scrupulously observes the rules of our adversary system in the interest of justice. - See *Fallon v. Calvert* (1960) 1 All ER. 281. I am yet to be convinced that the criticisms are either valid or fair. The prosecution whose duty it is to

discharge its constitutional responsibilities, is not expected to impinge on the constitutional protection of the accused person.

I regard it an infringement of the constitutional protection of the accused to found his conviction on his own confession alone except where this is based on his plea of guilty on arraignment or anytime during the trial, or supported by evidence outside the confession.

I have already pointed out that Oladejo was not on the facts, a case decided on extra-judicial confession, as there was no confession in either of the statements in issue. Asanya, however, is different. It is a case in which the confession of the appellant may be regarded as retracted in his testimony. The question is whether the decision in Asanya is a departure from the inconsistency rule? I do not think so. The inconsistency rule rests on two limbs-

(i) The evidence given in court by the prosecution witness (now extended to accused and his witnesses), where inconsistent with the extra-judicial statement, is to be regarded as unreliable.

(ii) The previous inconsistent statement of the prosecution witness (extended to include accused & other persons) whether given on oath, or otherwise is not evidence of the truth of the matters stated herein.

I concede and there is considerable judicial authority for the proposition that a case is only authority for what it actually decided. It is not appropriate to quote it for a proposition that may seem logically to follow from it. - See Quinn v. Leathem (1911) AC. at p. 506, Neither Ukpong, nor Golder, from which the rule is derived concerned the extra-judicial confession of an accused person. The High Courts of Australia and Canada in Driscoll v. The Queen (1977) 137 C.L.R. 517 at p. 537, and Deacon v. The King (1947) 3 D.L.R. at p. 776 respectively have remained loyal to the rule as formulated in R v. Golder (supra).

In this country, there is a long line of cases since Udo v. The Queen, in 1964 to Kim v. The State (supra) in 1992 holding that the inconsistency rule has no application to extra-judicial confessions made by an accused person. The judgment of this Court in Asanya v. The State (supra) decided differently will appear to be out of step with the trend of judicial decisions. However, the ratio decidendi of Asanya v. The State (supra) suggests that the inconsistency rule is capable of extension without altering the original principle. The ratio decidendi of R. v. Golder (supra) and R. v. Ukpong (supra) is that the evidence in court of a witness where inconsistent with his extra-judicial statement is to be regarded as unreliable. The previous inconsistent statement of such witness is not evidence of the truth of the matters stated therein.

Therefore by analogical reasoning of the fact that an accused person is a

witness, and an extrajudicial confession is an extra-judicial statement, a retraction naturally falls within the scope of the inconsistency rule and ought to be caught by the principle.

In reasoning by analogy, there is usually the perception of relevant likenesses between the previous case and the case before the court. There is also the determination of the ratio decidendi of the previous case. There is finally the application of the ratio decidendi of the previous case to the case before the court. It is at this stage that the extension of the rule to cover the case in hand becomes relevant and decisive.

The common law derives its growth by analogical extension of established and well settled principles to the facts of new situations not envisaged by the original formulation of the rule. This was how the common law duty imposed on a manufacturer of food and drinks products without possibility of intermediate examination in *Donoghue v. Stevenson* (1932) 2 KB 606 at p. 619 was extended to the manufacturers of clothing in *Grant v. Australian Knitting Mills* (1936) AC 85. It was also extended to the plaintiff in *Haseldine v. Daw* (1941) 2 KB 343.

The principle in *Rylands v. Fletcher* (1866) L.R. I Exch. 265, developed on the principle of strict liability, that he who so makes an unnatural user of his land resulting in excessive risk and damage to his neighbour, is strictly liable for any damage caused by the escape of dangerous things from the land, has been applied in *Ranham Chemical Works Ltd. v. Belvedere Fish Guano Co.* (1921) 2 AC 465. It was there held that neighbouring land owners could be awarded damages for damage caused to them from explosions from explosives accumulated on defendants land.

