

SUPREME COURT OF NIGERIA
18TH DECEMBER, 1998. SC. 135/1997.
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE,
A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
E. O. OGWUEGBU, A. I. IGUH, JJSC.

AZEEZ OKORO	APPELLANT
V.		
THE STATE	RESPONDENT

CONSTITUTIONAL LAW - *Right to life - Under S. 30 (1) of the 1979 Constitution - The death penalty is not inconsistent with the section.*

CONSTITUTIONAL LAW - *Fundamental rights - The question whether or not the appellant is or has been subjected to torture - Contrary to S. 31(1) (a) of the Constitution - Cannot be decided in the present appeal as it is not intrinsic to it.*

CRIMINAL PROCEDURE - *Arraignment - Requirements of proper arraignment - Laid down in KAJUBO'S CASE - The arraignment of the appellant accorded with the requirements.*

CRIMINAL PROCEDURE - *Evidence - Proof beyond reasonable doubt - In the circumstances of the present case -The case against the Appellant was not proved beyond reasonable doubt.*

EVIDENCE - *Admissibility - Extra-judicial statement made by the Appellant's wife - Who was not called as a witness - Cannot be inadmissible under s.161 of the Evidence Act.*

EVIDENCE - *Hearsay Evidence - Admissibility - The extra - judicial statement of the Appellant's wife who is not called as a witness - Is hearsay evidence - And is inadmissible.*

***EVIDENCE - Admissibility - Inadmissible** evidence which was not objected to - This will not affect its inadmissibility - As parties cannot by consent admit in evidence that which by law is inadmissible.*

EVIDENCE - Wrongful admission of evidence - It's effect - In the present case it could not be said that the mind of the learned trial judge - Was not affected by the evidence.

FACTS

In the High Court of Lagos State the appellant was charged with the offence of murder under S. 319(1) of the Criminal Code of Lagos State. The appellant, the deceased (Rafiu Ikoyi) and PW1 (Jimoh Oseni) were brothers, the appellant being the eldest of the three. Relations between PW1 and the appellant's wife had not been cordial. On 13th July 1984, the family effected a settlement between them. Apparently the appellant's wife was not satisfied because when on 14th July 1984 P.W.1 visited the family house at Ifetedo village, where the appellant resides, the latter advised the former to stay away from the family house for the time being as his wife was still aggrieved. P.W. 1 refused and went into a room in the house where he slept on a mat on the floor. The deceased was sleeping on the bed in the same room. P.W. 1 was aroused from sleep by three hefty men who came into the room accompanied by the appellant. The three men attacked the P.W. 1 and a fight ensued which woke up the deceased. The deceased tried to separate the fight. This annoyed the appellant who then went into his room and brought out a gun. From the corridor of the house, appellant shot into the room and the deceased was hit.

The three men on seeing what happened ran away. P.W. 1 reported the incident at the Police Station, Elera. The appellant was subsequently arrested. He made a statement to the police. He also testified in his evidence at the trial. He denied the charged and averred that it was PW1 who shot and killed the deceased. At the instance of the defence counsel, the statement made by the appellant's wife Alhaja Taibatu was tendered in evidence as Exhibit E even though the latter was not called to

testify by either side. At the conclusion of hearing the learned trial judge after a review of the evidence accepted the evidence of P.W.1 and rejected that of the appellant. He convicted the appellant and sentenced him to death. The appellant unsuccessfully appealed to the Court of Appeal. He has now further appealed to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right to hold that the Appellant was properly arraigned in accordance with the rule in KAJUBO'S case and if not should the Appellant be retried or discharged and acquitted?

2. Whether the prosecution proved its case, i.e that the Appellant murdered the deceased with the necessary standard of proof?

3. Whether Section 319(1) of the Criminal Code is inconsistent with Section 31(1) (a) of the constitution of the Federal Republic of Nigeria and therefore null and void, and if so whether the affirmation of the death sentenced by the Court of Appeal was correct."

HELD (Allowing the appeal per lead judgment of **OGUNDARE JSC**, **KUTIGI JSC**, Dissenting)

Criminal Procedure - Arraignment

1. On Question 1, it is my decision that the arraignment of the Appellant accorded with the requirements of proper arraignment laid down in Sunday Kajubo v. The State (1988) 1 NWLR 721 at pp. 731, 737. The Appellant was arraigned before the trial court on 26th May, 1986. There was, in my respectful view substantial compliance with Section 215, Criminal Procedure Law of Lagos State and Section 33(6) (a) of the Constitution of the Federal Republic of Nigeria 1979. (p. 2850 A)

Constitutional Law - Right to life

2. On Question 3, I hold, for the reasons given by this court this morning in KALU V. THE STATE (supra) that -

(a) The death penalty is not inconsistent with Section 30(1) of the Constitution which provides-

"30(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." (p. 2850 H)

B

Constitutional law - Fundamental rights

3. As the question whether or not the Appellant is or has been subjected to "torture or to inhuman or degrading treatment" contrary to section 31(1) (a) of the constitution is not intrinsic to the appeal now before us, it cannot be decided in this appeal. The Appellant would need to have recourse to section 42(1) of the constitution (as amended) (p. 2851 B)

Admissibility - Extra-judicial statement

D 4. Under the first heading it is submitted that Exhibit E the statement of Appellant's wife made to the police during the police investigation of the case was inadmissible under section 161(2) of the Evidence Act as "the Appellant and his wife were married under a monogamous arrangement".
 E To avail himself of section 161(2), therefore, Appellant, must prove that his marriage to his wife was monogamous. I can find no evidence on record in proof of this fact. All that the Appellant said in evidence was: "I am married." This is no evidence that the marriage was monogamous
 F in nature. In my event, section 161 deals with evidence of a witness and not the admissibility of an extra-judicial statement made by someone who is not called as a witness. Exhibit E can, therefore, not be inadmissible under section 161 of the Evidence Act. (p. 2852 A)

G

Evidence - Hearsay evidence

5. It is my view that Exhibit E is inadmissible. It is a written account of what Alhaja Taibatu, Appellant's wife, told pw3 in the course of the investigation of the case. It is, therefore, hearsay evidence. It is trite law
 H that hearsay evidence is inadmissible and section 8 of the Evidence Act cannot be relied upon to admit it in evidence. Ozude v. Inspector-general of police (1965) 1 All NLR 102; (1965) ANLR 106. Exhibit E would only have been admissible to contradict Alhaja Taibatu or test her cred-

ibility had she given evidence in this case. But she did not give evidence. It was wrong of the learned trial Judge to have admitted, in evidence, her statement to the police, Exhibit E. (p. 2852 F)

Inadmissible evidence which was not objected to

6. Exhibit E was tendered in evidence by defence counsel during his cross-examination of pw3. The prosecutor did not object to its admissibility in evidence. This fact, however, will not affect its inadmissibility³ as parties cannot by consent or otherwise admit in evidence that which, by law, is inadmissible - Minister of Lands, WN v. Azikiwe & Ors. (1968) 1 All NLR 49; (1969) 6 NSCC 31. (p. 2853 A) B
C

Wrongful admission of evidence

7. What then is the effect of this wrongful admission of Exhibit E? Section 227 (1) of the Evidence Act provides: D

"227.(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted 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." E

The Federal Supreme Court (the precursor of this Court) held in Queen v. Baba Haske (1961) 1 All NLR 330, 333; (1961) 2 NSCC 193 at 196 that an appeal court will quash a conviction where it is clear that if after expunging inadmissible evidence, there is not left sufficient evidence on which the conviction of an accused by the trial court can be sustained. F

In the instant case, there is no doubt that Exhibit E is highly prejudicial to the Appellant. There were two witnesses to the event leading to the death of the deceased - pw1 for the prosecution and the Appellant for the defence. It is a case of the oath of one against the oath of the other. G

Notwithstanding that the learned trial Judge claimed he warned himself about the evidence of pw1 before accepting same, could it be said that H

³ The Supreme Court also arrived at the same decision in the following cases: Hada v. Malumfashi (1993) 10 KLR 102; and Oseni v. Dawodu (1994) 7 KLR 51

his mind was not affected by Exhibit 'E'? Having regard to the above observations of his, I would answer the question in the negative. The learned Judge, for instance, said:

"Evidence abounds which I believe that the Accused fired his gun into the room at pw1 where pw1 the three man (sic) brought by the Accused and the deceased were. The deceased was thereby hit and he died therefrom."

