

SUPREME COURT OF NIGERIA
14TH DECEMBER, 2001. SC. 204/1999
CORAM:- A. G. KARIBI- WHYTE, M. E. OGUNDARE,
S. U. ONU, S. O. UWAIFO, A. O. EJIWUNMI, JJSC.

ABAYOMI OLALEKAN APPELLANT
V.
STATE RESPONDENT

CRIMINAL PROCEDURE -Identification -Murder - Where appellant did not contest – That P.W.1 knew him very well - Concurrent finding of fact on his identification - Will not be disturbed (H 1)

CRIMINAL PROCEDURE - Interpreted document - Admissibility- Interpreter's testimony - That does not disclose questions asked and the language - Makes the document inadmissible (H 3)

CRIMINAL PROCEDURE - Interpreter - Of appellant's Statement - Should give detailed evidence - To avoid making the recorded statement hearsay (H 2)

EVIDENCE - Appeals - Witnesses - Tainted witness - Submission that wife of deceased is a tainted witness -Is not correct - As rightly held by the lower courts (H 5)

EVIDENCE - Wrongful admission s. 227 (1) E. A. Murder – Appeal- Reversal - Expunging Exhibit A that was wrongfully admitted - Will not ground a reversal- As miscarriage of justice was not occasioned (H 4)

FACTS

On or about 1.00 a.m on 31st August, 1988, Appellant came to the residence of the deceased, broke the entrance door and shot the deceased who died instantly in his sleep. Appellant then dragged deceased's wife, raped her and inflicted machete cuts on her, she became unconscious. On regaining consciousness, she discovered that

appellant had taken some items belonging to the deceased. She reported what happened to villagers in the neighbouring village who took her to a police station at Ijebu-Igbo where a report was made. From the police station she was taken to General Hospital, Ijebu-Ode for treatment. The corpse of the deceased was taken to a morgue where autopsy was performed on the body by a Doctor.

On trial, appellant denied committing the offence although he admitted knowing the deceased and his wife. Trial judge found the Appellant guilty. His appeal to the Court of Appeal failed. He has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION.

.. Whether the learned Justices of Court of Appeal were right in affirming the conviction of the Appellant by the learned trial Judge."

Arguments ore, however. proffered on four issues, that is to say, (1) identification of the Appellant and (2) the confessional statement (3) non-consideration of Appellant.; defence and (4) 1st PW as a tainted witness

HELD: (Unanimously dismissing the appeal per lead judgment of OGUNDARE JSC)

Identification - Murder

1. In the light of the evidence at the trial and which I have highlighted above, I think the observations of the two Courts below are unassailable. The Appellant, at the trial, did not contest that PW1 knew him very well and could identify him at any time of the day. The question of identification is an issue of fact for the trial court to make a finding on. The learned trial Judge who saw and heard PW 1 give evidence, did not hesitate to accept her evidence. I have no reason to interfere with his finding (which finding the Court below affirmed) that it was the Appellant who invaded the deceased's house on the fateful night, shot and killed him (p. 3410 C)

Interpreter-Of appellant's statement

2. It is not enough, in my respectful view, that the interpreter is called to testify that he acted as interpreter between the accused and the police interviewer, he must testify as to the question or questions he put to the accused on behalf of the interviewer and the answers given to him by the accused person in the latter's own language and which he interpreted to the interviewer in English language. Without this evidence the prosecution would not have proved that the statement sought to be tendered by the interviewing police officer was more than just hearsay. It is not for the defence to establish what went on between the accused and the interpreter. The burden of proving that fact is on the prosecution and not on the defence. It is for this reason that, in my respectful view, the interpreter must be called to testify and to elicit from him, in evidence, what the accused told him that he interpreted to the interviewing police officer (p.3415 A).

Interpreted document - Admissibility

3. In the case on hand. PW3 the interpreter testified. But other than to say he acted as the interpreter between the Appellant and PW6, he was silent on the questions he put to the Appellant and in what language, and the latter's answers. To make matters worse he was also the interpreter between the Appellant and DSP Taverro before whom the Appellant confirmed Exhibit A. In my respectful view more details are required of PW3's evidence to make Exhibit A admissible in law. The conclusion I reach is that the statement ought not to have been admitted in evidence. I reject it in evidence and expunge it from the record.
(p. 3415 H)

Wrongful admission of evidence S.227 (1) E.A

4. The question arises: Is there any evidence apart from Exhibit A to sustain the verdict of guilt of the Appellant? There is the evidence of PW1 which the learned trial Judge accepted there is also evidence that stolen from the house of the deceased on that fateful night were subsequently found in the Appellant's house during a search conducted by the police in his presence. These two taken together are adequate to sustain the verdict of guilt entered against the Appellant. The

conclusion I lean on the admissibility of Exh. A is, therefore, of little comfort to the Appellant. The wrongful admission of the statement has not occasioned any miscarriage of justice. (p. 3416 D)

B Tainted witness

5. Learned counsel for the Appellant has also made submissions on two other issues, namely non-consideration of Appellants defence and PW1 was a tainted witness. I have examined his submission on these issues and I find no merit in them. The learned trial Judge disbelieved the evidence of the Appellant. I have no reason to disagree with the Court below when it affirmed the trial court. Both Courts also found, and quite rightly, in my respectful view, that PW1 was not a tainted witness. We have not been told what purpose of her own PW 1 had to serve in the evidence she gave. It was eye witness account of an incident that took place in her presence and of which she was a victim. Would the facts that her husband was killed and she too sustained serious injuries make her a tainted witness when she gave an account of what happened? I rather think not. (p. 3416 G/3417 D)

