

SUPREME COURT OF NIGERIA
13TH JULY, 2000. SC. 193/1999
CORAM:- A. B. WALL, M. E. OGUNDARE, E. O. OGWUEGBU,
A. I. IGUH. S. O. UWAIFO, JJSC

JOSEPH IDOWU	APPELLANT/APPLICANT
V.		
THE STATE	RESPONDENT

***APPEALS** - Ground of appeal - Which is not a ground of law - Leave of the court would be required to appeal on it*

***CRIMINAL LAW** - Murder - Proof - What must be established - In order to establish a charge of murder*

***CRIMINAL LAW** - Murder - Under section 316 (3) of the Criminal Code - What the prosecution must prove*

***CRIMINAL LAW** - Murder - Unlawful carnal knowledge - Death as a result of such act - Where there was no evidence that the act was of such a nature as to be likely to endanger human life - The conviction of the appellant for murder was wrong - But he is guilty of manslaughter*

***CRIMINAL PROCEDURE** - Confession - Free and voluntary confession of guilt - Made by an accused person - When it is sufficient to warrant his conviction*

***CRIMINAL PROCEDURE** - Confession - Extra judicial confession - Retraction at the trial - Test to be applied to it - To determine its truth*

***CRIMINAL PROCEDURE** - Confessional statements - Retraction at the trial - Truth of the statements - Evidence outside the statements - There was such evidence in the instant case - To confirm the truth of the contents of those statements*

FACTS

In the High Court of Ogun State Ijebu-Ode Judicial Division, the appellant was charged with the Murder of Shade Pelemo, a girl of 4 years and 9 months on or about the 7th day of July, 1991 contrary to section 319 (1) of the Criminal Code Law Cap. 29 Laws of Ogun State, 1978. The deceased was placed in the custody of the appellant, her uncle, by her parents who had travelled on the 4th day of July, 1991. On the 7th day of July, 1991, the appellant had unlawful carnal knowledge of the deceased. After the event, the appellant discovered that the deceased was bleeding profusely from the vagina. She was rushed to the hospital unconscious but died the following day as a result of her injuries. She was said by the doctor (P.W. 4) who performed the autopsy, to have been brought to the hospital unconscious with head injury and deep wound in her private part. In the doctor's opinion the deceased died "as a result of the multiple injury to the head and the private part." The deceased usually suffered from convulsion. There was no eye witness account to the event leading to the death of the deceased other than the confessional statements Exhibits A and C made by the appellant to the police. These confessional statements, although confirmed before a superior Police Officer, were subsequently retracted by the appellant in his defence on Oath. The appellant's defence was total denial of the charge

The learned trial judge tested the truth of Exhibits A and C by examining the facts therein contained along with the rest of the evidence before the court particularly the evidence of PW. 4, and found corroborative evidence of the said confessions. The learned trial judge found the appellant guilty as charged, convicted him of murder and sentenced him to death by hanging. The appellant's conviction and sentence were affirmed by the Court of Appeal and he has now appealed to the Supreme Court raising two issues. In the consideration of the appeal the Supreme Court raised a new issue and learned counsel for both parties were invited to address the court further on the issue

ISSUES FOR DETERMINATION

1. Whether:

(a) *The Court below was justified in the light of the evidence in the printed record in concluding that the appellant was properly convicted on the retracted confessional statements, Exhibits A and C.*

2. *Whether, on the facts, a case of murder or manslaughter was made out.*

HELD (Unanimously allowing the appeal per lead judgment of **OGUNDARE JSC**)

Appeals - Ground of appeal

1. Ground 4, therefore, not being a ground of law simpliciter Appellant would require leave of this Court to appeal on it. That leave not having been sought nor obtained, ground 4 is incompetent and issue 2 predicated on it is hereby struck out. (p. 2466 B)

Confession - Free and voluntary confession of guilt

2. The law is that a free and voluntary confession of guilt made by an accused person, if it is direct and positive is sufficient to warrant his conviction without any corroborative evidence as long as the Court is satisfied of the truth of the confession. See: Jimoh Yesufu v. The State (1976) 6 SC 167 at 173 See also: Koiki v. The State (1976) 4 SC. 107 at 111. But it is the practice to look outside the confession, some evidence, however slight, of confirmatory circumstances. (p. 2467 A)

Confession - Extra judicial confession

3. Where an extra judicial confessional statement of an accused person is, however, retracted at the trial, a long line of cases has laid it down that some tests are to be applied to it to determine its truth. In Philip Kanu & Anor. v. R. (1952) 14 WACA 30, 32, that West African Court of Appeal adopted the tests approved by Ridley J in R. v. Sykes (1913) 8 Cr. A.R. 233, 236-237 wherein the learned Judge cited with approval the following statement of law made by the Commissioner that tried the case originally:

"A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive and is properly proved, a jury

may, if they think fit convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

Since Kanu v. R., these tests have been applied in this country in numerous cases. See: R. v. Obiasa (1962) 2 NSCC 412. (p. 2467 E)

Confessional statements - Retraction at the trial

I have set out earlier in this judgment the salient part of the evidence of PW 4. Surely, if one places the evidence of PW 4 alongside the account given in Exhibit C, it is not difficult to agree with the conclusion of the learned trial Judge that the contents of Exhibit C are true. The Court below was right to affirm her conclusion. I too affirm it and resolve the issue under consideration against the Appellant. There was evidence outside Exhibit A & C that confirmed the truth of the contents of those statements as regards the defilement of the deceased by the Appellant.

(p. 2470 A)

Murder - What must be established

"In order to establish a charge of murder under the Code, there must be evidence of:

1. The fact of death;
2. death within a year and a day of the act;
3. the act or omission on the part of the accused directly causing the death of the deceased; and
4. the intent to kill or to do grievous bodily harm; or to do an act or make an omission likely to endanger human life while pursuing an unlawful purpose." (p. 2471 B)

Murder - Under section 316 (3) of the criminal code

6. To secure a conviction for murder under subsection (3) of section 316, the prosecution must prove that the death of the deceased was caused by means of an act done in the prosecution of an unlawful purpose and that the act is of such a nature as to be likely to endanger human life. (p. 2474 B)

Murder - Unlawful carnal knowledge

7. There was no evidence that the act of the Appellant was of such a nature as to be likely to endanger human life. The learned trial Judge admitted much but sought to substitute her opinion for this lapse in the case for the prosecution. There was no evidence that what the Appellant did to the deceased, was of such nature as to be likely to endanger human life. The evidence of the tender age of the deceased and her antecedent medical history per se, would not be sufficient evidence, without more, to justify that conclusion. Moreso that PW 4 did not tell the Court the effect these would have on the act of the Appellant. The deceased's tender age would only make him liable for an offence under section 218 of the Criminal Code. The evidence of Dr. Adeboye, PW 4 was not helpful in this regard. PW 4 found that the deceased had head injury but there was no evidence as to how she came to sustain the head injury. There was no evidence, therefore, that it was the act of the Appellant that caused the head injury. The conclusion I reach, therefore, is that the learned trial Judge was wrong in convicting the Appellant of murder and the Court below was equally wrong in affirming that verdict. The deceased, however, died as a result of the Appellant's unlawful act of having carnal knowledge of her; he is, therefore, guilty of manslaughter contrary to section 317 of the Criminal Code and I convict him accordingly. (p. 2480 A)

NOTABLE POINTS OF INTEREST**OGUNDARE JSC*****1. Murder - The difference between English and Nigerian Law***

In England the test to be applied is different. In one way it is more

favourable to an accused person and in another way less favourable. In the case of Director of Public Prosecutions v. Beard (1920) A. C. 479) the House of Lords cleared up doubts which had been expressed by Stephen J. in Rex v. Serne and Another (16 Cox 311). In Beard's case it was clearly laid down that by the law of England if a person, while in the act of committing a felony involving violence, kills another without having the intention of so doing, the killing is murder. The difference then between the English and Nigeria law is:-

(a) In England the killing must be done in the act of committing a felony involving violence whereas in Nigeria it is sufficient if death is caused by means of an act done in prosecution of an unlawful purpose (i.e. not necessarily a felony); But

(b) In Nigeria it is necessary also that the act should be of such a nature as to be likely to endanger human life; this is not necessary in England. (p. 2475 G)

2. Appellant's repulsive conduct

The Appellant's conduct is very repulsive. He was an uncle to this girl of tender years who was put in his care while the parents went on a journey. He abused the confidence reposed in him. I sentence him to 14 years IHL. His sentence is to commence from the date of his conviction by the trial court. (p. 2480 F)

3. Poor quality of investigation and prosecution

I cannot end this judgment without commenting on the poor quality of the investigation, if any, carried out by the police in this case. Had there been a more thorough investigation, the mission link would have been obtained. The quality of the prosecution at the trial was not better either. None of those who hearkened to the alarm raised by the Appellant was called to testify. All concerned appeared to be content with Appellant's confessional statements Exhibits A & C. Had these failed, the whole case would have collapsed totally and the Appellant would have walked away free. (p. 2480 G)

WALI JSC*4. Retraction of a voluntary confession - Consequence of*

Mere retraction of a voluntary confessional statement by an accused person does not render it in-admissible or worthless and untrue in considering his guilt. See R. v. Sykes [1913] 8 Cr. App. 233 and Kanu. v. B The King 14 WACA 30. (p. 2484 B)

5. When an accused person will be found guilty of Murder

An accused person will be found guilty of manslaughter if it is proved that he intentionally committed an act which was unlawful and dangerous and which inadvertently caused death. The test is an objective one. In judging whether the act is rash, dangerous, and unlawful, the test is not that the accused recognised its danger. See Larkin [1942] Cr. App. R 18; Church [1966] 49 Cr. App. R. 206; [1966] 1 Q.B. 59 and D.P.P. v. Hewbury; D.P.P. v. Jones [1976] 62 Cr. App. R 291. (p. 2484 G)

OGWUEGBU JSC*6. Sentiments have no place in judicial deliberations*

I can understand the anxiety of the learned trial judge who saw the act of the appellant in ravishing a girl of under five years of age as horrendous and unacceptable and, therefore, he must suffer the supreme penalty for the death of the victim. Every right thinking being should feel that way but the law should be correctly applied. Sentiments have no place in judicial deliberations. I will not go beyond a strong condemnation of the brutal assault on the innocent and helpless victim by the appellant. (p. 2490 A)

7. The test for an act of a nature likely to endanger human life

In Idiong & Or. v. The State (supra) at p. 33, Verity, C.J. formulated the test for an act of a nature likely to endanger human life thus:

"It is to be observed that the act must be one of such a nature as to be 'likely to endanger human life', and we think that an act cannot be said to be likely to have a certain effect if a reasonable man would not expect it to have such a result, even though in the event that result en-

UWAIFO JSC

8. *The more appropriate crime when death occurs as a result of the act of
B ravishment*

Having considered the relevant authorities on s. 316 (3) of the Criminal
Code, I think at the moment it is best to go by the opinion of Okonkwo
until circumstances arise, backed by evidence, to justify convicting for
C murder in cases of rape where death results from the very act of ravish-
ment. This means that under s. 316 (3) when death occurs as a result of
the very act of ravishment, manslaughter is the more appropriate crime
not murder unless there is compelling evidence. But when for the pur-
D pose or in the course of the unlawful act of ravishment, the rapist com-
mits any other act which is of such a nature that is likely to endanger
human life, and death results, he is guilty of murder. (p. 2510 B)

REPRESENTATION

E O. A. Obianwu Esq. for the appellant
Mrs. A. O. Asenuga, Director of Public Prosecutions (Ogun State) with
O. Ibikunle Esq; Senior State Counsel, for the respondent

F CASES REFERRED TO

Yesusu v. The State (1976) 6 SC 167 at 173
Koiki v. The State (1976) 4 SC. 107 at 111
Ntaha v. The State (1972) 4 SC 1
Ikemson v. The State (1989) 3 NWLR 455
G R. v. Obiasa (1962) 2 NSCC 412
Obosi v. The State (1965) NMLR 119
Onochie v. The Republic (1966) NMLR 307
Obue v. The State (1976) 2 SC. 141
H Dawa v. The State (1980) 8 0 11 SC. 236
Director of Public Prosecutions v. Beard (1920) A. C. 479)
R. v. Sykes [1913] 8 Cr. App. 233
Kanu. v. The King 14 WACA 30.

Director of Public Prosecutions v. Beard (1920) A. C. 479)

Rex v. Serne (16 Cox 311)

STATUTES REFERRED TO

Constitution (Amendment) Decree No. 3 of 1998, S. 1 (a)

B

Constitution of the Federal Republic of Nigeria; 1979; s 213

Criminal Code Law cap. 29 Laws of Ogun State, 1978; ss. 218,316, 317 and 319

LEAD JUDGMENT BY OGUNDARE JSC

C

This is an appeal against the judgment of the Court of appeal (Ibadan Division) affirming the conviction for murder and sentence of death passed on the Appellant by the High Court of Ogun State (Ijebu-Ode Judicial Division). Appellant had stood trial on a one count Information for murder contrary to section 319 (1) of the Criminal Code Law of Ogun State in that on or about the 7th day of July, 1991 at the Ogun State Forestry Camp J4 Ijebu Waterside, he murdered one Shade Pelemo. To this charge the Appellant pleaded "not guilty". At the trial, five witnesses testified for the prosecution while the Appellant gave evidence in his defence. Learned counsel for both the Appellant and the prosecution addressed the Court and, in a considered judgment, the learned trial Judge, on 3rd August 1992, found the Appellant guilty as charged, convicted him of murder and sentenced him to death by hanging.

