

**SUPREME COURT OF NIGERIA**  
6TH FEBRUARY, 1996. SC. 93/1993  
**CORAM:- M. L. UWAIS CJN, A. B. WALI,**  
**I. L. KUTIGI, Y. O. ADIO, A. I. IGUH, JJSC.**

MONDAY NWAEZE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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***APPEALS*** - Concurrent findings of Courts - Appellate Court will not interfere - Where no special circumstances exist.

***CRIMINAL LAW*** - Murder - Inference of murder - Whether person with whom deceased was last seen alive - Is the murderer.

***CRIMINAL PROCEDURE*** - Procedural Error - Does not warrant discharge and Acquittal of appellant.

***EVIDENCE*** - Confession - Free and voluntary confession of guilt - Is sufficient to warrant conviction - Without corroboration.

***EVIDENCE*** - Burden of proof- What prosecution must prove -To establish a chance of murder.

***EVIDENCE*** - Interpreter - Admissibility - Statement of accused in a language other than English - Recorded through an interpreter - How to be admitted.

***EVIDENCE*** - Witnesses - Duty of prosecution - Is to call material witnesses - To prove its case.

***EVIDENCE*** - Wrongful admission of evidence - Where evidence was wrongfully admitted - Whether accused will be discharged in all cases.

***EVIDENCE*** - Wrongful admission of evidence - When will it ground acquittal

**FACTS**

The appellant was charged in the High Court of Imo State with the murder of one Nwaeze Ogolo, the deceased upon the facts that on

the 31<sup>st</sup> March, 1982, one Rose Nwaeze, the P.W.1, a sister-in-Law of the appellant, heard someone groaning with pains. She being curious, ran towards the direction of the groaning only to see the appellant, with a matchet in his hand, running from the deceased person's room from which the groaning was coming. P.W.1 got to the said room to meet the horrible sight of the deceased matcheted to death. Only P.W. 1, then nursing her two-week old baby, the appellant and the deceased were within the premises at the material time. P.W.1 then raised an alarm and the matter was reported to the Police which dispatched sergeant John Idowu (P.W.2) who investigated the matter, to the scene of the incident. The corpse of the deceased was conveyed to the General Hospital, Okpuala, where one Dr. Obioha Okoro conducted post mortem examination of the corpse. He also gave evidence, (as P.W.3), on the cause of the deceased's death.

The appellant who was later arrested led the Police to discover the matchet with which the deceased was hacked to death. He made a statement in Igbo language that was recorded by the Police through an interpreter. The interpreter was not called to testify at the trial because of his ill health. The matchet was also not tendered in evidence. The appellant, who denied making any statement to the Police, also denied the offence charged, but admitted being in the room with the deceased on the said date and pushing down the deceased. The trial judge considered the evidence before him and found the appellant guilty and sentenced him to death. The appellant's appeal to the Court of Appeal Port Harcourt Division against the decision was dismissed. Appellant has further appealed to the Supreme Court raising five main issues.

### **ISSUES FOR DETERMINATION**

*"1. Whether the ingredients and standard required of circumstantial evidence had been satisfactorily proved by the prosecution and if not whether the trial court was not in error in convicting, and appellate (court) affirming such conviction of the appellant on such evidence when there was no proof of the act and intent.*

*2. Whether the conflicts, contradictions and inconsistencies in the evidence of the prosecution were not material enough to create doubt in the mind of the court to sufficiently render evidence of the prosecution grossly fall short of the standard required to prove the offence beyond reasonable doubt." Etc, see p. 186*

**HELD** (Unanimously dismissing the appeal per lead judgment of **ADIO JSC**)

***Murder - Burden of proof***

1. In a charge of murder, the burden is on the prosecution to prove that:- (a) the deceased had died; (b) the death of the deceased was caused by the accused; and (c) the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence. The evidence relied upon may be direct or be circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused beyond reasonable doubt. The onus, in this connection, on the prosecution as a general rule never shifts and a misdirection on the question of onus of proof is fatal unless it can be shown that on a proper direction the result will be the same. (p. 186 F)

***Procedural error***

2. There may be some merit in the contention being made for the appellant especially when in the end the intended forensic examination had not been lined out and the result thereof had not been known by the time that the appellant was being tried. I do not, however, agree with the learned counsel for the appellant that the foregoing error, if any, alone would properly have warranted the acquittal and discharge of the appellant. (p. 189 A)

***Free and voluntary confession of guilt***

3. The statement, from the point of view of the appellant, was important because, as I have earlier stated, it was allegedly confessional. A free and voluntary confession of guilt by a prisoner, if it is direct and positive and is made and satisfactorily proved, is sufficient to warrant a conviction tin any corroborative evidence so long as the court is satisfied of the truth of the confession. (p. 189 E)

***Statement of accused in a language other than English***

4. The court below was perfectly right in holding that the statement, Exhibit "A", was inadmissible as the interpreter of the statement, made by the appellant from Igbo to English to the investigating police officer who recorded it in English, was not called to testify on the point. The legal That if the statement of an accused is made in a language other than it is interpreted into English by an interpreter to the re-interpreter must be called to give evidence, on the point, at the in fused otherwise the contents of the statement will be hearsay will be inadmissible. (p. 190 C)

***Wrongful admission of evidence***

5. I stated, in the case of the complaint about the matchet and the alleged irregular use of the evidence about it, that I did not agree that if the complaint was justified it necessarily meant that the appellant should be discharged and acquitted on that ground alone. My view is the same in the case of the complaint about the admission of the statement and the alleged use made of it by the learned trial Judge which the court below overruled. Wrongful admission of evidence by a trial court will result in the reversal of its judgment by an appellate court only where it has occasioned or resulted in a miscarriage of justice. (p. 191 A)