**NOTABLE POINTS OF INTEREST
KARIBI-WHYTE JSC**

F 1. Tainted witness defined

The accepted definition of a “tainted witness” is a person who is either an accomplice or who on the evidence may be regarded as having some purpose of his/her own to serve. It is obvious on the evidence that PW1 is not an accomplice. There is nothing on the evidence to suggest that PW1 has any other interest to serve than to identify her assailant and the killer of her husband. It is preposterous reasoning to suggest that the status of the evidence of a wife or husband who witnessed the murder of a spouse or other offence, gives rise to a disqualifying interest which renders such evidence tainted and therefore requires corroboration. A tainted evidence is that which on account of other extraneous interest renders the veracity suspect and therefore less credible. In the instant case PW1 is also a victim of the event whose evidence is in any case

deserving of utmost credibility and whose evidence is probative. (p. 3422 D)

UWAIFO JSC

B

2. Interpreted statement Exh. A – Was rightly admitted

I cannot see how what is contained in exhibit A in the present case would be different from what p.w. 3 interpreted. I cannot also imagine what more he was expected to say from the evidence he gave if he was not cross examined or the cross-examination was not properly directed to relevant questions. I am } therefore satisfied that the prosecution called the necessary witnesses who gave sufficient evidence in the present case to make exhibit A admissible. (p. 3439 H)

D

EJIWUNMI JSC

3. Proof of interpreted statement - Obligation of the prosecution

Bearing in mind that the prosecution has the burden of proving the guilt beyond reasonable doubt of the Appellant, it is my humble view that the prosecution should have approached the proof of the statement of the Appellant strictly with this burden in mind. Therefore, the prosecution should have not only called the interpreter as they did as a witness, but the interpreter should have been made to go through the statement, Exhibit A, in full view of the court in order for him to explain to the court that that was the statement which he interpreted to the Appellant. (p. 3448 G)

G

REPRESENTATION

A. Fashanu Esq. for the Appellant

Chief O. Oyebolu, A.G. Ogun state with him N. I. Agbolu Esq.

D.P.P. Ogun state for the Respondent.

H

CASES REFERRED TO

Raymond Turnbull v. The Queen (1976) 63 Cr. App. R132 at 137 State v. Aibangbee & Anor. (1988) 3 NWLR at p. 548

Igbi v. The State (2000) FWLR 358

- Shivero v. The State (1976) All NLR 230
Ajidahun v. The State (1991) 9 NWLR (pt. 213) 33 at 40-41
Akpan v. The State (1992) 6 NWLR (Pt.248) 439 at 467
R. V Zakwakwa (1960) 5 FSC 12
B R. v. Ogbuewu 12 WACA 483
R. v. Attard (1959) 43 Cr. App. R90
R. v. Gidado 6 WACA 60 at 62
Ishola v. The State (1978) 9-10 SC 81 at p. 100
C Mailayi v. The State (1968) All NLR 117 at 123

STATUTE REFERRED TO

Evidence Act, S. 227

D

LEAD JUDGMENT BY OGUNDARE JSC

This appeal came before us for hearing on Thursday 20th September 2001 and after hearing learned counsel for the appellant
E arguing in favour of the appeal, I summarily dismissed it as lacking in merit and indicated then that I would give my reasons for so doing today. Here below are my reasons.

This is an appeal against the judgment of the Court of Appeal (Ibadan Division) affirming the conviction of the appellant for the murder of Rabiul Kassim and the sentence of death passed on him by the
F High Court of Ogun State sitting at Ijebu-Igbo.

At the trial of the appellant the prosecution called 9 witnesses and tendered a number of exhibits including the appellant's statements to the police. The appellant gave evidence in his own defence and rested his case. After addresses by learned counsel for the defence and the prosecution, the learned trial Judge, in a reserved judgment, found the charge of murder laid against the appellant proved and convicted him accordingly. He was sentenced to death.
G

H The case for the prosecution was that on or about 1.00 a.m. on 31st August 1988 at ATIKORI Village, via Ijebu-Igbo the appellant came to the residence of the deceased and knocked at the entrance door rather violently. The deceased Rabiul Kassim and his wife, Adebisi

Rabiu (PW1) were in the house and asleep at the time. The knock aroused Adebisi Rabiu from sleep but the husband Rabiu Kassim was still sleeping. The appellant broke the entrance door and shot at Rabiu Kassim who was still sleeping at the time. Rabiu Kassim died instantaneously. The appellant following the shooting came into the house, held on to Adebisi, dragged her to the couple's bed and raped her. He later inflicted some matchet cuts on her; she became unconscious. On regaining consciousness she discovered that the appellant had left taking along with him the deceased's dane gun and hunter's lamp, radio and other items belonging to the couple including the sum of N1,000.00. Adebisi went to a neighbouring village - Fowosere Village - and reported what happened to the villagers who took her to the police station at Ijebu-Igbo where a report was made. From the police station, she was taken to the Ijebu Ode General Hospital for treatment. The corpse of the deceased Rabiu Kassim was also taken to hospital morgue at Ijebu-Ode where Dr. Osiyemi performed an autopsy on the body.

Adebisi (PW1), while on admission in the hospital, made a statement to police Corporal Kester Ossai (PW5), then stationed at Ijebu-Igbo police station. In the statement Adebisi mentioned the appellant as her assailant and the murderer of her husband. The appellant who was arrested by the Fowosere villagers in the morning of the incident was again re-arrested by Cpl. Ossai and charged with the offence of murder. He volunteered a statement to Sgt. Ossai in Yoruba language which the latter recorded and read over to the appellant who affirmed that the statement was correctly recorded and thumb-printed it. Cpl. Ossai later translated the statement into English Language. The statement and its English version were tendered and admitted in evidence at the trial. In consequence of the contents of appellant's statement, five others were arrested but later released as there was no evidence, apart from the appellant's statement, against them.

The case was later transferred to the State Directorate of Investigation and Intelligence, Abeokuta for further investigation. Here the appellant made another statement to Sgt. Linus Patricks (PW6) through an interpreter, Inspector Alamu Adeosun (PW3). Being a con

B fessional statement, the appellant was taken to DSP Samson Taverto before whom he affirmed the correctness of the statement. The statement was tendered and admitted in evidence at the trial. Sgt. Patricks executed a search warrant in the house of the appellant where a number of items including dane guns, were recovered. Some of the items were identified by Adebisi (PW1) as belonging to her and her husband and stolen from their house on the fateful night.