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The Appellant, being dissatisfied with this judgment appealed unsuccessfully to the Court of Appeal. He has now further appealed to this Court upon two original and two additional grounds of appeal. The four grounds of appeal read:

G

"1. That the court erred in law to have believed that my relationship with the deceased killed her.

2. That the decision of the Court was (the) harsh if at all her death was caused by my affairs with her. There was no intention to kill.

H

3. The Court of Appeal erred in law in its conclusion that the Court of trial was justified in law in convicting the Appellant on the confessional statements which the Appellant retracted at the trial.

Particulars of Errors

(i) *There is nothing independent of the confessional statements Exhibits A and C indicative of the guilt of the Appellant and;*

B (ii) *The undisputed facts before the Court negated the truth of the confessional statements.*

(iii) *The Court of Appeal in the circumstances erroneously endorsed the trial Court's wholehearted acceptance of the alleged confessions without applying the test NWAEBONYI v. STATE (1994) 5 NWLR (Pt. 343) 138.*

C 4. *The Court of Appeal erred in law when it held that the prosecution had proved its case beyond reasonable doubt against the Appellant.*

Particulars of Error

D (i) *Exhibits A and C which were confessional statements retracted by the Appellant and remained uncorroborated in the light of the evidence before the Court.*

E (ii) *The circumstantial evidence relied upon was not cogent and did not irresistibly point to the fact that the Appellant was the culprit.*

(iii) *The medical evidence before the court was inconclusive.*

(iv) *In the circumstances, a real doubt as to the guilt of the Appellant existed and ought to have resolved in his favour."*

The relief he seeks in this reads:

F *"That the sentence passed on me be set aside for a lesser punishment, if it cannot be totally quashed."*

G In his brief of argument filed pursuant to the rules of this Court, the Appellant abandoned the original grounds of appeal and based on the additional grounds, he formulates the following two issues for the determination of his appeal, to wit:

"The Appellant respectfully prays the court to determine whether:

H (a) *The Court below was justified in the light of the evidence in the printed record in concluding that the appellant was properly convicted on the retracted confessional statements, Exhibits A and C.*

(b) *Whether the court below was right in its conclusion that the prosecution had established beyond reasonable doubt that the Appellant*

murdered the deceased."

I think these two issues are properly raised on the grounds of appeal relied on by the Appellant and they will be adopted for the purpose of this appeal.

At the oral hearing of the appeal on 24th February, 2000 both Mr. Obianwu, for the Appellant and Mrs. Asenuga, learned DPP of Ogun State advanced oral arguments in further elucidation of submissions in their respective briefs. We adjourned for judgment. In the consideration of our verdict we thought it desirable to have further arguments from learned counsel as to whether, on the facts, a case of murder or manslaughter was made out. Learned counsel for both the Appellant and Respondent each filed a supplementary brief on the point and, on 18th May 2000 offered further oral arguments. We then further adjourned to today 13th July 2000 for judgment.

Before I proceed further with the consideration of the appeal I think I need at this stage to set out the facts. There was no eye witness account to the event leading to the death of Shade Pelemo, the deceased other than the confessional statements Exhibit A and C made by the Appellant to police officers (pw 2 & pw 3) at different times and which statements the Appellant retracted at the trial. As the Appellant claimed at the trial that he made the statements under duress, there were trials within trial before they were admitted in evidence after the learned trial Judge had found they were made voluntarily. From the evidence of the deceased's father (PW 1) and the doctor who performed post mortem examination on the corpse of the deceased and the two confessional statements of the Appellant, Exhibits A & C, the following facts emerge.

PW 1, Ferdinand Taiwo Pelemo, the father of the deceased Shade Pelemo, aged about 5, was a storekeeper at the Ogun State Forestry Plantation project at J4 Ijebu East Local Government. He is a relation of the Appellant who lived with him and his family. On 4th July 1991, PW 1 left for Akure in company of his wife and left his two young children Rotimi, male, aged 7 and Shade, female, aged about 5 in the care of the Appellant. Both he and his wife returned in the evening of the 7th July only to be told that Shade had taken ill and was in hospital at Ijebu-Ode.

He left for the hospital at Ijebu-Ode on 8th July and was there when Shade died in the afternoon of that day. On 9th July he identified the corpse to PW 4, Dr. Adeboye who performed a post mortem examination on the corpse of the deceased. Shade usually suffered from convulsion.

The Appellant was handed over to Sgt. Chikwen (PW 2) who on 8/7/91 arrested him and obtained a statement, Exhibit A from him. PW 2 visited J4 with the Appellant and complainant where he recovered one small blood stained pant belonging to the deceased, a pair of torn knickers belonging to the Appellant, two belts and one torn polo shirt. The items were later sent to the Forensic Laboratory but due to lack of chemical they, could not be examined for blood stains and were returned. They were tendered in evidence.

The case was later transferred to the homicide section of the State Investigation and Intelligence Bureau, Abeokuta, for further investigation. Sgt. Lamidi Musa who took over the further investigation obtained another statement (Exhibit C) from the Appellant who admitted to ASP Francis Sowole (the officer in charge of the homicide section) that he made the statement voluntarily. ASP Sowole testified as P.W 5

Dr. Olusegun Abimbola Owolabi Adeboye (PW 4) of the State Hospital, Ijebu-Ode performed autopsy on the corpse of Shade Pelemo. The child was brought into the hospital "unconscious, with head injury with deep wound in her private part." "She was bleeding properly (sic) from her private part." Before PW. 4 could do anything to repair the wound in the private part, Shade died. PW. 4 performed a post mortem examination and found -

"her in position of braised stem injury which is suggestive of head injury. The wounds in her private part were still fresh. The fresh wound in her private part in my opinion could be caused by a penetration object. Any thing that made a forced entry. We did not find any remnant of anything inside her so we could not decide the object."

He opined that -

"The child died as a result of the multiple injury to the head and the private part."

According to PW. 4, "the head injury was caused by contact with a blunt object like falling down or knocking the head against a hard surface. The head injury could have been caused by a struggle of (sic) it leads to a fall." Testifying further, PW. 4 said:

"A person who is unconscious has lost communication with the rest of us, but the cause of his unconsciousness may result in some movements. Like twitching, foaming in the mouth etc. An unconscious person who is restless can fall down. It is possible for the head injury to precede the injury to the private part.

The people who brought her said they found her in the house unconscious and bleeding. How the injury occurred, nobody told me.

We do make attempt to find out cause of unconsciousness or illness but in this case the concentration was on saving her life. Attempt was even made to put her on oxygen. She was twitching and foaming in the mouth."

Cross examined, PW. 4 testified:

"She was convulcing by the time she was brought to us. Any head injury could cause convulsion which is just irritation of the brain.

There was no evident that the injury to the vagina was caused by accidental fall on a sharp object otherwise there would be evidence of the object. It was more like forced entry of a penetrating object,"

In Exhibit A made on 8/7/91, the Appellant said:

"On Thursday 4/7/91 my brother Taiwo Pelemo and his wife Margaret Pelemo travelled to Akure in Ondo State and leave (sic) me and their children Rotimi Pelemo and Shade Pelemo 'f'. So on Saturday 6/7/91 around 0.9 PM. me and my brother's friends buy drinks and begin to drink till midnight before everybody went to sleep. On Sunday morning around 8. 00 a.m 7/7/91 I carry the remaining drink begin drink and I drink all finish and I lose my control. After that I forced my brother's daughter Shade Pelemo and sexed her and she was crying so I left her and I go sleep and when I come wake from sleep I come see Shade Pelemo crying and I come ask what happened to her and she come tell me say I sexed her by force. This time I come call people make they help me. When I come de shout Mr. Jimoh and his wife came and help me carry

Shade Pelemo to General Hospital, Ijebu-Ode. At the hospital they admitted her and started giving her some treatments. When the motor we carry us come, want to go back to J4 inside via Ogbere I say made I follow the driver so that I will tell my brother if he don return. When I reach J4 inside my brother Taiwo Pelemo had returned and they have already told him the thing wey happen and he himself do look for motor to carry him to the General Hospital. The time I take reach J4 was 7.00 PM. and he begin to ask me what happened and I came tell him everything. So, he came tell me say make I de pray say make nothing happen to his daughter. After the people who live together with us in the Camp come take me say make I go sleep for the Security Officer for J4, so that I no go kill myself and I sleep there till today 8/7/91 before the Security men say make I no go anywhere and they come give me food and I eat. So this evening around 5.15 P.M. as I de for the Security Office J4 the people wey go to the General Hospital go look Shade Pelemo come tell me say she don die. After my brother Taiwo Pelemo with the security men from J4 come carry come report me for Ogbere Police. Na only me sex Shada Pelemo. The time I de sex Shade I no know myself. This is my first time somebody report me for Police. I will not drink above myself again and I no go sex small girl again. I know that the age of Shade the deceased was five years before the day I sex her and I did know say she go die."

And in Exhibit C made on 16/7/91, he said:

"I know Taiwo Pelemo 'm'. He is my senior brother. His father is the senior brother of my father. He is the person that brought me from our home town Erusu Akoko in Ondo State to J4 where I stay with him. On Thursday 4/7/91 my brother Taiwo Pelemo and his wife Margaret Pelemo travelled to Akure in Ondo State. They left behind their two children one Retimi Pelemo 'm' and Shade Pelemo 'f' for me to take care of them. On Saturday 6/7/91 at about 9.00. PM. myself and my brother's friends namely (1) Jimoh 'm' (2) Kehinde 'm' (3) Ajani 'm' all of Forestry Camp J4 were drinking native gin (Ogogoro) in front of my brother's house. We drank till about 1.00 a.m. of 7/7/91. We are not celebrating anything. That was how we drink in the camp. At around 1.00 a.m.

everybody left to their rooms to sleep. I also went to bed. When I woke up at about 8.00 a.m. of Sunday 7/7/91, I drank the remaining drink which was inside Coke bottle left by Jimoh because I dont want my brother to see the drink. I later make Gari for Rotimi and Shade to eat. After eating, they went to play. At about 10.00 a.m. while myself and Rotimi B was outside playing with his friends, I removed Shade's pant from her waist and carried her on my brother's bed. I sharted to finger the girl. I first put in the small finger of my left hand. The finger did not enter into the vagina. But I forced it in. I later put in the fourth finger. When the C finger entered, I used it to screw the vagina until it got slack. I then forced my penis into the vagina. The girl was crying bitterly but I did not leave her until I spermed. When I got up from her, I discovered that the vagina has torn and blood was rushing out. This girl is about four years and nine months old, she has no breast. Nothing attract me on her body. D The act was done on the hand of devil. When I finished with the girl and she started bleeding, I quickly wear her pant for her and shouted for people to held. Mr. Jimoh and his wife. Mr. Zacheaus and his wife ran to scene. They helped me to rush her to General Hospital, Ijebu-Ode. E I also followed them to the Hospital. The girl was admitted in the hospital. While we came back to the Camp and I was detained with the Security men guarding the Camp. At this time, my brother Taiwo Pelemo the father of the girl returned from Akure. He asked me what was happened. F I explained everything to him. He asked me whether I did better, I told him that I done that out of the influence of alcohol. My brother said that I should pray the girl should not die. On the following day Monday 8/7/ 91 at about 5.00 PM. I was told that Shade Pelemo had died in the G Hospital at Ijebu-Ode. I was then taken to Ogbere Police Station where a case of murder was reported against me. The police detained me in the cell. On the following day, my brother came to informed (sic) me in the cell that he has collected the corpse of the girl and she has been buried. H I have not married but I have a girl friend. She is about nineteen years old. She was not around at the time I sex Shade. That was why I did not go to her. There are many prostitutes at J4 and I have money to take to them for sexual intercourse, but drink and evil pushed me to Shade in-

stead of prostitute. That is all I know."

At the trial however, the Appellant gave a somewhat different story. This is the account of the incident he gave on oath:

"I am an apprenticed grader operator. I know Shade Pelemo.
 B She is dead. Shade was the daughter of my brother. I did not kill Shade.
 On 6/7/91 when my brother and his wife went to Akure for the weekend
 they left me in charge of Shade and her brother Rotimi. In the evening
 the friends of my brother came and sent me to purchase illicit gin for
 them. They usually come to drink with my brother. I bought the drinks
 C They were drinking and recording cassettes. I also drank with them. My
 brother's friends left that night.

The following morning 7/7/91 three of my brother's friends re-
 turned that they did not complete the recording the previous evening. I
 D was preparing Eba for my brother's children Shade and Rotimi Pelemo.
 After we eat (sic) my brother's friend asked for the remaining illicit gin
 from the previous evening. I gave it to them and we all drank.

