

**SUPREME COURT OF NIGERIA**

4TH JULY, 1997. SC. 103/1996

**CORAM:- A. B. WALL, I. L. KUTIGI, M. E. OGUNDARE, E. O.  
OGWUEGBU, U. MOHAMMED, JJSC.**

CLEMENT OBRI ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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**CRIMINAL LAW** - *Conviction - Evidence - Where declared unreliable - There is nothing to be corroborated in it - As to enable it ground appellant's conviction.*

**CRIMINAL PROCEDURE** - *Witnesses - Contradictions between the sworn evidence of a witness and his extra judicial statement - The court should regard both versions of evidence as unreliable.*

**FACTS**

The Appellant was charged with murder contrary to section 319 (1) of the criminal code. Nine witness testified for the prosecution. The Appellant testified in his own defence. The key witness who testified for the Prosecution was a seven year-old boy who was not sworn and whose evidence in court contradicted his extra judicial statement. At the end of the trial, the Judge accepted the unsworn evidence of the seven year-old boy and convicted the Appellant and sentenced him to death.

The Appellants appeal to the Court of Appeal was dismissed, hence this appeal to the Supreme Court on three issues.

**ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal was right when it came to the conclusion that the trial judge had complied with the provisions of sections 155(1) and 183(1) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, before receiving the evidence of PW.1, a small child aged about 7 years. Etc, see p. 1443*

**HELD** (Unanimously allowing the appeal per lead judgment of **KUTIGI JSC**)  
**Witnesses - Contradictions between evidence**

1. There is no doubt that the evidence of PW.1 in court and his extra judicial statement to the police violently contradicted one another on the crucial point of whether or not he saw the murderer commit murder in this case. The law on the point is quite clear. And that is that where a witness's real testimony in

court contradicts or is inconsistent with his previous extra judicial statement, the court should not only regard the sworn oral testimony as being unreliable but also the previous statement whether sworn or unsworn as not constituting evidence upon which it can act. Consequently, neither of the two versions of the story is worthy of credit and therefore incapable of establishing the truth. (p. 1444 E)

### **Evidence - Where declared unreliable**

2. The record abundantly shows that the learned trial judge relied solely on the unreliable evidence of PW.1 to convict the appellant. I know he did talk of corroboration of PW.1's evidence in certain respects, but once PW.1's evidence was declared unreliable, then there is nothing to be corroborated in his evidence by any other evidence. The only logical conclusion therefore is that there was no proof that the appellant caused the death of the deceased, an essential ingredient of the offence of murder. The appeal therefore succeeds and it is hereby allowed. (p. 1445 F)

### **NOTABLE POINT OF INTEREST**

#### **WALIJC**

#### *1. Where the credibility of a witness is successfully impeached*

Where the credibility of a witness is successfully impeached his evidence loses probative value: There was no evidence by the prosecution explaining the contradiction. If the prosecution's case was to be proved beyond reasonable doubt, it was necessary and imperative on the prosecution to disprove the appellant's allegation that it was somebody else that slaughtered the deceased. If an accused person made an allegation that some one else committed the offence, it is incumbent on the prosecution to rebut the allegation by evidence. (p. 1446 H)

### **REPRESENTATION**

Chief O. B. Onyali for the appellant

Mrs. Akon B. Ikpeme, D.P.P Cross-River, for the respondent

### **CASES REFERRED TO**

R. v. Ukpong (1961) ALL NLR 25

Oladejo v. The State (1987) 3 NWLR (Part 61) 419

Umani v. The State (1988) 1 NWLR (Part 70) 274

Ibeh v. The State (1997) 1 KLR 134

Ohunyon v. The State (1996) KLR (Pt. 38) 359

Onyegbu v. The State (1995) 4 KLR 978

Asanya v. The State (1991) 3 N.W.L.R. (Pt. 180) 422

Joshua v. The Queen (1964) 1 ALL NLR 1 at page 3

**STATUTES AND RULES REFERRED TO**

Criminal Code - section 319 (1)

Evidence Act - sections 155(1) and 183 (1)

**LEAD JUDGMENT BY KUTIGI JSC**

The appellant was charged with the offence of murder contrary to section 319 (1) of the Criminal Code. He pleaded not guilty to the charge. Thereafter the prosecution called five witnesses and tendered some exhibits. The appellant testified in his own defence and called no witness.

The learned trial judge in a considered judgment found the appellant guilty as charged and sentenced him to death.