C In his evidence at the trial, the appellant denied committing the offence. He admitted knowing the deceased and his wife Adebisi but denied killing the deceased.

D It is on these facts that the learned trial Judge found the appellant guilty. His appeal to the Court of Appeal failed. He has further appealed to this court. Although in his brief of argument filed on his behalf by his learned counsel, only one issue is formulated as arising for determination in this appeal, to wit:

“Whether the learned Justices of Court of Appeal were right in affirming the conviction of the appellant by the learned trial Judge.”

E Arguments are, however, proffered on four issues, that is to say, (1) identification of the appellant and (2) the confessional statement; (3) non-consideration of appellant’s defence and (4) 1st PW as a tainted witness. The first two issues come within the ambit of the grounds of appeal raised in the amended notice of appeal.

F In resolving this appeal therefore, I shall first consider the two issues.

Issue (1) - Identification of the Appellant:

G Both in his briefs and oral submissions, Mr. Fashanu learned counsel for the appellant laid emphasis on the time the incident leading to the death of the, deceased took place. He referred to the evidence of PW1 who put the time at 1.00 a.m. He argued that there was no evidence that there was any lighting in the room at the time, it would be difficult, if not impossible to come to the conclusion that PW1 had opportunity to identify the appellant as the assailant that night. He urged
 H the court to apply the test laid down by the Court of Appeal (England) in Raymond Turnbull v. The Queen (1976) 63 Cr. App. R132 at 137 and to hold that the appellant was not properly identified as the assailant.

With respect to learned counsel, I think he lost sight of the evidence adduced at the trial. PW 1 testified thus:

"I know the accused and Rabiun Kassim now deceased, he was my husband.

On 31.8.88 at about 3 years ago the accused knocked at the door of the house where I live forcibly, I woke up at the time, he finally broke the door, and shot my late husband who was fast asleep. The deceased died on the spot after shooting. The accused dragged me to the bed and raped me. He later took a matchet which he used to wound me on the left face and right shoulder (Witness demonstrates) and right palm which I raised in defence. I became conscious (sic), when I later recovered, the accused was not around and my wares and belongings were missing."

She was not cross-examined on how she came to know it was the appellant who did those horrible things that night.

The appellant in his evidence, under cross-examination, said:

"I know the deceased as my father's friend. I know deceased's wife. I did not attend any school. PW1 and the deceased used to visit my (sic) day and (night). I know both of them sell pellets and I used to buy from her."

Further cross-examined, he added:

"I know PW1 who know (sic) me I told the police that the deceased was my father's friend."

And in his first statement (Exh. F - English version), he had said: "Rabiun was my father's friend before he died and I have been going to their house since a long time ago. I have my personal dane gun which I use for hunting and the gun is in my house up till (now) the time I came to Ijebu Igbo. There is no time when the wife of Rabiun will see me that she will not recognise me whether during the day or night.

If the woman recovers and she happens to say that I was the person who did the havoc, they should kill me immediately because the woman knows me both day and night."

The trial court had this to say on identification of the appellant:

"I hold from the evidence before me after careful consid-

eration that there is no need for identification parade as PW1 and the accused person are well known to each other."

The court below, in reacting to the appellant's complaint that the trial Judge did not adequately consider the issue of his identification by PW1 as the person who shot and killed the deceased Rabi, observed, per Adekeye, JCA:

"The 1st PW find ample opportunity to see and identify the accused who is well-known to her, as he shot the deceased, attempted to rape her and inflict machet cuts on her,"

In the light of the evidence at the trial and which I have highlighted above, I think the observations of the two courts below are unassailable. The appellant, at the trial, did not contest that PW1 knew him very well and could identify him any time of the day. The question of identification is an issue of fact for the trial court to make a finding on. The learned trial Judge who saw and heard PW1 give evidence, did not hesitate to accept her evidence. I have no reason to interfere with his finding (which finding the court below affirmed) that it was the appellant who invaded the deceased's house on the fateful night, shot and killed him. I think the evidence available in this case met the standard laid down in such cases as *Turnbull v. The Queen* (1976) 63 Criminal Appeal Reports 132 at p. 137 (cited by learned counsel for the appellant), *State v. Aibangbee & Anor.* (1988) 3 NWLR (pt.84) 548 (cited in the lead judgment of the court below) and *Igbi v. The State* (2000) FWLR 358, (2000) 3 NWLR (Pt.648)169. PW1 not only claimed she knew the appellant, the latter admitted this and went on to say that their relationship had been a close one over a period.

I find no substance in the complaint on identification.

Issue 2

Appellant's confessional statement.

It is the argument of learned counsel for the appellant that as the appellant's confessional statement Exhibit A was obtained by PW6 through an interpreter, PW3 who did not testify of the interview he conducted culminating into Exhibit A, the statement was inadmissible and should be expunged from the record even though objection was not taken to it at the trial.

PW6, Sgt. Linus Patricks testified thus:-

“On 6th day of November, 1988 I was on duty at the State Directorate of Investigation Bureau Abeokuta when a case of murder transferred from Ijebu-Igbo Police Station was referred to me along with the accused person for further investigation. On 7th September 1988 the accused person was re-arrested, cautioned and charged with the offence of murder through the medium of an interpreter. He volunteered his statement in Yoruba language. I recorded the statement in English through an interpreter, same was read over to him through the interpreter, he accepted it to be true and correct before affixing his thumb print. The interpreter and myself signed the statement.”

Inspector Aremu Adeosun who was referred to in the evidence of PW6 testified as PW3. He said:

“On 7.9.88 a case of murder was referred to Sgt. Patrick Linus for investigation. I acted as an interpreter between the said Sgt. and the accused. The Sgt. obtained the accused’s statement, read same to him and he admitted that it was true and correct. I read the accused confessional statement to him and he admitted that it was true. He thumb printed the said statement. I signed the statement as the interpreter along with the I.P.O.