After sometime, I was feeling dizzy and I sleep on a bench out-
 E side. About 12 noon, I was woken up by cry. I did not see my brother's
 friends again. I saw Shade on the bed stretching. I ran out to seek help.
 They carried her and said she had convulsion. She was given the herbal
 medicine for convulsion but it was not effective so we took her to the
 F maternity clinic at J4. The lady there examined her and said we should
 take her to the General Hospital in Ijebu-Ode.

At Ijebu-Ode we told them she had convulsion. She was treated
 and by evening the rest of us were asked to go home leaving two women
 with her.

G I went back home. Towards evening one of the women left with
Shade came back to say that Shade was raped. I denied knowledge of it.

My brother returned that evening. I explained to him that she
 had convulsion and was on admission. My brother then went to the
 H General Hospital and he and his friends said I should wait with the
 securitymen at J4.

The following morning nobody came. The securitymen bought
 food for me. At about 5.00 p.m. the people returned from the Hospital to

say that Shade Pelemo was dead. I was then taken to the Police Station. I did not have sexual intercourse with Shade and also that I know, did." (underlining is mine)

The Appellant's evidence at the trial is almost identical with his statements (Exhibits A & C) except as to the act of defilement of Shade B which he admitted in Exhibits A & C but denied in his evidence at the trial.

At the oral hearing of the appeal, Mr. Obianwu for the Appellant formally abandoned Grounds I & 2 which were accordingly struck out. C He also conceded that ground 4 is not a ground of law simpliciter and that he did not obtain leave of this Court to appeal on grounds other than of law alone. The Appellant's appeal to the Court of Appeal was dismissed on 1st July 1998. As at that date the Constitution (Amendment) D Decree 1998, No 3 of 1998 was in force. Section 1 (a) of the Decree amended Constitution by substituting a new section 213 of the Constitution of the Federal Republic of Nigeria 1979. The new section 213 reads in part:

"231. - (1) *The Supreme Court shall have jurisdiction to the E exclusion of any other court to hear and determine appeals from the Court of Appeal.*

(2) *An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in the following cases -*

(a) *where the ground of appeal involves questions of law alone, F decisions in any civil or criminal proceedings before the Court of Appeal;*

(b) *decisions in any civil or criminal proceedings on questions G as to the interpretation or application of this Constitution;*

(c) *decisions in any proceedings on questions as to whether any of the provisions of Chapter IV of this Constitution has been, is being or is likely to be contravened in relation to any person.*

(3) *Notwithstanding the provisions of subsection (2) of this section, H no appeal shall lie to Supreme Court from any decision of the Court of appeal in respect of an interlocutory decision.*

(4) *Nothing in this section shall confer any right of appeal from*

a decision of the Court of Appeal granting or refusing leave to appeal to the Court of Appeal from any decision of a High Court.

(5) Subject to the provisions of subsections

(2), (3) and (4) of this section, an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with the leave of the Supreme Court."

Ground 4, therefore, not being a ground of law simpliciter Appellant would require leave of this Court to appeal on it. That leave not having been sought nor obtained, ground 4 is incompetent and issue 2 predicated on it is hereby struck out.

We are now left with only Issue 1.

It is argued in the Appellant's brief and in the oral submissions of his learned counsel that the Court below were in error when they held that Exhibits A & C were corroborated by the evidence of PW 4. It is argued that PW 4 did not testify to the fact that the Appellant defiled the deceased. It is submitted that the questions posed in Nwaebonyi v. The State (1994) 5 NWLR 138 to determine the veracity of a confessional statement cannot be resolved against the Appellant. Learned counsel, Mr. Obianwu, in his oral argument submitted that there was no evidence outside Exhibits A & C implicating the Appellant in the offence charged. He observed that Exhibits A & C were retracted at the trial by the Appellant and submitted that as there was no evidence on record to show that the statements were true, the Court could not act on them to convict. He further submitted that the evidence on record negated the truth of Exhibits A & C. Learned counsel further submitted that there was no evidence as to how the deceased sustained the head injury found on her by PW 4. He urged us to allow the appeal, set aside the conviction for murder and acquit and discharge the Appellant.

Mrs. Asenuga, both in her brief and in oral argument, submitted that the Appellant was rightly convicted and urged us to dismiss the appeal. She argued in her brief that the learned trial Judge tested the truth of Exhibits A & C by examining the facts contained in them with evidence outside them, particularly the evidence of PW. 4 She urged us not to disturb the findings of fact made by the Courts below.

The law is that a free and voluntary confession of guilt made by an accused person, if it is direct and positive is sufficient to warrant his conviction without any corroborative evidence as long as the Court is satisfied of the truth of the confession. See: Jimoh Yesufu v. The State (1976) 6 SC 167 at 173 where Obaseki, Ag. JSC B (as he then was) delivering the judgment of this Court, said:

"There is a long line of judicial authorities (on the effect of confessions and we agree with the statement which establish that in Nigeria, a free and voluntary confession of guilt by a prisoner, whether under examination before a magistrate or otherwise, if it is direct and positive and is duly made and satisfactorily proved, is sufficient to warrant convictions without any corroborative evidence so long as the Court is satisfied of the truth of the confession (Edet Obase v. The State (1965) NMLR 119). But it is desirable to have outside a defendant's confession to the police, some evidence, be it slight of the circumstances which make it probable that the confession was true. [Paul Onochie & 7 Others v. The Republic (1966) NMLR 307 R. v. Kanu 14 WACA 30." D

See also: Koiki v. The State (1976) 4 SC. 107 at 111; Ntaha v. The State (1972) 4 SC 1, Ikemson v. The State (1989) 3 NWLR 455. But it is the practice to look outside the confession, some evidence, however slight, of confirmatory circumstances. Where an extra judicial confessional statement of an accused person is, however, retracted at the trial, a long line of cases has laid it down that some tests are to be applied to it to determine its truth. In Philip Kanu & Anor. v. R. (1952) 14 WACA 30, 32, that West African Court of Appeal adopted the tests approved by Ridley J in R. v. Sykes (1913) 8 Cr. A.R. 233, 236-237 wherein the learned Judge cited with approval the following statement of law made by the Commissioner that tried the case originally: F

"A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive and is properly proved, a jury may, if they think fit convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be H

tested and examined, first by police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

Since Kanu v. R., these tests have been applied in this country in numerous cases. See: R. v. Obiasa (1962) 2 NSCC 412; Obosi v. The State (1965) NMLR 119; Onochie & Ors. v. The Republic (1966) NMLR 307; Obue v. The State (1976) 2 SC. 141; Jimoh Yesufu v. The State (supra); Dawa v. The State (1980) 8 0 11 SC. 236; Nwaebonyi v. The State (supra).

Now to the case on hand. The learned trial Judge found that Exhibits A & C were made by the Appellant voluntarily. She adverted her mind to the fact that as the Appellant retracted those statements she had to be satisfied of their truth before she could convict. She said:

"The prosecution alleged that the accused person made two confessional statements, Exhibits 'A' and 'C' to the Police. The court ruled during the voir dire that the statements were voluntarily made. The two statements were however retracted when the accused person testified. Where an accused person retracts his confessional statement, it is the duty of the court, having regard to all the circumstances, to consider whether the accused had made the statement, whether the statement was true and whether the confession was voluntary."

Examining Exhibits A & C in the light of evidence outside them the learned Judge observed:

"The testimony of the accused corroborates part of the contents of Exhibits 'A' and 'C'. Only the accused could have given such details in Exhibits 'A' & 'C' regarding the visit of the friends of PW. 1; the purchase and drinking of illicit gin, the recording of cassettes and the preparation of food for the children. The only material part of Exhibits A & C omitted from the testimony of the accused was his defilement of

the deceased. However, that aspect of the statement had been corroborated by the doctor. While the doctor was not specific that she was defiled, he indicated as much. He said that the wound in her private part was deep and fresh. It was caused by a penetrating object forcefully intruded into her. He was sure that the penetration was not accidental otherwise a bit of the object would have been detected in her. Further, the doctor said that the child was twitching and bleeding profusely from her private part till she died. In his testimony, the accused said that one of the women who took Shade to the hospital said she was raped. These are facts independent of the confessional statement from which the court can draw the incontestible inference that the confessional statements are true. The inference from the evidence is that the penetrating object which forcefully injected itself into the child were the finger and the penis of the accused as contained in his confessional statements."

and concluded -

"I find that the accused person made the statements Exhibits 'A' and 'C' voluntarily and that the contents are true.

The Court below, per Okunola J.C.A. reviewed the law, the facts in the case and the findings of the learned trial Judge and concluded:

"I agree with the above finding of fact by the learned trial Judge particularly when viewed against the evidence of PWs 1-5 particularly PW 4 the medical practitioner."

The Appellant said a lot of things in Exhibits A & C which are in line with his evidence at the trial. The only area of retraction is as regards to the defilement of the deceased. He admitted this in Exhibits A & C and gave a vivid account in Exhibit C. He said in Exhibit C:

"At about 10.00 a.m. while myself and Rotimi was outside playing with his friends. I removed Shade's pant from her waist and carried her on my brother's bed. I started to finger the girl. I first put in the small finger of my left hand. The finger did not enter into the vagina. Before I forced it in. I later put in the fourth finger. When the finger entered, I sued it to screw the vagina until it got slack. I then forced my penis into the vagina. The girl was crying bitterly but I did not leave her until I spermed. When I got up from her, I discovered that the vagina has

torn and blood was rushing out.".....

When I finished with the girl and she started bleeding, I quickly wear her pant for her and shouted for people to help."

I have set out earlier in this judgment the salient part of the evidence of PW 4. Surely, if one places the evidence of PW 4 alongside the account given in Exhibit C, it is not difficult to agree with the conclusion of the learned trial Judge that the contents of Exhibit C are true. The Court below was right to affirm her conclusion. I too affirm it and resolve the issue under consideration against the Appellant. There was evidence outside Exhibit A & C that confirmed the truth of the contents of those statements as regards the defilement of the deceased by the Appellant.

As stated earlier in this judgment, we invited learned counsel for the parties to address us further on whether, on the facts, a case of murder or manslaughter was made out. Both learned counsel filed supplementary briefs which we find to be very useful in the resolution of this new issue raised by us, Learned counsel also proffered oral arguments. Incidentally the two Courts below also gave consideration to this issue in their respective judgments.

Mr. Obianwu, both in his brief and oral argument, submitted that on the facts the Appellant could not be convicted of murder under the provisions of section 316 (3) of the Criminal Code of Ogun State. He further submitted that the evidence did not reveal that any act done in furtherance of the unlawful purpose of raping the deceased could be said to endanger the life of the deceased. He cited a number of decided cases to buttress his submissions. I shall refer to these authorities later in this judgment.

Mrs. Asenuga, learned leading counsel for the Respondent, on the other hand, submitted that, on the facts, a case of murder was made out. She submitted that the deceased died as a result of the act of the Appellant which was of a nature as to likely to endanger human life. She referred to the proviso to Section 316 (3). She also referred to the age of the deceased and her state of health and in particular to the evidence of the Appellant where he testified that -

"I saw Shade on the bed stretching. I ran out to seek help. They carried her and said he had convulsion."

Mr. Obianwu, in reply, drew attention to the fact that the two Courts below did not find as a fact that it was the act of the Appellant that accelerated the death of the deceased. B

The learned trial Judge set out what must be proved in a charge of murder. She said, and I agree with her:

"In order to establish a charge of murder under the Code, there must be evidence of: C

1. The fact of death;

2. death within a year and a day of the act:

3. the act or omission on the part of the accused directly causing the death of the deceased; and

4. the intent to kill or to do grievous bodily harm; or to do an act or make an omission likely to endanger human life while pursuing an unlawful purpose." D

Dealing with the 4th ingredient above the learned trial Judge reasoned:

"However, under Section 316 (3) of the Criminal Code, before the court can convict for murder, the prosecution must not only prove that the unlawful act of the accused caused the death of the deceased, it must show that the unlawful act is of such a nature as to be likely to endanger human life. The test for whether the act is of a nature likely to endanger human life is whether death is a reasonably probable consequence of the act." E
F

In R. v. Nameri 20 NLR 6, the accused committed rape on a girl of thirteen and she bled to death from the injury done to her private part by the act of violation. In view of the evidence in court that it was not unusual for girls of that age to have sexual intercourse, which did not usually lead to death, the court found the accused not guilty of murder but of manslaughter. G

The ravishing of the girl of five is clearly an unlawful act. The question to be asked is whether it is an act of such a nature as to be likely to endanger life. In The King v. Udofa Idiong and Umo (1950) 13 W.A.C.A. 30 a case on section 316 (3) of the Criminal Code the court H

held that -

'It is to be observed that the act must be one of such a nature as to be 'likely to endanger human life and we think that an act cannot be said to be likely to have a certain result if a reasonable man would not expect it to have such a result even though in the event that result ensued.

In coming to the decision to convict the accused for manslaughter as against the conviction of murder, Bairamian, J. found that the act of ravishing the girl of thirteen years of age in that case was not by itself of such a nature as to be likely to cause death as it was not unusual for thirteen year old girls to have sexual intercourse without such fatal result.