**C      *Witnesses - Duty of Prosecution***

6. It is sufficient to say, in this connection, that the law imposes no obligation on the prosecution to call a host of witnesses. All the prosecution needs to do is to call enough material witnesses to prove its case and, in so doing, it has a discretion in the matter. If the evidence of a witness is very essential to the defence of the accused, it is for the accused to call him. He should not expect the prosecution to call the witness since the prosecution is not expected to perform the function of the prosecution and the function of the defence. (p. 191 E)

**E      *Wrongful admission of evidence - When will it ground acquittal***

7. I now deal with the questions raised under the first issue. Wrongful admission of evidence will result in the discharge and acquittal of the accused only where there is insufficient lawful evidence to sustain the charge. (p. 191 G)

**F      *Inference of murder***

8. The court below rightly held that the finding of the learned trial Judge was unassailable and I cannot see anything wrong with the aforesaid view of the court below. When the P.W. 1 heard the groaning of the deceased it was reasonable to infer that the deceased was not dead immediately before his groaning which the P.W. 1 heard but not long thereafter when the P.W. 1 got to his (deceased's) room he was already dead. As the P.W. 1 saw the appellant running out of the said room of the deceased and since the P.W. 1 said that apart from the deceased and the appellant, there was no other person in the premises other than herself and the young baby in the compound, it could be inferred that the appellant was the last person with whom the deceased was with alive. He (the appellant) was the last person with whom the deceased was seen alive. The foregoing is circumstantial evidence from which it may be inferred that it was the appellant that killed the deceased. Circumstantial evidence may ground

a conviction where it is unequivocal, positive and points irresistibly to the guilt of the accused person. (p. 192 G)

### ***Concurrent findings of courts***

9. The position in the present appeal is that after disregarding the confessional statement, Exhibit "A", and the evidence about the matchet which was found at the place where the appellant told the police that he hid it, there was still abundant lawful evidence on record which enabled the prosecution to prove the charge preferred against the appellant beyond reasonable doubt. There were no special circumstances warranting interference of this court with the concurrent findings made by the courts below and this court will, therefore, not interfere. (p. 194 E)

### ***NOTABLE POINT OF INTEREST***

#### ***Adio JSC***

##### ***1. Violence can be inferred from groaning***

In this case, it could reasonably be inferred from the groaning of the deceased which the P.W. 1 heard on the day in question that some sort of violence was going on in the room of the deceased. The deceased and the appellant were the only two persons in the room and not long thereafter the P.W. I was coming to the room she saw the appellant running from the room. On getting there the P.W. 1 found the deceased dead matchet cuts which could not be self-inflicted on his neck. The evidence of the appellant about the alleged misunderstanding between him and the deceased on the alleged use by the appellant of the soap of the deceased the alleged falling down of the deceased when the deceased attempted in heat him with a broom was nothing but a fairy tale which no reasonable tribunal would believe. (p. 193 G)

### ***PRESENTATION***

M .B. Wali Esq. for the appellant

Miss N. U. Chianakwalam D.P.P. Abia State for the respondent

### ***CASES REFERRED TO***

Aruna v. The State (1990) 6 N.W.L.R. (Pt. 155) 125 137

Ali v. The State (1988) 1 N.W.L.R. (Pt. 68) 1

Nwabueze v. The State (1988) 4 N.W.L.R. (Pt.90) 503

Fatoyinbo v. Attorney-General Western Nigeria (1966) W.N.L.R. 4

Shivero v. The State (1976) 3 S.C. 63

- Iyu v. The State (1965) 1 All N.L.R. 203 at p. 209  
 Adaje v. The State (1979) 6-11 S.C. 18 at p. 28  
 Asiriyu v. The State (1987) 4 N.W.L.R. (Pt. 67) 109  
 Oladejo v. The State (1987) 3 N.W.L.R. (Pt. 61) 419  
 Esai v. The State (1976) 11 S.C. 31  
 B Ukorah v. The State (1977) 4 S.C. 167  
 Uche v. The State (1973) All N.L.R. 826 at 829  
 Ike v. Ugboaja (1993) 9 KLR 62

**STATUTE REFERRED TO**

- C Criminal Codes. 319

**LEAD JUDGMENT BY ADIO JSC**

- The charge, which was preferred against the appellant, was murder contrary to section 319 of the Criminal Code Cap 30 of the Laws of Eastern Region, 1963 applicable in the Imo State of Nigeria.  
 D The allegation made against him was that he the appellant on the 31st day of March, 1982, at Amazu Umuacha Village, Ngwa in the Isiala Ngwa Judicial Division murdered Nwaeze Ogolo (m).

- Sometime on the 31st day of March, 1982, at Amazu Umuacha Village, Isiala Ngwa, one Rose Nwaeze, a nursing mother who was  
 E also the sister-in-law of the appellant and the daughter-in-law of the deceased, heard someone groaning. She, as a result, got up and went in the direction of the groaning. On the way to the place where the sound was coming from, she saw the appellant running out of a room holding a matchet in his hand. On reaching the said room she  
 F found, on the ground, the corpse of the deceased who was the father of the appellant. She discovered that there were some matchet cuts on the corpse of the deceased and that the deceased was dead. Apart from her young baby, there was no other person at the scene other than the deceased, the appellant and herself (Rose).