On 8.9.88 the accused person was brought before my superior police officer named Stephen Taverro D.S.P. who read the accused’s statement to him (accused) and I interpreted same to the accused in Yoruba language. The accused agreed that the statement was true and correct; he agreed that it was made voluntarily. The superior officer filled admission confession form in the presence of the accused, I.P.O. and myself, the form was explained to the accused and he agreed that the contents were true. He affixed his thumb to the form which I signed along with the I.P.O. and Mr. Stephen Taverro.”

It is learned counsel’s submission that the statement, Exhibit A is hearsay evidence. And as no evidence was forthcoming from PW3 as to the nature and detail of the confession appellant made to him which he interpreted to PW6, Exhibit A was wrongly admitted in evidence.

In reply to the submissions of learned counsel for the appel-

lant, the learned Attorney-General of Ogun State, Chief Oluseyi Oyebolu argued thus:

"It is submitted with respect that Ex. A was never taken in Yoruba Language which Yoruba version should have been tendered through P.W.3 together with Exh. A as espoused in judicial authorities. See Shivero v. The State(1976) All NLR 230; Ajidahun v. The State (1991) 9 NWLR (pt.213) 33 at 40-41. The procedure adopted in obtaining Exh. A. was sufficient in law to ensure that the appellant understood what he thumb-printed. See Akpan v. The State (1992) 6 NWLR (Pt.248) 439 at 467 paragraphs D-E. PW.3 gave evidence on the role he played in obtained (sic) Exh. 'A' and that he did not record any statement but merely acted as an interpreter. The appellant through his counsel at the trial court did not object to the appellant's statement (Exh.A) being tendered.

It is submitted with respect that Exhibit A did not fall into the category of hearsay evidence rule as enunciated in Shivero v. The State (supra). Also, the appellant's counsel did not cross-examine PW3 as to the truth, voluntariness or otherwise of Exhibit 'A'; hence this honorable court cannot entertain the complaint on appeal, It is further submitted that P.W.3 testified during trial when Exhibit "A" was tendered, unlike in decided cases where the interpreter was never called as a witness at the trial, which will make such evidence hearsay see R v. Zakwakwa (1960) 5 FSC 12. This honorable court is therefore, urged not to expunge Exhibit "A" and to hold that the trial court and the court below were right in considering Exhibit "A" as pan of the prosecution's case."

It would appear that the objection taken to Exhibit A in this court is different to the objection raised on it in the court below. In that court it was the question of its voluntariness that was contested as borne out by issue 3 raised in the appellant's brief in that court. And this led to the observation of the court to the effect that

"When the voluntariness of a confession is being denied, a trial within trial will be held, but if the statement is voluntarily made then it is admissible by virtue of Section 27 of the Evidence

Act Laws of the Federation of Nigeria 1990.

It is however noteworthy that when an accused person alleged that the confessional statement credited to him is made under duress or not made voluntarily by him, objection must then be raised to its admission when the statement is sought to be tendered in evidence and not after they have (sic) been admitted in evidence.” B

Of course, this observation represents the law and to that extent, their lordships of the court below arrived at a correct decision,

In this court, however, a new ground of attack was opened. C And this is that Exhibit A is hearsay evidence and, therefore, inadmissible. If Exhibit A is inadmissible in law, then the question of its inadmissibility can be raised even at this stage. This is so because a court is enjoined to decide a case on legal evidence only. The question I now have to determine is whether Exhibit A is inadmissible. D

Exhibit A was taken down by PW6 in English language. The Appellant did not speak to him in that language but in Yoruba. PW6 does not understand Yoruba language. So he needed someone to interpret to him. PW3 was the interpreter. The appellant spoke to PW3 in Yoruba language and the latter interpreted this to PW6 in English language which the latter wrote down in that language as Exhibit A. Surely, what PW6 wrote down can only be hearsay evidence and therefore inadmissible unless the interpreter is also called to testify - see: R v. Ogbuewu 12 WACA 483; where the West African Court of Appeal F stated:

“It often happens that statements have to be made to the Police through an illiterate interpreter and so cannot be written down in the language in which made. What this court has said, as have other courts also on innumerable occasions, is that, where an interpreter has had to be used in the taking down of a statement, the statement is inadmissible unless the person who interpreted it is called as a witness as well as the person who wrote it down. This necessity is frequently over-looked and it may be that rejections of statements for this reason have given rise to a belief that statements are inadmissible unless written in the language in which made. But this is not so; it is a matter of proof and not of H

admissibility. This is one of the reasons which make it better (as we have already said) that statements should be written down in the language used whenever it is practicable to do so."

See also *Zemba Shivera v. The State* (1976) All NLR 230; (1976) 10 NSCC 197; *The Queen v. Zakwakwa* 5 FSC 12. The evidence of the interpreter must relate to the question or questions he put to the accused person on behalf of the interviewing police officer and the answers given to him by the accused person in the latter's own language - *R. v. Attard* (1959) 43 Crim. App. Report 90. See also *R v. Gidada* 6 WACA 60 at 62 where the West African Court of Appeal observed:

"It seemed to us that this failure on the part of the trial Judge to appreciate the inadmissibility as evidence of alleged statements by the appellant, when such statements were not confirmed and established by the persons acting as interpreters, was fatal to the conviction herein in that the learned trial Judge misdirected himself in accepting such statements as having been proved."