Being dissatisfied with the judgment of the High Court, the appellant appealed to the Court of Appeal, Enugu Division. Three issues were formulated for its determination thus:-

*"(i) Did the learned trial judge comply with Sections 154(1) and 182(1) of the evidence Act before he received and relied on the evidence of PW1. to convict the accused and can the conviction stand?*

*(ii) Do the irregularities committed by the learned trial judge in the course of the trial not amount to denial of fair hearing to the accused?*

*(iii) Given the irreconcilable contradictions between the previous statement to the police and the testimony in court, was the learned trial judge right to have relied on the testimony in court of PW.1 to convict the accused ?"*

Each of the above issues was considered and resolved against the appellant. Consequently his appeal was dismissed by the Court of Appeal and the conviction and the sentence of the High Court were confirmed.

The appellant has now appealed against the judgment of the Court of Appeal to this Court. In accordance with the Rules of Court; the parties filed and exchanged briefs of argument. These were adopted and relied upon at the hearing and in addition oral submissions were made.

Chief Onyali learned counsel for the appellant in his brief submitted the following three issues as arising for determination in the appeal:-

*"1. Whether the Court Appeal was right when it came to the conclusion that the trial judge had complied with the provisions of sections 155(1) and 183(1) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, before receiving the evidence of PW.1, a small child aged about 7*

years.

2. *Whether the Court of appeal was right when it refused to consider the effect of the contradictory statement made by PW.1 to the police simply on the ground that the said statement was not tendered in evidence even though the said statement had formed part of the record of proceedings before the Court of Appeal.*

3. *Whether the Court of Appeal was right to have come to the conclusion that there had been sufficient corroboration of the evidence of PW.1 from the evidence of PW.2, PW.3 and PW.4"*

What is common to all the three issues above is the evidence of PW.

1. His evidence was either not properly received, contradictory with his extra judicial statement to the police, or not at all corroborated. Because of the importance of the evidence of PW.1 who was the only eye witness among the five prosecution witnesses, this court at the hearing and on the application of the learned counsel for the appellant, Chief Onyali, and in the interest of justice admitted in evidence the extra-judicial statement which PW. 1 made to the police dated 23/9/84, the day the alleged murder was committed. It was marked Exhibit SC. 1. It could be seen that even in the Court of Appeal, two out of the three issues submitted for determination revolved around the evidence of PW. 1. Certainly as the only eye witness, the importance of his evidence cannot be over-emphasized.

Now, PW.1 (Ogar Joseph) the record shows was a child of about seven years of age at the time he appeared in court before the learned trial judge on 27/11/85. He must therefore be aged about six years at the time the offence was committed on 23/9/84. PW.1 who was said to be a brother of the deceased testifying on page 12 of the record said amongst others:-

*"On the day this thing happened I was sleeping when the accused Clement, came in with one person and tied Okara to his bed. He picked one knife from the cupboard and cut his throat. Witness points to the neck region. After cutting the deceased, the accused started to shout that thieves had killed Okara. The other person ran away. As accused was shouting he used the knife and inflicted a wound on his shoulder. The accused then threw the knife into the bush in front of our house. The incident happened at night but the accused had brought in a lantern. I was sleeping as I laid down but accused's noise woke me."*

Under cross-examination he said:-

*"I made a statement to the police. It is true that on the fateful date, I was with my brother - the deceased - in the house and also with the accused and that we had our meal together."*

As I said above, the witness PW.1, as rightly admitted by him, had

made a statement to the police on 23/9/84, the very day the incident happened. In the said extra-judicial statement (Exhibit SC. 1) the witness said inter alia:-

*"In the night of 22/9/84, the deceased Okara, Clement and myself ate food-super. When we finished Okara went outside on trousers saying that he was going to take bath. Clement asked him to come for us to sleep.*

- B The decease replied that he should be left alone. Clement and I went and slept on the floor of the room. When Clement shouted that thief had killed Okara I woke from sleep. I saw Okara on the bed in pool of blood. He was bound hand and feet. Our lamp was on and electric light. There was blood on my head. The landlady came out. I went to sleep in her room. By the time*  
*C I got up there was blood on the body of Clement. He told me to wash the blood on my head. He too, washed the one on him. We had slept before the deceased came in and I cannot tell if he locked the door before he slept."*

It is glaring that PW.1 made a clear and unambiguous statement (Exhibit SC.1) to the police showing that he did not witness the murder. He was asleep. But