The only evidence before the trial court on who fired the gun that killed the deceased was that of pw1 and Exhibit E and it must be this that the learned trial Judge referred to as "evidence abounds." (pp. 2853 B/2855B)

Criminal procedure - Evidence

8. Having regard to the above lapses and bearing in mind the strained relationship between Pw1 and the deceased and the wrongful admission of EXHBIT E which is prejudicial to the Appellant, I would not say that the case against him was proved beyond reasonable doubt, a burden enjoined on the prosecution. Consequently, I resolve Question 2 in favour of the Appellant. I, therefore, allow his appeal, set aside the judgments of the two courts below and enter a verdict discharging and acquitting the Appellant of the charge of murder of Rufai Ikoyi brought against him. (p. 2857 E)

NOTABLE POINT OF INTEREST

KUTIGI JSC (Dissenting)

1. The inadmissible evidence did not affect the decision

It must be clear by now that the evidence of P.w.1 requires no corroboration under the law even though the learned trial judge took extra caution to warn himself before he accepted the evidence. He was right in the circumstances of the case. And the mere fact that P.w.1 said he is a brother of the appellant as well as a brother of the deceased and therefore a blood relation, does not ipso facto make his evidence liable to suspicion when there is nothing to suggest that on the record. ... Applying the above principles to the case, it is abundantly clear to me that even without Exhibit E., the learned trial judge had sufficient and enough evidence

before him to have convicted the Appellant as he did particularly having regard to the testimonies of prosecution witness Nos. 1 & 2 above. The evidence of both P.Ws 1 & 2 were not in any way effectively challenged by the Appellant at the trial. I am unable to see how the inadmissible evidence could have affected the decision of the trial court. The Appellant had no defence for the charge against him. The charge against the appellant was proved beyond reasonable doubt. I have no reason to interfere. Issue (2) therefore fails. (p. 2868 B)

REPRESENTATION

O. Agbakoba, SAN, with N. Quarkers and S. Amadi for the appellant.
W. Folami (Mrs.) Attorney-General Lagos State with F. Arthur-Worrey, D.P.P. for the Respondent.

CASES REFERRED TO

Queen v. Olubunmi 3 FSC 8 at p.10
Kajubo v. The State (1998) 1 NWLR (pt. 73) 721
Erekanure v. The State (1993) 4 NWLR
Ogugu v. The State (1994) 9 NWLR 1
Ozude v. Inspector-general of police (1965) 1 All NLR 102; (1965) ANLR 106.
Minister of Lands, WN v. Azikiwe (1968) 1 All NLR 49; (1969) 6 NSCC 31.
Queen v. Haske (1961) 1 All NLR 330, 333; (1961) 2 NSCC 193 at 196

STATUTES REFERRED TO

Criminal Code of Lagos State, Section 319(1)
Criminal Procedure Law of Lagos State, section 215
Constitution of the Federal Republic of Nigeria 1979, Sections 30(1), 31(1) (a), 33(6) (a) and 42(1)
Evidence Act, sections 8,161, and 227

LEAD JUDGMENT BY OGUNDARE.JSC

In this appeal, the Appellant questions the affirmation, by the Court of Appeal, of his conviction for murder and the sentence of death passed on him by the High Court of Lagos State.

B The Appellant, the deceased (Rafiu Ikoyi) and PWI (Jimoh Oseni) were brothers, the Appellant being the eldest of the three. Relations between PWI and the Appellant's wife had not been cordial. On 13th July 1984 the family effected a settlement between them. It would appear, however, that Appellant's wife was not quite satisfied. For when on 14th C July PWI visited the Appellant at his Ifatedo village residence. The latter informed the former that his wife was not yet satisfied with the settlement and advised PWI not to come to the family house for the time being. The Appellant lived in the family house at Ifatedo Village. PWI D retorted that he could not be precluded from coming to the family house and went into a room in the house where he slept on a mat on the floor in the room The deceased, a brother, slept on the bed in the room. PWI was aroused from sleep by three hefty men who came into the room accom- E panied by the Appellant. The three men pounced on PWI and gave him a beating.. A fight ensued which woke up the deceased. On waking up, the deceased saw what was going on and questioned (in a loud voice) the Appellant why he brought thugs into the house to beat PWI. The de- F ceased tried to separate the fight. This annoyed the Appellant who then went into his room and brought out a gun. From the corridor of the house, Appellant shot into the room where the deceased was trying to rescue PWI from the three men who were beating and stabbing him with knife. The deceased was hit and gave a loud cry. The three men on G seeing what happened ran away. PWI reported the incident at the police station, Elere.

The police came to the house with PWI but found the premises locked up; the Appellant was no where to be seen. A search was made H for the Appellant but unsuccessfully. The police returned to their station. On the following day the police called at the house again in company of PWI but still found the premises locked up. This time, the police broke in and found the deceased dead on the floor. The police conveyed the corpse

first to their station and later to the hospital mortuary where a postmortem examination was performed on it by PW 2, Dr. Koley. The doctor found a gun-shot wound on the body and damages to the internal organs as a result of the wound. He opined that death was caused by the laceration of the spleen and liver coupled with internal haemorrhage B

Pw3, police Sergeant Olaposi Akinola who was assigned to investigate the charge of murder against the Appellant obtained a statement, under caution, from him on 27/12/84. Pw3 visited the scene of crime on 29/12/84 in company of the Appellant.

A search of the house was made but nothing was recovered. On 14/5/85 C the Appellant made a second statement of the witness to the effect that nothing was recovered from his house. Both statements were tendered and admitted in evidence. Cross-examined, P.W 3 testified that he went with the Appellant to look for one Baba Ahmed mentioned by the Appellant in his first statement to the witness (Exh . C.) At the instance of D defence counsel, the statement made by the Appellant's wife Alhaja Taibatu was tendered in evidence as Exhibit E even though the letter was not called to testify by either side. E

P.W. 4, L/cpl Cosmos Eke of Elere Police Station was the officer to whom pw1 on 14/7/84 lodged his complaint of murder against the Appellant and who visited the scene both on 14/7/84 and 15/7/84. On 28/7/84 he arrested the Appellant and , at Elere (Exh.G) The case F was later transferred to the CID where P.W 3 took over investigation.

In Exh. C1 the English translation of his statement to the police, the Appellant gave the following account of what happened on the fateful Day:

"On the 14/7/84 Oseni Jimoh came to Ifatedo village via old G Agbado I asked for my money from him. The whole money is N2,000 but I only asked for 200.00 but of the money . He said which money I asked from him and said the money which he had used to repair his H motorcycle,?? I said it was good like that as you know that I am well and you know that I have a bad leg and my leg did not allow me to go to anywhere. On the spot (sic) there, he gripped me by the neck against the wall and fell me down. He then gripped my neck against the grand (sic)

and started beating. Raifu Suberu, Alhaja Taibatu and Morufu Mabayoje did not allow him to kill me. As they managed dragged him on top of me, I started going to the Police Station but when I got to Alagbado I was unable to go further because of my leg. I asked people to find me vehicle to convey to me to Elere then Iya Alaro told me that I should not go and report to the police that which day we returned from one police station. There the son of the woman came out called Baba Amedi and asked me whether there was something I supposed to give him and I failed to give him and I said no.

