

SUPREME COURT OF NIGERIA

18TH JULY, 1997. SC. 137/1996

**CORAM:- M. E. OGUNDARE, E. O. OGWUEGBU, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC**

STEPHEN ENOGA APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW - *Self defence and provocation - Were adequately considered by the lower courts - In rightly holding that the defences do not avail the accused.*

CRIMINAL PROCEDURE - *Evidence of the accused - The inconsistency rule - Cannot be extended to the evidence and extra judicial statement of an accused.*

CRIMINAL PROCEDURE - *Evaluation of evidence - Where correctly done by the trial court - Whether the case was proved beyond reasonable doubt.*

EVIDENCE - *Credibility of witnesses - Proper procedure in drawing court's attention thereto - Is vide cross examination.*

EVIDENCE - *Cross examination - Purpose thereof - Matters in respect of which the witness may be questioned.*

EVIDENCE - *Cross examination - Where a witness was cross examined - But an issue of credibility was not put to him - His evidence will remain unshaken.*

FACTS

The appellant was tried before the high court of the defunct Bendel State Oleh (now in Delta State), for the offence of murder of one Godwin Ikor, deceased. The prosecution's case was mainly based on the evidence of PW3, the only eye witness. PW3 and the appellant went to prostitutes' house where they met the appellant. As soon as the appellant saw the deceased, he threw away a glass of drink that he was holding, held the accused by the hand and a fight ensued between them. PW3 and some other people separated the fight and PW3 took the deceased and walked away towards a different direction. Appellant came to that other spot, hit the PW3 with a big stick on his fore-

head, rushed towards the deceased and hit him at the back of his neck. The deceased died on the spot.

The appellant's extra judicial statement to the Police which supported the PW3's testimony was inconsistent with his evidence in court. The lower courts misdirected themselves on the inconsistency rule but no miscarriage of justice was occasioned thereby. The trial court found the appellant guilty as charged and sentenced him to death. His appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court raising 3 issues.

ISSUES FOR DETERMINATION

"(i) Whether the Court of Appeal was right in applying the inconsistency rule to the extra judicial statement of the Appellant and his evidence in court.

(ii) Whether the conviction of the Appellant was sustained by the Court of Appeal upon properly evaluated evidence, ALTERNATIVELY, whether the Court of Appeal was right in coming to the conclusion that the guilt of the Appellant was proved beyond reasonable doubt as required by law.

(iii) in the event of the failure of Issue (ii) above, whether from the evidence the Appellant was not entitled to the defence of self Defence or Provocation".

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

The inconsistency rule

1. The inconsistency rule which has been explained in the extract of the judgment of Uwaifo, JCA, above is now the correct statement of the law. The rule cannot be extended and applied to the evidence and extra-judicial statement of an accused person. I agree that Atinuke Ige, J.C.A., was in error to make in her judgment the following judicial pronouncement;

"The law is very clear that where a witness's statement to the Police contradicts his evidence in court, the court should regard him (i.e. accused in this case) as an unreliable witness and discountenance both his statement to the Police and his evidence in court. (p. 1818 F)

Credibility of witnesses - Cross examination purpose

2. The proper procedure in drawing the court's attention to the credibility of a witness is to cross-examine him as to his credit. Since the purpose of cross-examination as to credit is to show that the witness might not be believed on oath, the matters about which he is questioned must relate to his likely stand-

ing, the witness's means of knowledge, his accuracy, veracity and associations. See S.199 of the Evidence Act. Advocates when cross-examining a witness as to credit are permitted to delve into a man's past and to drag up such dirt as they can find there. (p. 1819 H)

Where a witness was cross examined

3. From the evidence in the case in hand PW3 was cross-examined but the issue of credibility to his testimony which learned counsel for the appellant would like this court to consider, in order to discredit his testimony, were not put to him during the cross-examination and his evidence remained unshaken. (p. 1820 B)

Evaluation of evidence

4. I have not been convinced by the argument of the learned counsel for the appellant that the learned trial judge had failed to evaluate the evidence correctly. The learned judge considered the testimonies of all the witnesses for the prosecution and the defence and, in my view, arrived at a right decision. The appellant cannot deny when he stated in Exhibit 'A', that he re-engaged the deceased in a dispute after they had been separated at Iyosa Street. I agree that this case had been proved by the prosecution beyond any doubt. (p. 1821 A)