- D* surprisingly in his evidence in court he claimed to be an eye witness to the extent that he saw the appellant cut the throat of the deceased. If as the witness claimed he was sleeping, definitely he did not witness anything like seeing the appellant cutting the throat of the deceased. The fact of murder or death of the deceased was proved beyond doubt. But the issue here is - who  
*E* killed the deceased? **There is no doubt that the evidence of PW.1 in court and his extra judicial statement to the police violently contradicted one another on the crucial point of whether or not he saw the murderer commit murder in this case. The law on the point is quite clear. And that is that where a witness's real testimony in court contradicts or is inconsistent with his**  
*F* **previous extra judicial statement, the court should not only regard the sworn oral testimony as being unreliable but also the previous statement whether sworn or unsworn as not constituting evidence upon which it can act. Consequently, neither of the two versions of the story is worthy of credit and therefore incapable of establishing the truth.** (See R. v. UKPONG (1961) All NLR 25,  
*G* ASANYA v. THE STATE (1991) 3 LRCN 70, OLADEJO v. THE STATE (1987) 3 NWLR (part 61) 419, UMANI v. THE STATE (1988) 1 NWLR (part 70) 274, ESANGBEDE v. THE STATE (1989) 4 NWLR (part 113) 57).

The appellant as I said denied the charge. In his statement to the police (Exhibit 8) he said:-

- H* *"Nobi me do the thing. Nobi me kill my brother Okara. I been sleep for carpet for ground with Ogar and the carpet near the bed where Okara been sleep. As I the sleep somebody cut me with knife for my shoulder. I run commot outside and I begin to shout thief, thief. Ogar too run follow me. I go knock the landlady for door and she wake up. I tellam say them cut me*

*something for my back. The landlady ask me say where Okara, I tellam say Okara sleep there for house. Me and landlady carry lamp go for our room and before we reach there Okara don die. Them cut Okara something for neck and he been lye for bed. Blood been dey commot Okara for neck and blood been pour for bed and pillow case. Me and landlady come go report for police....."*

B

And in his testimony before the trial Court he also said:-

*"On 22/9/87, being Saturday, I went to the market in the morning at about 8 a. m. I supplied meat as usual and then returned home. After returning I carried my motor cycle battery to the electrician. I was with him till about 6p.m. I went into my house and met PW.1 and one other man. Deceased told me that we have a stranger - PW.1 and one other person. That I should go to Ishibori to tell the wife to prepare food for them. The wife told me that she couldn't because she was tired. I returned and told the deceased. He told me to go and buy food. I went and bought food for the stranger and the PW.1.*

D

*All of them ate. The stranger said he was going to Okuku but will return later in the evening to spend the night with us. He did not return in time. The deceased left for the house of the nearby girl friend. I put a goat skin on the ground and put bed sheet and I laid down with PW.1. The deceased shut the door and left for the girl friend's house.*

E

*The PW.1 and I slept. I did not know when the deceased returned.*

*In the midnight, I heard someone stabbed me on my shoulder. I shouted - thief - thief - thief - but no one came out. I went to PW.2 - and woke her up. She brought a lantern to our house and then I saw that my friend had been killed. I cried. I asked PW. 2 to take me to the Station and there I F reported the matter to the police ....."*

**The record abundantly shows that the learned trial judge relied solely on the unreliable evidence of PW.1 to convict the appellant. I know he did talk of corroboration of PW.1's evidence in certain respects, but once PW.1's evidence was declared unreliable, then there is nothing to be corroborated in his evidence by any other evidence. The only logical conclusion therefore is that there was no proof that the appellant caused the death of the deceased, an essential ingredient of the offence of murder.**

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**The appeal therefore succeeds and it is hereby allowed.** The judgments of both the High Court and the Court of Appeal are accordingly set aside. The appellant is found not guilty of the offence charged and is hereby discharged and acquitted.

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## WALI JSC

I have a preview of the lead judgment of my learned brother Kutigi, JSC and I agree with it. I only want to contribute the following by way of emphasis. The success or failure of the prosecution's case is hinged to the evidence of P.W. 1, a boy of about 6 years when the offence was committed B and about 7 years old when he testified in court. Before his evidence in court, he made extra-judicial statement to police which was not put in evidence at the trial, though P.W. 1 was cross-examined on its contents. With the consent of both the prosecution and the defence the extra-judicial statement was put in evidence and marked Exhibit SC 1 in this Court.