Then Baba Amedi asked three men to accompany me to our village to go and settle the matter for us when I reached home, I did not meet alhaja but I met Oseni Jimoh and Rafiu Suberu sleeping. Then one of the three men woke Jimoh and he stood up. Then he was asked the cause of our fight. He said, I used a charmed ring in beating him. And the people told him that I can not do so. Then he told him (sic) that they should not tell him nonsense and slapped one of them. There fight started Jimoh then told Rafiu to fire at them that they are thieves. There Rafiu went and carried a dane gun and fired one of the three men. That one fell, and Rafiu went to (me) load the dane gun by then I was at the entrance of the house. As Rafiu turned, Jimoh fired and met Rafiu at the back. Jimoh wanted to fire (me) before he fired at Rafiu.

He did so before and one double barrel dane gun seised (sic) from him.

The dane gun is at Elere with Mr. Olaleye Rafiu did not offend Jimoh wanted to kill me and herit (sic) my properties because I am child-less. I was not the person that killed Rafiu. Jimoh killed Rafiu.

In the house where the incident occurred is made of four rooms and a shop. I did not know the actual name of Baba Amedi. I did not know the names of the three men that accompanied me to Ifatedo. Rafiu killed one of the three men accompanied with dane gun, then the other two men unfired removed the corpse of their person to Baba Amedi's house our family did not settle any quarrel for my wife and Jimoh on 14/7/84. I did not ask Jimoh not to come to our village again because of my wife. I did not know where Baba Amedi is working. After the incident I

ran to the family of my mother at Abeokuta I was not the person that locked Rafiu inside room it might be my wife after he had died and I had ran (sic) away."

He testified in his defence at the trial. His evidence runs thus:

"On 14.7.84 about 3.30 p.m. P.W 3 (sic) came to Ifatedo. He came in and greeted me. He met my mother-in-law. He went to my wife's shop to sit. About 5 minutes after I got up as I was not well with back ache and pain in my legs.

At the verandah I greeted him and asked for my money. I asked for N200.00. He did not give me. He said he had repaired his motor-cycle with the money. He gripped me by the neck and gave me a head butt. I fell. pw1 started to beat me. The deceased and Alhaja Taibatu and Morufu were there. They separated us. I left house and was going to report at Elere police Station at Alagbado, I was tired. I waited at one Iya Alaro, near us. I told her what happened. Iya Alaro's son came out. He is Baba Ahmed. I told him what happened. Iyaalaro said I should return home for settlement with 3 men. I knew only one Kabira's husband - I do not know the others.

On returning home, I did not see anyone. I went to room I gave to Oseni. I saw Pw1 and deceased sleeping on the floor. Deceased can stay in the house anytime.

I went to the room alone. I saw both asleep. The three men were called. They came in to them.

Pw1 was called by one of the men. He did not answer. The man woke Pw1 up. He got up. He was annoyed. He was asked what caused the fight. He said I beat him with medicine. He saw (sic) no one should query him. The men did not go. Pw1 got up and beat Kabira's husband. Fight ensued, (sic) between pw1 and the three men.

They disturbed deceased where he was sleeping. Pw1 was shouting 'thief' thief' and asked deceased to shoot them. Deceased brought out gun and cutlass. I told them not to shoot. deceased took gun and shot one of the men. The man fell.

I was in the corridor.

Pw1 also had a gun. It belonged to him. Deceased had his gun.

It is Exhibit 'F'

The two men were struggling with pw1. The deceased was hit.

We all dispersed (sic). The man shot by pw1 was later removed.

I went into hiding in the bush. The fourth day, I went into house. It was

B *the 6th day I went to the police."*

Cross examined, he deposed:

Pw1 said my wife damaged his mother (sic) cycle, hence he used my money to repair it. My wife damaged the motor cycle twice.

C *There was quarrel between PW1 and my wife before. There were several settlements."*

At the conclusion of evidence, counsel addressed the court.

In a reserved judgment, the learned trial Judge after a review of the evidence, accepted the evidence of pw1 and rejected that of the Appellant.

D *He found-*

1. *"I am satisfied upon evidence in this case that the gun shots that killed the deceased came from the gun of the Accused,"*

E 2. *"I am satisfied upon evidence in this case that it was the act of the Accused in firing his gun into the room that directly caused the death of RAFIU IKOYI."*

3. *"I am therefore satisfied of the fact of death of RAFIU IKOYI on or about the 15th day of July, 1984."*

F 5. *"Evidence abounds which I believe that the Accused fired his gun into the room at pw1 where pw1 the three man (sic) brought by the Accused and the deceased were. The deceased was thereby hit and he died therefrom.*

G 6. *I hold that the Accused intended the natural and probable consequences of his act of firing his gun into a crowd of people in a room.*

7. *I am satisfied that the prosecution had established the necessary INTENT to found GUILT in the Accused.. See. THE STATE v. IBRAHIM 1986 I.L. QRN 19.*

H 8. *I hold therefore that the Accused intended to kill the deceased RAFIU IKOYI."*

On Pw1, the learned trial Judge observed

"I have carefully considered the role of Pw1 in this case. I have

warned myself of the danger of relying heavily on his testimony.

I have had the opportunity of seeing and hearing pw1 testify. He impressed me as a witness of truth.

Having fully warned myself, I am of the firm view that his testimony was truthful and reliable. see; PETER SUNDAY UDOH v. THE STATE 1972. 4SC.55"

He convicted the Appellant of murder and sentenced him to death.

The Appellant unsuccessfully appealed to the Court of Appeal. He has now further appealed to this Court upon 5 grounds of appeal as contained in his amended notice of appeal. Pursuant to the Rules of this court, a brief was filed on behalf of the Appellant by Olisa Agbakoba Esqr. SAN. The Respondent did not file a brief. The appeal was consequently argued on the Appellant's brief alone, although the Respondent was represented at the oral hearing of the appeal by Mrs. W. Folami, learned Attorney-General of Lagos State.

In that brief, the following three questions are formulated for the determination of the appeal, that is to say,-

"1. Whether the Court of Appeal was right to hold that the Appellant was properly arraigned in accordance with the rule in KAJUBO'S case and if not should the Appellant be retired or discharged and acquitted?

2. Whether the prosecution proved its case, i.e, that the Appellant murdered the deceased with the necessary standard of proof?

3. Whether Section 319(1) if the Criminal Code is inconsistent with Section 31(1) (a) of the constitution of the Federal Republic of Nigeria and therefore null and void, and if so whether the affirmation of the death sentenced by the Court of Appeal was correct."

I shall consider Questions 1 and 3 first. Both Mr. Agbakoba SAN and Mrs. Folami adopted and relied on their arguments in SC. 24/1994: ONUOHA KALU VS. THE STATE which appeal was heard earlier in the morning of the same day that the present appeal was also argued, that is, 24th September 1998. Questions 1 and 2 in that other appeal. Judgment was given earlier this morning in the said appeal. In view of the decisions of this Court in respect of these questions, I must resolve

Questions 1 and 3 against the Appellant in this case.

On Question 1, it is my decision that the arraignment of the Appellant accorded with the requirements of proper arraignment laid down in Sunday Kajubo v. The State (1988) 1 NWLR 721 at pp. 731, 737. The Appellant was arraigned before the trial court on 26th May, 1986. (part of the record for that day reads:

"Accused present.

Mrs. Onyeabo for State.

No appearance for Accused.

COURT: What language does Accused speak. He speaks Yoruba. Read charge and interpret to Yoruba and explain to the accused.

PLEA: Accused pleads.

NOT GUILTY to charge.

ACCUSED: I have no lawyer.

Mrs. Onyeabo: I have witnesses. Accused has no lawyer yet, I ask for judgment.

COURT: Accused will be remanded at Ikoyi Prisons."