The rationale behind the formulation of the inconsistency rule I must reiterate, is to ensure that the evidence received against the accused in a criminal charge is both credible and reliable. I do not think the desire for credibility and reliability is less important where the evidence in issue "is the confession of the accused person, than in other cases.

I am not unmindful of the possibility of a retraction which will, as it has been suggested, wipe out the gains of a voluntary confession to the case of the prosecution. That is clearly not the issue. The issue is whether where an accused has raised inconsistent defences at his trial, the court is entitled to choose which defence it will accept. I do not think that is desirable. I think it will be preposterous and a travesty of justice for a rule of law or practice which will allow such an expedient. The best solution lies in the application of the inconsistency rule which rejects the defences where irreconcilable. The adage still holds good, that it is better for society for ten guilty to be set free than one innocent convicted. In my view the extension of the inconsistency rule to

cover extra-judicial confessions is a development of the law in the right direction. It is not a departure from the rule but an extension of the rule to cover situations not hitherto envisaged. *Asanya v. The State* (supra) should not be overruled.

The consequence however, is that where the only evidence against the accused is his own voluntary confession rendered unreliable by its retraction, 5 the court will have no evidence upon which to act. The issue is not as easy as that. A retraction is not by itself conclusive of the truth therein. It could still be tested by other evidence to determine its veracity. Where the retraction is merely a denial that "I did not make the confession" the rule will not apply as this is not a statement different from the confession. The rule will only apply 10 where two inconsistent stories are put up by the accused. The voluntary confession may still stand even after its retraction, where there is evidence outside the confession rendering it probable that the confession is true and the retraction false. As I have already stated in this judgment, the confession will only be suspect where it stands alone without any corroborating evi- 15 dence outside it, whether this evidence is circumstantial. In such a situation, the court can act on the voluntary confession and ignore the retraction.

The art and science of judging, the evaluation of admitted evidence has never been and is not supposed to be mechanical. Neither is it decided by a rule of the thumb. The rationale for allowing a retraction to neutralise a 20 voluntary confession is the desire to ensure justice in the administration of criminal justice by ensuring that the conviction of the accused is based on credible evidence. Hence, when, as in the instant case, there is corroborating evidence outside the retracted confession rendering it probable that the confession is true and the retraction false, the interest of justice unequivocally 25 demands and clamant that the confession should be given effect. The probative effect of the corroborating evidence is conclusive.

In the instant case, the truth of the confession is supported by the evidence of P.W.3 who saw the appellant in the neighbourhood of the crime, 30 the fact that the body was found without the hunch back as claimed in the confession, and that appellant went into hiding after the discovery of the offence. These are facts outside the confession rendering it probable that it is true and consequently neutralising the retraction. The trial Judge was right in convicting on the confession which by itself is sufficient in proof of the offence. The Court below was right in affirming the conviction. 35

I have read the judgment of the learned Chief Justice of Nigeria in this appeal. Our views are clearly different in respect of the issue of the scope

of the inconsistency rule in *R v. Golder*, as applied by this Court in *Oladejo* and

Asanya. I still remain unconvinced by the excellent and elaborate arguments in support of the view that those two cases have departed from the rule as formulated. In my view, in Asanya, the rule was merely extended to cover retracted voluntary confessions.

Apart from the above, I agree with the other reasons in the judgment of the learned Chief Justice of Nigeria. I find no merit in the appeal, which I also hereby dismiss.

The conviction of the appellant affirmed by the Court below is hereby further affirmed.

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### **KAWU JSC**

I read in advance the judgment of Hon. Chief Justice of Nigeria with which I was in full agreement at the conference. I adopted his reasons and conclusions as mine in dismissing this appeal.

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### **BELGORE JSC**

I agree that Asanya's case has been too wide in its assertion that once an accused person at trial resiles on his voluntary statement to Police before prosecution both statement should be disregarded and be deemed unreliable. It is unfortunate that this decision no doubt has led many lower courts to discharge persons who otherwise were guilty. If this case is allowed to stand, the mischief it will bring on justice will be immense. All an accused person who, before trial made a voluntary statement confessing the offence has to do is to enter the witness box at trial and resile from the statement and he will automatically be set free. Despite the wide meaning given Asanya's case, I do not believe that it was intended to achieve that unjust purpose.