In the case on hand, there is no evidence, and it is very inconceivable that such a horrendous act of ravishing a five years old girl could be acceptable as usual. The prosecution has proved beyond reasonable doubt that the accused person unlawfully killed Shade Pelemo by the unlawful act of having carnal knowledge of her which is an act which is reasonably probable to endanger her life."

The Court below, per Okunola JCA, was of the view that -

"The prosecution did not only prove the act was unlawful but further showed that the unlawful act was of a nature as to be likely to endanger human life. The test for whether the act is of a nature likely to endanger human life is whether death is a reasonable probable consequence of the act. See R. v. Okoni (1938) 4 WACA 19. I hold that for the trial judge to come to a conclusion that the act of ravishing a four years nine months old girl is not act likely to endanger her life would have been perverse."

As I shall show presently, I think their Lordships of the two Courts below, with profound respect to them, were in error in the conclusion they reached. The learned trial Judge admitted there was no evidence on the issue but nevertheless drew a conclusion adverse to the Appellant. Surely, this cannot be right. It is not for her to substitute her opinion for evidence. The position of the Court below is worse. Okunola JCA who read the lead judgment of that court, with which the other Justices that sat with him agreed, found that the prosecution "further

showed that the unlawfully act was of a nature as to likely to endanger human life." The learned Justice of Appeal did not point to the evidence led by the prosecution in proof of this fact; he simply just surmised that such evidence existed. I think the learned trial Judge was right when she said there was no such evidence.

B

Section 316 of the Criminal Code of Ogun State reads:

"316. Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances that is to say -

(1) if the offender intends to cause the death of the person killed, or that of some other person;

C

(2) if the offender intends to do to the person killed or to some other person some grievous harm;

(3) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

D

(4) if the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the commission of an offence which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such offence;

F

(5) if death is caused by administering any stupefying or overpowering things for either of the purposes last aforesaid;

(6) if death is caused by wilfully stopping the breath of any person for either of such purposes; is guilty of murder.

In the second case it is immaterial that the offender did not intend to hurt the particular person who is killed.

G

In the third case it is immaterial that the offender did not intend to hurt any person.

In the three last cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result."

From the facts in this case, paragraphs (1), (2), (4), (5) and (6) would not appear to apply. We are left with paragraph (3). The learned trial

H

judge rightly found on the evidence that the deceased Shade Pelemo was killed by the act of unlawful carnal knowledge of her by the Appellant and it is immaterial that the Appellant did not intend to hurt her. But the question, however, remains whether the act is of such a nature as to be like to endanger human life.

To secure a conviction for murder under subsection (3) of section 316, the prosecution must prove that the death of the deceased was caused by means of an act done in the prosecution of an unlawful purpose and that the act is of such a nature as to be likely to endanger human life. Section 316 (3) (or some other section of the Criminal Code similar to it) has some for consideration by the Courts in a number of cases.

I start with R. v. Nameri, 20 NLR 6 where the accused committed rape on a girl of 13, and she bled to death from the injury done to her private parts by the act of violation. There was no medical evidence in the case by there was evidence that it was not unusual for girls at that age to have sexual intercourse, not did it lead to death. There was no evidence that the act of ravishment by itself was of such a nature as to be likely to endanger life. The accused was found not guilty of murder but of manslaughter only. Bairamian J. (as he then was) - a judge of considerable knowledge and experience - in his judgment reviewed the law in England and Nigeria and pointed out the differences in the two laws. On the facts of the case before him, the learned Judge observed at page 8 of the Report:

"As regards the act of ravishment in the case in hand there is no evidence that by itself it is of such a nature as to be likely to endanger human life. There was recently in this Court another case of rape on a girl of about thirteen - the case of Elisha Agoha. There the girl bled, but she went about for at least two hours before she was taken to hospital and it was not until the following day that the doctor saw her. He found that the hymen had been torn and that the tear extended backwards to include the labia minora. The tear, he said, was consistent with consent. Agoha was convicted of rape. There was no suggestion in Agoha's case that the wound caused by the violation was a grave wound.

In the case in hand there is no evidence on the nature and extent of the wound caused by the violation of Zulai, or any evidence that in the judgment of ordinary men the act of violation and the wound it may cause to a woman, say a virgin, which Zulai may have been, is one likely to endanger life. It is the first instance of ravishment by itself causing death that I know of. The prisoner must therefore be acquitted of murder, but he is certainly guilty of manslaughter under s. 317 of the Code."

In R. v. Motesho Okoni & Ors., 4 WACA 19 on the other hand, the 1st & 2nd accused persons at the instance of the 3rd accused, set first to a house believing that one Shitta was in it. One Yesajo, a woman was badly burnt and was taken to the hospital where she died. The trial judge found -

(1) *The third accused, a person in authority over first and second accused, ordered them to commit a felony, namely arson, in regard to the dwelling house where they knew Shitta to be.*

(2) *The first and second accused in concert, and because of third accused's orders, proceeded at once to carry out that felony.*

(3) *The carrying out of that felony was the setting first to Basin's house.*

(4) *The fatal burning of Yesajo, an inmate of that dwelling house was a reasonably probable consequence of setting fire to the house."*

He found all the 3 accused persons guilty of murder. On appeal to the West African Court of Appeal, their appeals were dismissed. The Court observed at pages 24-25 of the Report:

"If the death of Yesajo was caused by means of an act done in the prosecution of an unlawful purpose, which act was of such a nature as to be likely to endanger human life, then the crime was murder; if not the killing was unlawful and amounted to manslaughter only.

In England the test to be applied is different. In one way it is more favourable to an accused person and in another way less favourable. In the case of Director of Public Prosecutions v. Beard (1920) A. C. 479) H the House of Lords cleared up doubts which had been expressed by Stephen J. in Rex v. Serne and Another (16 Cox 311). In Beard's case it was clearly laid down that by the law of England if a person, while in the act

of committing a felony involving violence, kills another without having the intention of so doing, the killing is murder. The difference then between the English and Nigeria law is:-

(a) *In England the killing must be done in the act of committing a felony involving violence whereas in Nigeria it is sufficient if death is caused by means of an act done in prosecution of an unlawful purpose (i. e. not necessarily a felony); But*

(b) *In Nigeria it is necessary also that the act should be of such a nature as to be likely to endanger human life; this is not necessary in England. Returning to the facts of the present case, the learned trial Judge did not record his finding in the exact words of the sub-section, but the four propositions which he set out and which have already been quoted a fortiori establish the two essential ingredients of sub-section (3).*

The carrying out by the first two appellants of a felony at the bidding of the third appellant was clearly the prosecution of an unlawful purpose; and that the act was of such a nature as to be likely to endanger human life is implicit in the finding that the fatal burning of Yesajo, an inmate of the dwelling house, was a reasonably probable consequence of setting fire to the house.

We are therefore, of opinion that the case is clearly within the provisions of sub-section (3) of section 316 of the Criminal Code and that the learned trial Judge was right to find each appellant guilty of murder."

The evidence clearly showed that the accused knew there would be inmates in the house at the time of the arson. It is reasonable to find, therefore, that the act of the accused persons in setting fire to the house was an act likely to endanger human life.

In Queen v. Gidado Akanbi (1962) NWLR 161, the deceased, who dressed as a masquerader at a funeral ceremony, had requested the accused to fire a gun at him in order to test the strength of his charms. The accused carried out the deceased's request. The deceased was injured and later died of the wound he received. It came out in evidence that the accused was a gun repairer, that the gun used on the fateful day was brought out from his workshop, but was loaded by the deceased,

unknown to the accused, with pellets contrary to their pre-arrangement that the gun should be loaded only with gun powder. Quashie-Idun C.J. said, at page 163 of the Report:

"....." if the accused knew that the gun had been loaded with pellets before he fired it at the deceased, then, he would be guilty of murder, even though he was requested by deceased to fire the gun at him. But if on the other hand, the accused believed that the deceased had loaded the gun only with gunpowder and without any pellets, then, it is my view that he would not reasonably have believed that an injury would have been inflicted on the deceased and therefore, could not be found guilty of murder

I am strongly of the view, however, that whether the gun was loaded with pellets or merely with gunpowder, it was unlawful for the accused to have fired it in a public place at the deceased, even though, he did so at the request of the deceased himself; but, I am not prepared to come to the conclusion that the unlawful act is of such a nature as to make the offence of the accused one of murder."

In Queen v. Gabriel Obi (1957) WRNLR 91, 93, the case for the prosecution was that the accused ravished a girl of about 14 years of age and that she died during the act. There was no evidence that the accused intended to kill or do grievous harm nor that any drug was given or her breath was stopped to facilitate the rape. Thomas J. as he then was, held that:

"It is true the girl was killed by the act of ravishment and it is immaterial that the accused did not intend to hurt her; but the question remains as to whether the act is per se of such a nature as to be likely to endanger human life.

It is clear from the case of Idiong and another v. The King referred to supra, that this is a question of fact which the prosecution has been silent on this point.

This was the view held by Bairamina, J. in Rex v. Nameri 20 N. L. R., page 6 where the facts were almost identical.

I will therefore find the accused not guilty of murder and discharge him thereon, but find him of manslaughter contrary to section 317

of the Code."

See also R. v. Ihom Dogo & Ors. 12 W. A. C. A. 512 where the West African Court of Appeal found that -

".....although the appellants undoubtedly acted in pursuance
B of an unlawful purpose and their acts were in themselves unlawful, it cannot be said, taking the evidence as a whole, that the acts themselves were of a nature likely to endanger life, even though in fact their cumulative effect caused death."

C This takes me to Udofa Unwa Idiong & Anor. v. The King, 13 WACA 30, a case cited by Bairamian J. in R. v. Nameri (supra) and Thomas J in Queen v. Gabriel. The two appellants in the case were convicted of murder. The case for the prosecution was that the 1st
D appellant obtained the services of the 2nd appellant, a native doctor, to procure an abortion by the administration of native medicine which resulted in the death of the woman aborted. The Court found that the 2nd appellant acted innocently, believing that the medicine was required to relieve the pain from which the woman was suffering owing to the
E retention of the placenta. The 1st appellant, however, intended that an abortion should be procured. Both appellants made statements to the police which, like in the case on hand, they retracted. Counsel for the respondent submitted that under section 316 (3) of the Criminal Code the
F 1st appellant was guilty of murder as the act committed was likely to have caused death. The West African Court of Appeal held that the 1st appellant was criminally responsible for causing the abortion, but the evidence did not establish that, as a reasonable man, the 1st appellant was aware that the act of the 2nd appellant was likely to endanger human life.
G Consequently he was not guilty of murder under section 316 (3) of the Criminal Code, but having caused death by an unlawful act he was guilty of manslaughter. Verity, CJ (Nigeria) delivering the judgment of the Court observed at pages 33-34 of the Report:

H "*It is to be observed that the act must be one of such a nature as to be 'likely to endanger human life', and we think that an cannot be said to be likely to have a certain result if a reasonable man would not expect it to have such a result, even though in the event that result ensued.*

It is necessary for us to consider, therefore, whether in the circumstances of the present case as established by the evidence, the act of the first appellant was likely to endanger human life in the sense that a reasonable man would expect that it probably would do so.

In the first place there is no sufficiently cogent evidence if indeed there be any evidence at all, as to the nature of the concoction or the likely results of its administration. If the analyst's certificate (which in the light of its terms is of dubious admissibility) is to be disregarded, there is no evidence as to the nature of the concoction or its probable effects. If, on the other hand, the certificate is to be regarded as evidence of the nature of the concoction, then it would appeal that its administration could not reasonably be expected to procure abortion, let alone endanger human life. Even if we are to assume that the second appellant, as a native doctor, had sufficient knowledge of the nature of the leaves selected by him, whatever they may have been, to be aware that they could be effectively used as an abortifacient, there is no evidence whatever that the administration of that particular abortifacient would be likely to endanger human life. The furthest the medical evidence goes in this case is that

'if a drug is administered to a woman who has a pregnancy of three or four months' duration, this, if strong enough, might cause contractions so strong as to rupture the womb,' and so cause death, as in this case, from shock and hemorrhage.

On this evidence we are not prepared to hold that the Crown has established beyond reasonable doubt that the act of appellant was of such a nature as to be likely to endanger human life in the sense in which we have interpreted this phrase, even though, in fact, it occasioned the woman's death.

The facts proved do not, therefore, in our opinion, fall within section 316 of the Criminal Code. They do, however, constitute an unlawful killing and the first appellant is therefore guilty of manslaughter within the meaning of section 317 of the Code.