E There was, in my respectful view substantial compliance with Section 215, Criminal Procedure Law of Lagos State which provides:

"215. The person to be tried upon any charge or information shall be placed before the Court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith."

and Section 33(6) (a) of the Constitution of the Federal Republic of Nigeria 1979 which, too, provides:

"Every person who is charged with a criminal offence shall be entitled -

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence;'

On Question 3, I hold, for the reasons given by this court

this morning in KALU V. THE STATE (supra) that -

(a) The death penalty is not inconsistent with Section 30(1) of the Constitution which provides-

"30(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." B

(b) As the question whether or not the Appellant is or has been subjected to "torture or to inhuman or degrading treatment" contrary to section 31(1) (a) of the constitution is not intrinsic to the appeal now before us, it cannot be decided in this appeal. The Appellant would need to have recourse to section 42(1) of the constitution (as amended) which provides- C

"Subject to the provisions of this Constitution, any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High court in that State for redress." D
See also: Ade Mike Musa Ogugu & Ors . v. The State (1994) 9 NWLR E 1 where I said at p. 45

"As the issue of the alleged breach of the constitutional provision as enshrined in Section 31(1) (a) of the constitution of the Federal Republic of Nigeria 1979 is not intrinsic to the proceedings leading to the appeals to this court by the appellants, this court will have no jurisdiction at this stage to entertain the complaints." F

Ogwuegbu, JSC also declared at p. 46:

This Court is therefore not the proper forum where the complaint under section 31 (a) can be made as a court of first instance." G

Uwais JSC (as he then was) and well JSC also made pronouncements in the case to the same effect.

I now turn attention to Question 2 which turns on the facts of the case. This question is dealt with in the Appellant's brief under two broad headings, to wit

1. Misapplication of section 160 (sic - 161) of the Evidence Act to let in inadmissible evidence, and

2. Conflicts, inconsistencies and gaps on cause of death.

Under the first heading it is submitted that Exhibit E the statement of Appellant's wife made to the police during the police investigation of the case was inadmissible under section 161(2) of the Evidence Act as "the Appellant and his wife were married under a monogamous arrangement ." Now, section 161(2) provides:

"When a person is charged with an offence other than one of those mentioned in the preceding subsection the husband or wife of such person respectively is a competent and compellable witness but only upon the application of the person charged."

The words "wife" and "husband" are defined in section 2(1) of the Act as meaning:

"Wife' and 'husband' mean respectively the wife and husband of a monogamous marriage."

To avail himself of section 161(2), therefore, Appellant, must prove that his marriage to his wife was monogamous. I can find no evidence on record in proof of this fact. All that the Appellant said in evidence was:

"I am married."

This is no evidence that the marriage was monogamous in nature. In my event, section 161 deals with evidence of a witness and not the admissibility of an extra-judicial statement made by someone who is not called as a witness. Exhibit E can, therefore, not be inadmissible under section 161 of the Evidence Act.

This conclusion notwithstanding, it is my view that Exhibit E is inadmissible. It is a written account of what Alhaja taibatu, Appellant's wife, told pw3 in the course of the investigation of the case. It is, therefore, hearsay evidence. It is trite law that hearsay evidence is inadmissible and section 8 of the Evidence Act cannot be relied upon to admit it in evidence. Ozude v. Inspector-general of police (1965) 1 All NLR 102; (1965) ANLR 106. Exhibit E would only have been admissible to contradict Alhaja Taibatu or test her credibility had she given evidence in this case. But she did not give evidence. It was wrong of the learned trial Judge to have admitted,

in evidence, her statement to the police, Exhibit E.

Exhibit E was tendered in evidence by defence counsel during his cross-examination of pw3. The prosecutor did not object to its admissibility in evidence. This fact, however, will not affect its inadmissibility as parties cannot by consent or otherwise admit in evidence that which, by law, is inadmissible -Minister of Lands, WN v. Azikiwe & Ors. (1968) 1 All NLR 49;(1969) 6 NSCC 31. B

What then is the effect of this wrongful admission of Exhibit E? Section 227 (1) of the Evidence Act provides:

"227. (1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted 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." C D

The Federal Supreme Court (the precursor of this Court) held in Queen v. Baba Haske (1961) 1 All NLR 330, 333; (1961) 2 NSCC 193 at 196 that an appeal court will quash a conviction where it is clear that if after expunging inadmissible evidence, there is not left sufficient evidence on which the conviction of an accused by the trial court can be sustained. Unsworth FJ, delivering the judgment of the court said: E F

"The question which we really have to decide is whether we can safely say that the trial Judge would certainly have come to the same conclusion if he had properly directed himself and excluded the first confession. In all the circumstances of the case, we feel that we could not safely say that the judge would certainly have held that the inducement (and possibly also the threat) made to this illiterate villager, had been dissipated at the time of the second confession"; or, even if he had so held, that he would necessarily have convicted the appellant on this subsequent confession alone." G H

And in The Queen v. Olubunmi Thomas, 3 FSC 8 at p.10, the Federal Supreme Court laid down the test to be applied in determining the effect of wrongful admission of evidence on the judgment appealed against.

Nageon de Lestang, Ag FCJ delivering the judgment of the Court said:

"The question which must be posed therefore is, would the learned trial judge have reached the same decision if the inadmissible evidence had not been admitted? It is impossible for us to say what effect that evidence may have had on the mind of the learned trial Judge and although we think that there was sufficient evidence without the inadmissible evidence to convict the appellant, we cannot say with certainty that the learned trial Judge must inevitably have come to the same conclusion. That being so we have no alternative but to allow this appeal, quash the conviction and sentence and order a verdict of acquittal to be entered."

In the instant case, there is no doubt that Exhibit E is highly prejudicial to the Appellant. There were two witnesses to the event leading to the death of the deceased - pw1 for the prosecution and the Appellant for the defence. It is a case of the oath of one against the oath of the other. The learned trial Judge observed in his judgment

"Through this witness, still under cross examination, the statement of the wife of the Accused was tendered and admitted in evidence as EXHIBIT 'E'.

The statement of the wife of the Accused, EXHIBIT 'E' said the accused came into the house with three men, who started fighting with pw1 while the Accused stood by looking . It stated RAFIU JIMO fired into the room and shot one of the three men, wounding him. RAFIU then entered.

EXHIBIT 'E' stated further:
'As he (RAFIU) entered into his room, hence, my husband AZEEZ OKORO fired at RAFIU with his dane gun.

The statement of the wife of the Accused contravened (sic) the assertion of the Accused, that it was pw1 who shot at RAFIU IKOYI.

EXHBIT 'E' further stated:
'My husband AZEEZ OKORO fired at RAFIU IKOYI with his dane gun in the room and RAFIU died on the spot. This incident made me and our neighbours to run away to various places."

Later in the judgment he again observed -

"EXHIBIT 'E' the statement of the wife of the Accused was tendered during cross-examination of prosecution witnesses, by the defence.

If, (sic) that is Exhibit 'E' stated the Accused fired his gun at the people in the room where the fight was going on.

B

I am satisfied upon evidence in this case that it was the act of the of the Accused in firing his gun into the room that directly caused the death of RAFIU IKOYI."

Notwithstanding that the learned trial Judge claimed he warned himself about the evidence of pw1 before accepting same, could it be said that his mind was not affected by Exhibit 'E'? Having regard to the above observations of his, I would answer the question in the negative. The learned Judge, for instance, said:

C

"Evidence abounds which I believe that the Accused fired his gun into the room at pw1 where pw1 the three men (sic) brought by the Accused and the deceased were.

D

The deceased was thereby hit and he died therefrom."

The only evidence before the trial court on who fired the gun that killed the deceased was that of pw1 and Exhibit E and it must be this that the learned trial Judge referred to as "evidence abounds."

E

Conflicts, Inconsistences and gaps on cause of death

The main submission under this heading is that

F

"In view of the confusion surrounding who actually shot the deceased, it is difficult to understand how the learned trial Judge preferred the evidence of pw1. It is trite that a trial court must give reason to believe the evidence of a witness and disbelieve the other. There is no magic in the expression 'I believe' of disbelieve."

G

There is no doubt that there are some aspects of this case that can be said to be unsatisfactory. The evidence of pw1 is that the deceased was shot at and died on 14th July 1984. But the learned trial Judge found:-

H

"I am therefore satisfied of the fact of death of RAFIU IKOYI on or about the 15th day of July, 1984.

There is evidence which I believe that the fatal gun shot was

fired on or about the 15th day of July, 1984 and that the deceased died on or about the same day."

