

SUPREME COURT OF NIGERIA
21ST JANUARY, 1994. S.C. 22/1992.
CORAM:- M. L. UWAI, I. L. KUTIGI, M. E.
OGUNDARE, U. MOHAMMED, S. U. ONU, JJSC.

IBRAHIM BATURE APPELLANT

V

THE STATE RESPONDENT

CRIMINAL PROCEDURE - Culpable homicide - requirement that leave be obtained from the trial High Court before preferring a charge against the accused person - where the Rules are silent as to whether it should be in open court or in Chambers - when presumption of regularity will come into play.

LEGISLATION - Criminal procedure - where the law is silent on the mode of implementing its provision - when held to give rise to presumption of regularity.

CRIMINAL PROCEDURE - Culpable homicide - requirement under s. 185 of the Criminal Procedure code - that leave of the trial High Court be obtained to prefer a charge against accused - whether complied with - in view of the endorsement in the record of proceedings.

CRIMINAL LAW - Criminal defences - self defence and provocation - when held not to avail the accused - when conviction based on appellant's confession was held to be justified

EVIDENCE - Culpable homicide - confessional statement - whether sufficient to justify conviction.

FACTS

The Appellant was convicted by the Bauchi State High Court for the offence of culpable homicide. Appellant who was in the Company of other Fulanis had an altercation with the deceased, a police constable then in the

company of one other person. The Appellant stabbed the deceased with a knife in the ensuing fight. He made confessional statements to the police admitting the murder. The Appellant was convicted by the learned trial Judge who relied on his confessional statements.

Appellant's appeal to the Court of Appeal was dismissed. On further appeal to the Supreme Court Appellant asked the court to determine whether his conviction was proper in the light of other evidence before the court apart from his confessional statements. Appellant also contested the competence of the trial High Court to entertain the case. It was urged on his behalf that the endorsement in the record of proceedings was not sufficient proof of compliance with the requirement under s. 185 of the Criminal Procedure Code - that no person shall be tried by the High Court without the holding of a preliminary inquiry by leave of a Judge of the High Court.

HELD (unanimously dismissing the appeal)

1. As the steps required to be taken (towards obtaining leave from the trial High Court to prefer a charge against the accused person) under the Rules, are silent as to whether it should be in open court or in Chambers, the presumption of regularity comes into play. And it cannot be said that the Appellant was prejudiced to such an extent that he did not appreciate what transpired in the proceedings before the trial court. (P. 24 L6)
2. There has not been a breach of the provisions of s. 185 of the Criminal Procedure Code to render the proceedings a nullity. Consequently, the trial High Court was competent and has the jurisdiction to try the Appellant. Thus, the approval given by the trial Judge as shown on the record of proceedings (*"Application approved to prefer the necessary charge"*) amounts to a proper leave to prefer a charge against the Appellant. (P. 25 L27)
3. The defence of self-defence cannot avail the Appellant in as much as his confessional statements in the exhibits were direct, positive, free and voluntary. And that the Appellant exchanged some words of abuse with the deceased cannot be said to constitute enough provocation to warrant the Appellant's wielding of a lethal weapon against the deceased (that led to his death) (P. 28 L1)
4. The Appellant being the aggressor was rightly convicted by the trial High Court and the lower court was justified in affirming the conviction based on Appellant's confession. (P. 28 L20)

REPRESENTATION.

O.B. James Esq. for the Appellant
Adamu Jauro Esq. (DPP Bauchi State) with Balarabe Poloma
(State Counsel 1) for the Respondent.

CASES REFERRED TO

1. R.v. Obiasa (1962) 1 All NLR 651
2. Madukolu v. Nkemdilim (1962) 1 All N.L.R. 587
3. Sken Consult Nig Ltd & Anor v. Ukey (1981) S.V. 6 at 18
4. Macfoy v. U.A.C. Nig Ltd (1962) A.C. 152
5. Okaroh v. The State (1991) 1 NWLR (part 125) 128
6. Okegbu v. The State (1979) 11 SC. 1
7. Ogbomor v. The State (1985) 1 NWLR (part 3) 240
8. The State v. Gwonto & Ors (1983) 14 N.S.C.C. 104
9. Lockan & Anor. v. The State (1972) N.S.C.C. 30
10. Jimoh Yesufu v. That State (1976) S.C. 167 at page 173
11. Achabua v. The State (1976) 12 S.C. 63 at page 68
12. Inusa Saidu v. The State (1982) 2 S.C. 41
13. Obosi v. The State (1965) NMLR 119 at page 123
14. Akpan v. The State (1990) 7 NMLR (part 160) 101 at 109
15. Itule v. Queen (1961) 2 N.S.C.C 221; (1961) All NJR. 462 at pages 224 and 465
16. Udofia v. The State (1984) 15 N.S.C.C. 836
17. Adaje v. The State (1979) 6 - 9 S.C. 18
18. Egboghonome v. The State (1993) 7 NWLR (Part 306) 383
19. R. v. Kanu (1952) 14 W.A.C.A. 30;
20. Mumuni v. The State (1975) 6 SC. 79
21. Aremu v. The State (1984) 6 S.C. 85;
22. Ejima v. The State (1991) 6 NWLR (Part 220) 627
23. Akpan v. The State (1992) 2 NWLR (Part 233) 19
24. Akinfe v. The State (1988) 3 NWLR (Part 85) 729
25. Obaji v. The State (1965) N.M.L.R. 417
26. Njoku v. The State (1993) SCNJ 36
27. Onuoha v. Commissioner of Police (1959) 4 FSC 23
28. Ike v. Nzekwe (1975) 1 All NLR 37
29. Swiss Air v. A.C.B. (1971) 1 All NLR 37
30. Ejiofodomi v. Okwonkwo (1982) 11 SC. 74

STATUTES REFERRED TO

1. Penal Code ss. 221, 222 (4)
2. Criminal Procedure Code Cap. 30 laws of Northern Nigeria, 1963 ss. 185 (b), 382
3. Criminal Procedure (Application for Leave to Prefer a charge in the High Court) Rules 1970
4. Evidence Act s. 131(1)

LEAD JUDGMENT BY ONUJSC

The appeal herein is sequel to the trial and conviction of the appellant by the High Court of Bauchi State sitting in Bauchi (per Ike Okoye, J.) on 16th September, 1986 for the offence of culpable homicide punishable with death contrary to section 221 of the Penal Code. The facts of the case are briefly that on the 14th day of February, 1985 at Kumo in Bauchi State, the appellant then walking on a road in company of other Fulanis, at about 10.30 p.m., had an altercation with the deceased, police constable Sabaru Garba, then in company of one Aishatu Alhassan. That the appellant stabbed him (the deceased) after both men engaged in a struggle and in the ensuing fight with a knife to his stomach, knowing that death would be the probable consequence of his act. The prosecution called seven witnesses in all while the appellant testified and called one witness for the defence. The trial court, in a well considered judgment, convicted and sentenced the appellant to death.