- G The matter was reported to the police. As a result, the appellant was arrested. He made, through an interpreter, a statement to the police which was said to be confessional. The said statement was tendered and admitted during the trial of the appellant though the police constable who interpreted it for the purpose of recording by the recorder could not testify because he was ill during the proceedings. The matchet which the investi-  
 H gating officer recovered from when the appellant said that he kept it was sent to the forensic laboratory for examination. It was not tendered during the proceedings as it had not been returned.

The evidence of the medical doctor, who conducted the post mortem examination on the corpse of the deceased, was that the deceased died as

a

result of the injury inflicted upon him. In the opinion of the medical doctor, the injury was caused by a sharp object like a matchet. There was no evidence that the injury was self-inflicted.

The appellant denied the charge. He agreed that he was in the room with his father the deceased, immediately before the incident. His evidence was that there was misunderstanding between him and the deceased about the soap of the deceased as a result of the allegation that he (appellant) used the soap. The deceased attempted to flog him (appellant) with a broom and the appellant pushed the deceased who fell down. The appellant observed that the deceased did not get up again. He (appellant) returned to the room with P.W.5, at whose instance he (appellant) called the deceased but the deceased did not answer. B C

The learned trial Judge duly considered the totality of the evidence before him and the submissions made by the learned counsel for the parties. He accepted the evidence led by the prosecution and rejected the defence put forward by the appellant. He found the appellant guilty of the charge and convicted him accordingly. The appellant was sentenced to death. D

Dissatisfied with the judgment of the learned trial Judge, the appellant lodged an appeal to the Court of Appeal. The court affirmed the finding of the learned trial Judge that, inter alia, it was the appellant that caused the death of the deceased and that the said act of the appellant was not accidental. E

Dissatisfied with the judgment of the court below, the appellant has now lodged a further appeal to this court. The parties duly filed and exchanged briefs. The appellant filed an appellant's brief and the respondent filed a respondent's brief. There were five main issues identified in the appellant's brief. Issue 3 was divided into two issues, issue 4 was divided into three issues, and issue 5 was divided into two issues. In short, there was proliferation of issues and in many cases one question was raised under one or more issues. Be that as it may, one has to make the best of the situation and make use of the issues formulated in the appellant's brief for the determination of the appeal. Only two issues were formulated in the respondent's brief. The issues formulated by the appellant in his brief which will be used for the determination of this appeal were as follows:- F G

1. *"Whether the ingredients and standard required of circumstantial evidence had been satisfactorily proved by the prosecution and if not whether the trial court was not in error in convicting, and appellate (court) affirming such conviction of the appellant on such evidence when there was no proof of the act and intent."* H

2. *Whether the conflicts, contradictions and inconsistencies in*

*the*

*evidence of the prosecution were not material enough to create doubt in the mind of the court to sufficiently render evidence of the prosecution grossly fall short of the standard required to prove the offence beyond reasonable doubt.*

B *3(a) whether the trial court admitted and considered and the Court of Appeal rejected but considered such extra judicial statement resulting in misdirection of law and perverse findings occasioning miscarriage of justice.*

C *3(b) If the answer is in the affirmative, whether this was not an error in law which pervasively affected the finding and occasioned a grave miscarriage of justice.*

*4(a) Whether the trial court was not in error by importing a (i) non existing evidence: (ii) wrongly inadmissible evidence and (iii) excluding otherwise material and necessary evidence for the just determination of the case, and (iv) wrongly affirmed by the Court of Appeal.*

D *4(b) If the answer to (a) above is affirmative whether there had not been perverse findings and conclusions which occasioned miscarriage of justice.*

E *4(c) If the answers to (a) and (b) above are in the affirmative, whether the affirmation of this by the Court of Appeal did not result in perverse findings occasioning grave miscarriage of justice. 5(a) whether the trial Court and the Court of Appeal sufficiently considered and the Court of Appeal reviewed the totality of the evidence before them respectively in respect of both the prosecution and the defence.*

F *5(b) If the answer is in the negative, whether they were not, respectively, in error to have concluded that the Prosecution had proved its case beyond reasonable doubt instead of acquitting and discharging the appellant."*

In a charge of murder, the burden is on the prosecution to prove that-

G (a) the deceased had died:  
(b) the death of the deceased was caused by the accused: and  
(c) the act or omission of the accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

H See *Ogba v. The State* (1992) 2 NWLR (Pt. 222) 164,

The evidence relied upon may be direct or be circumstantial. Whether the evidence is direct or circumstantial, it must establish the guilt of the accused beyond reasonable doubt. The onus, in this connection, on the prosecution as a general rule never shifts and a misdirection on the



question of onus of proof is fatal unless it can be shown that on a proper direction the result will be the same. See *Arima v. The State* (1990) 6 NWLR (Pt.155) 125, 137 and *Ozaki v. The State* (1990) 1 NWLR (Pt. 124) 92. The credibility of evidence does not ordinarily depend on the number of witnesses that testify on a point. Evidence of one credible witness, if accepted and believed by a trial court is sufficient to justify a conviction. See *Ali v. The State* (1988) 1 NWLR (Pt. 68) 1. However, if there is inconsistency in the prosecution's case such as to cast doubt on the guilt of the accused, the accused should be given the benefit of doubt and he should be discharged and acquitted. See *Onubogu v. The State* (1974) 9 SC 1: *Nwabueze v. The State* (1988) 3 NWLR (Pt. 86) 16 and *Kalu v. The State* (1988) 4 NWLR (Pt. 90) 503. B C