In some parts of the country the procedure for pre-trial recording of the accused person's statement is not law but were strict procedural practice based on Judge's Rules 1912 of England. But it is the law in some parts of the country (Criminal Procedure (Statement to Police Officer) Rules Cap. 30 Laws of Northern Nigeria, 1963 made pursuant to section 373 of Criminal Procedure Code Law). In the Rules aforementioned the format of caution before taking down a statement is clearly set out as follows:

*"I have decided to make a complaint against you before a court. Do*

*you wish to make a statement? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."*

In all criminal cases before a court, there are always two sides; that is to say, the case for the prosecution and that for the defence. The statement of the accused person to police officer made under the caution, whether the statutory caution as exists in the laws of Northern States or as in the practice based on Judges Rules 1912 of England as adopted in the Southern States the attitude of courts must remain the same. The voluntary statement of the accused person is apart of the case for the prosecution whether it contains confession or not and whether the accused resiles it or not during trial. It is when the court treats such statement as part of the defence of an accused person that the confusion arises as to consistency of the accused person's testimony. The most important aspect of the words of caution should not be overlooked, it says -

"and may be given in evidence." 15

This prima facie refers to evidence at trial by the prosecution that ".....decided to make a complaint against, (accused) before a court" (brackets mine). If in the trial before a court of law the accused person asserts in his evidence that he never made the statement voluntarily (in which case the voluntariness will be decided in a trial within trial), or that he never made the statement at all (whereby voluntaries is not involved and court can admit the statement subject to the weight to be attached to it in general consideration of all the evidence at the trial, the statement should always be viewed as part of the case for the prosecution fortiori if the accused does not challenge the statement. Such a statement, once legally admitted in evidence, will be juxtaposed with all the evidence in court including the defence so as to decide the general merit of the case. But such statement is always a part of the case for the prosecution. The Court should not regard the voluntary statement as "what will be your evidence at trial" but only "may be given in evidence by the prosecution." (Italics mine). 30

Looking at section 27 of Evidence Act (Cap. 112, Laws of Federation of Nigeria, 1900) a confession is relevant as against the person making it who is charged with a criminal offence; and if voluntary, it is admissible. The admission of a confession in evidence can only be vitiated if in making the confession to a police officer before trial, it appears to trial court that it was obtained by inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient to give the accused person grounds which would appear to him reasonable for sup-

posing that making it he would gain any advantage or avoid any evil of a temporal nature (see section 28 Evidence Act). Apart from these vitiating instances the voluntary statement of an accused person is squarely within the ambit of the case for the prosecution and must be placed side by side with the defence to arrive at a conclusion.

5 For the foregoing reasons and for the fuller reasons in the judgment of the Chief Justice of Nigeria with which I am in full agreement, I find that I must fully qualify Asanya' s case as too widely stated and thus cannot be the correct stand of the law. I also dismiss this appeal in agreeing with Chief Justice of Nigeria's judgment wherein the voluntary statement of the accused  
10 to the police officer before trial was held to have been rightly admitted in evidence and the rejection of the evidence in court of the accused was upheld.

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### **OLATAWURA JSC**

My Lord the Chief Justice of Nigeria in his lead judgment has stated the facts and issues involved in this appeal. The learned Chief Justice has also referred to the submissions made by the counsel on both sides and the amici  
20 curiae invited to address us on one significant issue out of the five issues raised by the appellant's counsel: The issue is of fundamental importance in the administration of criminal justice and my contribution will therefore be limited to this issue to wit:

Whether the Court of Appeal was justified in affirming the decision  
25 of the trial court which convicted the appellant for conspiracy to murder mainly on the alleged extra-judicial statement of the appellant from which the appellant not only totally retracted but also contradicted in his testimony before the trial court."