Being dissatisfied with the decision, the appellant appealed to the Court of Appeal, Jos Judicial Division, (hereinafter referred to as the court below) which, in a reserved judgment, dismissed the appeal on 15th May, 1991. It is against the said judgment that the appellant has now appealed to this court after seeking and obtaining the leave of court for an extension of time to do so on 8th May, 1992.

On 4th November, 1993 when this appeal came up for hearing before us, learned counsel for the appellant, Mr. James, moved his application for leave to argue additional grounds of appeal, to deem those grounds as duly filed and served, extension of time within which to file appellant's brief already filed and to deem same as properly served. As there was no opposition from Mr. Jauro of counsel to the respondent, the prayers were accordingly granted. Mr. Jauro, on behalf of the respondent then withdrew an application dated 28th September, 1993 which he said was not well grounded. As there was no objection thereto from Mr. James. That application was accordingly struck out. It was at that point in time that Mr. Jauro urged the court to deem the respondent's brief filed within time to be deemed as duly filed. The court

having acceded to his request and both briefs having been hitherto exchanged between the parties, the hearing of the appeal proper was then embarked upon.

On behalf of the appellant in his brief, two issues - a primary and a secondary issue - were submitted for our consideration viz:

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1. Primary Issue:

Was the trial High Court which heard this case in the first instance competent to entertain it; and

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2. Secondary Issue:

Having regard to the evidence before the trial High Court particularly exhibits A, A1, B, B1 (i.e. the Statement (sic) of the accused) especially when tested as to their truth by examining them in the light of other evidence, were the learned justices of the Court of Appeal right in affirming the

15 *judgment of the trial High Court.*

The respondent on the other hand in his brief, formulated three issues for determination, all of which in essence, boil down to and coincide with the appellant's two. For, while respondent's issues 1 and 2 overlap appellant's issue 1, its Issue 3 is identical with appellant's secondary Issue i.e. 2. They

20 are:-

1. Whether leave to prefer a charge against the accused person was granted by the trial High Court as required by section 185(b) of the Criminal Procedure Code.

25 *2. Whether failure to grant the leave vitiates the proceedings and renders it a nullity.*

3. Whether the confession by the appellant in his confessional statement to the police is direct, positive and unequivocal and satisfied the test laid down in R. v. Obiasa (1962) 2 SCNLR 402; (1962) 1 All NLR 651.

30 In the consideration of this appeal, I intend to stick to the appellant's two issues as submitted.

Issue 1

In the written submission in the appellant's brief, the kernel of learned
35 counsel's contention is that the High Court which heard this case at first instance was not competent to entertain the case. He therefore argued, that it is common ground that the offence for which the appellant as accused was tried is triable by the High Court. Thus by section 185(b) of the Criminal Procedure Code Cap.30 of the Laws of Northern Nigeria, 1963 applicable to

Bauchi State, *"No person shall be tried by the High Court unless a charge is preferred against him without the holding of a preliminary inquiry by leave of a Judge of the High Court."* The procedure for obtaining such leave of a Judge, he maintained, is contained in the criminal procedure (Application for Leave to prefer a charge in the High Court) Rules. 1970. He then argued that it is common ground in this case on appeal that the appellant was not committed 5 for trial to the High Court after the holding of a Preliminary Inquiry. It is therefore clear, he contends, that the condition precedent to the exercise of jurisdiction to try the appellant by the High Court must be obtained - a requirement which is not only mandatory by the use of the word "SHALL" but is also fundamental in that it goes to the root of the entire proceedings. After citing in 10 support thereof the provisions of section 131(1) of the Evidence Act, learned counsel submitted that applying those provisions to those of section 185(b) of the Criminal Procedure Code (Ibid). It becomes clear that when leave of a Judge of the High Court is sought and obtained, evidence of same can only be by reference to the order granting the leave which must ordinarily contain the 15 name of the Judge that grant it as well as the date it was granted. He therefore maintained that looking at the record of appeal herein, pages 1 to 17 contain the application of leave to prefer the charge against the appellant under section 185(b) of the Criminal Procedure Code (Ibid) but that there is nothing to show that the leave sought was granted and if so by whom and on what date. 20 He therefore submitted that the High Court which heard this case had no jurisdiction to entertain it by reason of non-compliance with the condition precedent to the exercise of its jurisdiction. Thus, it is further contended, the court below erred in law in affirming the decision of the said High Court, which to all intents and purposes, amounts to a nullity. Reliance was placed on the 25 cases of *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; (1962) 1 All NLR 587; *Skenconsult Nig. Ltd & Ors. v. Ukey* (1981) 1 S.C.6 at 18 approving *Macfoy v. U.A.C. Ltd.* (1962) A.C.152. Should the submission succeed added learned counsel, that is the end of the appeal since the competence of a court to try a case is fundamental. 30

The oral submission of learned counsel at the hearing of the appeal on 4th November, 1993 herein before alluded to, took the same trend as in his written brief. Suffice it to say, that the following dialogue which took place between James, Esq. learned counsel for the appellant and this court, sheds 35 light on the matter as follows:-

Court to Mr. James: - Have you read page 1 of the Record of proceedings (bottom of page) to see a signature there signifying approval to prosecute the case?

James: - I have

Court: - You were not in the case in the trial court and in the Court of Appeal where this point was not taken up?

James: Yes

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Court:- You had not sought this court's leave to argue this point?