Self defence and provocation

5. The issue of self defence and provocation raised in issue (iii) had been adequately considered by the learned trial judge in his judgment. The appellant's statement, Exhibit 'A', which he admitted making soon after his arrest clearly show that the appellant had enough time to cool down after the first fight at Iyosa Street. The appellant himself told the police in his statement, "I took back yard to near Ala Square where I waited for him". This has established beyond all doubt that the appellant was aggressor during the second fight during which the deceased died. The defences of self defence and provocation are not available in the given circumstances since the appellant was the aggressor and the assailant in the fight. The trial court was quite right to reject such defence and I agree that the Court of Appeal decided properly in affirming the conviction and sentence against the appellant for the murder of Godwin Okor. (p. 1821 B)

NOTABLE POINTS OF INTEREST**ONUJSC***1. The inconsistency rule - Purpose thereof*

The inconsistency rule, that is, the rule that where a witness makes an extra-judicial statement which is inconsistent with his testimony at the trial, such testimony is to be treated as unreliable while the statement is not regarded as evidence on which the court can act, was developed in the interest of justice, and formulated for the resolution of conflict between the later evidence and previous statement of a witness, be he for the prosecution or for the defence, to ensure that the evidence received is credible. But it was not formulated for the resolution of inconsistency in the evidence of an accused person and his extra-judicial confession. (p. 1823 F)

2. Where misdirection does not occasion miscarriage of justice

The two courts below being bound by the doctrine of Stare decisis, the pronouncement made by the Court of Appeal which I earlier set out above is erroneous and constitutes a misdirection. Where, as in the instant case, a mere misdirection does not of itself occasion a miscarriage of justice and thereby vitiate the judgment this court will decline to intervene to set the decision aside. (p. 1824 F)

IGUHJSC*3. Definite intention to murder exist*

All available defences open to the appellant were carefully considered by both Courts below and rejected. It cannot be doubted that having regard to the weapon used and the part of the body which the appellant struck, there was a definite intention to murder the deceased. (p. 1826 F)

REPRESENTATION

E. C. Ukala for the Appellant

N. N. Osuhor, Assistant Legal Officer, Ministry of Justice, Delta State, for Respondent.

CASES REFERRED TO

Egboghonome v. The State (1993) 7 NWLR (Part 306) 383

R. v. Ukpong (1961) ALL NLR 25

R. v. Golder (1960) 1 W.L.R. 1169

Oladejo v. The State (1987) 3 NWLR (Pt. 61) 419 at 427

Ibina v. The State (1989) 5 NWLR (Pt. 12) 238 at 247

Mbenu v. The State (1988) 3 NWLR (Part 84) 615

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

STATUTE REFERRED TO

Evidence Act ss. 199, 179(1)

B LEAD JUDGMENT BY MOHAMMED JSC

The appellant was convicted at the High Court of Bendel State, sitting at Oleh by Akpiroroh J. for the offence of murder and sentenced to death by hanging. He was found to have caused the death of one Godwin Ikor, at Ozoro, in Oleh Judicial Division in what is now Delta State.

C The prosecution's case was given mainly through the testimony of the only eye witness to the incident, one Richard Ashakobe, who gave evidence as P.W. 3. He told the trial court that on the fateful day when the incident happened, he went out together with the deceased to prostitutes' houses at Iyosa Street, Ozoro. When they reached there they met the appellant in front of the houses of the prostitutes. The witness testified further and said:

"As soon as he saw the deceased, he threw away a glass of drink that he was holding and held the deceased by his hand and fight ensued between them. I separated the fight with some people.

E *I took the deceased and started to walk away while other people took the accused and started to walk away too. When I got to the petrol station at Ala Square with the deceased, I saw the accused person rushing towards us with a big stick. When I saw him, I held him and he hit me on my forehead with the stick and I bent down because of the pain. He rushed on the deceased and*
F *hit him at the back of his neck with the stick and he fell down. I raised an alarm that the accused had killed the deceased, but nobody came. I then ran to inform the 2 P.W. The 2 P.W. followed me to the scene where he saw the deceased lying dead on the ground".*

The doctor who conducted postmortem examination on the body of G the deceased gave evidence as PW1. He told the court that the cause of death, in his opinion was the transection of spinal cord in the cervical region. The doctor explained that what he meant by transection of the spinal cord was that the spinal cord had been broken into two parts. He further explained that the breaking of the spinal cord might have been caused by a hit from behind H with a heavy object or to have one's neck hitting a heavy object through a fall. The doctor also observed some bruises and lacerations on the body of the deceased which could have been caused in his opinion by a sharp object.