Two decisions of this Court were called into question after refer-  
30 ences were made to earlier decisions. The two decisions are: Saka Oladejo v. State (1987) 3 NWLR (Pt.61)419; (1987) 7 S.C. 207/224 or (1987) 2 NSCC 1025 and Asanya v. State (1991) 3 NWLR (Pt.180) 422/451. I will say however that our decision in Asanya's case (supra) and our reluctance to overrule the decision in Oladejo v. State (supra) led to the invitation to the amici curiae.

35 The issue for consideration before us is - whether the principle:

Whether a witness (or 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....."



should be extended to extra-judicial confession of an accused person which he subsequently retracts at the trial. There can be no doubt, that under section 27 of the Evidence Act an accused person can be convicted on the confession made by him once it is properly proved and admitted in evidence: Rex. v Ajayi Omokaro (1941) 7 WACA 146; Ogoala v. The State (1991) 2 NWLR (Pt. 175) 509; Queen v. Obiasa (1962) 2 SCNLR 402; (1962) 2 All NLR 465. 5

It is now necessary to consider the ratio decidendi in Asanya's case (supra) in so far as the retraction of confessional statement is concerned. There has been no argument to the contrary that an accused person who decided to give evidence in a case is a witness. The inconsistency rule consists of two parts: 10

(i) The evidence given in court by a witness (which includes the accused) is unreliable.

(ii) The previous inconsistent statement of a witness (which again includes the accused) cannot be regarded (whether given on oath or not) as the truth of the matter stated in it. 15

The genesis of the inconsistency rule is traceable to the case of Queen v. Ukpong (1961) 1 SCNLR 53; (1961) All NLR 26 which approved the statement in R. v. Golder (1961) WLR 1169. The statement made by a witness who subsequently gives evidence on oath contrary to his earlier statement is used to contradict him under section 198 of the Evidence Act. This is done 20 under cross-examination. The position is different in the case of confessional statement voluntarily made but later retracted by the accused. Once a confessional statement is admitted in evidence, and this is done during the case for the prosecution, it becomes part of the case for the prosecution. Until the 25 accused gives evidence retracting the statement, the inconsistency rule does not come into play. But having formed part of the case for the prosecution, the Judge is bound to consider its probative value when considering the retraction made subsequently.

There is hardly any doubt in view of the strong and forceful submissions made to us by the amici curiae that the principle or ratio decidendi in Asanya's case (supra) is too wide in that the inconsistency rule covers confessional statement. I will therefore agree with Chief Williams, SAN in his brief where he submitted thus:

*"It may well be that in stating the inconsistency rule the court overlooked the fact that admissions and confessions unlike "self-serving" or exculpatory statements have, over the years in the course of the history of the*

*common law, been treated as admissible evidence of the truth of what is confessed or admitted. That being so, a rule relating to the probative-value*

to all extra-judicial statements cannot be stated in terms which do not recognise the difference between admissions and confessions as compared with other statements. Moreover, it would only lead to confusion if a rule on the weight to be ascribed to particular piece of evidence covered by the inconsistency rule is stated in general terms which include confessions and admissions and which suggest that such evidence is irrelevant or inadmissible. Finally, it is submitted that there is a real and vital difference between extra-judicial statements which are put in as part of the case for the prosecution on the one hand, and similar statements put in evidence by either party for the limited purpose of discrediting the testimony of a particular witness.

10 In the former class of cases, the extra-judicial statements are evidence intended to prove the truth of what is contained in the statement concerned whilst in the latter class of cases, the statement is not put forward by the party who tenders it for the purpose of establishing the truth of what is stated therein unless, of course, the party sought to be discredited chooses to adopt it; in that case the statement is the evidence of the person who adopts it and not the evidence of the person who tenders it".

What is a confessional statement and the use to be made of it is as stated under section 27 of the Evidence Act which states:

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27(1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inferences that he committed the crime

(2) Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only

(3) - (Not relevant).

A confession which is being impugned on the ground that it was not voluntary is different from a retraction of the confession. In the case of the former depending on the grounds adduced a trial within a trial would have been held, and once admitted it forms part of the proceedings. It will be considered along with the evidence led in the whole proceedings. The defence of an accused person includes his evidence in court and his extra-judicial statement notwithstanding his attempt to disown any portion of it. A voluntary

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35 confessional statement precedes the trial of the case in respect of which it is made, it is therefore part of the case of the prosecution. The mere fact it is

retracted at the trial does not affect its admissibility. The court can act on it.