In this case none of the prosecution witnesses testified that he/she saw the appellant when he allegedly inflicted matchet cuts on the deceased. In other words there was no eye-witness of the commission of the crime. The prosecution relied, as shown by the facts of the case summarized above, on circumstantial evidence. The circumstantial evidence that will meet the requirement of Onus of proof in criminal cases is the evidence that fixes the accused to the crime with sufficient cogency and which excludes the possibility that someone else had committed the crime. See *Fatoyinbo v. Attorney-General, Western Nigeria* (1966) WNLR. 4. On the basis of the evidence before him, the learned trial Judge rightly made, inter alia the following findings of fact which were affirmed by the court below:- D E

(a) that sometime, on the day in question, Rose (the sister-in-law of the appellant who was nursing a young baby) heard the deceased who was groaning in his room: F

(b) that immediately thereafter Rose got up and was going to the room of the deceased to find out what was wrong with him, when she saw the appellant, with a matchet held in one of his hands, running out of the room of the deceased: G

(c) that when she got to the room of the deceased, she found him in a pool of blood with two matchet cuts on his neck and he was dead: G

(d) that the persons in the house in which the incident happened were at the time of the incident, the appellant, the deceased, Rose and her baby: H

(e) that it was only the appellant that was with the deceased in the deceased's room in the house at the time of the incident: H

(f) that after the appellant had been arrested, he made a statement in Igbo which was translated by a constable in English to the recorder:

(g) that as the aforesaid statement was confessional, the appellant and the statement were taken before a superior police officer

where after the

statement had been read and translated to the appellant, the appellant said that it was voluntary and correct:

(h) that the constable who read and interpreted the statement of the appellant to the recorder in English became ill and was unable to testify during the trial of the appellant

(i) that the appellant led the police to the place where the matchet held by the appellant at the time of the incident was found by the police:

(j) that the injuries on the neck of the deceased were caused by a sharp object like a matchet, and

(k) that the aforesaid injuries inflicted by the appellant on the deceased caused the death of the deceased.

Rose, P.W.1, stated that when she heard the groan of the deceased at the time of the incident, she rose immediately and went to the room of the deceased to find out what was wrong with him. On her way, she saw the appellant running away, with a matchet held in one of his hands, from the room of the deceased and when she reached the room she found the deceased dead in a pool of blood with two matchet cuts on his neck. Rose never stated whether the matchet held by the appellant was blood stained or not blood stained. That had led to some controversies. In referring to the same matchet, the P.W.2, who was a police constable investigating the case, described the matchet categorically as a blood stained matchet. He said, inter alia, as follows:-

*"I recovered the matchet with which the accused killed the deceased from the bush with the help of the accused who took me to the bush. I sent the matchet to the forensic laboratory Lagos for examination of the blood stain. The matchet is still there in Lagos."*

The contention of the learned counsel for the appellant under issues 2, 4 and 5 was that the P.W. 1 who saw the appellant holding the matchet immediately after the incident never stated whether the matchet was blood stained or not blood stained. It was not only wrong but also prejudicial but not fatal to the case of the appellant for the P.W.2 to describe the matchet as a blood stained matchet. I think that there was substance in the contention especially as there was no specific evidence, with proper source of basis, for the assertion by P.W.2 that the matchet was the matchet that the appellant used to kill the deceased or that it was blood stained. The statement made by the appellant, which contained an assertion that the matchet was the matchet which the appellant used to kill the deceased, though admitted as Exhibit "A" by the learned trial Judge, was held by the court below to be inadmissible and, therefore, was rejected. It was further contended for the appellant that though the learned trial Judge stated that he

would not rely on Exhibit "A" he was influenced by it in coming to the decision that the appellant killed the deceased, a decision which the court below stated was unassailable. There may be some merit in the contention being made for the appellant especially when in the end the intended forensic examination had not been carried out and the result thereof had not been known by the time that the appellant was being tried. I do not, however, agree with the learned counsel for the appellant that the foregoing error, if any, alone would properly have warranted the acquittal and discharge of the appellant. My reasons will be given later in the judgment. B

Closely connected with the questions raised under issue 2, 4 and 5 is the question raised under the third issue, that is, the admissibility of the statement, Exhibit "A", allegedly made by the appellant to the police. There was evidence before the learned trial Judge, that the appellant made the statement in Igbo through a police constable who translated it into English to the investigating police officer who recorded it in English. There was also evidence that when the trial of the appellant was going on before the learned trial Judge, the police constable who acted as interpreter for the purpose of recording the statement had become ill and could not testify. The learned trial Judge, however, thought that proper foundation for the admissibility of the statement had been laid. He, therefore, admitted it as Exhibit "A". The court below did not agree on the point, with the view of the learned trial Judge and ruled that the statement was inadmissible and, therefore, rejected it because the interpreter of the statement was not called as a witness and did not testify. D E

The statement, from the point of view of the appellant, was important because, as I have earlier stated, it was allegedly confessional. A free and voluntary confession of guilt by a prisoner, if it is direct and positive and is duly made and satisfactorily proved, is sufficient to warrant a conviction without any corroborative evidence so long as the court is satisfied of the truth of the confession. See *Obosi v. The State* (1965) NMLR 119. In *Omokaro v. R.* (1941) 7 WACA 146 the only issue raised in the appeal was whether a conviction, could be based on a confession alone. The West African Court of Appeal, in dismissing the appeal, stated, as follows:- F G

*"The only question raised by this appeal is whether a conviction based entirely upon evidence of confessions by appellant can stand. The case of Sykes 8 C.A.R. p. 233 affords clear authority that such evidence is sufficient. The learned trial Judge enquired more carefully into the circumstances in which the alleged confessions were made, one of them before an European Assistant Commissioner of Police, and was satisfied of their genuineness. "The appeal must be dismissed."* H

So, one should not be surprised that the appellant regarded the admissibility of the statement as serious. He might be found guilty of the offence on the basis of the confession in Exhibit "A" alone. The complaint of the appellant was not limited to the admissibility of the statement. The learned  
 B counsel for the appellant further submitted that though the learned trial Judge stated that he would disregard Exhibit "A", he eventually made use of its contents in arriving at his decision that the appellant caused the death of the deceased, which decision the court below regarded as unassailable. It was then submitted for the appellant that without the contents of Exhibit  
 C "A", it could not be said that the prosecution's case against the appellant had been proved beyond reasonable doubt or that the appellant, in the circumstance, received a fair trial. For those reasons, the appellant should have been discharged and acquitted by the court below.