C It is evident from both evidence of P.W. 1 and Exhibit SC. 1, the witness was asleep when the incident took place. In his evidence, he said:

*"On the day this thing happened I was sleeping when the accused Clement, came in with one person and tied Okara to his bed. He picked one knife from the cupboard and cut his throat. After cutting the deceased the D accused started shouting that thieves had killed Okara. The other person ran away ..... I was sleeping as I laid down but accused's noise woke me up."*

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Under cross examination he said:-

E *"When they tied him and cut his throat, I did nothing but laid down quietly to observe all that they were doing. I was not sleeping but my eyes were shut when he brought a lantern close to me to find out if I was asleep."*

In Exhibit SC 1 he stated as followings:-

*"In the night of 22/9/84 the deceased Okara Clement and myself ate F food-super. When we finished Okara went outside on trousers saying that he was going to take bath. Clement ask him to come for us to sleep. The deceased replied that he should be left alone. Clement and I went and slept on the floor of the room. When Clement shouted that thief had killed Okara, I woke from sleep."*

G Both the evidence of PW.1 and his extra-judicial statement showed beyond any doubt that the witness cannot be an eye witness to the happening of the incidence leading to the deceased's death as he was fast asleep at the time and only awoken by the shout of the appellant after it had happened. The best that could be said about this evidence is that it is circumstantial which H did not identify the appellant as the only person that could have committed the offence. To further weaken inference on the evidence that it was the appellant that committed the crime is the statement contained in Exhibit SC 1 that appellant was in company of another person who ran away immediately after the offence was committed. Where the credibility of a witness is suc-

cessfully impeached his evidence loses probative value: Ayanwale & Ors. v. Atande & Anor. (1988) 1 SC 1. There was no evidence by the prosecution explaining the contradiction. If the prosecution's case was to be proved beyond reasonable doubt, it was necessary and imperative on the prosecution to disprove the appellant's allegation that it was somebody else that slaughtered the deceased. See Opyemi v. The State [1985] 2 NWLR (pt. 5) 101; Eze Ibeh v. The State [1997] 1 KLR 134; Frank Onyenakeya v. The State [1964] All NLR 143; Oje v. The State [1972] All NLR 280 and Jizurumbe v. The State [1976] All NLR 180.

If an accused person made an allegation that some one else committed the offence, it is incumbent on the prosecution to rebut the allegation by evidence. In the present case, failure by the trial court and the Court of Appeal to consider properly the defence raised by the appellant coupled with the prosecution's failure to satisfactorily explain the contradiction between the evidence of P.W. 1 and his extra-judicial statement Exhibit SC 1 and of which the trial court based its judgment as an eye-witness to the murder of the deceased, lead to miscarriage of justice. See Njovens v. The State [1973] 5 SC 1 at 35.

The prosecution's case has not been proved beyond reasonable. See Valentine v. The State [1980] 1 - 2 SC 116; Ohunyon v. The State [1996] KLR (pt. 38) 359. The appellant is entitled to the benefit of doubt created in prosecution's evidence.

It is for these and the more detailed reasons in the lead judgment of my learned brother Kutigi, JSC that I also hereby allow the appeal and enter a verdict of acquittal and discharge in favour of the appellant.

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#### OGUNDARE JSC

I agree entirely with the reasoning and conclusion reached by my learned brother Kutigi JSC in his judgment just delivered, a preview of which I had ere now. I have nothing more to add except to say that there was no credible evidence, direct or circumstantial, that linked the appellant with the murder of the deceased.

I, too, allow the appeal and set aside the judgments of the two Courts below. I enter a verdict discharging and acquitting the appellant.

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#### OGWUEGBU JSC

I have had a preview of the judgment read by my learned brother Kutigi, J.S.C. and I agree with his reasoning and conclusion. I would also



allow the appeal.