Following Oladejo's case (supra) our decision in Asanya's case (supra)

to the effect that:

*"Where a witness makes a statement which is inconsistent with his testimony such testimony is to be treated as not reliable while the statement is not regarded as evidence upon which the court can act",*

should not apply to confessional statement. It will be an escape route freely 5  
taken by an accused person without any hindrance to escape from justice. It  
will not be in the interest of the society to allow a man who has confessed to  
his crime to walk out of court a free man simply because he had a change of  
mind, the whole trial will be a mockery. As aptly put by the Attorney-General of  
Ondo State: "it would be dangerous to apply the principle to extra-judicial 10  
confession of accused persons as it would open the floodgate of retraction of  
all statements made by accused person before police officers:'

Although the ratio decedendi in Asanya's case has been modified in 15  
Kim v. The State (1992)4 NWLR (Pt.233)17 at 51, the sweeping departure made  
by Asanya's case from the earlier decisions on conflicting statements made by  
witnesses will be relied upon by an accused person where the strong evi-  
dence against him is his confessional statement.

It is for these reasons and the fuller reasons contained in the lead 20  
judgment of the learned Chief Justice of Nigeria that we should now overrule  
the decisions of this court in Oladeja and Asanya's cases. They are accord-  
ingly overruled.

On the other issues already dealt with in the lead judgment I entirely  
agree that the appeal should be and is hereby dismissed. 25

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### **KUTIGIJS**

I read in advance the judgment just delivered by the Honourable 30  
Chief Justice of Nigeria. I agree with his reasoning and conclusions. There is  
no doubt that the inconsistency rule in R. v. Golder (1960) 1 WLR 1169 applies  
only to a witness who is shown to have made a previous statement inconsis-  
tent with the evidence given by that witness at the trial. The case of an ac-  
cused person has always been treated differently and the guiding principles  
are well settled (see for example R. v. Itule (1961) 2 SCNLR 163; (1961) 1 All NLR 35  
462; R. v. Obiasa (1962) 2 SCNLR 402; (1962) 1 All NLR 651; Atolabi v. Police

(1961) 2 SCNLR 307; (1961) 1 All NLR 654; The State v. Enabosi (1966) 2 All  
NLR 116; Udo v. State (1972) 6-9 S.C. 234; Achabua v. State (1976) 12 S.C. 63;

52 Egboghonome v. The State (1993) 11 KLR Kutigi JSC  
Onochie v. The Republic (1966) NMLR 307; Kanu v. The King 14 WACA; Ndo  
v. The King 14 WACA. The decisions of this court therefore in the cases of  
Saka Oladejo v. The State (1987) 7 S.C. (Pt.1) 207; (1987)3 NWLR (Pt.61) 419  
and Asanya v. The State (1991) 3 NWLR (Pt.180) 422 were a clear departure  
5 rule to cover extra-judicial statements (including confessions) of accused per-  
sons as well. I will also overrule them in that regard. These extra-judicial state-  
ments (including confessions) are invariably part of the evidence adduced by  
the prosecution to prove the case against the accused. The statements must  
therefore be assessed and evaluated by the trial court together with other  
10 relevant evidence in order to reach a just decision.

In the appeal before us I think the appellant was properly convicted  
on his extra-judicial confessional statement-(Exhibit B). It is clear that the  
learned trial Judge satisfied himself of the truth of the confession by examin-  
ing it in the light of the rules as laid down in *The Queen v. Obiasa* (supra). The  
15 Court of Appeal was equally right in affirming the conviction. The appeal has  
no merit and it is hereby dismissed.

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#### WALI JSC

20 I am privileged to have read in advance the lead judgment of my  
learned brother Bello, the Chief Justice of Nigeria and I entirely agreed with his  
reasoning and conclusion. I adopt them as mine. I also dismiss the appeal and  
affirm the decisions of the trial court and the Court of Appeal for those same  
25 reasons.

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