Another aspect of the confusion surrounding this case is the issue of the gun used in killing the deceased. The learned trial Judge B found:

"I disbelieve the evidence of the Accused that the deceased died as a result of gun shot wounds received from EXHIBIT 'F' fired by pw1.

I prefer and believe the evidence of pw1 that the said deceased C RAFIU IKOYI died from gun shot wounds received from the gun of the Accused fired by the Accused."

Pw4, the police officer who on 15/7/84, in company of pw1, broke open the house at Ifatedo where the unfortunate incident happened testified and said:

D *"On 15.7.84 about 8 a.m. self and complainant went to scene of incident at Ifatedo village Agege. Searched for the deceased. It (sic) was not seen. We forced door of the passage into house of accused. We saw the deceased on the floor. We removed body to General Hospital E Lagos.*

Deceased was in a pool of blood and blood was on the passage.

There was a wound on the back of the deceased. It was a gun shot wound. The body of the deceased was decomposed. The room F was scattered. I know Jimo Oseni, the complainant.

Pw1 showed me a dane gun which he said belonged to the deceased."

Cross-examined, the witness testified:

G *"I saw a gun lying on laps of deceased. The gun belonged to the deceased. I did not test for finger prints on the gun.*

I did not find the three men, the accused said he brought to settle the quarrel.

H *A bullet was recovered from body of deceased. I passed it to State C.I.D. when the case was sent."*

Some questions arise: How did blood come to be in the passage or corridor of the house? If the deceased did not take out his gun as deposed to by Pw1, how did that gun come to be found on his lap after his

death in the room? In the light of the statement made by the Appellant to this witness (Exhibit G), why was the deceased's gun not examined for fingerprints to determine who handled it and why was the gun not sent for forensic examination to determine whether or not it was recently fired? What happened to the bullet that was recovered from the body of the deceased? And why was it not sent to the forensic laboratory to determine if it could have been fired from the deceased's gun, Exhibit F. These are questions which due to the inept way the investigation was conducted, the prosecution offered no answers to. Furthermore Pw1, prosecution's star witness said

"I Was covered in blood. My hand and face were stitched."

There was no corroboration of this vital evidence from Pw4 who was on 14/7/84 assigned Pw1's report for investigation and who went with the latter to the scene of crime on 15/7/84. Had the learned trial Judge adverted his mind to all these salient weaknesses in the case for he prosecuted he would not have readily accepted the evidence of Pw1 as he did and based conviction on it, reinforced, as were, by Exhibit E, an admissible evidence.

Having regard to the above lapses and bearing in mind the strained relationship between PW1 and the deceased and the wrongful admission of Exhibit E which is prejudicial to the Appellant, I would not say that the case against him was proved beyond reasonable doubt, a burden enjoined on the prosecution. Consequently, I resolve Question 2 in favour of the Appellant. I, therefore, allow his appeal, set aside the judgments of the two courts below and enter a verdict discharging and acquitting the Appellant of the charge of murder of Rufai Ikoyi brought against him.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I agree with him that this appeal has merit and that it should be allowed.

The facts of the case are fully stated in the said judgment. The

Appellant formulated three questions for us to determine, viz -

"1. Whether the Court of Appeal was right to hold that the Appellant was properly arraigned in accordance with the rule in Kajubo's case and if not should the Appellant be retired or discharged?

B *2. Whether the prosecution proved its case, i.e. that the Appellant murdered the deceased with the necessary standards of proof?*

3. Whether Section 319(1) of the Criminal Code is inconsistent with section 31(1) (a) of the Constitution of the Federal Republic of Nigeria and therefore null and void, and if so whether affirmation of the death sentenced by the Court of Appeal was correct."

C As no Respondent's brief had been filed, these are the only issues before us. Issues Nos. 1 and 3 are identical to the Appellant's issues Nos. 1 and 2 respectively in the case of Onuoha Kalu v The State, Suit D No. SC. 24/1996 which was heard on the same day (24th September, 1998) as this case and the judgment therein (unreported) was delivered earlier today. Both counsel for the parties herein - Mr. Agbakoba, SAN for the Appellant and Mrs. Onu Folami, learned Attorney-General of E Lagos State, for the Respondent, - submitted at the hearing of this case that the court's decision in Onuoha Kalu's case (supra) should apply to this case. In that case we answered both questions in the negative. The answers therefore to issues Nos. 1 and 3 herein are both in the negative F for the reasons given in Onuoha Kalu's case.

It remains now to answer issue No.2 which in essence is whether the prosecution has proved its case at the trial beyond reasonable doubt. The charge against the Appellant in the trial court was for murder. The deceased died of a gun shot which was allegedly inflicted on him by the G Appellant. There were two eyewitnesses to the incident - P.w.1 (a half brother of the Appellant) and the Appellant's wife. In his evidence p.w 1 clearly testified that the Appellant shot the deceased with his (Appellant's) gun. The wife of the Appellant, who was not called as a witness, made a H statement to the police in the course of their investigation of the incident which led to the death of the deceased. The investigating police Officer testified for the prosecution as p.w.3. In the course of his testimony, under cross-examination, the statement made to the police by the

deceased's wife was introduced by counsel for the defence who tendered the Statement as evidence and it was admitted by the learned trial judge as Exhibit E.

At the conclusion of the trial evidence available before the trial court consisted of the eye-witness account of p.w.1 and Exhibit E on one hand and the denial by the Appellant in both his statement to the police under caution Exhibit C1 and his testimony, on the other hand. The Appellant alleged that it was p.w.1 who shot the deceased.

The learned trial judge rejected the defence of the Appellant and accepted the testimony of p.w.1 together with the evidence in Exhibit E. The question is: did the totality of the evidence believed by the learned trial judge prove the case against the Appellant beyond reasonable doubt? In answering the question, it is obvious that the admission of Exhibit E was wrong, even if admitted under cross-examination, because the deceased's wife who made it was not called as a witness. The learned trial judge could have not rightly admitted it in evidence because its contents were hearsay.

Now Section 227 subsection (1) of the Evidence Act, Cap. 112 E of the Laws of Federation of Nigeria, 1990 provides:-

"227. (1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted 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."

As stated earlier in this judgment apart from the eye-witness account by P.w. 1 of the incident that led to the death of the deceased, there was Exhibit E, in which the Appellant's wife stated

"My husband Azeez Okoro fired at Rafiu Ikoyi (deceased) with his dane gun in the room and Rafiu died on the spot. This incident made me and our neighbours to run away to various places."

In making his findings, the learned trial judge remarked thus:-

"I am satisfied upon evidence in this case that it was the act of the Accused in firing his gun into the room that directly caused the death of Rafiu Ikoyi Evidence abounds, which I believe

that the Accused fired his gun into the room at P.w. 1 where P.w. 1, the three men (sic) brought by the Accused and the deceased were.

The deceased was thereby hit and he died therefrom."

There is no doubt that the statement made in Exhibit E which was inadmissible by virtue of its being hearsay, was prejudicial to the Appellant. The question to be asked could Exhibit E be excluded from the evidence believed by the learned trial judge and thereafter the conviction of the Appellant of the offence charged be upheld? If I had been the trial judge, I certainly would have convicted the Appellant on the testimony of P.w. 1 who was an eye-witness. I would not have needed the statement in Exhibit E to convict him. This would have been in accordance with the provisions of section 227 subsection (1) of the Evidence act. But then would the learned trial judge have taken the same stand with me? This is an objective test, the answer to which has been provided in the decision of the Federal Supreme Court in the case of The Queen v Olubunmi Thomas, 3 FSC 8, where de Lestang, Ag. FCJ (as he then was) held as follows at p. 10 thereof:-

"The question which must be posed therefore is, would the learned trial judge have reached the same decision if the inadmissible evidence had not been admitted? It is impossible for us to say what effect that evidence may have had on the mind of the learned trial Judge and although we think that there was sufficient evidence without the inadmissible evidence to convict the appellant, we cannot say with certainty that the learned trial judge must inevitably have come to the same conclusion. That being so we have no alternative but to allow this appeal, quash the conviction and sentence and order a verdict of acquittal to be entered."