Two more witnesses, PW2, who identified the body of the deceased to the doctor and PW4, the police corporal who investigated the case, also

testified for the prosecution. PW4 recorded a statement which the appellant admitted to have made voluntarily after his arrest.

The learned trial judge, in a well considered judgment, found the appellant guilty as charged. He convicted and sentenced him to death by hanging. Dissatisfied with the judgment the appellant went on appeal to the Court of Appeal. In a unanimous decision the lower court dismissed the appeal. He has now come before us on 4 grounds of appeal. Learned counsel for the appellant, in the appellant's brief, formulated three issues from those grounds for the determination of this appeal. The issues are:

"(i) Whether the Court of Appeal was right in applying the inconsistency rule to the extra judicial statement of the Appellant and his evidence in court.

(ii) Whether the conviction of the Appellant was sustained by the Court of Appeal upon properly evaluated evidence, ALTERNATIVELY, whether the Court of Appeal was right in coming to the conclusion that the guilt of the Appellant was proved beyond reasonable doubt as required by law.

(iii) in the event of the failure of Issue (ii) above, whether from the evidence the Appellant was not entitled to the defence of self Defence or Provocation".

Learned counsel for the respondent adopted the issues raised by the appellant and submitted that this appeal could be determined on all the issues raised together. Mr. Ukala for the appellant opened up with the argument raised in issue I. He picked on the erroneous decision of the lower court in this appeal, where it relied on decisions which had been overruled by this court on the "inconsistency rule". This Court sitting in a full court dealt with the issue in the case of Egboghonome v. The State (1993) 7 NWLR (Part 306) 383. The inconsistency rule was first applied in this country in the case of R. v. Ukpong (1961) ALL NLR, 25 where the Federal Supreme Court adopted the opinion of Lord Parker, C.J., in the case of R. v. Golder (1960) 1 W.L.R. 1169. In that case the learned Chief Justice of England held:

"In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements whether sworn or unsworn, do not constitute evidence upon which they can act".

In a later decision of this court, in the case of Oladejo v. The State (1987) 3 NWLR (Pt. 61) 419 at 427 the inconsistency rule was extended to include statements made by an accused person. This is clear in the opinion of

Nnamani J.S.C., in that judgment wherein he held:

"Where a witness (here an accused person) makes a statement which is inconsistent with his testimony, such testimony is to be treated as unreliable while the statement is not regarded as evidence upon which the court can act".

B The decision in Oladejo v. The State (supra) was affirmed by a panel sitting in a full court in the case of Asanya v. The State (1991) 3 NWLR (Part 180) 422 at 451. This very important question of law was reconsidered again in the case of Egboghonome v. The State (supra). Bello CJN (as he then was) in the lead judgment, which he wrote, agreed with the opinion of Uwaifo, JCA., in C the case of Ibina v. The State (1989) 5 NWLR (Pt. 12) 238 at 247 where the learned justice made a correct statement of the law thus:

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

The inconsistency rule which has been explained in the extract of the judgment of Uwaifo, JCA, above is now the correct statement of the law. The rule cannot be extended and applied to the evidence and extra-judicial statement of an accused person. I agree that Atinuke Ige, J.C.A., was in G error to make in her judgment the following judicial pronouncement;

"The law is very clear that where a witness's statement to the Police contradicts his evidence in court, the court should regard him (i.e. accused in this case) as an unreliable witness and discountenance both his statement to the Police and his evidence in court. See the cases of Joshua v. H The Queen 1964 1 ANLR 1 at 3-4 Onubogu v. The State 1974 1 ANLR (pt. 2) at 17 - 18 Akanbi Enitan v. The State 1986 3 NWLR (Pt. 30) 604 at 611, Raphael Nwabueze v. The State 1988 4 NWLR (Pt. 86) 16."