In *R. v. Attard*, the prosecution proposed to call evidence by a police officer of an interview which he had conducted with the prisoner through an interpreter. The defence submitted that, since neither the police officer nor the prisoner could understand what the interpreter said to the other, the evidence of the police officer was inadmissible as being hearsay, and that only the interpreter could give evidence of the questions which he put to the prisoner on behalf of the police officer and of the answers given to him by the prisoner in the prisoner's own language. It was held by Gorman, J sitting on the Central Criminal Court (England) that the submission was correct and that the evidence of the police officer in relation to the interview was inadmissible. The learned Judge summarised the submission of Mr. Edward Clarke, defence counsel, which he accepted, thus:

"It is said by Mr. Edward Clarke that, when there is an interview of that kind, the best person, or the nearest person to the prisoner, is the interpreter, and the interpreter, he does not dispute, can be called to say: 'I heard the detective-superintendent put the question. I then translated that question. I said this to the prisoner and the prisoner said this to me'; the interpreter be

ing asked as a sort of intermediary between the non-English-speaking prisoner and the English speaking detective superintendent." This point which was novel in English law in 1959 had been part of our law in Nigeria since 1940 when *R v. Gidodo* was decided by the old West African Court of Appeal. ***It is not enough, in my respectful view, that the interpreter is called to testify that he acted as interpreter between the accused and the police interviewer; he must testify as to the question or questions he put to the accused on behalf of the interviewer and the answers given to him by the accused person in the latter's own language and which he interpreted to the interviewer in English language. Without this evidence the prosecution would not have proved that the statement sought to be tendered by the interviewing Police officer was more than just hearsay. It is not for the defence to establish what went on between the accused and the interpreter. The burden of proving that fact is on the prosecution and not on the defence. It is for this reason that, in my respectful view, the interpreter must be called to testify and to elicit from him, in evidence, what the accused told him that he interpreted to the interviewing Police officer.*** In the wake of *R v. Attard*, the Home Office in England, at the suggestion of the Director of Public Prosecutions issued a circular to Chief Officers of Police stating that:

"it will be necessary in similar cases in the future to ensure that the interpreter is available to give evidence as to oral statements made by the accused, as is already done in the case of written statements. It will be desirable that, whenever practicable, the interpreter should make his own notes of the interview for use in the event of his being called to give evidence. Failing this, the interpreter should be asked to initial the record of the interview made in the notebook of the police officer conducting the interview, so that it can be used by the interpreter to refresh his memory when giving evidence."

I think the contents of this circular meet the requirements of *R v. Gidodo* and other similar cases.

In the case on hand, PW3 the interpreter testified. But

other than to say he acted as the interpreter between the appellant and PW6, he was silent on the questions he put to the appellant and in what language, and the latter's answers. To make matters worse he was also the interpreter between the appellant and DSP. Taverro before whom the appellant confirmed Exhibit A. In my respectful view more details are required of PW3's evidence to make Exhibit A admissible in law. The conclusion I reach is that the statement ought not to have been admitted in evidence. I reject it in evidence and expunge it from the record.

This, however, is not the end of the matter. Section 227(1) of the Evidence Act provides:

"227. (1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case, where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted."

The question arises: Is there any evidence apart from Exhibit A to sustain the verdict of guilt of the appellant? There is the evidence of PW1 which the learned trial Judge accepted. There is also evidence that items stolen from the house of the deceased on that fateful night were subsequently found in the appellant's house during a search conducted by the Police in his presence. These two taken together are adequate to sustain the verdict of guilt entered against the appellant. The conclusion I reach on the admissibility of Exh. A is, therefore, of little comfort to the appellant. The wrongful admission of the statement has not occasioned any miscarriage of justice.

Learned counsel for the appellant has also made submissions on two other issues, namely non-consideration of appellant's defence and PW1 was a tainted witness. I have examined his submissions on these issues and I find no merit in them. The learned trial Judge disbelieved the evidence of the appellant. I have no reason to disagree with the court below when it affirmed the trial court. Both courts also found, and quite rightly, in my respectful view, that PW1 was not a tainted wit-

ness. In *Ishola v. The State* (1978) 9-10 SC 81 at p.100, this court, per Idigbe JSC, admonished -

“We think it is proper to confine this category of witness (i.e. ‘tainted’) to one who is either an ‘accomplice’ or, by the evidence he gives, (whether as witness for the prosecution or defence) may and could be regarded as having some purpose of his own to serve”. B

See also *Mailayi v. The State* (1968) All NLR 116 at 123 where this court, per Coker JSC observed:

“Recently there has been a tendency among criminal lawyers to create a category of ‘tainted’ witnesses but as counsel for the appellants did not dilate on this, we do not think that a close consideration of that issue arises in the present case. We however observe that the expression ‘tainted’ is very loose and if its application is not kept within proper bounds a great deal of confusion will be unleashed into an area of evidence which even now is fraught with difficulties.” D

We have not been told what purpose of her own PW1 had to serve in the evidence she gave. It was eye witness account of an incident that took place in her presence and of which she was a victim. Would the facts that her husband was killed and she too sustained serious injuries make her a tainted witness when she gave an account of what happened? I rather think not. E

From all I have been saying above, I find no merit in this appeal which is accordingly dismissed. I affirm the conviction for murder and the sentence of death imposed on the appellant. F

KARIBI-WHYTE JSC

 G

After hearing the parties on the dismissal of the appeal of appellant against his conviction for murder by the High Court and by the Court of Appeal on the 20th September, 2001, I summarily dismissed the appeal of the appellant and stated that I will give my reasons for so doing today. I hereunder set out my reasons. H

Introduction:

Appellant was on the 14th February, 1991 indicted on informa

tion for the offence of murder contrary to section 316(a) and punishable under section 319(1) of the Criminal Code, Cap.29 Vol. 11 Laws of Ogun State at the High Court of Ogun State sitting at Ijebu-Ode. After hearing the evidence of witnesses for the prosecution, and the appellant gave evidence on his own defence, the learned trial Judge, Ade Adenubi J. on 13th December, 1993 found the offence proved and convicted him as charged and sentenced him to death. Appellant appealed against both conviction and sentence on four grounds of appeal. The Court of Appeal heard argument of the parties in the appeal, and on the 14th July, 1999 dismissed the appeal of the appellant and affirmed the judgment of the learned trial Judge. Still dissatisfied, appellant has appealed to court of appeal in which it was alleged that the court erred in affirming the conviction of the appellant. By a motion dated 7th May, 2001 appellant sought and was granted leave to amend the notice of appeal filed on 4th October, 1999. The amended notice of appeal contains three grounds of appeal challenging the identification of the appellant, the admission of the confession, and non-consideration or inadequate consideration of the defence of the appellant.