What strengthens my feeling that it could not be said with certainty that the learned trial judge would have convicted the Appellant if the evidence in Exhibit E were excluded, are the facts that there was evidence that the relationship between p.w.1 and the Appellant was strained and the learned trial judge found it necessary to look for corroborative evidence in Exhibit E and had to warn himself about the danger of admitting the evidence of P.w. 1 without corroboration. Furthermore, under

the doctrine of precedent, the decision in The Queen v Olubunmi Thomas (supra) is binding on this court. I therefore have no alternative but to give the benefit of the doubt to the Appellant by allowing the appeal and setting aside the decisions of the lower courts. The conviction and sentenced are quashed and I enter a verdict of not guilty. The Appellant is hereby acquitted and discharged.

BELGORE JSC

Our Law of Evidence, still a colonial heritage, is biased in favour of monogamous marriage as special privilege. It is however not for Court to amend the law, as that is the function of the legislature. But be that as it may, the statement made to police by the wife of the accused, even if admissible for the reason that she is his polygamous wife, is just another piece of evidence that must be tendered viva voce by the person who made it. The wife of the appellant was not called as a witness and no reason was proffered for this. Her statement to the police, exhibit E, at the very best is hearsay and therefore inadmissible. This Exhibit E, is the corroboration learned trial judge used to believe the evidence of PW1, whose evidence leaves many loopholes unfilled. Inadmissible evidence cannot corroborate any weak evidence. The case for the prosecution has not been proved beyond reasonable doubt, PW1, with all his antagonism towards the appellant, cannot be said to be disinterested party. I find merit in this appeal and I therefore allow it. The conviction and sentence of death passed by the trial court and affirmed by the Court of Appeal is set aside. I enter a verdict of discharge and acquittal.

WALI JSC

I have been privileged to have a preview of the lead judgment of my learned brother Ogundare, JSC with which I entirely agree.

The appellant was tried and found guilty of murder of Rafiu Ikoyi, his brother, by shooting him with a gun. He was accordingly convicted and sentenced to death by hanging. His subsequent appeal to

the Court of Appeal, Lagos Division was dismissed. He has now further appealed to this court.

In compliance with the Rules of this court, parties filed and exchanged briefs of argument.

B Learned counsel for the appellant Mr. Agbakoba SAN, raised the following three issues in his brief for this court's determination-

"1. *Whether the Court of Appeal was right to hold that the Appellant was properly arraigned in accordance with the rule in KAJUBO'S case and if not should the Appellant be retried or discharged and acquitted?*"

2. *Whether the prosecution proved it's case, i.e, that the Appellant murdered the deceased with the necessary standard of proof?*

3. *Whether Section 319 (1) of the Criminal Code is inconsistent with Section 31(1) (a) of the Constitution of the Federal Republic of Nigeria and therefore null and void, and if so whether the affirmation of the death sentence by the Court of Appeal was correct."*

E Issues 1 and 3 supra are virtually identical in purports and substance to issues 1 and 2 in SC 24/1996: Onuoha Kalu v. The State the judgment of which has just been delivered. I have already signified my concurrence with the reasoning in that judgment in my concurring judgment.

F I shall comment on the 1st issue by way of emphasis which is related to the arraignment of the appellant at the commencement of the trial. It was the argument and submission of Chief Agbakoba, learned Advocate Counsel for the appellant that the trial of the appellant was vitiated by the non-compliance with section 215 of the CPL Cap. 32 Laws of Lagos State and the principles laid down by this court in Kajubo v. The State (1988) 1 NWLR (pt. 73) 721 and Erekanure v. The State (1993) 4 NWLR.

H Was the provision of section 215 CPL Lagos State complied with?

To answer this question, I have to make excursion into the trials court's record of proceedings of 26th May, 1986, the date the accused was formally arraigned for taking his plea. It reads thus;

"Accused present. Mrs. Onyeabo for the State No appearance for the Accused

Court: What language does accused speak.

He speaks Yoruba

Read charge and interpret to Yoruba and explain to the Accused. B

PLEA, Accused pleads.

NOT GUILTY to the charge"

I have no hesitation in saying that section 215 of the Criminal Procedure Law of Lagos State was substantially complied with. The section reads-

"215. The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order; and the charge or information shall be read over and explained to him to the satisfaction of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith." C D

The provision is to intimate the accused with the contents of the charge he is to stand trial for. The court's proceedings of 26 -5-86 E clearly shows that the charge was read, interpreted and explained to the appellant in Yoruba, the language he understood. It was after the learned trial Judge was satisfied that he fully understood the charge that he recorded his plea of not guilty. The provision of the law should not be stretched to a point of absurdity by reading into it that the judge must record that the charge was explained to the accused to his satisfaction before taking his plea. It will be impeaching the integrity of the judge to do that as no judge will take the plea of an accused person if he is not satisfied that the charge was read and explained to the accused to his satisfaction. It is my view that the principles laid down in both Kajubo v. The State and Erekanure v. The State (supra) have been substantially, if not fully, complied with, resulting in no miscarriage of justice. There was no contravention of or derogation from section 233 (6) (a) of the constitution of Nigeria, 1979 as the charge was read, interpreted and explained to the appellant in Yoruba, the language he said he understood. F G H

Issue 1 is therefore answered in affirmative.

On Issue 3 I would also say that the death penalty and its method of execution is lawful and valid as same is sanctioned by both sections 30 (1) and 31(1) (a) of the constitution of Nigeria, 1979. In support of this conclusion I adopt the reasoning contained in the lead judgment in SC. B 24/96 just delivered this morning by my learned brother Iguh, JSC and with which I have already signified my agreement in my concurring judgment.

Issue 3 must be answered in the negative.

C Issue 2 deals with the facts and the substance of the evidence adduced by the prosecution in proof of the charge against the appellant.

Exhibit "E" is the statement made by Alhaja Taibatu Olawore, the wife of the appellant, to the police. It was admitted in evidence through P.W.3, a police Sergeant who was assigned to conduct further investigation into the case. In Exhibit E Taibatu Olawore made a damaging and incriminating statement against the appellant. She was not produced by D the prosecution to testify and be cross-examined on her statement. There was no iota of explanation why she was not called. That notwithstanding the learned trial judge made use of and was influenced by the contents of Exhibit E in concluding that appellant was guilty. The learned judge said in his judgment- E

"The statement of the wife of the Accused, EXHIBIT "E" said F the accused came into the house with three men, who started fighting with P.w. 1 while the Accused stood by looking. It stated RAFIU JIMO fire into the room and shoot one of the three men, wounding him. RAFIU then entered.

G *EXHIBIT "E" stated further;*

"As he (RAFIU) entered into his room, hence, my husband AZEEZ fired at RAFIU with his dane gun.

The statement of the wife of the Accused contravened (sic) the assertion of the Accused, that it was P.w. 1 who shot at RAFIU IKOYI.

H *EXHIBIT "E" further stated;*

"My husband AZEEZ OKORO fired at RAFIU IKOYI with his dane gun in the room and RAFIU died on the spot. This incident made me and our neighbours to run away to various places."

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"I am satisfied upon evidence in this case that the gun shots that killed the deceased came from the gun of the Accused."

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"EXHIBIT "E" the statement of the wife of the Accused was tendered during cross examination of prosecution witness, by the defence.

If, that is Exhibit "E" stated that Accused fired his gun at the people in the room where the fight was going on.

I am satisfied upon evidence in this case that it was the act of the Accused in firing his gun into the room that directly caused the death of RAFIU IKOYI."

The learned trial judge having made reference to the evidence including Exhibit E, went on to state that-

"I have had the opportunity of seeing and hearing P.w. 1 testify . He impressed me as a witness of truth.

Having fully warned myself, I am of the firm view that his testimony was truthful and reliable."