Now, notwithstanding the error of the lower court in respect of the inconsistency rule raised in issue 1, is the lower court right to affirm the

conviction and sentenced passed by the trial court against the appellant for the murder of Godwin Ikor at Ala Square, Ozoro? It should be pointed out that although the trial court did refer to the inconsistency rule and cited the cases of R. v. Golder (supra) and R. v. Joshua (1964) 1 ALL NLR page 1, it considered the defences of provocation and self defence which the learned counsel for the appellant submitted had not been fully and adequately considered. The learned trial judge considered such defences in his judgment wherein he held as follows:

"I do not accede to the submission of learned counsel to the accused that the defences of provocation and self-defence are available to the accused person on the facts of this case because there is no evidence that the deceased provoked the accused before the first encounter at Iyosa Street so also the second encounter at Ala Square rather it was the accused who provoked the deceased that led to the first scuffle between them. I accept and believe the evidence of the 3 P.W. that he only separated the accused and the deceased in the first scuffle at Iyosa Street and prevented the accused from hitting the deceased with Exhibit "B" in the second scuffle at Ala Square. In Exhibit "A" the accused said:-

"After the first fight his friends wanted to take him away from me then I took backyard to near Ala Square where I waited for him. ...".

On issue (ii) learned counsel for the appellant Mr. Ukala conceded that there are two concurrent findings of fact that the prosecution have proved beyond all reasonable doubt that the appellant had caused the death of the deceased when he hit him with Exhibit "B" (a piece of plank) at the back of his neck. The learned counsel however submitted that this court could disturb the concurrent findings of the two lower courts if it has been found to be perverse and based on substantial error. Mr. Ukala went through the evidence before the court in his submission and pointed out that the trial court had not evaluated the evidence properly.

The witness whose evidence is in the centre of attack by learned counsel for the appellant is P.W.3. This is the key and only eye-witness to the incident in which the deceased lost his life. After his testimony, PW3 was subjected to cross-examination. His credibility as a witness of truth had not been put to question and his answers to the questions put to him are convincing. Mr. Ukala made heavy weather of the testimony of this witness. Learned counsel argued that the witness's disinterestedness is a necessary consideration in determining his credibility. Onuoha v. State (1989) 2 NWLR (Part 101) 23 at 40. Counsel argued that PW3 was a friend of the deceased and that he admitted in his evidence to have taken part in fighting the appellant.

The proper procedure in drawing the court's attention to the cred-

ibility of a witness is to cross-examine him as to his credit. Since the purpose of cross-examination as to credit is to show that the witness might not be believed on oath, the matters about which he is questioned must relate to his likely standing, the witness's means of knowledge, his accuracy, veracity and associations. See S.199 of the Evidence Act. Advocates when cross-examining a witness as to credit are permitted to delve into a man's past and to drag up such dirt as they can find there. See R. v. Sweet-Escott (1971) 55 Cr. App. R. 316. From the evidence in the case in hand PW3 was cross-examined but the issue of credibility to his testimony which learned counsel for the appellant would like this court to consider, in order to discredit his testimony, were not put to him during the cross-examination and his evidence remained unshaken.

The learned trial judge considered the relevance of the testimony of P.W.3 and believed him. The testimony, it seems, agreed with the statement the appellant made to the police (Exhibit 'A') soon after his arrest. P.W.3 in his evidence told the trial court that the fight took place in two places. It is clear from the statement, Exhibit 'A', which the appellant admitted making that the fight took place in two places. The appellant was explicit on what transpired between him and the deceased on the fateful day. He said so in the following words:

"Yesterday night at my brother's compound as I, my father and my brothers were drinking so from there this very boy by name Godwin Iko came with two of his friends. As they came we started exchanging words which later brought fight between me and him. As we were fighting he started hitting me with his head on my face and caused me harm. When I saw blood on my face I told him that he has gave (sic) me wound that he will carry me to nearby chemist to treat me. After the first fight his friends wanted to take him away from me then I took back-yard to near Ala Square where I waited for him. So when they came I told him to take me to a chemist so that I will not go to police to report. After that he said that I want die from there he started fighting me again, hit me with his head. After that he started hitting me with bamboo stick. One Richard and others were there when the fight was going on. When they were hitting me I retaliated by giving them blows too. When he hit me with bamboo I took the bamboo from him and hit him back. I did not know what killed him but all I knew is that we fight and he is the person who gave me all this wounds (sic)."