The appeals are allowed to this extent, that the conviction of the first appellant for murder is quashed and the sentence of death set aside,

but we substitute a verdict that he is guilty of manslaughter and sentence him to five years imprisonment." (Underlinings are mine)

Coming back now to the case on hand, **there was no evidence that the act of the Appellant was of such a nature as to be likely to endanger human life.** The learned trial Judge admitted much but sought to substitute her opinion for this lapse in the case for the prosecution. There was no evidence that what the Appellant did to the deceased, was of such nature as to be likely to endanger human life. The evidence of the tender age of the deceased and her antecedent medical history per se, would not be sufficient evidence, without more, to justify that conclusion. Moreso that PW 4 did not tell the Court the effect these would have on the act of the Appellant. The deceased's tender age would only make him liable for an offence under section 218 of the Criminal Code. The evidence of Dr. Adeboye, PW 4 was not helpful in this regard. PW 4 found that the deceased had head injury but there was no evidence as to how she came to sustain the head injury. There was no evidence, therefore, that it was the act of the Appellant that caused the head injury. The conclusion I reach, therefore, is that the learned trial Judge was wrong in convicting the Appellant of murder and the Court below was equally wrong in affirming that verdict. The deceased, however, died as a result of the Appellant's unlawful act of having carnal knowledge of her; he is, therefore, guilty of manslaughter contrary to section 317 of the Criminal Code and I convict him accordingly. The Appellant's conduct is very repulsive. He was an uncle to this girl of tender years who was put in his care while the parents went on a journey. He abused the confidence reposed in him. I sentence him to 14 years IHL. He sentence is to commence from the date of his conviction by the trial court.

I cannot end this judgment without commenting on the poor quality of the investigation, if any, carried out by the police in this case. Had there been a more thorough investigation, the mission link would have been obtained. The quality of the prosecution at the trial was not better either. None of those who hearkened to the alarm raised by the

Appellant was called to testify. All concerned appeared to be content with Appellant's confessional statements Exhibits A & C. Had these failed, the whole case would have collapsed totally and the Appellant would have walked away free.

B

WALI JSC

I have had the privilege of reading in advance, a copy of the leading judgment of my learned brother Ogundare, JSC and I entirely agree with his reasoning and conclusion for allowing the appeal and substituting the conviction for murder with manslaughter. I fully endorse the reasoning and conclusion as mine. C

I wish to contribute the following by way of emphasis on the lead judgment. D

There is no doubt as emerged from the evidence adduced in this case, the findings of both the trial court and the Court of Appeal that the appellant ravished his victim, a girl of tender age of 5 years by forcefully having carnal knowledge of her, resulting in an injury to her private part. E But the question to ask and to answer is was there such description, the extent and gravity of the wound which would lead to the inevitable conclusion that it was such act which was of such a nature to justify conviction as stipulated in Section 316 (3) of the Criminal Code of Ogun State? F I shall answer the question in the negative for the following reasons -

1. P.W. 4, the medical doctor that examined the deceased when she was brought to the hospital both before and immediately after her death, testified thus -

"On 8th July, 1991 a child brought form J4 unconscious, with head injury with deep wound in her private part, died at the state hospital. She was Shade Pelemo. G

I saw her on 8th July and was actually preparing to repair the damaged wound in her private part. Throughout the time she was unconscious. She was bleeding properly from her private part. H

When she died, I performed the post mortem examination. I found her in a position of braised stem injury which is suggestive of head

injury. The wounds in her private part were still fresh. The fresh wound in her private part were still fresh. The fresh wound in her private part in my opinion could be caused by a penetrating object. Any thing that made aforced entry. We did not find any remnant of anything inside her
 B so we could not decide the object. I wrote a report immediately after the post mortem examination.

When the deceased was brought to me before she died, I did not make any diagnosis of the probable cause of the deep wound injury in her private part. The child died as a result of the multiple injury to the
 C head and the private part.

Since there was no one to give any history of what happened. The person who brought her did not give an account of what happened. The head injury was caused by contract with a blunt object like falling
 D down or knocking the head against a hard surface. The head injury could have been caused by a struggle of it leads to a fall.

A person who is unconscious has lost communication with the rest of us, but the cause of his unconsciousness may result in some move-
 E ments. Like twitching foaming in the mouth etc. An unconscious person who is restless can fall down. It is possible for the head injury to preceed the injury to the private part.

The people who brought her said they found her in the house
 F unconscious and bleeding. How the injury occurred nobody told me. We do make attempt to find out cause of unconsciouness or illness but in this case the concentration was on saving her life. Attempt was even made to put her on oxygen. She was twitching and foaming in the mouth. Con-
 G nection means temporary loss of consciouness. We were hoping that she could be resuciatated. She was convulging by the time she was brought to us. Any head injury could cause convulsion which is just irritation of the brain.

There was no evident that the injury to the vergina was caused
 H by accidental fall on a sharp object otherwise there would be evidence of the object. It was more like a forced entry of a penetrating object,"

2. The learned trial judge in considering the evidence inclusive that of P.W. 4, the medical doctor, commented -

"However, under Section 316 (3) of the Criminal Code, before the court can convict for murder, the prosecution must not only prove that the unlawful act of the accused the death of the deceased, it must show that the unlawful act is of such a nature as to be likely to endanger human life. The test for whether the act is of a nature likely to endanger human life is whether death is a reasonably probable consequence of the act."

And after considering the decisions in R. v. Nameri 20 NLR 6; The King v. Udofa Idiong & Umo [1950] 13 WACA 30, She concluded -

"In the case on hand, there is no evidence, and it is very inconceivable that such a horrendous act of ravishing a five years old girl could be acceptable as usual. The prosecution has proved beyond reasonable doubt that the accused person unlawfully killed Shade Pelemo by the unlawful act of having carnal knowledge of her which is an act which is reasonably probable to endanger her life."

Earlier, the father of the deceased and who testified as P.W. 1, stated thus under cross-examination -

"When I arrived and they told me that:

Shade was ill and taken to the hospital. I thought she had her usual ailment which was convulsion. I was asking why they did not give her usual medicine."

Where a person is charged with a criminal offence, be it murder or any other criminal offence, the onus on the prosecution is proof beyond reasonable doubt. See Section 137 (1) of the Evidence Act and the decisions in Joshua Alonge v. Inspector General of Police [1959] IV FSC 203; R v. Samuel Abengowe 3 WACA 85 and R v. Oledima & 6 Ors. 6 WACA 202. The cause of death of the victim must be caused by the act of the accused or in other words, it must be shown that it was that act which caused the deceased's death. See Sunday Omonuju v. The State [1976] 5 SC I and Frank Onyenankya v. The State [1964] NMLR 34.

There was no eye witness to the incident and the circumstantial evidence linking the accused/appellant to the offence he was charged with, tried and convicted is inconclusive. See Valentine Adie v. The State [1980] 1 - 2 SC 116 and Lejzor Teper v. The Queen [1952] AC 483

particularly at 489.

However, there are Exhibits A & C, i.e. the accused/appellant's confessional statements of ravishing the deceased, a girl aged 5 years. Exhibits A & C were subjected to a trial - within trial to decide their voluntariness or otherwise. It was after following this procedure that the learned trial judge admitted the two statements as voluntarily made by the accused/appellant which he retracted while testifying in his own defence. But mere retraction of a voluntary confessional statement by an accused person does not render it in-admissible or worthless and untrue in considering his guilt. See R. v. Sykes [1913] 8 Cr. App. 233 and Kanu. v. The King 14 WACA 30.

If the confessional statement is satisfactorily proved, a conviction founded on it without more, will be sustained by an appellate Court. See The Queen v. Obiasa [1962] 1 All NLR 645; Paul Onochie & 7 Ors v. The Republic [1966] NMLR 307; Obue v. The State [1976] 2 141 and Jimoh Yesufu v. The State [1976] 6 SC 167.

In The Queen v. Gabriel [1957] WRNLR 9, Thomas J [as he then was] while considering a case involving rape of a girl of 14 years in the course of which she died, stated -

"It is true that the girl was killed by the act of ravishment and it is immaterial that the accused did not intend to hurt her; but the question remains as to whether the act is per se of such a nature as to be likely to endanger human life this is a question of fact which the prosecution has been silent on this point."

The question that falls to be decided is whether there was intent to cause death by the accused/appellant: Brown Etuk Udo v. The Queen [1964] All NLR 16. I can find no such evidence.

An accused person will be found guilty of manslaughter if it is proved that he intentionally committed an act which was unlawful and dangerous and which inadvertently caused death. The test is an objective one. In judging whether the act is rash, dangerous, and unlawful, the test is not that the accused recognised its danger. See Larkin [1942] Cr. App. R 18; Church [1966] 49 Cr. App. R. 206; [1966] 1 Q.B. 59 and D.P.P. v. Hewbury; D.P.P. v. Jones [1976] 62 Cr. App. R 291.

However the evidence adduced proved an unlawful act caused by the accused not amounting to murder, and where such is the case, and following the decisions in Nameri and Gabriel (supra) I find the accused not guilty of murder but guilty of manslaughter by virtue of Section 179 of the Criminal Procedure Act applicable in Ogun State. See Nwachukwu John v. The State [1986] All NLR 496. B

The conviction of murder of the accused by the trial court which was subsequently affirmed by the Court of Appeal is set aside and in place thereof a conviction for manslaughter contrary to Section 317 of the Criminal Code is substituted. A sentence of 14 years imprisonment with hard labour, taking effect from the date of his conviction for murder by the trial court is hereby imposed. C

It is for these and fuller reasons in the lead judgment of my learned brother Ogundare, JSC that I also hereby allow the appeal on the conviction of murder with a substitution for manslaughter. D

But before concluding this judgment, I wish to comment on the way and manner the prosecution conducted the investigation of this case. The method adopted left much to be desired. With the number of police officers trained as lawyers in the Police Force, the quality of the police investigation, particularly in this case, is far below the quality and standard one would expect in this age of technological developments. The Ministry of Justice, which has the responsibility of supervising investigation of Criminal cases, particularly those involving human lives, are also not free from blame. Prosecutions of cases are more often than not conducted in a loose and unsatisfactory manner, resulting in acquittal of criminals who should have been convicted. E F

G

OGWUEGBU JSC

I have had the privilege of reading in draft the judgment of my learned brother, Ogundare, J.S.C. and I fully agree with him. H

The appellant was charged in the High Court of Ogun State, Ijebu-Ode Judicial Division with the murder of Shade Pelemo, a girl of 4 years and 9 months on or about 7 - 7 - 91 contrary to section 319 (1) of

the Criminal Code Law Cap. 29 Laws of Ogun State, 1978. He was tried, convicted and sentenced to death. His appeal to the Court of Appeal was dismissed and he has further appealed to this court against the conviction and sentence.

B There were two original grounds of appeal and two additional grounds of appeal. They were numbered (1) to (4). At the hearing of the appeal on 24-2-2000, grounds 1 and 2 were abandoned and ground (4) was incompetent. Grounds (1), (2) and (4) and the issues formulated from them were struck out. The appellant was left with ground 3. An
C issue for determination distilled from the said ground 3 reads:

*"The Appellant respectfully prays the courts to determine whether:
The Court below was justified in the light of the evidence in the printed record in concluding that the appellant was properly convicted on
D the retracted confessional statements, Exhibits A and C."*

At the hearing on 24-2-2000, counsel adopted their respective briefs of argument and made oral submissions in amplification of the arguments contained in the briefs. The appeal was adjourned for judgment. When the appeal was being considered, the court decided to invite
E counsel in the case to address it further on whether a case of murder or manslaughter was made out on the facts and in the light of the provisions of section 316 (3) of the Criminal Code Law of Ogun State of Nigeria.

F Further briefs of argument were filed and on 18-5-2000, counsel addressed us further after adopting their additional or supplementary briefs. It is important at this stage to state in summary form, the facts of the case. The appellant was living with his elder brother, Ferdinand Taiwo Pelemo and his wife at Forestry Farm, J4, Ijebu Waterside, Ijebu Ode in
G Ogun State. On 4-7-91, the appellant's said elder brother and his wife travelled to Akure for the week-end and left their two children Rotimi (a boy aged 7 years and Shade (girl) aged 4 years and 9 months in the care of the appellant. On 7-7-91, appellant had unlawful carnal knowledge of
H Shade. She bled profusely from the vagina and was rushed to the hospital where she died the next day. The appellant was arrested and prosecution for murder. His conviction and sentence which were confirmed by the court below resulted in this appeal. He made two confessional state-

ments to the police which he retracted at the trial. The facts of the case, the two confessional statements of the appellant and the evidence of the medical doctor (P.W. 4) are fully set out in the lead judgment of my learned brother Ogundare, J.S.C. It is unnecessary to repeat them.

It was the appellant and the deceased who knew what happened. B
The medical officer who examined Shade when she was brought to the hospital and who performed the post mortem examination on the body testified as P.W. 4. His evidence is corroborated by Exhibits "A" and "C".

The only issue for determination remaining after grounds 1, 2 C
and 4 of the grounds of appeal and the issues formulated from them were struck out was based on Exhibits "A" and "C". At the trial the appellant retracted his two confessional statements to the police. The learned trial judge conducted a trial within trial and found that the statements were freely and voluntarily made. She admitted them in evidence as Exhibits D
"A" and "C".