Appellant and the respondent filed their briefs of argument. Only one issue for determination agreed to by both parties has been formulated from the grounds of appeal filed. This is as follows:

“Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant by the learned trial Judge.”

It is necessary to state the facts of this case which has resulted in the appeal before us, before considering the issue for determination formulated.

The Facts-

The case of the prosecution in the trial court was that on 31st August, 1988 at about 1.00 a.m., appellant knocked on the door of the house occupied by PW1 and her husband. Before the door could be opened for the appellant, he broke open the door and shot the husband who was fast asleep. The husband died on the spot. Thereafter, appellant dragged PW1 to the bed and raped her. He later inflicted machet cuts on the left side of her face, right shoulder and right palm which

she raised to defend herself.

PW1 became unconscious as a result of the attack. When she regained consciousness, PW1 observed that appellant had left but took with him her wares and property such' as radio, pomade, gun powder, hunter's lamp, blades, N1,000, etc. including the dane gun of her husband, the deceased. PW1 later went to the neighbouring Fowosere Village to report the incident to the villagers. She told them that it was appellant that killed her husband and also inflicted machet cuts on her. She was taken to the Ijebu-Igbo Police Station and later to Ijebu-Ode General Hospital where she was hospitalised for about two months. PW1 identified the appellant to the Police as her assailant and as the person, who killed her husband, the deceased. B C

Appellant denied the charge against him. He made two statements, one, Exhibit E, which is exculpatory whereas the second Exh. A-A1 is confessional. On search at the residence of appellant, Exhibits G.H.J.K were recovered. These are items claimed to belong to PW1. Exhibits P and R, Police Forms used in recording the recovered items were recorded in English without an illiterate jurat. Appellant merely thumb printed. Similarly, he confessional statement Exhibit A-A1 was not recorded in the Yoruba language in which appellant made the statement. D E

In his judgment at the trial, the learned trial Judge held that the question of identification of the appellant did not arise as it was never in issue throughout the trial. This was because the accused admitted he knew the deceased and PW 1, also stated in evidence that appellant was well known to her. PW1 was the only eye witness. F

The learned trial Judge referred to the confessional statement of the appellant Exh. "A" and held that it was voluntary. He regarded the confession as a relevant factor supporting the case of the prosecution. The ingredients of the offence of murder were held to have been proved beyond reasonable doubt. G

The Court of Appeal affirmed the judgment of the trial Judge on both the identification of the accused and the admission and reliance on the confession Exhibit A by the learned trial Judge. H

Arguing, the only issue for determination formulated, learned counsel to the appellant considered (a) the issue of the identification of the appellant by PW1, (b) the confessional statement of the appellant, (c) the non-consideration of appellant's defence, and (d) the weight of the evidence of PW1 as a tainted witness. These contentions were urged under the general umbrella of the only issue whether the Court of Appeal was right in affirming the judgment of the learned trial Judge.

It is helpful to consider the submissions on (a) and (d) together. I shall then consider (b) and (c) separately each of which stands alone.

Arguments of learned counsel - (1) For the Appellant

Mr. Fashanu, learned Counsel to the appellant made elaborate submissions on the question of the identification of appellant by PW1, both in appellant's brief of argument and oral expatiation of same before us.

Mr. Fashanu admitted that the evidence of PW1 was the only eye witness to the event, but submitted that the findings of the evidence of the identification were in conflict and inconsistent. Reliance for this submission was on the evidence of PW1 that she was woken up from sleep at about 1 a.m. by the knock at the door by the accused. Accused forcibly broke open the door before she could open it, shot at and killed 'her husband who was still fast asleep, dragged PW1 to the bed and raped her.

Learned counsel argued that the Court of Appeal which affirmed the finding of the learned trial Judge that on the evidence there was no need for identification as PW 1 and the accused persons were well known to each other, went on to observe that the issue of illumination of the room was not considered by the learned trial Judge.

He then submitted that in view of the failure on the part of the learned trial Judge to consider the issue of the illumination of the room, it will be difficult to come to the conclusion that PW1 had opportunity to identify the appellant at 1 a.m., the time of the commission of the alleged offence. Mr. Fashanu cited and relied on *Turnbull v. The Queen*.(1976) 63Cr. App. R. 132; *Abudu V. the State*(1985) 1 NWLR (Pt .1) 55; *Ajibade v. State* (1987) 1 NWLR (pt.48) 205, *Asakitikpi v. State* (1993) 5 NWLR (pt.296) 641.

It was submitted that if the courts below had taken into account the time of the incident, which was at 1 a.m. and the total absence of illumination of the room, they would have come to the conclusion that the quality of the identification was poor and was not strong enough to link appellant with the commission of the offence. It was learned counsel's contention that the issue of identification and therefore identity of the appellant was not properly considered and resolved. The findings though concurrent are perverse and ought to be set aside. (b) Respondent: Chief Oyebolu, Hon. Attorney-General for Ogun State arguing the case for the respondent submitted on the evidence of PW1 and PW8 that identification of appellant as the killer of the deceased was proved beyond reasonable doubt. It was further submitted that the evidence of appellant of acquaintance with the deceased's family on cross-examination that the possibility of mistaken identity of appellant by PW1 should not be considered.

It was argued that since PW1 was not cross-examined on the question whether her room was illuminated at the time of the incident. It is immaterial in the determination of the identification of appellant. The Hon. Attorney-General referred to *Abudu v. The State* (1985) 1 NWLR (Pt. 1) 55; *Ajibade v. The State* (1987) 1 NWLR (Pt.48) 285; *Asakitiki v. The State* (1993) 5 NWLR (Pt.296) 64] relied upon by learned counsel to appellant are cases on the consideration of the weakness of identification evidence, and where the identification is doubtful. They are not applicable to the facts of the instant case where the evidence of identification of appellant was positive, direct and spontaneous. We were urged to uphold, and not to disturb the findings of the courts below.