Three issues are formulated for determination in the appeal. They read as follows:

"1. *Whether the Court of Appeal was right when it came to the conclusion that the learned trial Judge had complied with the provisions of B Sections 155(1) and 183(1) of the Evidence Act. Cap 112 Laws of the Federation of Nigeria before receiving the evidence of P.W.1, a small child aged about 7 years.*

2. *Whether the Court of Appeal was right when it refused to consider the effect of the contradictory Statement made by PW.1 to the police C simply in the ground that the said statement was not tendered in evidence even though the said statement had formed part of the records of proceedings before the Court of Appeal.*

3. *Whether the Court of Appeal was right to have come to the conclusion that there had been sufficient corroboration of the evidence of D PW.1 from the evidence of PW.2, PW.3 and PW.4."*

The complaint of the appellant in the first issue is that the learned trial judge did not fully comply with the provisions of sections 155(1) and 183(1) of the Evidence Act Cap 112, Laws of the Federation of Nigeria in that at the preliminary enquiry before taking the evidence of P.W.1, he allowed the E prosecuting counsel and the court to put questions to the witness without affording the defence the same opportunity. It was also stated in the appellant's Brief that the first requirement of section 183(1) of the Evidence Act was satisfied; that P.W.1 had answered questions put to him rationally and that he (p.W.1) possessed sufficient intelligence to justify the reception of his evidence. F It was however contended that the second requirement of the said Section 183(1) was not complied with namely, that the child witness understood the duty of speaking the truth.

It is necessary to set out the provisions of sections 155(1) and 183(1) of the Evidence Act. They read:

G "155(1) *All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."*

H "183(1) *In any proceeding for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath, may be received, though not given upon oath, If, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty*

*of speaking the truth."*

The P.W.1 who is the star witness for the prosecution was aged six years at the time the alleged offence was committed and about seven years when he testified at the trial of the appellant. The P.W.1 is a child. He has not attained the age of fourteen years. See section 2(1) of the Criminal procedure Act Cap 80, Laws of the Federation of Nigeria. The record of proceeding at the trial court just before the child witness testified reads:

*"The P.W.1 - a child of about 7 years of age is called into the witness box. Questions are put to him by the State Counsel and the Court. He answers them rationally. He possesses sufficient intellect. But he does not seem to understand the nature of oath e.g. He does not know why he must swear on the Holy Bible before giving evidence."*

In his judgment dated 10:6:87, the learned trial judge made the following observations about the competence of the 1st P.W. to testify:

*"P.W.1 - Ogar Joseph - a boy of about the age of 7 years at the time of the commencement of this trial. Preliminary questions were put to him which had nothing to do with the trial. He understood the questions and he answered them rationally. This is also borne out by his brilliant and unequivocal answers to questions put to him by the learned Defence Counsel, the learned State Counsel and the Court. But he did not seem to fully understand the nature of Oath and the reason for his being requested to swear on the Holy Bible before testifying .....He was not sworn. He was asked to tell the court what happened in respect of this case he stated without equivocation as follows:"*

At page 58 of the record the learned trial judge further observed:

*"I was satisfied that P.W.1 was sufficiently intelligent to appreciate what he was saying and understands the duty of speaking the truth. ...."*

From the above excerpts, the court was of the opinion that P.W.1 did not understand the nature of oath but possessed sufficient intelligence to justify the reception of his evidence though not given on oath.

The learned trial judge was perfectly in order to have received the unsworn evidence of the P.W.1. There is sufficient compliance with section 183(1) of the Evidence Act. See the case of Onyegbu v. The State (1995) 4 N.W.L.R. (pt. 391) 510. The learned defence counsel ought to have been allowed to put questions to P.W.1 as to his competence to testify since the prosecution was allowed to do so. However, the failure to afford him that opportunity did not occasion any miscarriage of justice. The matter being investigated at that stage had nothing to do with the offence charged.

Since p.W.1 is within the category of the persons mentioned in sec-

tions 151(1) and 183(1) of the Evidence Act, it is for the judge to ascertain whether he is of competent understanding to give evidence and aware of the nature of and obligation of an oath. If satisfied that he is, it is for the judge to allow him to be sworn and examined. In this case, the judge was not satisfied that P.W.1 understood the nature of oath. He received his unsworn evidence B as he was entitled to do under section 183(1) of the Evidence Act.

However, the court must not convict on the unsworn evidence of a child such as the P.W.1 unless his evidence is corroborated by some other material evidence in support thereof implicating the accused. See Okabichi & Ors. v. The State (1975) 3 S.C. 135 at 146. The extra-judicial statement of P.W.1 C (Exhibit SC 1) contradicted his evidence at the trial. When a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the court should not only regard his evidence at the trial, the court should not only regard his evidence at the trial as unreliable but also, the previous statement, whether sworn or unsworn does not constitute evidence upon which it D can act. The court should reject the inconsistent statement and the testimony. See R. v. Golder 45 Cr. App. R.5, Ukpong v. The Queen (1961) All N.L.R. 26 and Asanya v. The State (1991) 3 N.W.L.R. (pt. 180) 422. The P.W.1 being the only eye witness to the offence, there is therefore nothing left to be corroborated. In the absence of any other evidence connecting the appellant with the of- E fence charged, the prosecution failed to prove its case and the appellant should have been discharged and acquitted by the learned trial judge.