In relation to the two statements the learned trial judge found as follow:

*"On the evidence adduced during the voir diar and during trial, E
I accept the prosecution's evidence that the accused was not induced by threat of any form to make the statement. The evidence of torture given by the accused appears more imaginary than real. In my view, he would have landed in the hospital or in his grave if he went through the physi- F
cal torture which he described. I believe the statements were voluntarily made....."*

*The testimony of the accused corroborates part of the contents of Exhibit "A" and "C". Only the accused could have given such details in Exhibits G
"A" and "C" regarding the visit of friends of P.W. 1; the purchase and drinking of illicit gin and the preparation of food for the children. The only material part of Exhibits "A" and "C" omitted from the testimony of the accused was his defilement of the deceased. However, that aspect of the statement had been corroborated by the doctor H
..... He said that the wound in her private was deep and fresh. It was caused by penetrating object forcefully intruded into her. Further, the doctor said that the child was twitching and bleed-*

ing profusely from her private part till she died..... These are facts independent of the confessional statement from which the court can draw incontestible inference that the confessional statements are true. The inference from the evidence is that the penetrating object which force-
B fully injected itself into the child were the finger and the penis of the accused as contained in his confessional statements. I find that the accused person made the statements Exhibits "A" and "C" voluntarily and that the contents are true. "

C The above finding of the learned trial judge cannot be faulted. It was affirmed by the court below and I see no reason to hold a contrary view. I agree with the courts below that the statements (Exhibits "A" and "C") are direct and positive, duly made and satisfactorily proved. A free and voluntary confession of guilt by a prisoner if it is direct and
D positive and is duly made and satisfactorily proved as in the case in hand, is sufficient to warrant conviction without corroborative evidence so long as the court is satisfied of the truth of the confession. See Yesufu v. The State (1976) 6 S.C. 167 at 173, Edet Obase v. The State (1965)
E NMLR 119, R. v. Sullivan (1887) 16 Cox 347 and R. v. Sykes (1913) 8 CR. App. R. 233.

In his supplementary brief, Mr. Obianwu, learned counsel for the appellant submitted that section 316 (3) of the Criminal Code had
F been the subject of the decisions in the following cases: R. v. Okoni (1938) 4 W.A.C.A. 19, R. v. Dogo (1949) 12 W.A.C.A., 519, R. v. Idion & Or. (1959) 13 W.A.C.A 30, R. v. Obi (1957) W.N.L.R. 91, R. v. Akanbi (1962) W.N.L.R. 16 and Obaji v. The State (1976) 7 SC. 173. He referred the court to Okonkwo And Nash On Criminal Law in Nigeria,
G 2nd ed. pages 233-336.

Mrs. Asenuga, learned Director of Public Prosecutions, Ogun State referred to sections 306, 311, 315 and 316 (3) of the Criminal Code in the respondent's supplementary brief. She submitted that to establish
H a charge of murder against an accused person, the prosecution must prove the following:

"(a) That the accused killed the deceased. To establish this the prosecution must adduce cogent evidence linking the accused with the

death of the deceased, by showing either a positive act or negative omission of the accused causing injury to the deceased which causing injury to the deceased which in turn resulted directly in the deceased death;

(b) that the killing of the deceased was unlawful;

(c) that the accused killed the deceased under one of the six B circumstances enumerated in section 316 of the Criminal Code. See Onah v. The State (1986) 3 NWLR Pt. 12 at 236-246 B-D."

She further submitted that the appellant was aware of what he was doing for he described in detail how he raped the deceased in his confessional statement and that he was not insane. She submitted further that from the facts established, the unlawful homicide committed by the appellant amounted to murder and that he was appropriately charged and convicted. C

The learned trial judge found the appellant guilty of murder under section 316 (3) of the Criminal Code. She found as follows: D

"However, under section 316 (3) of the Criminal Code, before the court can convict for murder, the prosecution must not only prove that the unlawful act of the accused caused the death of the deceased, it must show that the unlawful act is of such a nature as to be likely to engender (sic) human life. The test for whether death is a reasonable probable consequence of the act. The ravishing of the girl of five is clearly an unlawful act. The question to be asked is whether it is an act of such a nature as to be likely to endanger life. In the case in hand, there is no evidence, and it is inconceivable that such a horrendous act of ravishing a five year old girl could be acceptable as usual. The prosecution has proved beyond reasonable doubt that the accused person unlawfully killed Shade Pelemo by the unlawful act of having carnal knowledge of her which is an act which is reasonable probable to endanger life". E F G

The court below affirmed the above finding when it held:

"The prosecution did not only prove the act was unlawful but H further showed that the unlawful act was of a nature as to be likely to endanger human life..... I hold that for the trial judge to come to a conclusion that the act of ravishing a four year and nine months old

girl is not an act likely to endanger her life would have been perverse."

The two lower courts got it all wrong. I can understand the anxiety of the learned trial judge who saw the act of the appellant in ravishing a girl of under five years of age as horrendous and unacceptable and, therefore, he must suffer the supreme penalty for the death of the victim. Every right thinking being should feel that way but the law should be correctly applied. Sentiments have no place in judicial deliberations. I will not go beyond a strong condemnation of the brutal assault on the innocent and helpless victim by the appellant.

I will now consider the provisions of section 316 of the Criminal Code of Ogun State and in particular section 316 (3) thereof which the courts below applied in this case.

It provides as follows:-

"316. Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say:-

(a)

(b)

(c) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;

(d)

(e)

(f)

is guilty of murder.

In the second case it is immaterial that the offender did not intend to hurt the particular person who is killed. In the third case it is immaterial that the offender did not intend to hurt any person. In the last three cases it is immaterial that the offender did not intend to cause death or did not know that death was likely to result."

Subsection 316 (c) had received judicial interpretations in our courts. See R. v. Okoni (supra), R. v. Nameri (1951) 20 N.L.R. 6, R.v. Idiong & Or. (supra), R. v. Obi (supra) and Obaji Aga (Alias Obaji Akpu) v. The State (1976) 6 S.C. 173. An act done in the prosecution of an unlawful purpose in section 316 (c) had been interpreted to mean an act

done in furtherance of a purpose which is unlawful. An act may be regarded as done in furtherance of an ultimate felony if it is a step intentionally taken for the purpose of effecting the felony. In R. v. Okoni (supra) it was clear on the evidence that the purpose for which the building (which was believed to house the intended victim) was set on fire (an act by itself unlawful since it amounted to arson) by the appellant was to effect the murder of the intended victim. The appellant was convicted for the murder of a woman Oma Etteh who was not the intended victim but who was in the house at the time and was consumed by the fire.

In the case of Idiong & Or. v. The State (supra), the first appellant intended the abortion of the pregnancy of the deceased and for that purpose, he procured the second appellant, a native doctor who administered the drugs to procure an abortion by the administration of native medicine which resulted in the death of the woman aborted. The West African Court of Appeal quashed the conviction of the first appellant for murder and substituted a verdict that he was guilty of manslaughter and a sentence of imprisonment was imposed on him. In the case of the second appellant, his conviction was quashed and a verdict of acquittal was substituted. The West African Court of Appeal found that he (2nd appellant) acted innocently, believing that the medicine was required to relieve the pain from which the woman was suffering owing to the retention of the placenta.

The prosecution in the case in hand were unable to establish beyond reasonable doubt that the unlawful act of the appellant without more, was an act likely to endanger human life. In the present case like Nameri's case where a girl aged 13 years died from bleeding caused by the prisoner in raping her, it was held that their death was not murder but manslaughter.

While it is true that Shade Pelemo was killed by the unlawful act of ravishment and it was immaterial that the appellant did not intend to hurt her; the question remained whether the act was of such a nature as to be likely to endanger her life. In Idiong & Or. v. The State (supra) at p. 33, Verity, C.J. formulated the test for an act of a nature likely to endanger human life thus:

"It is to be observed that the act must be one of such a nature as to be "likely to endanger human life", and we think that an act cannot be said to be likely to have a certain effect if a reasonable man would not expect it to have such a result, even though in the event that result ensued"

In this case there is no evidence from the prosecution that the act of the appellant was of such a nature as to be likely to endanger the life of Shade.

On the evidence, the facts proved do not come within section 316 (3) of the Criminal Code. They do, however, constitute an unlawful killing. The conviction for murder and the sentence of death are hereby set aside. In their place, I substitute a conviction for manslaughter and sentence the appellant to fourteen (14) years imprisonment which I do not even consider to be sufficient penalty for this most horrific act.

Before concluding this appeal I think I should comment on the unsatisfactory manner the investigation and prosecution of this case were carried out. Had the organs of government carrying out those functions been alive to their responsibilities, the outcome of the proceedings in respect of this brutal act would have been different. The lapses are unfortunate.

F

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned friend, Ogundare, J.S.C. and I am in complete agreement that the appellant, on the evidence adduced before the court, cannot be guilty of the offence of murder for which he was charged and convicted by the High Court of Ogun State which conviction was affirmed by the Court of Appeal.

The facts of the case, as found by the trial court, were extraordinarily revolting, disgusting and intensely obnoxious. The deceased, Shade Pelemo, as infant aged only 4 years and 9 months, was placed in the custody of the appellant, her uncle, by her parents who had travelled on the 4th day of July, 1991. On the 7th day of July, 1991 the appellant

savagely and in a most horrendous manner pounced on the deceased, her infant niece, and pulled off her pant. He tried to insert his finger into the child's vagina but this could not enter probably because the deceased was still *virgo intacta*. Nonetheless, the appellant, as beastly as he was, thrust his finger with force into the child's vagina inspite of her wild B cries. Having over-powered the deceased, he next forced his erect penis into the deceased's vagina inspite of her excruciating cries and had unlawful carnal knowledge of her. In the words of the appellant, the deceased was all this time "crying bitterly" but he did not leave her until he C had discharged his sperm into her vagina. In the process and, again, in his own words, he discovered after the event that the child's "vagina was torn and blood was rushing out". He went on -

"This girl is about 4 years and nine months old. She has no D breast. Nothing attracted me on her body. The act was done by the hand of devil."

The deceased who bled profusely from her vagina was rushed to the hospital unconscious but died the following day as a result of her injuries. On the evidence of the Doctor who conducted post mortem E examination on her body on the 8th July, 1991, the deceased was unconscious and bleeding profusely from her private part when her first saw her. He was preparing to repair the "deep wound" in her private part when she gave up. The wounds in her private part were still fresh. In F his opinion, the child died as a result of the multiple injuries to the head and her private part.

The appellant, upon arrest by the Police made confessional statements, Exhibits A and C to the Police. These confessional statement, G although confirmed before a Superior Police Officer, were subsequently retracted by the appellant in his defence on oath.

It is well settled that a free and voluntary confession, whether H judicial or extra-judicial, so long as it is direct, positive and properly proved, is sufficient proof of guilt and conviction could be based entirely on such evidence. It is however important that the court should not act on the confession without first testing the truth thereof. See Jimoh Yusuf v. The State (1976) 6 S.C. 167, Jafiya Kopa v. The State (1971) 1 All

N.L.R. 150, Nwangbomu v. The State (1994) 2 N.W.L.R. (Part 327) 380, Kalu and Another v. King 14 W.A.C.A. 30. In the same vein, a confessional statement may be sufficient to ground a conviction notwithstanding its retraction by the accused as in the present case. See B Egbochonome v. The State (1993) 7 N.W.L.R. (Part 306) 383, Mumuni v. The State (1975) 6 S.C 79, Ikpasa v. The State (1981) 9 S.C. 7 etc.

In the present case, the learned trial Judge adequately tested the truth of Exhibits A and C by examining the facts therein contained along with the rest of the evidence before the court, particularly the evidence of P.W. 4, and found corroborative evidence of the said confessions. These findings of the learned trial Judge were affirmed by the Court of Appeal and it was upon them that the trial court convicted the appellant for the offence of murder contrary to section 319 (1) of the Criminal Code, Cap. 29, Laws of Ogun State of Nigeria, 1978. He was accordingly sentenced to death. The appellant's conviction and sentence were affirmed by the Court of Appeal and he has now appealed to this court.

The main issue that has arisen for determination in this appeal is E whether going by the provisions of section 316 (3) of the Criminal Code of Ogun State of Nigeria, 1978 viz-a-viz the facts involved in this case, the unlawful homicide committed by the appellant was murder or manslaughter under section 315 of the said Criminal Code.

F Section 316 (3) of the Criminal Code of Ogun State which is relevant to the issue under consideration provides as follows -

"316. Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say -

- G 1.....
2.
3. If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life.

- H 4.
5.
6.
is guilty of murder. In the third case, it is immaterial that the

offender did not intend to hurt any person"

It is evident from the above provisions of the Criminal Code of Ogun State that four conditions must be satisfied by the prosecution before the offence of murder under section 316 (3) may be established.

These conditions comprise as follows -

- (i) That the offender killed the deceased;
- (ii) That the killing is unlawful;
- (iii) That death was caused by means of an act done in the prosecution of an unlawful purpose;
- (iv) That the unlawful purpose is of such a nature as to be likely to endanger human life.

There is an additional provision in section 316 (3) of the said Criminal Code that in so far as the offence of murder under that sub-section is concerned, it is immaterial that the offender did not intend to hurt any person.