Consideration of the Contentions

I have considered the submissions of learned counsel. I am of opinion the findings of the two courts below are unassailable. It is important to observe that appellant never contested the fact that he was well known to PW1 and that he could be identified by her at any time of the day or night. There was no evidence that PW1 was in doubt as to the identity of the person who broke into her house, shot and killed her husband and raped her. PW1 had no hesitation in disclosing his

identity to the members of Fowosere Village as stated by PW8.

The evidence before the learned trial Judge, and affirmed by the court below met the requirements laid down in *Turnbull v. The Queen* (supra); *State v. Aibangbee & Anor.* (1988) 3 NWLR (pt.84) 548. There is therefore no reason to interfere with the concurrent findings of the courts below. There is accordingly no substance in the criticism of the identification of the appellant by PW1.

Consideration of arguments that PW1's evidence is tainted -
 C The other complaint is that the evidence of PW1 should be regarded as tainted being the wife of the deceased who has her own purpose to serve. It was submitted that the learned trial Judge misdirected himself in law in holding that the PW1 is not an interested party. It was therefore argued that her evidence required corroboration.

D The accepted definition of a "tainted witness" is a person who is either an accomplice or who on the evidence may be regarded as having some purpose of his/her own to serve. - See *R. v. Enahoro* (1964) NMLR 65; *Ifejirika v. The State* (1999) 3 NWLR (Pt.593) 59;
 E *Ogunlana v. The State* (1995) 5 NWLR (Pt.395) 266. It is obvious on the evidence that PW1 is not an accomplice. There is nothing on the evidence to suggest that PW1 has any other interest to serve than to identify her assailant and the killer of her husband. It is preposterous reasoning to suggest that the status of the evidence of a wife or husband who witnessed the murder of a spouse or other offence, gives rise to a disqualifying interest which renders such evidence tainted and therefore requires corroboration. A tainted evidence is that which on
 F account of other extraneous interest renders the veracity suspect and therefore less credible. In the instant case PW1 is also a victim of the
 G event whose evidence is in any case deserving of utmost credibility and whose evidence is probative.

It is not disputed, and the learned trial Judge found that PW1 was the only eye witness to the incident. In *Oteki v. Bendel State*
 H (1986) 2 NWLR (pt.24) 648, it has been held,

"Where the evidence of a single witness is sufficiently probative of the offence charged the fact that the witness has other

personal interests of his own to serve, is by itself not sufficient to reject such evidence. The effect of such interest is to place the trial Judge on his guard to warn himself as to the veracity of the evidence.”

The court is therefore entitled to accord the evidence of PW1 the credibility it deserves and its probative value. The evidence of PW1 as to the identity of the appellant is direct and positive and required no corroboration. - See Onafowokan v. The State (1987)3NWLR (pt.61) 538; Oteki v. A. -G, Bendel State (1986) 2 NWLR (pt.24) 648.

In Admissibility of Exhibit A

The other matter which call for consideration is the admissibility vel non of the confessional statement of the appellant in the trial court, and its affirmation by the court below. The main thrust of the argument of appellant’s counsel is that the learned trial Judge relied heavily on the confessional statement of appellant as a relevant factor in support of the case of the prosecution. It was submitted that the statement, which was hearsay, was inadmissible. This is because it was not recorded by PW6 in the language in which it was made, PW3 and the person who interpreted to the recorder of the statement was not called to give evidence of the interpretation. Appellant therefore had no opportunity to cross-examine the interpreter on the statement credited to him. It was pointed out that the confessional statement was tendered through PW6, the recorder, after PW3 the interpreter had already given evidence.

It was submitted that on the authority of decided cases there was the need to call the interpreter of a statement whenever the statement of the accused was obtained through an interpreter. The rationale of the rule is to allow the court to consider the detailed statement of the accused as given by the interpreter. Exhibit A, the confessional statement which is inadmissible evidence should be expunged from the record as it ought not to have been admitted in the first instance. Learned counsel cited and relied on Attard v. State (1959) 43 Cr. App. R. 90; Shivero v. The State (1976) All NLR 230; R. v. Gidado (1940) 6 WACA 60; R. v. Ogbuwu (1949) 12 WACA 483; Alade v. Olukade (1976) 10 NSCC 34, (1976) 2 SC 183.

In answer to the submission of learned counsel to the appellant, learned counsel to the respondent has argued that the decided cases relied upon by appellant are not applicable to the facts of the

instant case. It was submitted that the statement Exhibit A was taken down in English language by PW6 through interpretation by PW3 from Yoruba language. There was evidence that PW3 interpreted and explained what appellant said in Yoruba language to PW6 who recorded same in English language before appellant thumb-printed. PW3 signed as interpreter of the statement.

B This same procedure was adopted during attestation of Exhibit A before the Superior Police Officer, - Mr. Stephen Taverro.

Learned Counsel distinguished the instant case from earlier decided cases relied upon where the statement was taken in the language in which the statement was made and which should have been tendered through the interpreter. - See *Shivero v. The State* (1976) All NLR 230; *Ajidahun v. The State* (1991) 9 NWLR (Pt.213) 33. It was submitted that the procedure adopted in obtaining Exhibit A was satisfying in law to ensure that appellant understood what he thumb printed - See *Akpan v. The State* (1992) 6 NWLR (pt.248) 439; *Mohammed v. The State* (1991) 5NWLR (pt.192) 438. The statement of PW3 in his evidence at the trial was that he did not record any statement, but merely acted as an interpreter, which was a statement of his role and was never contradicted or challenged by the defence. There was no objection by the defence at the trial to the tendering of Exhibit A. The voluntariness or otherwise of Exhibit "A" cannot be challenged on appeal. Exhibit "A" did not fall within the category of hearsay evidence rule as enunciated in *Shivero v. State*. (1976) All NLR 230.