James: Yes. But I refer to Criminal Procedure (Applications for Leave to Prefer a charge in the High Court) Rules, 1970, particularly Rule 3(2) and (4) thereof. Further, I submit that the Judge must hear the parties 10 on the matter and rule on it. I, however, concede that there is no format in which the approval to prefer a charge is given.

Court:- You concede that the act is therefore purely administrative?

15 *James:- I do, but I contend that the approval must be express.*

The learned Director of Public Prosecutions for his part submitted that it would now be too late in the day for the point raised by learned counsel for the appellant to be taken as an objection at the Supreme Court and in the 20 Court of Appeal. He called in aid the case of Okaroh v. The State (1991) 1 NWLR (Pt.125) 128. He further argued that even if the complaint of the appellant was correct the lapse only amounted to an irregularity since it did not occasion a miscarriage of justice and the lapse was cured by section 382 of the Criminal Procedure Code. He relied for this submission on Okegbu v. The 25 State (1979) 11 S.C. 1. Learned Director of Public Prosecution further submitted that omission, if any, would only amount to a technicality which should not be allowed to interfere with the attainment of substantial justice. He relied on the dicta of Obaseki, J.S.C. in Ogbomor v. The State (1985) 1 NWLR (Pt.2) 223 of Eso, J.S.C. in The State v. Gwonto (supra) and of Nnaemeka-Agu, J.S.C. 30 in Okaroh v. The State (supra).

It will be pertinent here in answer to the appellant's complaint to the effect that no leave was granted by the trial Judge for the prosecution to prefer a charge against the appellant as required by section 185(b) of the Criminal 35 Procedure Code, by firmly stating that a glance at page one of the Record of Proceedings, clearly shows at the bottom of that page after the last paragraph thereto, that an approval to prefer the necessary charge was given by the trial Judge and this on 21st August, 1985. The words used there are expressly "Application approved to prefer the necessary charge." And as against those

express words, is the signature of the writer. I take judicial notice of the fact that as at the time 21st August, 1985, there was a Judge of the Bauchi State High Court called Bisi Kolawole (now of blessed Memory). The signature indicates the name 'Kolawole' and I have no difficulty in arriving at the conclusion that the approval of the application to prefer a charge under section 185(b) of the Criminal Procedure Code was given by him and that satisfied the Procedure to be followed. It is in this regard that the maxim *Omnia Praesumuntur Solemniter esse acta*," that is to say, "all acts or things are presumed to have been done rightly and regularly," amply comes into play here. See *The State v. Gwonto & Ors.* (1983) 1 SCNLR 142; (1983) 14 NSCC. 104 and *Locknan & Anor. v. The State* (1972) NSCC. 30.

Now, section 185(b) of the Criminal Procedure Code under which the Criminal Procedure (Applications for Leave to Prefer a charge in the High Court) Rules, 1970 (hereinafter referred to as the Rules) provides mandatorily that

*"No person shall be tried by the High Court;
(a) (not applicable)
(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a Judge of the High Court."*

Rule 3(2) and (4) of the Rules states:

"3(1): (Not applicable)

(2):- Where no proceedings have been taken under Chapter XVII of the Criminal Procedure Code the application shall state the reason why it is desired to prefer a charge without such proceedings having been taken, and

(a) there shall accompany the application proofs of evidence of the witnesses whom it is proposed to call in support of the charge; and

(b) the application shall include a statement that the evidence shown in the proofs will be evidence which will be available at the trial and that the case disclosed by the proofs, is to the best of the knowledge, information and belief of the applicant, a true case.

(3) (Not applicable)

(4) It shall not be necessary for the applicant to appear before the Judge when all application is made under rule 3 or for the respondent to be put on notice when an application is made under either rule 2 or rule 3; provided that the Judge may, if he sees fit, order in any application under these rules that the respondent be put on notice and that he be served with a copy of the

application and supporting papers; and in that event the Judge shall give both parties an opportunity of being heard before reaching a decision on the application."
 (Italics is mine for emphasis).

5 In the case in hand, as the steps required to be taken as stipulated in the rules above are silent as to whether it should be in open court or in chambers to wit: as they do not require the appearance of the applicant before the Judge nor that he be put on notice when the application is made by or on his behalf and learned counsel concedes that he was neither in the case at the
 10 trial stage nor on appeal in the court below, the presumption of regularity hereinbefore referred to, comes into play.

 In the light of what I have said above, it cannot be said that the appellant was misled, embarrassed or even prejudiced to such an extent that he did not know or appreciate what he was facing or what transpired in the
 15 proceedings in the trial court. The appellant clearly, in my opinion, therefore cannot rely upon such an omission, if any, to vitiate the trial. This is because such a point should not be hung unto as a technicality to defeat the ends of justice. After all the rules have not expressly provided that for such an approval, leave shall be given in Chambers or in open court. Invariably, under
 20 the rules, an accused person has not much to do with the actual moving of the application, provided his counsel would have hitherto been served with copies of the proofs of service. I am here not to be taken as saying that the grant of leave to prefer a charge ought not to be expressly given or stated in the record of the trial court. Rather, what I mean is that mere technicalities (as
 25 opposed to substantial justice upon which the law looks with seriousness) as depicted in the instant case ought not to be allowed to defeat the end of justice. For as Obaseki, J.S.C. pointed out in Oghomor v. The State (supra) at page 240:

*"The dictates of justice which demand that the guilty be punished
 30 and the innocent set free after a fair hearing under procedural irregularity do not permit the acquittal of an otherwise guilty accused person upon fanciful errors contained in the charge. The law always aims at substantial justice."*

See also The State v. Gwonto (supra) where Eso, J.S.C. had this to say:
 35 *"The court has for sometime now laid down as a guiding principle that it is more interested in substance than in mere form - justice can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice."*

 And in Okaroh v. The State (supra) Nnaemeka-Agu, J.S.C. at page 136

said inter alia:

".....criminal justice in our courts is a matter of substance and not one that can be achieved by striking around for any tenuous twig of irregularity and technicality."