It is not disputed in the present case that the appellant caused severe injuries to the deceased in the course of raping and ravishing her which injuries resulted directly in her death. The evidence of P.W. 4, the medical Doctor who conducted post mortem examination on the body of the deceased together with the confessional statements of the appellant, Exhibits A and C, clearly establish this fact. By section 218 of the Criminal Code, it is an unlawful act punishable by imprisonment for life, with or without whipping, to have carnal knowledge of a girl under the age of eleven years. The expression "an act done in the prosecution of an unlawful purpose" in the sub-section has been held to mean act done in furtherance of a purpose which is unlawful. See Obaji Aga v. The State (1976) 7 S.C. 173. It is therefore plain that the act of the appellant in raping the deceased who at all material times was aged only four years and nine months was clearly unlawful. In the circumstances, there can be doubt that the prosecution did satisfactorily prove the above first three conditions set out above under the aforesaid section 316 (3) of the Criminal Code for the establishment of the offence of murder. The main question for consideration in this appeal seems to be whether the act of the appellant was of such a nature as to be likely to endanger human life.

That is the fourth ingredient of the offence of murder as prescribed under the said section 316 (3) of the Criminal Code of Ogun State 1978.

I think it can safely be said that the test for whether an act is of a nature likely to endanger human life must depend on whether death or the loss of human life is a reasonably probable consequence of the act in question. See R v. Motesho Okoni and others (1938) 4 W.A.C.A 19 at 25. The act must be one of such a nature as to be "likely to endanger human life" and an act cannot be said to be likely to have a certain result if a reasonable man would not expect it to have such a result, even though, in the event, that result ensued. See udofa Idiong and Another v. The King (1950) 13 W.A.C.A 30 at 33. It therefore becomes necessary to consider whether in all the circumstances of the present case, established by the evidence, the act of the appellant was likely to endanger human life in the sense that a reasonable man would expect that it probably would do so.

There can be no doubt that from the facts of this case, the unlawful purpose is the ravishing of the deceased, Shade Pelemo, a girl of only 4 years old as admitted in the confessional statements, Exhibits A and C. That act itself is contrary to law. It is a felony and constitutes the offence of defilement under section 218 of the Criminal Code of Ogun State of Nigeria and punishable on conviction by imprisonment for life with or without whipping as already pointed out. The logical but crucial question that must be asked is what the appellant did in furtherance of the prosecution of the unlawful propose of raping the deceased which act was of such a nature at to be likely to endanger human life.

In this regard, the trial court was of the view that the appellant's unlawful act of ravishing the deceased is an act which is reasonable probable to endanger her life. Said the learned trial Judge -

"In the case on hand, there is no evidence, and it is very inconceivable that such a horrendous act of ravishing a five years old girl could be acceptable as usual. The prosecution has proved beyond reasonable doubt that the accused person unlawfully killed Shade Pelemo by the unlawful act of having carnal knowledge of her which is an act which is reasonably probable to endanger her life.

I find the accused guilty of murder."

The Court of Appeal was in agreement with the learned trial Judge on the issue. It stated -

The prosecution did not only prove the act was unlawful but further showed that the unlawful act was of a nature as to be likely to endanger human life. The test for whether the act is of a nature likely to endanger human life is whether death is a reasonably probable consequence of the act. See R. v. OKONI (1938) 4 W.A.C.A 19. I hold that for the trial judge to come to a conclusion that the act of ravishing a four years nine months old girl is not act likely to endanger her life would have been perverse."

With profound respect to both courts below, I can find no evidence whatever on record from which to hold that the extremely offensive and horrendous act of the appellant by defiling his niece of only 4 years old is per se as an act of such a nature as to be likely to endanger human life. Whether or not a particular act is of a nature as to be likely to endanger human life is a question of fact which, unless appropriately established by evidence, may not be regarded as established by the court save, of course, in the clearest possible case.

Without doubt, the entire circumstances of this case appeal to me utterly despicable, obnoxious and clearly disgusting I cannot see my way clear to conjecture or infer that the defilement of a four year old infant is an act, the probable consequence of which is the death of the victim in the absence of any cogent medical evidence on the point. There is no such evidence in the present case. In the circumstance, it is with considerable reluctance that I find myself not prepared to hold that the prosecution has established beyond reasonable doubt that the act of the appellant was of such a nature as to be likely to endanger human life, even though, in fact, it occasioned the death of the deceased in the present case.

In the final result, the facts proved by the prosecution do not, in my opinion, fall within section 316 (3) of the Criminal Code of Ogun State, 1978. The however, constitute an unlawful killing and the appellant must therefore be found guilty of the offence of manslaughter con-

try to section 317 of the Criminal Code of Ogun State of Nigeria, 1978.

The appeal is accordingly allowed and the conviction of the appellant for the offence of murder contrary to section 319 (1) of the Criminal Code of Ogun State is hereby quashed. The sentence of death passed on him is set aside. In substitution thereof the appellant is found guilty of manslaughter contrary to section 317 of the Criminal Code of Ogun State of Nigeria and he is hereby sentenced to 14 years imprisonment with hard labour. His sentence is to commence from the date of his conviction by the trial court

UWAIFO JSC

I have had the opportunity of reading in advance the judgment of my learned brother Ogundare JSC. After due consideration of the essential facts of the case and a close examination of the applicable law, I agree with him that the appeal be allowed. As I consider the legal issues involved very important I intend to state my views in full.

This appeal is from a judgment of the Court of Appeal, Ibadan Division given on July 1, 1998. The appellant, an adult of 23 years of age, lived with his uncle, Mr. Taiwo Pelemo, and his wife at a place known as the Ogun State Forestry Camp J4 Ijebu Waterside. The couple also lived with their two children.

Rotimi, a boy and Shade, a girl of 4 years 9 months of age. On 4 July, 1991, the couple travelled leaving Rotimi and Shade in the care of the appellant. On 7 July, 1991, the appellant raped Shade. She died in the General Hospital, Ijebu-Ode the next day.

The appellant was charged with the offence of murder contrary to section 319 of the Criminal Code law of Ogun State for unlawfully killing Shade Pelemo, and was tried at the High Court, Ijebu-Ode. On 4 August, 1992, in a painstaking judgment, he was convicted for murder and sentenced to death by Titi Mabogunje, J. His appeal to the Court of Appeal was dismissed. He further appealed to this court and set down in his brief of argument two issues for determination, namely:

(a) Whether the court below was justified in the light of the

evidence in the printed record in concluding that the appellant was properly convicted on the retracted confessional statements, exhibits A and C.

(b) Whether the court below was right in its conclusion that the prosecution had established beyond reasonable doubt that the appellant B murdered the deceased.

After the appeal had been heard on 24 February, 2000 upon the two issues recited above, both counsel for the parties were subsequently invited to address the court upon a further issue -

Whether, going by the provision of section 316 (3) of the Criminal Code of Ogun State vis-a-vis the facts involved in this case, the unlawful homicide committed was murder or manslaughter.

Each counsel filed a supplementary brief of argument on this issue, and on 18 May, 2000 further submissions were made to the court by both D counsel.

As to how the act of rape on Shade was committed, the appellant in his confessional statement to the police, as contained in exhibit C, said inter alia:

"At about 10.00 am... I removed Shade's pant from her waist and carried her on my brother's bed. I started to finger the girl. I first put in the small finger of my left hand. The finger did not enter into the vagina. But I forced it in. I later put in the fourth finger. When the F finger entered, I used it to screw the vagina until it got slack. I then forced my penis into the vagina. The girl was crying bitterly but I did not leave her until I spermed. When I got up from her, I discovered that the vagina was torn and blood was rushing out".

The girl was rushed to the general hospital, Ijebu-Ode when, according to the appellant, she was bleeding and he had to shout for help. As already said, she died in the hospital the following day. There is no evidence as to the treatment given to her before she died. She was said by the doctor who performed the autopsy, Dr. O.A.O. Adeboye, to have been brought to the hospital unconscious, with head injury and deep wound in her private part. In the doctor's opinion, Shade died "as a result of the multiple injury to the head and the private part."

Learned counsel for the appellant submitted that there was nothing outside his confession which remotely connected the appellant with the injuries which led to the death of the deceased. He argued that there was absence of cogent medical evidence as to what caused the said injuries and that it was mere speculation that the fingers and penis of the appellant did cause the injury to her private part. Learned D.P.P. For the respondent contended that the confession of the appellant was free and voluntary, and since it was direct and positive, it was enough upon which to convict him for the offence charged. She said the confession was tested against the medical evidence which corroborated the confession.

I think the confession in this case satisfies the necessary test for attaching due weight to it, whether retracted or not, which, as laid down by the authorities, is: (1) is there anything outside the confession to show that it is true? (2) Is it corroborated? (3) Are the relevant statements of fact made in it true as far as can be tested? (4) Was the accused one who had the opportunity to commit the offence? (5) Is his confession possible? (6) Is it consistent with other facts which have been ascertained and have been proved? This test has been adopted and approved in many cases by this court including Nwaebonyi v. The State (1994) 5 NWLR (pt. 343) 138. It has also been laid down as good law that a free and voluntary confession of guilt by an accused person which is direct and positive, so long as it is possible, is sufficient to warrant his conviction provided the court is satisfied of the truth confession. It will only then be a matter of prudence to look for any corroborative evidence: See Yusuf v. That State (1976) SC 167; Ikemson v. The State (1989) 3 NWLR (pt. 110) 435; Nwangbonu v. The State (1994) 2 NWLR (pt. 237) 380.

The confessional statement by the appellant was retracted in his testimony in court. It cannot be disputed that the confession is largely corroborated by other evidence regarding the injury sustained by the girl to her private part. The confession is positive and direct and is such that the court can act on notwithstanding that it was retracted by the appellant. All the court will need to do is to consider both the confession and the evidence in retraction and decide where the truth lies: See Egboghonome v. The State (1993) 7 NWLR (Pt. 306) 383 at 419.

Looking at the two issues canvassed on behalf of the appellant and the only issue upon which this court ordered for and received further address, it would appear that, in essence, what would need to be resolved on this appeal are, first, whether the act of the appellant caused the death of Shade; and second, whether, if it did, the facts and circumstances were such as to amount to murder or manslaughter. I would think they can be regarded as the two issues arising for the determination of this appeal.

Both counsel presented very stimulating arguments in regard to whether in the present case, murder or manslaughter has been established. The principle underlying s. 316 (3) of the Criminal Code was examined, and interpretations as suit each party were proffered. Learned counsel for the appellant's submission is that apart from the unlawful purpose of raping Shade, there was no evidence of any other act which was such as was likely to endanger human life. He says the unlawful purpose, that is the rape, cannot at the same time also be the act done in furtherance of that purpose.

On the other hand, the learned D.P.P. contends that rape can take a normal form or an abnormal form. It is in the abnormal form the likely danger to human life may be found. But she argues further that the age of the victim could play a decisive role as well. In the instant case, both as to the age of the victim and the manner she was raped, the danger to her life can be seen. The appellant, she says, used his fingers to violently expand the vagina of a girl such tender age before he forced his penis into it. The result was severe injuries to her vagina, blood rushing out of it, and the unbearable agony she went through as she, such a tender girl, cried bitterly but the appellant would not mind her plight until he satisfied himself sexually. Both counsel discussed the relevant authorities on the issue.

As regards the first issue, there is no doubt that it was when the appellant was alone with Shade that she sustained the injuries to her head and vagina. Those found in the vagina were sufficiently accounted for by the appellant as contained in his statement to the police, an except from which I have already reproduced above. The cause of the head

injuries is not known. There is evidence that the girl was convulsing when she reached the hospital and the doctor said a head injury could cause convulsion. It appears from the evidence of the father of the girl that she had a history of convulsion. On this particular occasion, it is not known which came first, the convulsion which could cause the girl to injure her head or the head injury which could have been the immediate cause of the convulsion. It is also not known whether because the appellant tampered with the girl's vagina in such a traumatic manner as described, it triggered off the convulsive seizure with the consequences of injury to her head.

Whatever it is, I am prepared to hold that the circumstances of the head injuries called for an explanation from the appellant who, as already said, was alone with the victim. I draw inspiration from the decision of this court in Igho v. The State (1978) NSCC (vol. 11) 168. It is very short judgment. In that case the appellant was charged with murder. The deceased left her house for a religious service on 20 August, 1973 but did not return home alive. The appellant was seen later in the day giving a ride to the deceased on the back of his bicycle. The appellant denied carrying the deceased on the back of his bicycle but the learned trial judge disbelieved him and accepted the evidence that he did. On that evidence, the deceased was last seen alive with the appellant. He was convicted. On appeal, Eso JSC observed at page 168:

"The deceased was last seen alive with the appellant. This evidence was accepted by the learned trial judge. He rejected the denial of the appellant. The only irresistible inference from the circumstances presented by the evidence in this case is that the appellant killed the deceased. The facts which were accepted by the learned trial judge, amply supported by evidence before him, called for an explanation, and beyond the untrue denials of the appellant (as found by the learned trial judge) none was forthcoming". [Emphasis mine]

To recapitulate, the appellant in the secrecy of Shade's father's bedroom all alone with her, mercilessly committed sexual intercourse with her. Mercilessly because he first used a finger to expand her vagina but not satisfied it was open enough, he inserted his fourth finger, ac-

ording to his confession, "to screw the vagina until it got slack. "He added. "I then forced my penis into the vagina. The girl was crying bitterly but I did not leave her until I spermed. When I got up from her, I discovered that the vagina has torn and blood was rushing out." Besides, she sustained head injuries. I have said that the circumstances of the head injuries called for an explanation from the appellant. None was forthcoming. Going by Igho's case, the appellant, in my view, ultimately caused those head injuries. The doctor, P.W. 4, said: "The child died as a result of the multiple injury to the head and the private part." With that opinion which is unchallenged, it is right to hold that the appellant caused the death of Shade.