In the first place Exhibit E is inadmissible as evidence against the appellant as its maker was not called nor was any explanation proffered in that regard. It is nothing but a piece of hearsay evidence. See section 227(1) of the Evidence Act and Ozude v. I.G.P. (1965) 1 All NLR, 102 and Minister o Lands Western Nigeria v. Azikiwe & Ors (1968) 1 All NLR 49.

Now coming back to the evidence of p.w1, the learned trial judge had no duty to warn himself before accepting that evidence if there was no agitation in his mind that P.w. 1 was a tainted witness who might have his own purpose to serve, particularly when the relationship between the appellant and p.w. 1 is critically considered vis -a-vis the facts in this case. No law says that an accused person cannot be convicted on the clear and unimpeachable evidence of a single witness. Such evidence does not require any corroboration.

Even when this court disregards the inadmissible evidence contained in Exhibit E, there is still left to be answered what influence such evidence might have had on the mind of the learned trial judge as regards

his conclusion on the guilt of the appellant. This all important point in this case was dealt with by this court in the Queen v. Thomas (1958) 3 FSC 8 particularly at page 10 where de Lestang Ag FCJ said-

"The question which must be posed therefore is, would the learned trial Judge have reached the same decision if the inadmissible evidence had not been admitted? It is impossible for us to say what effect that evidence may have had on the mind of the learned trial Judge and although we think that there was sufficient evidence without the inadmissible evidence to convict the appellant, we cannot say with certainty that the learned trial Judge must inevitably have come to the same conclusion. That being so we have no alternative but to allow this appeal, quash the conviction and sentence and order a verdict of acquittal to be entered."

With these elements of doubt in this case which were fully discussed and commented upon in the lead judgment of my learned brother Ogundare, JSC and with which I have already signified my agreement, there is no alternative for me other than to give the benefit of the doubt to the appellant and enter a verdict of acquittal and discharge in his favour.

The appeal succeeds. The judgments of the trial Court and the Court of Appeal are hereby set aside. The appellant is acquitted and discharged.

KUTIGI JSC (Dissenting)

In this Appeal the Appellant was charged and convicted of the offence of murder under section 319(1) of the Criminal Code of Lagos State. He was sentenced to death. His appeal to the Court of Appeal holden at Lagos was unanimously dismissed. He has further appealed to this court.

In the brief filed on behalf of the Appellant by learned counsel Olisa Agbakoba, SAN, the following three issues are submitted for determination -

"1. Whether the Court of Appeal was right to hold that the Appellant was properly arraigned in accordance with the Rule in KAJUBO'S

case and if not should the Appellant be retired or discharged and acquitted?

2. Whether the prosecution proved its case i.e. that the Appellant murdered the deceased with the necessary standard of proof?

3. Whether section 319(1) of the Criminal Code is inconsistent with section 31(1) (a) of the constitution of the Federal Republic of Nigeria and therefore null and void, and if so whether the affirmation of the death sentence by the Court of Appeal was correct."

Issues (1) & (3) above are exactly the same issues which were raised and determined earlier this morning in the sister case of ONUOHA KALU VS. THE STATE (Appeal No. SC.24/1994). In view of our decision in respect of those issues, which are binding on us, issues (1) & (3) herein must be resolved against the Appellant.

On issue (2) I agree with learned counsel for the Appellant that no foundation at all was laid for the admission in evidence of Exhibit E, which was the statement of Appellant's wife implicating him in the murder. Exhibit E should therefore be expunged from the record being inadmissible in evidence. And I so hold.

However, the record shows that the eye witnesses in this case were (1) Appellant's wife, who did not testify and (2) JIMO OSENI, a brother of the Appellant. He testified as P.W. 1. He said in evidence that

"Accused then said I should wait for him. He left me and I went to a room, I slept. Accused returned where I was sleeping. I saw accused and three hefty men. I was not alone in the room. My brother Rafiu was in the room with me sleeping on the bed. I was lying on a mat in the room. The man kicked me at the back of my leg. I woke, they started to beat me. My brother accused stood by inside the room. Fight woke up Rafiu Ikoyi. He was shouting name of accused and questioning why he brought Thugs to beat me. Rafiu Ikoyi was separating me from the Thugs. The three (3) men brought army knives. They threatened to cut my neck. I was covered in blood. My hand and face were stitched. Accused was annoyed as Rafiu Ikoyi was separating us. He went to his room and brought a gun. He returned with a gun and from the corridor shot inside

the room. Rafiu Ikoyi was hit. He shouted. The hooligans started running. I too started to run into the bush I then went to police Station."

Under cross-examination he said inter alia -

"I never fought with accused Accused went to
 B his room and brought out his gun Wife of accused was
 present with others at the scene I have no gun
 I had no grudge with accused. No fight with him. Accused is older than
 me I spoke the truth."

C It must be clear by now that the evidence of P.w.1 requires no
 corroboration under the law even though the learned trial judge took ex-
 tra caution to warn himself before he accepted the evidence. He was
 right in the circumstances of the case. And the mere fact that P.w.1 said
 he is a brother of the appellant as well as a brother of the deceased and
 D therefore a blood relation, does not ipso facto make his evidence liable to
 suspicion when there is nothing to suggest that on the record.

Again, the postmortem examination was undertaken by one Dr.
 Chittaranjan Koley (P.w.2) who confirmed that RAFIU IKOYI died lac-
 E eration of spleen and liver with internal haemorrhage consistent with gun
 shot wound. The witness was not cross - examined by counsel for the
 appellant.

The learned trial judge in his judgment had this to say -

F "I am satisfied upon in this case that it was the act of the Ac-
 cused in filing his gun into the room that directly caused the death of
 Rafiu Ikoyi, I have carefully considered the role of P.w.1 in this case. I
 have warned myself of the danger of relying heavily on his testimony.

G I have had the opportunity of seeing and hearing P.w. 1 testify.
 He impressed me as a witness of truth. Having fully warned myself, I
 am of the firm view that his testimony was truthful and reliable (see
PETER SUNDAY UDOH VS. THE STATE (1972) 4 SC.55."

I agree.

H The Court of Appeal in the lead judgment delivered by Pats-Acholonu,
 JCA, and with which others agree said:-

*"In evaluating the evidence of witnesses particularly the testi-
 mony of the prosecution, the Court would consider the substantiality of*

the evidence. The evidence of P.w.1 was that the appellant shot the deceased, pure and simple. The evidence of p.w.1. was not really and effectively challenged by the appellant."

Again, I think the Court of Appeal was right.

It is provided in the Evidence Act as follows-

"226. (1) *The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted 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.*"

In AJAYI VS. FISHER (1956) i FSC 90 the principles to be adopted in situations like this one are stated thus -

"If the Court of Appeal is of the opinion that the inadmissible evidence cannot reasonably have affected the decision it will not interfere. If it is of opinion that without the inadmissible evidence the decision must have been different, it will interfere. If, however, there is other evidence in the case, and although the Appeal Court thinks that the inadmissible evidence must have influenced the decision, yet it is unable to say that without the inadmissible evidence, the decision would or would not reasonably have been different, its proper course will be to order a retrial."

See also R. VS. THOMAS (1958) 3 FSC 8, R. VS ABODUNDU (1959) 4 FSC 70.

Applying the above principles to the case, it is abundantly clear to me that even without Exhibit E., the learned trial judge had sufficient and enough evidence before him to have convicted the Appellant as he did particularly having regard to the testimonies of prosecution witness Nos. 1 & 2 above. The evidence of both P.Ws 1 & 2 were not in any way effectively challenged by the Appellant at the trial. I am unable to see how the inadmissible evidence could have affected the decision of the trial court. The Appellant had no defence for the charge against him. The charge against the appellant was proved beyond reasonable doubt. I have no reason to interfere. Issue (2) therefore fails.

All the three issues having been resolved against the Appellant,

the appeal fails.

The judgments of both the High Court and the Court of Appeal are affirmed.

B

OGWUEGBU JSC

I have had the privilege of leading in draft the judgment just delivered by my learned brother Ogundare, J.S.C. and I agree with him that this appeal should be allowed.