The court below was perfectly right in holding that the statement, Exhibit "A", was inadmissible as the interpreter of the statement, made by  
 D the appellant from Igbo to English to the investigating police officer who recorded it in English, was not called to testify on the point. The legal position is that if the statement of an accused is made in a language other than English and it is interpreted into English by an interpreter to the recorder, the interpreter must be called to give evidence, on the point, at the  
 E trial of the accused otherwise the contents of the statement will be hearsay and the statement will be inadmissible. See *Shivero v. The State* (1976) 3 SC. 63 and *Iyu v. The State* (1965) 1 All NLR 203, at p. 209. Jacks J.C.A. followed the foregoing principles and stated, inter alia, follows:-

*"It is clear in the above passage, and in particular from the underlined portions, that the evidence of the witness narrating what constable Felix Okereke, told him was hearsay and inadmissible. The constable, Felix Okereke ought to have been called to give evidence."*  
 F

The court below was, therefore, right in ruling that the statement, Exhibit "A", was inadmissible. It was, however, contended by the learned  
 G counsel for the appellant that without the contents of the statement it could not be said the charge against the appellant was proved beyond reasonable doubt or that the appellant received a fair trial. The court below did not share the aforesaid view and commented thereon as follows:-

*"But this is not the end of the matter. In passage at pages 21 - 22 already reproduced by me the learned trial Judge, for the reasons  
 H stated therein, had concluded that it was the appellant who caused the death of his father by inflicting matchet cut on him. He arrived at the conclusion without taking into account the confessional statement, Exhibit "A"....."*

Indeed, it is manifestly clear that, without Exhibit "A",

the guilt of the appellant was established beyond reasonable doubt.....I find no room for suggesting that a miscarriage of justice was occasioned by the admission of Exhibit "A ".

I stated, in the case of the complaint about the matchet and the alleged irregular use of the evidence about it, that I did not agree that if the complaint was justified it necessarily meant that the appellant should be discharged and acquitted on that ground alone. My view is the same in the case of the complaint about the admission of the statement and the alleged use made of it by the learned trial Judge which the court below overruled. Wrongful admission of evidence by a trial court will result in the reversal of its judgment by an appellate court only where it has occasioned or resulted in a miscarriage of justice. See *R. v. Essien* 5 WACA 70; *Orosunlemi v. The State* (1967) NMLR 278; *Okaroh v. The State* (1990) 1 NWLR (Pt. 125) 128 and *Aremu v. The State*, (1991) 7 NWLR (Pt.201) 1. See also section 226 of the Evidence Act.

It is necessary to deal with one aspect of this case dealt with in the appellant's brief. It was argued that this was a case in which clearly certain persons should have been called or re-called as witnesses by either the prosecution or by the learned trial Judge. The persons who, it was argued, should have been called or recalled as witnesses included the spouse of the PW.1, one of the villagers who assisted in effecting the arrest of the appellant, and the forensic analyst. It is sufficient to say, in this connection, that the law imposes no obligation on the prosecution to call a host of witnesses. All the prosecution needs to do is to call enough material witnesses to prove its case and, in so doing, it has discretion in the matter. See *Adaje v. The State* (1979) 6-9 SC 18 at p. 28. If the evidence of a witness is very essential to the defence of the accused, it is for the accused to call him. He should not expect the prosecution to call the witness since the prosecution is not expected to perform the function of the prosecution and the function of the defence. See *Asariyu v. The State* (1987) 4 NWLR (Pt. 67) 709; and *Ogbodu v. The State* (1987) 2 NWLR (Pt. 54) 20 in which it was held that the prosecution was not bound to call the son of the appellant who was present when the crime was committed if the prosecution felt his evidence was not vital to its case. The defence might call him, if it desired; nothing stopped it from doing so.

I now deal with the questions raised under the first issue. Wrongful admission of evidence will result in the discharge and acquittal of the accused only where there is insufficient lawful evidence to sustain the charge. See *Babalola v. The State* (1989) 4 NWLR (Pt. 115) 264. In *Shivero's* case *supra*, the accused stabbed the deceased in the presence of witnesses. The

statement which he made to the police was held to be inadmissible because, as was the position in the present case, the interpreter of the statement to the recorder thereof did not give evidence. The conviction based on evidence of eye-witnesses, result of post-mortem examination, voluntary visit to the police station and of how knife was found, was held to be proper. In the present case, the evidence led by the prosecution against the appellant was not based solely on the confessional statement. Exhibit "A" or limited to the evidence concerning the matchet which the P.W.1 said that the appellant held when he was running away from the room of the deceased. The evidence led by the prosecution included the evidence of Rose Nwaeze (P.W.1) who stated, inter alia, as follows:-