Be that as it may in the instant case, I cannot see myself agreeing with the learned Director of Public Prosecutions' submissions that had there been non-compliance with the provisions of section 185 of the Criminal Procedure Code, it constitutes a mere irregularity curable by section 382 of the Code which provides:

"382. Subject to the provisions hereinbefore contained, no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission, warrant, charge, public summons, order, judgment or other proceedings before during or during trial or any inquiry or other proceedings under this Criminal Procedure Code unless the Appeal Court of reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity."

This is because the authorities called in aid by him above can only be relevant where the breach complained of is a mere irregularity. They do not apply where such a breach or non-compliance goes to the root of the matter. For instance, where the question is as to the competence or jurisdiction of the trial court, if raised at any stage, even on appeal, will be entertained and the proceedings wrongly embarked upon declared a nullity vide *Madukolu v. Nkemdilim* (supra); *Macfoy v. U.A.C.* (supra) and *Skenconsult Nig. Ltd & Anor v. Ukey* (supra).

In the instant case in which I am not persuaded from the surrounding circumstances to hold that there was a breach of the provisions of section 185 of the Criminal Procedure Code (although the recording of the grant of the leave to prefer a charge against the appellant could have been better done to leave no room for the confusion as herein aroused) the proceedings are, in my view, not rendered a nullity.

Consequently, the trial High Court, in my firm view, was competent to try the appellant and was possessed of the jurisdiction to do so. The provisions of section 382 of the code would similarly have no application here.

In result, I hold that the approval given by the trial Judge at page 1 of the Records I earlier alluded to, amounts to a proper leave to prefer a charge against the appellant. I accordingly answer issue one (primary issue) in the affirmative.

Issue 2:

Coming to Issue 2, it is settled law that if a person makes a free and voluntary confession which is direct, positive, true and unequivocal and made out of consciousness of the necessity to uphold truth even in the face of death, it can and has been held by the Supreme Court in several cases, sufficient to support a conviction of murder. See *R. v. Obiasa* (supra), *Jimoh Yesufu v. The State* (1976) 6 S.C.167 at page 173; *Achabua v. The State* (1976) 12 S.C.63 at page 68; *Inusa Saidu v. The State* (1982) 4 S.C.41 and *Obosi v. The State* (1965) NMLR 119 at page 123.

For a confession to be upheld as set out in *R. v. Obiasa* (supra) it should be tested as to its truth by examining it in the light of other evidence to determine whether:-

- (a) There is anything outside it to show that it is true;
- (b) It is corroborated;
- (c) The facts stated in it are true in so far as can be tested;
- (d) The accused had opportunity of committing the offence;
- (e) The accused's confession is possible;
- (f) The confession is consistent with other facts which have been ascertained and proved.

See also *Akpan v. The State* (1990) 7 NWLR (Pt.160) 101 at 109.

In the English translations of the appellant's Statements to the Police (Exhibits A1 and B1) which are confessional in nature, the appellant said inter alia:

EXHIBIT A1

".....Yesterday being Thursday 14/2/85 at about 22 hours in the night although I was not with watch, I left in a certain house of drink from Kumo town on my way going home myself alone I met with someone together with a lady when we met he just abuse me saying that to who fathers house I am going then I myself answered him that I am going to his mothers house from there he came on me with the intention of getting me arrested as such he beat him with my stick but he still got hold of me and take away my stick from my hand immediately I see saw I then bring out my knife and chuck him with it but still the man got hold of me with my knife and get me down almost about three times, when we were on the struggle someone came and met us and I heard him holding me and get me arrested to the Police Station.

And I don't know that the person I was fighting with him is a Government Civil Servant and also the man did not beat me with any stick or with anything."

EXHIBIT B1

".....being Saturday 16/2/85 about 0800 hours in the morning when I was in the cell on the matter that were I chuck a police someone who was later came to my notice on 14/2/85 that Thursday he is a policeman the person or the police officer investigating my case whom I don't know his name but later on introduce himself to me as Insp. Isah Abubakar inform me that the said police whom I chuck with my knife had died at General Hospital, Kaltungo on 15/2/85 although I have been hearing the death but I was not informed directly till on 16/2/85" 5

True it is that the trial Judge first, in finding the appellant guilty of the offence of culpable homicide in the instant case, relied in the main on the statements made by him (appellant) namely Exhibits A, A1, B and B1 respectively. 10

Secondly, having discountenanced the evidence of PW1 and PW5 as eye-witnesses to the commission of the offence, the learned trial Judge however relied on the evidence of PW2, the Medical Doctor who treated the deceased before his death to convict the appellant. 15

Now, it is the contention of the appellant that Exhibits A1 and B1 did not satisfy all the tests set out above and that the appellant ought to have been convicted under section 222(4) of the Penal Code and not section 221 of same. The reason for such a submission we are told, is that if the stabbing took place during the course of the fight between the appellant and the deceased, it follows that the appellant did so in defence of himself and not knowing that death would be the probable consequence of his act. 20

With utmost due respect, there can be nothing farther from the truth. In the first place, there was never a time that the appellant denied making Exhibits A, A1, B and B1 which as pointed out above, are confessional in nature. All that appellant admittedly alleged was that he killed the deceased either accidentally or in self-defence. Both these, the learned trial Judge rightly, in my view, considered and rejected including the fact of his having lost two teeth in the encounter, a defence which the learned trial Judge regarded as an after-thought. Secondly, quite apart from the confessional nature of the statements (it is no use picking out Exhibits A and A1 alone to be impugned) the evidence of PW2, the Medical Doctor who examined and treated the deceased before he (deceased) died gave the cause of death to be due to abdominal injury with a sharp object which could not have been self-inflicted. In addition, PW4, Inspector Isa Abubakar, through whom these statements were received in evidence, also said that he observed the abdominal injury inflicted on the deceased and through him too, were received the appellant's stick, gown and knife (Exhibit C) - all of which were consistent with other facts which have been ascertained and proved at the trial. Hence, the defence of 25 30 35

self-defence could not avail the appellant, in as much as the confession in Exhibits A, A1; B and B1 were direct, positive, free and voluntary. Also, that appellant exchanged some words of abuse with the deceased could not, in my view, be said to constitute enough provocation to warrant the beating of the deceased first with a stick and after the stick was taken away from him, for him
5 to wield a lethal weapon such as Exhibit C, on the deceased. See *Itule v. Queen* (1961) 2 SCNLR 183 at 187; (1961) 2 NSCC 221; (1961) All NLR 462 in which at pages 224 and 465 respectively of the Reports, Brett, Ag. Chief Justice of the Federation said:

10 *"A confession does not become inadmissible merely because the accused person denied having made it, and in this respect a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession; R. v. Kanu and another*
14 *WACA. 30. The fact that the appellant took the earliest opportunity to*
15 *deny having made the statement may lend weight to his denial: R. v. Sapela & Anor. (1957) SCNLR 307; 2 F.S.C.24 but it is not itself a reason for ignoring the statement."*

The appellant being the aggressor through and through, he was, in
20 my judgment, rightly convicted by the trial court and the court below was justified in affirming same based on his confession. See *Udofia v. The State* (1984) 15 NSCC. 836 where this court held that:-

"Issues of facts, evaluation of evidence and credibility of witnesses are peculiarly within the exclusive competence of the trial court. An appel-
25 *late court is bound by the findings of a trial court."*

See also *Adaje v. The State* (1976) 6 - 9 S.C.18.

Besides, there is outside the appellant's confession, which in this case was not retracted at the trial or were the need to have arisen, even outside the evidence of PW2 (the doctor) in as much as the deceased virtually died at
30 the scene of crime from the fatal injuries inflicted on him by the appellant, from which to have logically inferred the cause of death.

Indeed, as this court held recently in the case of *Eghoghonome v. The State* (1993) 7 NWLR (Pt.306) 383, where an extra-judicial confession has been proved to have been made voluntarily and it is positive and unequivocal
35 and amounts to an admission of guilt, as in the instant case, it will suffice to ground a finding of guilt regardless of the fact that the maker resiled therefrom or retracted it altogether at the trial, since such a u-turn does not necessarily make the confession inadmissible. See *R. v. Kanu* (1952) 14 WACA 30; *The Queen v. Itule* (1961) 2 SCNLR 183; (1961) 2 NSCC 221, (1961) All NLR 462; *The*

Queen v. Obiasa (supra); Mumuni v. The State (1975) 6 S.C.79; Aremu v. The State (1984) 6 S.C.85; Ejiniima v. The State (1991) 6 NWLR (Pt.200) 627; Akpan v. The State (1992) 6 NWLR (Pt.248) 439 and Akinfe v. The State (1988) 3 NWLR (Pt.85) 729 to mention but a few.

In conclusion, even if the stabbing took place during the fight, which was a consequence of the struggle, the appellant cannot, in my view, seek refuge in section 222(4) of the Penal Code to escape liability as he was depicted as having acted in a most cruel and unusual manner. The force and manner of his (appellant's) reaction to his being threatened by the deceased, if indeed the deceased did same before the fight ensued, was excessive and disproportionate to the imagined provocation (see Obaji v. The State (1965) NMLR 417. Moreso that the deceased was unarmed. See Njoku v. The State (1993) 6 NWLR (Pt.299) 272; (1993) SCNJ 36. Appellant's life was never in danger at any point in time not even when he asserted so in his defence which the trial Judge rejected nor that he was thrown to the ground three times by the deceased and in the process lost two teeth - an assertion that was rightly rejected by the two courts below as an after-thought. I am therefore satisfied, for all the reasons set out above, that Exhibits A1 and B1 did indeed satisfy the test laid down in R. v. Obiasa (supra) and the defence under section 222(4) of the Penal Code clearly would not avail him. My answer to Issue 2 (secondary Issue) is accordingly rendered in the affirmative.

It is in the light of the foregoing that I find no merit in this appeal and so dismiss it. The decision of the court below is accordingly affirmed by me.

UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother Onu, J.S.C. I agree that the appeal has no merit. I, however, wish to add the following in respect of issue No. I in the appellant's brief of argument which reads:-

"Was the trial High Court which heard this case in the first instance competent to entertain it?"

and issues Nos. 3.01 and 3.02 in the respondent's brief of argument, to wit:-

"3.01 Whether leave to prefer a charge against the accused person was granted by the trial High Court as required by section 185(b) of the Criminal Procedure Code.

3.02 Whether failure to grant leave vitiates the proceedings and ren-

ders it (sic) a nullity."

By section 185 of the Criminal Procedure Code, Cap.30 of the Laws of Northern Nigeria, 1963 applicable to Bauchi State in trials by the High Court of Bauchi State:-

"185. No person shall be tried by the High Court unless:-

5 *(a) he had been committed for trial to the High Court in accordance with the provisions of Chapter xvii: (of the Criminal Procedure Code) or*

(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a Judge of the High Court; or

10 *(c) a charge of contempt is preferred against him in accordance with the provisions of section 314 or section 315."*

(Parenthesis mine)

It is clear from the foregoing that the provisions of section 185 of the Criminal Procedure Code Cap.30 are mandatory and that there cannot be a
15 valid trial in the High Court where none of the provisions of the section under either subsection (a) or (b) or (c) has been satisfied.

In the present case there was an application under section 185(b) for leave to prefer a charge by a State Counsel to whom the powers of the Attorney-General of Bauchi State were delegated under the provisions of section 7
20 of the Criminal Procedure Code Law, Cap.30 of the Laws of Northern Nigeria, 1963. The procedure for making the application is provided under the Criminal Procedure (Application for Leave to prefer a charge in the High Court) Rules, 1970. The rules govern applications to a Judge of the High Court under section 185(b) of the Criminal Procedure Code, Cap.30 for leave to prefer a charge
25 against a person without holding a preliminary inquiry.

Now, where an application is brought under the Rules, rule 3 subrule (4) thereof provides:-

30 *"(4) It shall not be necessary for the applicant to appear before the Judge when an application is made under rule 3 or for the respondent to be put on notice when an application is made under either rule 2 or rule 3;*

.....

It seems to me, therefore, that the application may be made ex parte and that it need not be entertained in open court. It is, indeed, more convenient for the Judge before whom the application is being made to deal with it
35 in chambers since neither the applicant nor the respondent need be before him. That is the procedure which appears to have been followed in the present case.