The learned trial judge after considering the statement above believed the testimony of P.W. 3 that the appellant started the fight at Iyosa Street and that when they were separated and PW3 and the deceased went their way the appellant rushed at them near the petrol station in Ala Square.

I have not been convinced by the argument of the learned counsel for the appellant that the learned trial judge had failed to evaluate the evidence correctly. The learned judge considered the testimonies of all the witnesses for the prosecution and the defence and, in my view, arrived at a right decision. The appellant cannot deny when he stated in Exhibit 'A', that he re-engaged the deceased in a dispute after they had been separated at Iyosa Street. I B agree that this case had been proved by the prosecution beyond any doubt.

The issue of self defence and provocation raised in issue (iii) had been adequately considered by the learned trial judge in his judgment. The appellant's statement, Exhibit 'A', which he admitted making soon after his arrest clearly show that the appellant had enough time to cool down after the first fight at Iyosa Street. The appellant himself told the police in his state- C ment, "I took back yard to near Ala Square where I waited for him". This has established beyond all doubt that the appellant was aggressor during the second fight during which the deceased died. The evidence tallied with the testimony of PW3 where he said that the appellant rushed at them near the D petrol station at Ala Square and hit each of them with a big stick. The deceased died on the spot. The defences of self defence and provocation are not available in the given circumstances since the appellant was the aggressor and the assailant in the fight. The trial court was quite right to reject such defence and I agree that the Court of Appeal decided properly in affirming the E conviction and sentence against the appellant for the murder of Godwin Okor.

In the result, I am satisfied that the learned trial judge made a correct decision in convicting the appellant and sentencing him to death. The Court of Appeal is right in affirming the decision. The appeal is dismissed. I affirm the judgment of the court below. F

OGUNDARE JSC

I agree with the reasoning and conclusion reached by my learned brother, Mohammed JSC in his judgment just delivered. I too dismiss the G appeal and affirm the judgment of the Court below.

OGWUEGBU JSC

I had the advantage of reading in draft the judgment just delivered H by my learned brother Mohammed, J.S.C. and I agree with his reasoning and conclusion that this appeal be dismissed. I have nothing useful to add.

ONU JSC

Having been privileged before now to read in draft the judgment just delivered by my learned brother Mohammed, JSC, I am in complete agreement therewith that this appeal lacks merit and ought to fail.

By way of expatiation I wish to add the following comments of mine.

B Of the three issues appellant has submitted as arising for our determination and which the learned Assistant Legal Officer, Delta State Ministry of Justice representing the respondent has adopted (a stance which I endorse), I only wish to make brief comments on Issue No. 1 and the evidence of P.W.1, Doctor Eric Akpejunor, who at the time of the commission of the offence that has given rise to the appeal herein, was in charge of the General Hospital, Oleh but now attached to the NKST Hospital, Zaki Biam, Benue State.

Issue No. 1 asks:

D *"(i) Whether the Court of Appeal was right in applying the inconsistency rule to the extra-judicial statement of the Appellant and his evidence in Court."*

My learned brother Mohammed, JSC has fully set out the facts of this case making it needless for me to repeat them here.

E In Exhibit "A", the appellant's extra-judicial statement he made to the Police on 28th February, 1983 - the very day the crime was committed which is confessional in nature, the appellant had the following to say among other things:-

F *"Yesterday night at my brother's compound as I, my father and my brothers were drinking so from there this very boy by name Godwin Iko came with two of his friends. As they came we started exchanging words which later brought fight between me and him. As we were fighting he started hitting me with his head on my face and caused me harm. When I saw blood on my face I told him that he has gave (sic) me wound that he will carry me to nearby chemist to treat me. After the first fight his friends wanted to take him away from me then I took backyard to near Ala Square where I waited for him. So when they came I told him to take me to a chemist so that I will not go to Police to report. After that he said that I want die from there he started fighting me again, hit me with his head. After that he started hitting me with bamboo stick. One Richard and others were there when the fight was going on. When they were hitting me I retaliated by giving them blows too. When he hit me with bamboo I took the bamboo from him and hit him back. I did not know what killed him but all I know is that we fight and he is the person who gave me all this wounds. It was because of the fight that made me to come to the police station to report him. One Unaraeke was around when*

the fight was going on and they all were fighting me together. The persons I called my father and brother are Mr. Ozofero and his friend Ogbodu."