For the above reasons and the fuller reasons contained in the judgment of my learned brother Kutigi, J.S.C., I, too, allow the appeal. The judgments of the courts below are set aside. I hereby enter a verdict of not guilty. F The appellant is discharged and acquitted.

### MOHAMMED JSC

The appellant has been convicted of the offence of murder and sentenced to death. The facts of this case give a bizarre picture of a gruesome murder. P.W. 2, Patricia Jabe Bikomson, who was the landlady of the deceased described what she saw in the night of 22/9/84 thus:

*"As I was sleeping, at about 1 a.m. I heard a heavy knock on my door and a voice calling "Mama", "Mama" come O! "Thief done kill us" H "Thief has killed my brother - Okara". I recognized the voice as that of the accused. I came out and opened the door. I questioned him and he repeated that thieves have killed his brother. He said the thieves cut him on the shoulder but I saw just a little incisive on his shoulder. I followed him to their room. To my greatest surprise I saw the deceased on his bed in a pool*

*of blood. I raised an alarm and cried bitterly. People came out. I examined his body and found a deep cut on his neck. I observed that the hands and feet of the deceased were tied and tied onto the bed. It was a horrible sight."*

The appellant and P.W.1 a boy of six years, were in the same room with the deceased when the incident happened. The little boy's testimony was given as if he was watching what was going on. He told the trial court that the incident happened at night but the accused had brought in a lantern. The boy went on and said;

*"I was sleeping as I laid down but accused's noise wake me. The deceased, had earlier sent the accused to go and buy some medicine. Thereafter the deceased laid on the bed and fell asleep. When the deceased was sleeping the accused went out and came back with another person. Both of them tie the deceased with rope and the accused cut the deceased, when accused shouted, the Landlady came out with some of the neighbours. They did not come into the house but were looking out for the thieves. The Landlady started shouting. She later asked me to go and stay in her house and I went. In the morning I noticed some blood stains on my head. I noticed blood on the accused hands and a wound on his shoulder".*

This was the testimony of the boy when he gave evidence as P.W.1, one year after the incident. But there was another extra-judicial statement which the little boy made to the police, one day after the murder. The statement was not admitted in evidence during the trial although P.W.1 was cross-examined over it. During the hearing of this appeal we granted the application of the appellant's counsel to admit the statement in evidence and it was admitted as exhibit SC 1. In Exhibit SC1, P.W.1 told the police that after eating food together with the appellant and the deceased, the deceased went out to take bath. P.W.1 and the appellant laid down on the floor and slept. The little boy told the police that he was sleeping when the appellant shouted that a thief had killed Okara (the deceased). The boy woke up and saw Okara bound hand and feet in a pool of blood, on the bed.

The statement in Exhibit SC1 is clearly in contradiction with the evidence P.W.1 gave in the witness box. In Joshua v. The Queen (1964) 1 All NLR 1 at page 3 this court observed:

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

Section 137 of the Evidence Act casts the burden of proving a crime upon the party who asserts it, and the standard it requires is proof beyond reasonable doubt. The fact that this appellant had run away from the police and was recaptured in Jos is not proof of his guilt. In Wills on Circumstantial

Evidence, page 140, it was reported that Mr. Justice Abbot on a trial for murder where evidence was given of flight, observed in his charge to the jury, that a person, however conscious of innocence, might not have the courage to stand a trial, but might, although innocent, think it necessary to consult his safety by flight. See The Queen v. Raime Akinsanya and anor. (1961) W.N.L.R.

B 222 at 225.

The evidence of the only eye witness P.W.1, who said he saw the appellant and another person unknown slaughtering the deceased, is unreliable. There is therefore doubt as to whether the appellant had alone or together with another person committed this gruesome murder. It is therefore

C not safe to convict him of the offence charged..

For these reasons and the fuller reasons given in the judgment of Kutigi, J.S.C., with which I agree, this appeal succeeds and it is allowed. The judgments of both the trial High Court of Appeal are hereby set aside. The appellant is discharged and acquitted.

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