However, learned counsel for the appellant has contended that no leave was obtained in accordance with the mandatory provisions of section

185(b) of the Criminal Procedure Code. He canvassed that by virtue of section 131(i) of the Evidence Act, when leave of a Judge is sought under section 185(b) and obtained, evidence of that can only be by reference to an order granting the leave. He argued further that the order must contain the name of the Judge and the date on which the leave was granted. Learned counsel then submitted that there is nothing in the record of appeal before us which shows 5 that the leave sought in this case was granted and if granted, by whom was it granted and on what date. He urged that we should hold that the Judge that tried the appellant had no jurisdiction to entertain the case and that the Court of Appeal erred in affirming the decision of the High Court since the trial was a nullity. He relied in support on the cases of *Madukolu v. Nkemdilim* (1962) 2 10 SCNLR 341; (1962) 1 All NLR 587; *Skenconsult Nig. Ltd. & Anor. v. Ukey* (1981) 1 S.C. 6 at 18; and *McFoy v. U.A.C. Ltd.* (1962) A.C. 152.

In reply, learned Director of Public Prosecutions drew our attention to page 1 of the record of appeal which contains the following hand written 15 words and date:-

"Application approved to prefer the necessary charge.

Kolawole

21/8/85."

He submitted that the endorsement amounts to an approval by the 20 trial Judge granting leave to prefer a charge against the accused (appellant) in satisfaction of the provisions of section 185(b) of the Criminal Procedure Code. He relied on the common law/maxim on evidence which states *Omnia praesumuntur rite esse acta*, which was found a place in section 150 of the Evidence Act, Cap.112 of the Laws of the Federation of Nigeria, 1990. In further 25 argument, he alluded that the issue was not raised in the lower courts and on the authority of the dictum of Nnaemeka-Agu, J.S.C. in the case of *Okarah v. The State* (1990) 1 NWLR (Pt.125) 128, it was now too late for learned counsel for the appellant to raise the point. Learned Director of Public Prosecutions canvassed in the alternative that the absence on the record of appeal 30 of the order granting leave under section 185(b) is a minor omission, or at best an inadvertence on the part of the trial Judge or is even a mere procedural irregularity which has not gone to the root of the case and has not occasioned miscarriage of justice. Therefore, he argued, the irregularity can be cured under the provisions of section 382 of the Criminal Procedure Code and the 35 decision in *Okegbu v. The State* (1979) 11 S.C.1. He submitted that the provisions of section 185(b) are not mandatory but directory since the presence of the accused is not necessary for leave to be granted by the trial court. That since the trial in a criminal case begins with the reading of the charge, the issue

whether leave was granted under section 185(b) or not is a matter of technicality which should not be allowed in the instant case to defeat the course of justice. He cited in support the cases of Oghonlor v. The State (1985) 1 NWLR (Pt.2) 225 at 240; State v. Gwonto (1983) 1 SCNLR 142; (1983) 14 NSCC 104; and Okaroh v. The State (supra) per Nnaemeka-Agu, J.S.C.

5 Now it is common ground as shown by page 1 of the record of appeal that there was an application made by one Mahmud A. Aliyu, State Counsel, in exercise of the powers of the Attorney-General of Bauchi State delegated to him, for leave to prefer a charge without holding a preliminary inquiry. The application was dated the 8th day of May, 1985. The question, therefore, is:
10 whether the application was granted? In answer to the question there is the endorsement (quoted above) which indicates that the application was "approved". The endorsement was signed by one Kolawole and was dated the 21st day of August, 1985. The word "approve" has been defined in The Shorter Oxford Dictionary to mean to assent to as good. It follows, therefore, that
15 approving the application connotes that the application is in order and that it is granted. With that hurdle over the next point is: who is Kolawole? Page 17 of the record of appeal shows copiously that there was a Judge of the High Court of Bauchi State called Bisi Kolawole. Although the accused was tried by Ike-Okoye J. the record of appeal shows that the case was first mentioned
20 before Kolawole J. on the 26th day of September, 1985 and subsequently on the 21st and 28th October, 1985. The accused was in court on the first and second occasions but not on the 28th day of November, 1985. His trial before Ike-Okoye J. commenced on the 26th day of November, 1985.

The conclusion which I draw from all these is that the endorsement
25 which appears at the bottom of the first page of the record of appeal was written by Kolawole J. If I am right in so holding, then it follows that the application to prefer the charge against the appellant was granted by Kolawole J. and that the provisions of section 185(b) of the Criminal Procedure Code, Cap.30 had been met. Consequently, the trial of the appellant in the High Court
30 is not a nullity.

I think it is apposite to draw attention of High Court Judges to the procedure to be followed in respect of applications brought under section 185(b) of the Criminal Procedure. Where the application is made *ex parte* it is the same as any application in that category. The fact that it could be disposed
35 of in chambers does not relieve the Judge before whom the application is made from writing proper minutes in the usual manner in his record book. The advantage of doing so is that a permanent record of the ruling can be guaranteed and the doubt created in the present case eliminated. The manner in which the application in this case was granted is, if I may say so, slipshod and

untidy.

For these and the reasons contained in the lead judgment, I see no merit in the appeal and it is hereby dismissed. The decision of the Court of Appeal is hereby affirmed.

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KUTIGI JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother Onu, J.S.C. I agree with him that page 1 of the record clearly showed that leave to prefer the charge against the appellant was given by a judge of the High Court. I also agree with him that the appellant was properly convicted on his extra judicial statements Exhibit A1 & B1. The appeal is accordingly dismissed.

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OGUNDARE JSC

I have had the advantage of reading in draft the judgment of my learned brother Onu, J.S.C. which has just been delivered. I agree with his conclusion that this appeal is lacking in merit and ought to be dismissed. In view however, of some issues raised in the briefs of the parties, I have considered it necessary to say a few words of my own.

My lord, Onu, J.S.C. has set out the facts and the issues for determination in this appeal; I need not repeat them here. I shall only proceed to consider the issues as formulated in the appellant's brief. The two issues formulated are as follows:

(1) Was the Trial High Court which heard this case in the first instance competent to entertain it?