*"I knew one Nwaeze Ogolo. He is now dead. He was my father-in-law. I also knew Monday Nwaeze, the accused person. He is the senior brother of my husband Julius Nwaeze. I remember the 31st day of March, 1982. At that date I have a two week old baby in my arms. I heard someone groaning. I was attracted to the direction from which the groaning came in order to find out what was happening. At that juncture I saw the accused ran out of the room with a matchet in his hand. I then went into the room and saw that my father-in-law had been hacked to death by the appellant ..... Apart from myself, the accused and the deceased there was no other person in our premises which was the scene of the incident."*

Cross-examined by the learned counsel for the appellant, the P.W.1 added that the incident took place in the room of the deceased. On the basis of the evidence before him and particularly the evidence of P.W.1, the learned trial Judge held , inter alia, as follows:-

*"The evidence is circumstantial. Both counsel for the accused and the prosecution are agreed that the court can convict on circumstantial evidence provided that the same is cogent and unequivocal and leads to the irresistible conclusion that the accused person and no one else did the act that caused the death of the deceased. I have reached this decision without taking account of Exhibit "A".*

The court below rightly held that the finding of the learned trial Judge was unassailable and I cannot see anything wrong with the aforesaid view of the court below. When the P.W.1 heard the groaning of the deceased it was reasonable to infer that the deceased was not dead immediately before his groaning which the P.W.1 heard but not long thereafter when the P.W.1 got to his (deceased's) room he was already dead. As the P.W.1 saw the appellant running out of the said room of the deceased and since the P.W.1 said that apart

from the deceased and the appellant, there was no other person in the premises other than herself and the young baby in the compound, it could be inferred that the appellant was the last person with whom the deceased was with alive. He (the appellant) was the last person with whom the deceased was seen alive. The foregoing is circumstantial evidence from which it may be inferred that it was the appellant that killed the deceased. Circumstantial evidence may ground a conviction where it is unequivocal, positive and points irresistibly to the guilt of the accused person. See *Oladejo v. The State* (1987) 3 NWLR (Pt. 61) 419. The position then is that if Mr. A was last seen alive with or in company of Mr. B and the next thing that happened was the discovery of the corpse of Mr. A. the irresistible inference is that Mr. A was killed by Mr. B. The Onus will then be on Mr. B, to offer explanation for the purpose of showing that he was not the one who killed Mr. A. In *Igbo v. The State* (1978), 3 SC 87, the deceased was last seen alive with the appellant who gave her a ride on the back of his bicycle. The corpse of the deceased was later found that night. The conviction of the appellant for the murder of the deceased was upheld by this court. The same conclusion was reached in *Amusa v. State* (1987) 4 SC 99: (1986) 3 NWLR (Pt. 30) 536 in which on 10/1/78 the appellant went out with the deceased and from that day no one saw the deceased alive until his corpse was discovered on the 21/1/78. The inference that was drawn was that the appellant, killed the deceased. The foregoing is the legal implication of the appellant being the person with whom the deceased was last with or seen with alive.

The foregoing was not the end of the matter. It would also be inferred from the evidence before the learned trial Judge that immediately before the P.W.1 heard the groaning of the deceased, the appellant and the deceased were the only person in the room of the deceased. Immediately after hearing the groaning of the deceased the P.W.1 left for the room of the deceased, saw the appellant running away from the room of the deceased, and on getting to the room she found the corpse of the deceased, with two matchet cuts on the neck. There was, therefore, valid basis for the finding of the learned trial Judge and for the affirmation of the finding that the appellant was the only person who could commit the alleged offence, See *Nafiu Rabi v. State* (1980) 8-11 SC 130. In this case, it could reasonably be inferred from the groaning of the deceased which the P.W.1 heard on the day in question that some sort of violence was going on in the room of the deceased. The deceased and the appellant were the only two persons in the room and not long thereafter when the P.W.1 was coming to the room she saw the appellant running away from the room. On getting there the P.W.1 found the deceased dead with matchet cuts which could not

be self-inflicted on his neck. The evidence of the appellant about the alleged misunderstanding between him and the deceased on the alleged use by the appellant or the soap of the deceased and the alleged falling down of the deceased when the deceased attempted to beat him with a broom was nothing but a fairy tale which no reasonable tribunal would believe. In somewhat similar circumstances in *Gabriel v. The State* (1989) 5 NWLR (Pt. 122) 457 at 462-463 Belgore, J.S.C. delivering the lead judgment of this court dismissing the appellant's appeal in that case stated. Inter alia, as follows:-

*"The peculiar nature of this case is that the appellant lied all along and this never helped his case. There was overwhelming evidence that he was alone with his wife in his room. Also evidence was clear that violence was going on between him and his wife (deceased) in his room and when she was shouting for help, the appellant refused to open the door he locked from inside. When his landlord, P.W.2, appealed to him to open the door, he refused and threatened P.W.2 with death should he force open the door. Nobody else entered the room up to the next morning when police got to the scene and found the appellant and the corpse of his wife. It was he (appellant) that had explanation to make as to what killed his wife....."*

*The appellant on all the evidence before the court was all along master of his own mind and action that I find no mitigating circumstances to interfere with the decision of learned Justices of Court of Appeal."*

The position in the present appeal is that after disregarding the confessional statement, Exhibit "A" and the evidence about the matchet which was found at the place where the appellant told the police that he hid it, there was still abundant lawful evidence on record which enabled the prosecution to prove the charge preferred against the appellant beyond reasonable doubt. There were no special circumstances warranting interference of this court with the concurrent findings made by the courts below and this court will, therefore, not interfere. See *Iyaro v. The State* (1988) 1 NWLR (Pt. 69) 256; and *Adekunle v. The State* (1989) 5 NWLR (Pt. 123) 505. This appeal lacks merit and it is hereby dismissed. The judgment of the court below is hereby affirmed.