C

The issues for determination are:

D

"1. Whether the Court of Appeal was right to hold that the Appellant was properly arraigned in accordance with the rule in Kajubo's case and if not should the Appellant be retired or discharged and acquitted?

2. Whether the prosecution proved its case, i.e. that the Appellant murdered the deceased with the necessary standard of proof?

E

3. Whether section 319(1) of the Criminal Code is inconsistent with section 31(1) (a) of the Constitution therefore null and void. and if so whether the affirmation of the death sentence by the Court of Appeal was correct."

F

Issues 1 and 3 are similar to Issues 1 and 2 in SC.24/1996 (Onuoha Kalu v. The State) which we was heard the same day before the hearing of the present appeal. Learned counsel for the parties in .S.C.24/1996 are the same as in this appeal. They agreed that the decision of this court on issues 1 and 3 in this appeal will abide the resolution of issues 1 and 2 in SC.24/1996. Having regard to the resolution of those issues against the appellant in SC.24/1996, Issues 1 and 3 herein are accordingly resolved against the appellant in this appeal. The only issue left is Issue 2 which I will now consider.

G

The wife of the appellant (Alhaja Taibatu) made a statement to the investigating police sergeant (P.W.3) in the course of his investigation. Alhaja Taibatu was not called as a witness but the defence tendered her statement through p.w. 3. It was admitted in evidence as Exhibit "E" without any objection. Exhibit "E" is hearsay evidence which was wrongly

admitted in evidence. The learned trial judge should have stopped the statement from being admitted in evidence when the prosecuting counsel failed to object to it.

The learned trial judge referred to this exhibit in his judgment. Immediately after referring to Exhibit "E" he held as follows:

"I am satisfied upon evidence in this case that it as the act of the Accused in firing his gun into the room that directly caused the death of RAFIU IKOYI."

The only eye witnesses to this crime were p.w. 1 and the wife of the accused. Exhibit "E" was part of the evidence which the learned trial judge considered and it was very prejudicial to the appellant.

On wrongful admission of evidence, section 227 (1) of the Evidence Act Cap. 112. Laws of the Federation of Nigeria 1990 provides:

"227(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted 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."

In this case the admission of Exhibit "E" was unfair to the appellant. Even though there was sufficient evidence without Exhibit "E" to convict the appellant, I am not learned convinced that the inadmissible evidence did not affect the mind of the learned trial judge. That being so, the only course open to the court is to allow the appeal. See The Queen v. Thomas (1958) 3 F.S.C. 8, The Queen v. Haske (1961) 1 All N.L.R. (pt.2) 330, Ajayi v. Fisher (1956) 1 F.S.C. 90 and Stirland v. D.P.P. (1944) A. C. 315.

I will allow the appeal, quash the conviction and sentence and a finding of acquittal and discharge is hereby entered.

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree that there is merit in this appeal.

The facts of this case, as found by the trial court and affirmed by the court below would appear to be straight forward. These, simply put, are that the appellant, without any legal justification whatever, shot at and killed the deceased on or about the 14th day of July, 1984 at Ifatedo Village, Alagbado in the Ikeja Judicial Division of Lagos State. This is the evidence of P.W.1, Jimo Oseni, the brother of the appellant, who witnessed the incident. Although the appellant claimed that the deceased died as a result of gun shot injuries he received from P.W.1, both courts below dismissed the allegation as untruthful. Said the trial court -

"In this case, P.W. 1 vividly testified as to how the deceased met his death from injuries he received from gun shot wounds from the gun of the accused. The accused prevaricated in his testimony and said it was the gun shots from the gun of the deceased that killed him, having been fired by P.W. 1.

I have no hesitation in preferring and believing the testimony of the witness, P.W. 1 on the issue. I disbelieve the evidence of the accused that it was P.W. 1 who fired at the deceased. I am satisfied upon evidence in this case that the gun shots that killed the deceased came from the gun of the accused.

The accused did not deny he had a gun on the day of the incident. He testified he took the gun away from his house, the scene of the crime, and that the said gun could no longer be seen. It is not in dispute that the gun, Exhibit F, belonged to the deceased, I believe P.W. 1 that Exhibit F was not the gun that killed the deceased.... "(Underling supplied)

The above are clear findings of fact which, with regard to the offence charged, do not in law required any corroboration. Additionally, they were affirmed by the court below and, unless, therefore, they are found to be perverse or unsupported by the evidence or reached as a result of a wrong approach to the evidence or a wrong application of a principle of substantive law or procedure, this court, even if disposed to come to a different conclusion upon the printed evidence cannot do so. See Enang v. Adu (1981) 11 - 12 S.C. 25 at 42; Igwego v. Ezeugo (1992) 6 N.W.L.R. (part 249) 561 at 574, Woluchem v. Gudi (1981) 5 S.C. 291

at 326 etc. It is clear to me that in the event of the above findings of fact being unimpeachable, then of course no option would be left to this court than to uphold the conviction and sentence of the trial court against the appellant as, affirmed by the Court of Appeal.

The learned trial Judge however went on to justify his findings B thus -

*"Exhibit e, the statement of the wife of the accused was tendered
ruing cross-examination of a prosecution witness by the defence. If, (sic)
that is Exhibit E stated that accused fired his gun at the people in the C
room where the fight was going on. I am satisfied upon evidence in this
case that it was the act of the accused in firing his gun into the room that
directly caused the death of Rufai Ikoyi. I have carefully considered the
role of P.W. 1 in this case. I have warned myself of the danger of relying D
heavily on his testimony. I have had the opportunity of seeing and hear-
ing P.W. 1 testify. He impressed me as a witness of truth.*

*Having fully warned myself, I am of the firm view that his testi-
mony was truthful and reliable."* (Underlining supplied).

It is indisputable that Exhibit E, the written Statement of the E
appellant's wife who was not called as a witness at the trial was inadmis-
sible in evidence except in proof of the fact that it was made to PW 3.
There was clearly no basis on the part of the appellant's learned counsel
for tendering the Exhibit in evidence when this was not for the purpose F
of contradicting the maker or impugning her credibility as a witness. It
was also an error on the part of the respondent not to have objected to
the admissibility of Exhibit E in evidence and a more serious error on the
part of the trial court to have admitted and used the Exhibit in evidence G
against the appellant.

The law is well settled that the 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 H
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
N.W.L.R. (part 72) 616 at 630, Umeojiako v. Ezenamuo (1990) 1 N.W.L.R.
(part 126) 253 at 270, Monier Construction Co. Ltd v. Azubuike (1990)

3 N.W.L.R. (part 136) 74 at 88 etc. And I ask myself whether the contents of the inadmissible document, Exhibit E, cannot reasonably be held to have affected the decision and that the judgment would have been the same if such evidence had not been received. I ask myself whether
 B the learned trial Judge would certainly have reached the same decision if he had excluded the inadmissible evidence, Exhibit E, from the proceedings. I think it is in the answer to these questions that my entire difficulty in this appeal hinges.

C In the first place, it is plain that the contents of Exhibit E are very much prejudicial to the appellant and corroborative of the damning testimony of the star witness for the prosecution in all essential and material particulars. That statement, in a nutshell, is to the effect that it was the appellant who fired his gun at the people in the room where the
 D deceased and others were and as a result of which the deceased was hit and thereby killed. I have given this matter very anxious consideration and I confess that I and myself unable to state with any degree of certainty whether or not the contents of Exhibit E might have affected the mind of
 E the learned trial judge in arriving at his findings of fact against the appellant. It is clear to me that there seems to be sufficient evidence from P.W.1. upon which the appellant could be convicted as charged. I am however unable to say with any degree of certainty that the learned trial
 F Judge would necessarily have arrived at the same conclusion on the facts as he did without the influence of Exhibit E. I think the court below was in error to have overlooked the inadmissibility of Exhibit E in evidence and its possible effects on the findings of the trial court.

G It is for the above and the more detailed reasons contained in the judgment of my learned brother that I, too, allow this appeal, set aside the judgments of the two courts below and acquit and discharge the appellant of the charge of murder of Rufai Ikoyi preferred against him.

H