(2) Having regard to the evidence before the trial High Court particularly Exhibits A, A1, B, B1 (i.e. the statements of the accused) especially when tested as to their truth by examining them in the light of other evidence, were the learned justices of the Court of Appeal right in affirming the judgment of the trial High Court?

Question 1: It is contended on behalf of the appellant that there is nothing in the printed record of appeal to show that the application for leave to prefer a charge brought by the respondent was ever granted by the Judge of the High Court before the trial of the appellant commenced. It is further

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contended by learned counsel that this omission is fatal to the proceedings before the High Court. He refers to S. 185(b) of the Criminal Procedure Code of Northern Nigeria (applicable in Bauchi State) and submits that that section is mandatory and failure to comply with it would render the trial a nullity.

5 For the respondent, Mr. Jauro learned Director of Public Prosecutions (Bauchi State) observed that leave of a Judge of the High Court of Bauchi State to prefer a charge was infact granted before the appellant was put on trial. He drew the attention of the Court to page 1 of the record where at the bottom thereof the following appears:

10 *"Application approved to prefer the necessary charge*
 Kolawole
 21/8/85"

Learned DPP further observed that the appellant was represented
15 throughout the proceedings at the trial court and would have been expected to raise an objection if there had been non-compliance with Section 185(b) of the Code. He then submitted that the maxim "omnia praesumuntur rite et solemniter esse acta" would apply. It is the learned DPP's further submission that it would now be too late in the day for the point raised by the learned
20 counsel for the appellant to be taken as an objection at the Supreme Court, the issue not having been raised both in the trial court and in the Court of Appeal. He relied for this submission on Okaroh v. The State (1991) 1 NWLR (Pt. 125) p.128. The learned DPP further submitted that even if the complaint of the appellant was correct, the lapse only amounted to an irregularity and as it did
25 not occasion any miscarriage of justice the lapse was cured by section 382 of the Criminal Procedure Code. He relied for this submission on Okegbu v. The State (1979) 11 S.C. 1. Learned DPP also in his further submission argued that the omission, if there was any, would only amount to a technicality which should not be allowed to interfere with the pursuit of substantial justice. He
30 relied on the dicta of Obaseki, J.S.C. in Oghomor v. The State (1985) 1 NWLR (Pt.3) 225 at 240, of Eso, J.S.C. in The State v. Gwonto (1983) 1 SCNLR 142; (1983) 14 NSCC 104 at 119 and of Nnaemeka-Agu, J.S.C. in Okaroh v. The State (supra),

I have given careful consideration to the submissions of learned
35 counsel in this case. At page 1 of the record is an application by the State Counsel for leave to prefer a charge of culpable homicide against the appellant. Attached to the application are: (1) the facts of the case; (2) the proposed charge; (3) a list of prosecution witnesses; (4) proofs of evidence and (5) a list of Exhibits. At the bottom of this page 1 is a minute approving the application

and signed by one Kolawole and dated 21/8/85. I take judicial notice of the fact that at that time there was a judge in the High Court of Bauchi State by the name Kolawole. The presumption therefore - and this has not been rebutted - is that the minute was made by Kolawole J. who was probably seized of the application for the State Counsel to prefer a charge against the appellant.

Section 185 of the Criminal Procedure Code provides: 5

"185. No person shall be tried by the High Court unless -

(a) he has been committed for trial to the High Court in accordance with the provisions of Chapter XVII; or

(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a judge of the High Court; or 10

(c) a charge of contempt is preferred against him in accordance with the provisions of section 314 or section 315."

(italics is mine)

Rules of procedure - Criminal Procedure (Application for Leave to Prefer a Charge in the High Court) Rules, 1970 - were made for effecting the provisions of the above section. I have read through the rules and I am satisfied that the application contained at page I of the record together with annexures thereto substantially accords with the rules. As there is nothing in the rules to suggest the format by which the judge would give approval to such an application, I am satisfied that the minute of Kolawole J. at the bottom of page 1 was in compliance with the requirement of section 185(b) of the Code. Having so concluded therefore, I must hold that there is no merit in the appellant's complaint. 15 20

I would have concluded my consideration of Question 1 but for some other submissions made by my learned DPP in his Brief. Non-compliance with section 185 of the Code, in my respectful view, is not a mere irregularity. I agree with learned counsel for the appellant that failure to comply with the requirements of the section would render a trial of an accused person in the High Court a nullity. On a true construction of the section, particularly having regard to the opening words of the section: 25 30

"No person shall be tried by the High Court unless..." that section is mandatory. It deprives the High Court of jurisdiction to try an accused person unless certain conditions are met, that is, the conditions in (a) - (c) of the section. In fact where those conditions are not met, the High Court would have no jurisdiction. These are statutory requirements that must be complied with before jurisdiction is exercised. In Okegbu v. The State (supra) this court per Idigbe, J.S.C. at page 51 - 52 held that enactments regulating procedure are usually construed as being imperative and would be so construed where such provisions are enacted for the benefit of the accused. See also Onuoha v. 35

Commissioner of Police (1959) 4 FSC 23; (1959) SCNLR 75. There can be no doubt that the conditions laid down in section 185 are clearly for the benefit of an accused person to protect him from being hounded on flimsy charges in the High Court.

The jurisdiction granted by section 185 to the High Court to try accused persons is a contingent jurisdiction. While there is no want of general jurisdiction over trial of criminal matters, exercise of jurisdiction is however contingent on the fulfillment of the requirements (a) - (c) of that section.

In Madukolu & Ors v. Nkemdilim (1962) SCNLR 341; (1962) ANLR (Pt 2) p. 581 (reprint) Bairamian FJ set out the ingredients that constitute the competence of a court. He said at page 589-590 of the report:

"Put briefly, a court is competent when -

(1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(3) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication."