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### UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Adio, J.S.C. For the reasons contained



therein, with which I entirely agree. I too will dismiss the appeal.

Accordingly the appeal is hereby dismissed and the decision of the Court or Appeal is affirmed.

**WALI JSC**

I am privileged to have read before now the lead judgment of my learned brother Adio, J.S.C. and I agree with his reasoning and conclusion that the appeal has no merit. I endorse the reasoning as mine.

For these same reasons contained in the lead judgment I also hereby dismiss the appeal and affirm the judgments of both the trial court and the Court of Appeal.

**KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother Adio, J.S.C. I agree that the appeal lacks merit and ought to fail. The circumstantial evidence against the appellant was overwhelming, unequivocal, positive and irresistible. The Court of Appeal also rightly rejected as inadmissible in evidence the extra-judicial statement of the appellant (Exhibit A) because the interpreter between the appellant and the Police recorder of the statement was not called as a witness. I also agree with the court below that even without Exhibit A the guilt of the appellant was established beyond reasonable doubt.

The appeal is dismissed. Conviction and sentence are affirmed.

**IGUH JSC**

I have had the privilege of reading, in draft, the lead judgment just delivered by my learned brother, Adio, J.S.C. and I agree entirely with him that there is no merit in this appeal.

Put shortly, the facts of this case simply are that on the 31st day of March, 1982. PW.1 who is the sister-in-law of the appellant was in her room when he heard someone groaning with pain. She became curious and proceeded towards the direction from which the distress sound was coming. On approaching the scene, which was the deceased's room, she saw the appellant running out therefrom with a matchet in his hand. He raced towards the road and presently disappeared. PW.1 then entered the room and discovered to her horror that the deceased had been brutally matcheted to death.

At all material times, only the appellant, PW.1 who was nursing her two week old baby and the deceased were in the premises. She

raised an alarm and the matter was subsequently reported to the police. PW.2. Sergeant John Idowu who investigated the case proceeded to the scene of crime, the room of the deceased where he saw his dead body in a pool of blood with severe matchet cuts. He conveyed the body to PW.3. Dr. Obiaha B Okoro who performed post mortem examination on it at the General Hospital, Okpuala Ngwa. The cause of death in the opinion of PW.3 was due to severance of the spinal cord and severe haemorrhage. The injuries were caused by a sharp object such as a matchet.

The appellant was arrested by PW.2 with the aid of the villagers three days after the incident. The matchet with which the deceased was killed was recovered from the bush with the help of the appellant. The appellant subsequently volunteered a written statement in the Igbo language which was recorded in the English language through an interpreter. Inspector O. Ndukwe. The said statement was confirmed before PW.4, a Divisional Police Officer as the appellant's true voluntary statement. D Inspector Ndukwe was unable to testify before the court at the appellant's trial as he became mentally sick and of unsound mind.

The appellant denied inflicting any matchet cuts on the deceased. He admitted that he was in the room of the deceased on the date in question and that he pushed the deceased who fell down but never got up E again. He denied making Exhibit A to the Police.

The learned trial Judge after some consideration of the evidence on the 14th April 1986 found the appellant guilty of the murder of the deceased, Nwaeze Ogolo and accordingly sentenced him to death. The appeal against his conviction and sentence was on the 28th January, 1993 F dismissed by the Court of Appeal, Port Harcourt Division. The appellant has now further appealed to this court.

It is not in dispute that there was no eye witness to the infliction of the savage matchet cuts on the deceased. The prosecution's case was based entirely on circumstantial evidence which, without doubt, can ground conviction in appropriate cases. However, before circumstantial evidence would G ground a conviction, it must lead only to one conclusion, namely, the guilt of the accused person, but where there are other possibilities in the case other than that it was the accused who committed the offence and that others, other than the accused had the opportunity of committing the offence with which he is charged, such an accused person cannot be found H guilty of the offence. See *Uwe Esai and 3 Ors. v. The State* (1976) 11 S.C. 39. But where strong circumstantial evidence is led against an accused in a criminal trial and this gives rise to the drawing of a presumption or inference, irresistibly warranted by such evidence, the court will not hesitate to draw such a presumption or inference, so

long as it is so cogent and compelling as to convince the jury that on no rational hypothesis other than the inference can the facts be accounted for. See *Uwe Idighi Esai and 3 others v. The State* supra; *Peter Eze v. The State* (1976) 1 S.C. 125; *Nwali v. The State* (1991) 3 NWLR (Pt.182) 663 etc. In other words, so long as the circumstantial evidence adduced against the accused cogently, irresistibly, positively, unequivocally, unmistakably and conclusively points to the accused as the perpetrator of the offence alleged to have been committed to the exclusion of any other person, a court of law would be entitled to infer from such evidence and the surrounding circumstances that the accused committed the offence and could safely convict on such evidence. See *Esai v. The State* (1976) 11 S.C. 39; *Ukorah v. The State* (1977) 4 S.C. 167; *Ntibunka v. The State* (1972) 1 S.C. 71; *Shazali v. The State* (1988) 5 NWLR (Pt.93) 164; *Kim v. The State* (1991) 2 NWLR (Pt.175) 622; *Ibina v. The State* (1989) 5 NWLR (Pt.120) 238; *Kalu v. The State* (1993) 6 NWLR (Pt. 300) 385 at 396 etc. But once the evidence conclusively points to the accused as the perpetrator of the crime and the same is adequately scrutinized and accepted by the court, the onus shifts to the accused to rebut the presumption of guilt or to cast a reasonable doubt in the prosecution's case, albeit by preponderance of probabilities. See *Onokpoya v. Queen* (1959) SCNLR 384; *Kalil v. The State* (supra).