Commenting on part of Exhibit 'A' I have set out above in his judgment, the learned trial judge said inter alia

"If his story that the first encounter was caused by the deceased when he took his drink from him and started to drink it why did he not say so in Exhibit 'A' which he made to the 4th P.W. at the earliest opportunity when this matter was quite fresh in his memory? It is settled law that previous statement which is inconsistent with sworn or unsworn evidence is not to be treated as evidence R. v. Golder 45 C.A.R. 5, R. v. Joshua (1964) 1 ALL NLR page 1." (Underlining is mine). C

It is the above - underlined words which the Court of Appeal, Benin Division (Coram: Ige, JCA reading the leading judgment and concurred in by Akintan and Nsofor, JJ.CA) approved as follows:-

"..... It is settled law that previous statement which is inconsistent with sworn or unsworn evidence is not to be treated as evidence. R. v. Golder 45 C.A.R. 5, R. v. Joshua (1964) 1 ALL NLR page 1. I do not believe the accused when he said that the first encounter started in his brother's compound when the deceased took his drink from him. I accept and believe the evidence of P.W.3 when he said that the accused started the fight when he saw the deceased at Iyosa Street, Ozoro. I find as a fact on the evidence before me that the accused started the fight at Iyosa Street." D E

The above observations emanate from the two courts below which naturally found in the extra-judicial statement of the appellant (Exhibit 'A'), extract from which I have set out above vis a vis the evidence of the appellant at the trial from which he (appellant) resiled - a phenomenon known as the inconsistency rule which found its way into Nigeria Criminal law through the case of R. v. Ukpong (1961) 1 SCNLR 53. The inconsistency rule, that is, the rule that where a witness makes an extra-judicial statement which is inconsistent with his testimony at the trial, such testimony is to be treated as unreliable while the statement is not regarded as evidence on which the court can act, G was developed in the interest of justice, and formulated for the resolution of conflict between the later evidence and previous statement of a witness, be he for the prosecution or for the defence, to ensure that the evidence received is credible. But it was not formulated for the resolution of inconsistency in the evidence of an accused person and his extra-judicial confession. So held this H court in its recent decision of Stanley Idigun Egboghonome v. The State (1993) 7 NWLR (Part 306) 383 adopting its earlier decision in Stephen v. The State (1986) 5 NWLR (Part 46) 978; Owie v. The State (1985) 3 NWLR (Part 3) 470; Mbenu v. The State (1988) 3 NWLR (Part 84) 615; Umani v. The State

(1988) 1 NWLR (Part 70) 274; Ikemson v. The State (1989) 3 NWLR (Part 110) 455 and Ibina v. The State (1989) 5 NWLR (Part 120) 238 but overruling Oladejo v. The State (1987) 3 NWLR (Part 61) 419 and Asanya v. The State (1991) 3 NWLR (Part 180) 422

The reasons why the mischief caused by the inconsistency rule must not be persisted in in cases of murder or culpable homicide punishable with death was clearly brought out in the Egboghonome Case (supra) in the judgment of Olatawura, JSC where the learned Justice said as follows:-

"Following Oladejo's case (supra) our decision in Asanya's case (supra) to the effect that: 'Where a witness make a statement which is inconsistent with his testimony such testimony is to be treated as not reliable while the statement is not regarded as evidence upon which the court can act.'

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

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

The two courts below being bound by the doctrine of Stare decisis, for which see Clement v. Iwuanyanwu (1989) 3 NWLR (Part 107) 39 and Eperokun v. University of Lagos (1986) 4 NWLR (Part 34) 162 at 193, the pronouncement made by the Court of Appeal which I earlier set out above is erroneous and constitutes a misdirection. Where, as in the instant case, a mere misdirection does not of itself occasion a miscarriage of justice and thereby vitiate the judgment for which see Aruna Bakare v. The State (1975) NMLR 23; Okorie v. Udom (1960) 5 SC. 162; Adeniji v. Disu (1958) 3 FSC 104 and Amadi v. Okoli (1977) 7 SC. 57) this court will decline to intervene to set the decision aside. This is because even though there was only one eye-witness account manifesting itself in the evidence of P.W.3 before the trial court, there being no rule of law which imposes an obligation on the prosecution to call a host of witnesses, all the prosecution need do is to call enough material wit-