The second issue is whether in all the circumstances, the death that thereby occurred made the offence murder or manslaughter. Section 315 of the Criminal Code Law of Ogun State provides:

"315. Any person who unlawfully kills another is guilty of an offence which is called murder or manslaughter, according to the circumstances of the case."

Section 317 also provides:

"317. A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter."

It is plain that after the act of killing has been established, it is the circumstances of the killing, based upon all essential facts, which lead to a verdict whether the offence committed is murder or manslaughter.

The learned trial judge, after considering the facts and circumstances of this case proceeded to resolve the issue whether murder or manslaughter had been established when she observed:

"....under section 316 (3) of the Criminal Code, before the court can convict for murder, the prosecution must not only prove that the unlawful act of the accused caused the death of the deceased, it must show that the unlawful act is of such a nature as to be likely to endanger human life. The test is whether death is a reasonably probable consequence of the act."

In R. v. Nameri 20 NLR 6, the accused committed rape on a girl of thirteen and she bled to death from the injury done to her private part

by the act of violation. In view of the evidence in court that it was not unusual for girls of that age to have sexual intercourse, which did not usually lead to death, the court found the accused not guilty of murder but of manslaughter.

B The ravishing of the girl of five is clearly an unlawful act. The question to be asked is whether it is an act of such a nature as to be likely to endanger life. In The King v. Udofa Idiong and Umo (1950) 13 WACA 30, a case on section 316 (3) of the Criminal Code the court held that -

C 'It is to be observed that the act must be one of such a nature as to be "likely to endanger human life" and we think that an act cannot be said to be likely to have a certain result if a reasonable man would not expect it to have such a result even though in the event that result ensued.'

D In coming to the decision to convict the accused for manslaughter as against the conviction of murder, Bairamian, J. found that the act of ravishing the girl of thirteen years of age in that case was not by itself
E of such a nature as to be likely to cause death as it was not unusual for thirteen year old girl to have sexual intercourse without such fatal result.

F In the case on hand, there is no evidence, and it is very inconceivable that such a horrendous act of ravishing a five years old girl could be acceptable as usual. The prosecution has proved beyond reasonable doubt that the accused person unlawfully killed Shade Pelemo by the unlawful act of having carnal knowledge of her which is an act which is reasonably probable to endanger her life."

G I have no difficulty in following the reasoning of the learned trial judge. She was obviously influenced in her conclusion by what, Bairamian, J. said upon the evidence before him in Nameri's case that the act of ravishing a girl of thirteen years of age was not by itself of such a nature as to be likely to cause death as it was not unusual for thirteen year old
H girls to have sexual intercourse without such fatal result. The temptation was there, I think, for the learned trial judge in the present case to consider that in a case of a much younger girl of the age of five years, the unlawful act of having sexual intercourse with her was an act likely to

endanger her life. The Court of Appeal found merit in that conclusion as expressed per Okunola JCA as follows:

"The prosecution did not only prove the act was unlawful but further showed that the unlawful act was of a nature as to be likely to endanger human life. The test for whether the act is of a nature likely to endanger human life is whether death is a reasonably probable consequence of the act. See R v. Okoni (1938) 4 WACE 19. I hold that for the act of ravishing a four years nine months old girl is not act likely to endanger her life would have been perverse."

Now, murder is established under s. 316 (3) of the Criminal Code Law when a person unlawfully kills another "if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life." The desideration in this provision as contained in two aspects of the act done by an accused person is (1) as regards the prosecution of an unlawful purpose, and (2) that the act is of such a nature as to be likely to endanger human life. The provisions in question has an appendage as further given under the said s. 316; and this is that "it is immaterial that the offender did not intend to hurt any person." That means that if the two conditions stated are satisfied, an accused person cannot be heard to say he did not intend to hurt any person. In the case of raping a girl, which is an unlawful act, coupled with an act of such a nature as to be likely to endanger her life, death thereby resulting, the accused cannot plead that he merely intended to satisfy his urge and not to hurt the victim, or to endanger her life as that would be immaterial.

I will like at this stage to refer to the views expressed on s. 316 (2) in Okonkwo and Naish: Criminal Law in Nigeria, 2nd edn., by C.O.Okonkwo to which our attention was drawn by learned counsel for the appellant and which he relied on in his submission. At page 236, the learned author said:

"It is submitted with respect that in cases of rape resulting in death, section 316 (3) ought not to be invoked

A where such death results from the very act of ravishment for then the act and the purpose are one and the same thing. On the other

hand, if in the course of raping a girl the accused presses the girl's throat to prevent her from screaming and and thereby throttles her, a charge of murder will clearly be

B laid under section 316 (3) because the unlawful purpose is rape and the act which causes death is the act of pressing her throat and if the court finds that the pressure applied is such as is likely to endanger human life, then it is murder" [Emphasis mine]

I find the above opinion quite interesting and fairly illustrative of how s. 316 (3) should be applied. I consider that I should discuss it further because I find rather intriguing what I may call, for want of a better term, the theory of the 'act and the purpose' being the same when death results from the very act of ravishment. So also is the dichotomy drawn between the act of rape which is an unlawful purpose and another act outside the very act of rape which causes death. I do accept the two theories to be valid as principles well expressed. However, it is, I think, worth exploring their frontiers for any possible exceptions as the uniquely peculiar facts of a case may demand. In order to do so I have categorised the passage quoted into parts A and B.

I think "the very act of ravishment" as contained in part A must be restricted to the raping per se in the sense that it should exclude any other unlawful act which is of such a nature as to be likely to endanger human life. In that case, if death occurs as a result of the very act of ravishment, there normally will be no conviction for murder but manslaughter going by the learned author's opinion. I have no doubt that that can be generally accepted. The decisions in R. v. Nameri (1951) 20 N.L.R. 6 and Queen v. Gabriel Obi (1957) W.L.N.R. 91 can be understood in that light. In the first case, the ravishment was with a girl of 13 years and the second case a girl of 14 years. Both bled to death as a result purely of the act of ravishment. The view was expressed in the Nameri case that there was evidence that it was not unusual for girls at that age to have sexual intercourse, nor did it usually lead to death. The Gabriel Obi case followed Nameri. Both are court of first instance cases. The catch in those cases, in my view, is whether it would make a difference if the age of a girl subjected to such ravishment is considerably

lower.

Those cases were decided on the basis that the act of ravishment in the peculiar circumstances of those cases was not such as could endanger human life. It must be recognised that human life in this context is a relative concept, depending on whose life it is. Can the sexual intercourse that will not endanger the life of a 13-year old girl be said also of a 12-months old girl, for instance, whose life is so tender that the slightest pressure on her in the act of raping her could extract life out of her? It is tempting to think that any special evidence is not necessary for this example of a 12-month old girl other than the age of such a girl. That may be a conclusion to which the observation in Udofia Unwa Idiong & anor. v. The King 3 WACA 30 may tend to lead. That was a case of procurement of abortion by the administration of native medicine, a case cited in Nameri and Gabriel Obi. In considering what might amount to an act likely to endanger human life, Verity C.J. (Nigeria) said at page 33:

"It is to be observed that the act must be one such a nature as to be 'likely to endanger human life, and we think that an act cannot be said to be likely to have such a result if a reasonable man would not expect to have such a result, even though in the event that result ensued.

It is necessary to consider, therefore, whether in the circumstances of the present case as established by the evidence, the act of the first appellant was likely to endanger human life in the sense that a reasonable man would expect that probably would do so."

The court then went on to discuss the insufficiency of the evidence as to concoction, or the likely results of its administration, as an abortifacient to a woman who has a pregnancy of three or four months' duration, so as to reach a conclusion that it would be likely to endanger her life. This obviously required such medical evidence that would clearly determine this. This is quite understandable as no other evidence could lead a reasonable man to a safe conclusion that such abortifacient when administered to a woman of that condition would kill her. The learned author of Criminal Law in Nigeria at page 236 *ibid*, while discussing Nameri's case in which the accused raped a 13-year old girl, said:

"He was charged with murder under section 316 (3) but was

convicted of manslaughter on the ground that his conduct was not such as to endanger human life having regards to medical evidence which showed that it is not unusual in Nigeria for 13-year-old girls to have intercourse and that it does not result in death. The case was therefore
 B treated as falling under section 316 (3) except for the fact that the act of the accused was not such as could endanger human life. Probably if the girl had been three years old, the accused would have been convicted of murder under that subsection." (Emphasis mine)

I think the idea that the view or opinion of the ordinary man may
 C be enough to decide whether the act of ravishing a girl and the injury sustained thereby would be such likely to endanger her life is predicated on there being evidence to support this, going by the observation of Bairamian, J. in R. v. Nameri (supra) at page 8 as follows:

"In the case in hand there is no evidence on the nature and
 D extent of the wound caused by the violation of Zulai, or any evidence that in the judgment of ordinary men the act of violation and the wound it may cause to a woman, say a virgin, which Zulai may have been, is one
 E likely to endanger life". (Emphasis mine)

It may well depend on the circumstances of every individual case. I agree with the learned D.P.P that the facts of the act of rape - the manner and violence employed and so on - must be scrutinised as well
 F taking the age of the victim into serious account. It seems to me that age differential, when faced with cases like Nameri where the age of the girl was 13 years and other situations where a girl of very tender age is involve, is capable of presenting a pretty kettle of fish. If the age of the girl per se could lead to the conclusion that the very act of ravishment on
 G her was such as was likely to endanger her life, then this would, admittedly, be regarded as an exception to the opinion expressed by the learned author in the A part of the passage above. That opinion, in my view, is correct as a general principle in the application of s. 316 (3) of the Criminal Code. I do not think it would be safe as a matter of law, without
 H reliable evidence, simply to found an exception to that principle on the mere tender age of a girl in order to convict for murder. The difficulty as to where to draw the line between what age is not unusual where death is

likely from sexual intercourse and what is unusual will be there in many instances if there is no evidence.

To the B part of the passage: the learned author says that if in the course of raping a girl the accused presses the girl's throat to prevent her from screaming and thereby throttles her, a charge of murder under s. B 316 (3) will succeed. This is because the unlawful purpose is rape and the act which causes death is the act of pressing her throat, which act is such as is likely to endanger human life. That was what happened in D.P.P. v. Beard (1920) AC 479 which was referred to in Nameri's case. I C fully endorse this scenario as well put but I will add that the pressing of the girl's throat need not be to prevent her from screaming. It is enough if the accused presses the girl's throat simply in the act of ravishing her knowing that he was indeed pressing her throat but not caring perhaps because of the sheer excitement of the ravishment. This is because, as D part A of the passage must be understood, death resulting in such a situation cannot be seen as arising from "the very act of ravishment" but from the act of pressing the girl's throat in the course or act of raping her - an act likely to endanger human life. It is even more so in my view, if E the rapist pressed his victim's throat as part, or though a desire, of his having maximum satisfaction from the act of sexual intercourse. In both situations, it is immaterial that he did not intend to hurt her.

This takes me to the present case. The victim, Shade, was very F tender in age. No one can dispute the fact that a girl 4 years 9 months old is extremely tender and that it is unusual for her to engage or be engaged in sexual intercourse. But whether death would necessarily result from such sexual intercourse is an open question upon which evidence is re- G quired for a definite conclusion. In Nameri at page 8, Bairamian, J. said: "It is true that the girl was killed by the act of ravishment and it is immaterial that the prisoner did not intend to hurt her; but the question remains whether the act is of such a nature as to be likely to endanger human life." but he added, as already said, that there must be evidence that act H of ravishment was of such a nature as to be likely to endanger human life. In my view, when the appellant used his fingers to fiddle with the vagina of Shade, though a girl of very tender age, it may just be an aspect

of "the very act of ravishment" of her. I cannot upon the evidence available go beyond that. However, it must be said it was a very reprehensible act, apart from being an unlawful act, which will deeply shock any reasonable person and arouse public disgust in a sense difficult to express, for the appellant to have violated Shade's innocence the way he did.

Having considered the relevant authorities on s. 316 (3) of the Criminal Code, I think at the moment it is best to go by the opinion of Okonkwo until circumstances arise, backed by evidence, to justify convicting for murder in cases of rape where death results from the very act of ravishment. This means that under s. 316 (3) when death occurs as a result of the very act of ravishment, manslaughter is the more appropriate crime not murder unless there is compelling evidence. But when for the purpose or in the course of the unlawful act of ravishment, the rapist commits any other act which is of such a nature that is likely to endanger human life, and death results, he is guilty of murder.

In the present case, unfortunately, the evidence available is nearly not enough to support a verdict of murder. For the above reasons, I too will allow the appeal against the verdict of murder and sentence of death of the appellant. I find him guilty of manslaughter and sentence him to 14 years I.H.L., and order that the sentence shall run from the date judgment was given by the trial court.

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