In the present case, it is not disputed that at all material times, only the appellant, the deceased and P.W.1 were in the premises where the deceased was matcheted to death. It is also not contested that only the appellant and the deceased were together in the deceased's room where the latter was murdered in cold blood. The evidence of P.W.1 to the effect that she heard someone groaning with pain, that she headed towards the direction from which the distress sound was coming, that on approaching the scene which was the deceased's room, she saw the appellant running out of the room of the deceased with a matchet in his hand and that he raced towards the road from where he disappeared were all accepted by the trial court and affirmed by the court below as fully established. Both courts below were also satisfied that P.W.1 immediately went into the said room of the deceased from where the appellant ran out with a matchet and discovered to her horror that the deceased had been hacked to death with severe matchet cuts. The appellant who had disappeared as soon as he ran out from the deceased's room was arrested with the aid of the villagers three days thereafter. It was the appellant, too, who led P.W.2 the investigating police officer to the bush from where the matchet with which he hacked the deceased to death was hidden.

There can be no doubt that from the above facts, particularly the running out by the appellant from the deceased's room with a matchet

in his hand immediately after the distress groan which attracted P.W.1 to the scene of crime, the appellant's hasty flight from the said scene of crime with his matchet in his hand, the fact that he was the last person to be seen with the deceased alive until P.W.1 found him dead with aggravated matchet cut injuries and the fact that it was the appellant who led the Police investigating team to the bush from where the matchet with which the deceased was brutally hacked to death was recovered, all lead to no other inference than that it was the appellant who murdered the deceased.

The above facts were accepted by the learned trial Judge and affirmed by the court below as established. They are also amply supported by evidence on record. In my view the only cogent, irresistible, conclusive and reasonable inference from the said established facts is nothing else other than that the deceased was given the brutal matchet cuts which led to the instant death of the deceased by the appellant in the said room of the deceased person. See *Isaac Ughe v. The State* (1973) 1 All NLR (Pt.11) 181. I am therefore in entire agreement with the court below that the appellant was rightly convicted for this offence of the murder of the deceased.

One last point I desire to comment upon is the appellant's alleged confessional statement to the Police, Exhibit A. This statement was said to have been made by the appellant in the Igbo language under caution. It was however recorded by P.W.2, the investigating police officer in the English language through an interpreter. Inspector Ndukwe who at the time of the trial had been declared mentally derailed. The trial court found this statement admissible in evidence and it was accordingly admitted in the proceedings and marked Exhibit A.

The court below, for its part, was of a different view. It held that Exhibit A was inadmissible in the proceedings as Inspector Ndukwe through whose interpretation the statement was recorded in the English language was not called to testify as a witness in the case and stand cross-examined on the accuracy of his interpretation.

The point cannot be over-emphasized that where an interpreter is used in the recording of the statement of an accused person, such a statement is in law inadmissible unless the person who was used in the interpretation of the statement is called as a witness in the proceedings as well as the person who recorded the same. Accordingly, failure on the part of a trial court to appreciate the inadmissibility, as evidence, of an alleged statement by an accused person when such statement is not confirmed and established by the person who acted as interpreter when it was being recorded in a different language can be fatal to a conviction which is based on such a statement in that the court would have misdirected itself in accepting the statement as having been proved. See *R. v. Gidado* 6 WACA 60

at 62: *R. v. Zakwakwa* (1960) 5 F.S.C. 12; *R. v. Ogbuewu* (1949) 12 WACA 483 etc.

The court below was entirely right therefore when it ruled that the appellant's alleged statement to the police, Exhibit A, was inadmissible in evidence.

The admission of Exhibit A in evidence by the trial court in the present proceedings was however not any matter of great moment as it is not every error in a case that will result in the appeal being allowed. It is only when the error is substantial in that it has occasioned a miscarriage of justice that the appellate court is bound to interfere. See *Gwonto v. The State* (1983) 1 SCNLR 142 at 151-153; *Azuetonma Ike v. Ugboaja* (1993) 6 NWLR (Pt. 301).19 at 556 etc.

In the same vein, wrongful admission of evidence shall not of itself be a ground for the reversal of a decision where it appears on appeal that such evidence cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted. See *Ezeoke v. Nwagbo* (1988) 1 NWLR (Pt. 72) 616 at 630; *Monier Construction Co. Ltd. v. Azubuike* (1990) 3 NWLR (Pt. 136) 74 at 88 etc. If the appeal court is of the opinion that the inadmissible evidence cannot reasonably have affected the decision, it will not interfere. See *Ajayi v. Fisher* (1956) 1 F.S.C. 90; *R. v. Thomas* (1958) 3 F.S.C. 8; *Layonu and others v. The State* (1967) 1 All NLR 198 and section 226(1) and (2). Evidence Act.

In the present case, it is the view of the court below, and I am in complete agreement with that court, that apart from the erroneous reception of Exhibit A in evidence, there is overwhelming circumstantial evidence against the appellant upon which he was rightly convicted by the trial court. Indeed, the court below in upholding the verdict of the trial court rightly recognised the inadmissibility of Exhibit A in evidence before it upheld the conviction of the appellant on the sole basis of the circumstantial evidence led against him at the trial. It is clear to me that Exhibit A which the trial court wrongly received in evidence in no way affected the guilt of the appellant. I therefore endorse the decision of the Court of Appeal which affirmed the conviction and sentence passed on the appellant.

It is for the above and the more elaborate reasons contained in the judgment of my learned brother, Adio J.S.C., that I too, dismiss this appeal as meritorious and affirm the decision of the court below.