nesses to prove its case, and in so doing it has a discretion. See E. O. Okonofua & Anor. v. The State (1981) 6-7 SC. 1 at 18; Samuel Adaje v. The State (1979) 6-9 SC. 18 at 28; Bako Bahar v. Yauri N. A. Police (1970) NNLR 107 at 112. See also S. 178(1) (now Section 179(1) of the Evidence Act, Cap. 112 Laws of the Federation, 1990. Indeed, it is now established that a court can convict upon the evidence of one witness without more, if the witness is not an accomplice in the commission of the offence and his evidence is sufficiently probative. See Numo M. Ali v. The State (1988) 1 NWLR (Part 68) 1 at page 20; Oteki v. A.G. of Bendel State (1986) 2 NWLR (Part 24) 648 and Ugboma v. Ugboma 3 ECCLR 860.

It is the further contention in the instant case by learned Counsel for the appellant that P.W. ³ was a friend to the deceased hence the following factors of his disinterestedness, his integrity, his veracity and his being bound by his oath to speak the truth ought to be considered. See Adelumola v. The State (1988) 1 NWLR (Part 73) 683. With profound respect to the learned counsel, since at the trial none of these factors were raised it is in my view a belated afterthought to do so here in the Supreme Court. True it is that the learned trial Judge acknowledged the fact of P.W. ³ being a friend to the deceased. However, in its judgment wherein the credibility of P.W.³ was not called in question, the learned trial Judge held inter alia after evaluating the sum total of the evidence adduced before him thus:

"I accept and believe the evidence of P.W.3 when he said that the accused started the fight where he saw the deceased at Iyosa Street, Ozoro. I find as a fact on the evidence before me that the accused started the fight at Iyosa Street.

With regard to the second fight at Ala Square, I also accept and believe the evidence of the 3 P.W. when he said that after the separation of the fight at Iyosa Street, and as he was taking the deceased home, the accused rushed towards them with Exhibit "B" and hit him on his forehead with it when he held him, and that when he bent down because of the pain he received from Exhibit "B" he (accused) hit the deceased on his neck with it and fell down. The defence of the accused that the deceased hit him with his head and bamboo stick is clearly an after thought and I totally reject it."

The court below found no reason not to accept these findings of fact and so justifiably accepted them. Having myself read the record of appeal and the briefs of argument, I too accept and agree with the concurrent findings arrived at by the two courts below with which I am loath to interfere.

Now to the medical evidence of Doctor Eric Akpejunor (P.W.1) who in his evidence in-chief stated inter alia as follows:-

"..... I certified the cause of death in my opinion to be a transec-

tion of the spinal cord in cervical region. By transection of the spinal cord, I mean that the spinal cord was broken into two parts. The breaking of the spinal cord into two parts might have been caused by a hit from a heavy object behind or a fall on an object with the neck. The bruises could have been caused by a fall and the laceration by a sharp object."

B It would appear clear from the above piece of evidence that the cloud cast by the use of the words "laceration by a sharp object" about which no attempt was made to explain whatever that means in the context of the use of a heavy object to hit the deceased on the neck from the back or a fall on the same, left some doubt. When, however, as indeed the totality of the evidence adduced C showed the deceased to have died on the spot leaving no room for speculation, an explanation thereof thus becomes unnecessary and indeed superfluous. See Tonara Bakuri v. The State (1965) NMLR 163; Adamu Kumo v. The State (1968) NMLR 227 and Lori v. The State (1980) 8-11 SC. 81 at 97.

For these reasons and the more detailed ones contained in the lead- D ing judgment of my learned brother Mohammed, JSC, I too dismiss this appeal and affirm the judgment of the court below which confirmed the decision of the trial court.

E **IGUHJSC**

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Mohammed, J.S.C. and I agree entirely with him that this appeal lacks merit and should be dismissed.

On the facts found by the trial Court as affirmed by the Court below, F it was the appellant who provoked the attack that led to the death of the deceased. The evidence of P.W. 1 and P.W. 3 is clear on the point. All available defences open to the appellant were carefully considered by both Courts below and rejected. It cannot be doubted that having regard to the weapon used and the part of the body which the appellant struck, there was a definite G intention to murder the deceased. This appeal is without substance and the same is hereby dismissed.

H