(italics is mine)

Non-compliance with section 185 of the Criminal Procedure Code would, in my respectful view, come under the third category stated above by Bairamian FJ. This being so, I find myself unable to accept the submission of the learned DPP that non-compliance with section 185 is an irregularity curable by section 382 of the Code which states:

"382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission or irregularity in the complaint, summons warrant, charge public summons, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Criminal Procedure Code unless the Appeal Court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity. "

I have examined all the authorities cited and relied upon by the learned

DPP. While I accept that these cases are relevant where the breach complained of is a mere irregularity, they do not however, apply where the breach renders the trial a nullity. For example, failure to serve process, where service of process is required. It has been held by this Court that such a failure goes to the root of the jurisdiction of the court and renders nullity proceedings in such cases - See: Sken Consult v. Ukey (1981) 1 S.C. 6. The question of jurisdictions not a mere technicality but one that goes to the root of the entire proceedings and unless there is competence any proceedings however well conducted and decided will be a nullity -Ike v. Nzekwe (1975) 2 S.C. 1. And it can be raised at any stage of the proceedings, even on appeal: Swiss Air v. A.C.B. (1971) 1 All NLR 37; Ejiofodomi v. Okonkwo (1982) 11 S.C. 74.

Question 2: It is not in dispute that appellant made exhibits A and B, the English translation of which are Exhibits A1 and B1. In these two statements he admitted stabbing the deceased. In his evidence at the trial, he did not deny making Exhibit A & B. Indeed this is what he said:

"I made a statement to the Police but I cannot understand what I told them. They showed me the statement. And I thumb impressed it. I could not understand what they wrote because I cannot read and write. Exh. 'A', resembles the statement I thumb impressed. I was called to make a statement and I made the statement. They were asking me questions and was giving answers. When the questioning stopped I also stopped talking."

This therefore cannot be a case where an accused person resiles at the trial the statement earlier made by him to the police. The learned trial Judge was therefore, right in treating Exhibit A & B as evidence on which he could rely to convict the appellant. The admission by the appellant in his evidence at the trial of the act of stabbing, is strong evidence corroborative of Exhibit A & B as to who caused the injury that resulted in the death of the deceased. This is what he said at the trial:

"On the 14/2/85 about 10.00p.m. I fought with somebody and I was arrested on my way back from Kumo market in the night. I met one man and a woman. I was alone. The man asked me whose father's house are you going to? I told him that I was going to his mother's house. The man then gave me a blow with his fist. Then we started wrestling. He threw me down three times. At this time the woman ran away when we started wrestling. As he throw (sic) me on the ground, he matched his foot on my mouth and 2 of my teeth got broken. Two of us got up from the ground and continued wrestling. He threw me down again, and continued giving me fist blows. As he continued giving me fist blows and I thought he would never leave me, I remem-

bered I had a knife on me and thinking that he would overpower me I then stabbed him. My teeth were already broken and I was bleeding from the mouth. At the time I stabbed him there was nobody there and the deceased was lying on me."

5 Under the cross-examination, he said:
"I cannot remember where I stabbed the deceased. The deceased was then lying on me and his abdomen was lying on top of me."

 and in re-examination, he added:
10 *"the knife was on my right part of my hip I used my right hand in stabbing the deceased."*

 The only difference I can see in his statements to the Police on the one part and his evidence at the trial on the other part is in the account of the event leading to his stabbing the deceased. The learned trial Judge accepted, as he was entitled to do, the version as narrated in Exhibits A & B and rejected for good reasons, the account given at the trial by the appellant. True enough the learned trial Judge did not act on the evidence of P.W.1 and P.W.5 as he held that they were not at the scene at the time the appellant stabbed the deceased. He however, considered the evidence of the doctor who performed the autopsy on the deceased, the Exhibits A & B and the evidence led in defence. He accepted the account given by the appellant in Exhibit A & B as well as the evidence of the doctor. He came to the conclusion that the appellant was guilty of culpable homicide of the deceased. In Exhibit A1 the English version of Exhibit A the appellant stated as follows:

25 *"I the above named and address voluntarily elect to state as follows:*

Yesterday, being Thursday 14/2/85 at about 22 hours in the night although I was not with watch. I left a certain house of drink from Kumo town on my way going home myself alone met with someone together with a lady when we met he just abuse me saying that to who fathers house (sic) I am going then I myself answered him that I am going to his mother's house from there he came on me with the intention of getting me arrested as such I beat him with my stick but he still got hold of me and take away my stick from my hand immediately I see saw (sic) I then bring out my knife and chuck him with it but still the man he got hold of me with my knife and get me down almost about three times. When we are on the struggle someone came and met us and I heard him holding me and get me arrested to police station.

And I don't know that the person I was fighting with him is a Govern-

Bature v. The State (1994) 2 KLR Ogundare JSC 39
ment Civil Servant and also the man did not beat me with any stick or with anything. I cannot say exactly where I chuck him with the knife but I only know that I chuck him with my knife that is all what I know."

The learned trial Judge was satisfied that the above version represented the truth of what happened on the day of the incident. This account, considered along with other evidence available at the trial, is to my mind credible. I have no reason to disagree with the conclusion reached by the learned trial Judge. I consequently do not accept the submission of learned counsel for the appellant that Exhibits A and B did not satisfy the test set out in the Queen v. Obiasa (1962) 2 SCNLR 402; (1962) 1 ANLR 651. These tests are:

- (a) *whether there is anything outside the confession to show that it is true;* 10
- (b) *whether it is corroborated;*
- (c) *whether the facts stated in it are true in so far as it can be tested;*
- (d) *whether the accused had the opportunity to commit the offence;* 15
- (e) *whether the accused's confession is possible;*
- (f) *whether the confession is consistent with other evidences which have been ascertained and proved.*

There is no doubt that Exhibit A is a confession. I agree with the learned trial Judge that on the evidence available before him, the above tests are satisfied. It is therefore, my conclusion that the Court below also is right in affirming the decision of the learned trial Judge. 20

In view of the conclusions, I have reached on the two questions set out for determination in this appeal, I dismiss this appeal and affirm the conviction of the appellant for culpable homicide and the sentence of death passed on him by the learned trial Judge. 25

MOHAMMED JSC

I agree that this appeal fails on all the grounds for the reasons given by my learned brother, Onu, J.S.C., in his judgment just read. I had a preview of the judgment in draft before now and I have nothing more to add. I dismiss the appeal because it is without merit and affirm the conviction and sentence. 30

Appeal dismissed