F It was pointed out that unlike in those cases where the interpreter was not called as a witness at the trial. PW3 testified as a witness - See *Zakwakwa v. Queen* (1960) 5 FSC 12 (1960) SCNLR 36. The courts below were right in considering, Exhibit A, as part of the case for the prosecution. It should not be expunged. Exhibit A, which has been proved to have been made voluntarily is an extra judicial confession. It is a direct, positive and unequivocal admission of the commission of the offence and sufficient for the conviction of the appellant even after retraction at the trial- See *Aremu v. The State* (1984) 6 SC 85.

H It seems to me that the contention of learned counsel to the appellant is that Exhibit A which contains the confession of the appellant is hearsay evidence and accordingly inadmissible in the trial of the appellant. The question whether the confession is admissible is not made an issue

before us. It is therefore important in the resolution of this issue to determine whether the confession is inadmissible or that the statement made by the appellant is hearsay and therefore inadmissible.

It is relevant to observe that no objection was raised against the confession at the trial. The question of the voluntariness vel non was not in issue. It was obvious that appellant made the statement in Exhibit A voluntarily. The question of its admissibility on that ground did not therefore arise. By virtue of Section 27(1) of the Evidence Law, a confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime.- See *Saidu v. The State* (1982) 4 SC 41. It is well settled that an accused can be convicted on his confession statement which is consistent with other ascertained facts which had been proved - See *Ntaha v. The State* (1972) 4 SC 1. A confession statement does not become inadmissible merely because the accused subsequently denies making it, and the fact that the accused took the earliest opportunity to deny 'having made it may lend weight to his denial, but it is not sufficient reason for ignoring the statement. - See *Shittu v. State* (1970) 1 All NLR 228; *Queen v. Itule* (1961) 1All NLR 462, (1961) 2 SCNLR 183; *Ikpassa v. A.-G., Bendel State* (1981) 9 SC 7.

The issue in this case is not that appellant did not make the confession statement in Exhibit A. It is that the statement he made in Yoruba which was interpreted to PW6 in English by PW3 and was recorded by PW6 in English Language and signed as, correctly recorded by appellant was hearsay, and therefore inadmissible even though the appellant signed that the statement recorded by PW6 from the interpretation of what appellant told PW3 in English was his correct statement. It is well established law that the evidence of a statement made to a witness by a person who is not called as a witness is called "hearsay" if the object of such evidence is to establish the truth of what is contained in the statement. It is a statement made by a person while giving oral evidence in the proceedings as evidence of any fact stated. - See *Subramaniam v. Prosecutor* (1965) 1 WLR 965; *The State v. Dandeson Ogbolu & Ors.* (1972) ECSLR 438 *Akingboye v. Salisu* (1999) 7 NWLR (Pt.611) 434; *Omo v. JSC* (2000) 12 NWLR (Pt.682) 444.

It would seem from the submission of learned counsel to the appellant who relied on the contention that because PW3 who inter-

preted appellant's statement made in Yoruba to PW6 in English did not give evidence of that fact as to the nature and detail of the confession made to him, the statement Exhibit A was inadmissible and wrongly admitted in evidence.

B It is pertinent to observe that the inadmissibility of Exhibit A was being raised for the first time before us. In the court below the issue raised against Exhibit A was the voluntariness of the making of the statement which was rightly rejected. Appellant did not raise objection when the statement of appellant was being tendered.

C The issue that Exhibit A is inadmissible in evidence on the grounds that the statement received was hearsay if established was sufficient for expunging Exhibit A from the proceedings. Exh. A being inadmissible ab initio. Learned counsel to the appellant has relied on the argument that Exhibit A was tendered through PW6 who merely D recorded the statement in English language as interpreted to him from Yoruba language by PW3. PW3 who was a witness in the proceeding did not give evidence of the confession in relation to Exhibit A. Appellant therefore had no opportunity to cross-examine PW3 on the content of Exhibit A tendered by PW6 after PW3 had given his evidence. E The statement Exhibit A tendered through PW6 was therefore hearsay and inadmissible. The contention is based on the proposition that whenever a statement of an accused is obtained through an interpreter, there was the necessity to call the interpreter as a witness. This is to F enable the court to consider the detailed statement as given by the interpreter.

I have read the decided cases cited as authority in support of the proposition and particularly the West African Court of Appeal G decisions in *R. v. Gidada* (1940) 6 WACA 60; and *R. v. Ogbuewu* 12 WACA 483. The Supreme Court decision in *Zakwakwa v. Queen* 5 FSC 12 (1960) SCNLR 36 and the judgment of this Court in *Shivero v. The State* (1976) All NLR 230.

H I have already stated the procedure followed in the making of Exhibit A, and also that it was tendered at the trial through PW6 who recorded in English language the statement of appellant made in Yoruba language as interpreted to him in English language by PW3. It is obvious therefore the statement of appellant in Exhibit A could not have

been recorded in Yoruba language even though made in Yoruba. It was recorded in English language, which was a translation of the Yoruba version of the statement. The important element is that the English translation of the Yoruba language version was interpreted to appellant who agreed to its correctness and thumb printed accordingly.

There is evidence in the instant case that the interpreter PW3 signed the statement Exhibit A as having interpreted it.

The general proposition is well settled that where an interpreter has been used in the recording of a statement, the statement is inadmissible unless the person who interpreted it is called as a witness as well as the person who wrote it down. - See *R. v. Ogbuewu* (1949) 12 WACA 483. The necessity of the interpreter confirming the statement and therefore rendering it admissible was stated in *R. v. Gidado* 6 WACA 60, at p.62.

In *R. v. Ogbuewu* (supra) the court made a very pertinent observation of the error which still affects the courts. After stating that a statement is inadmissible unless the person who interpreted it is called as a witness as well as the person who wrote it down. It was pointed out that rejection of statements for this reason have given rise to a belief that statements are inadmissible unless written in the language in which made. But this is not so it is a matter of proof and not of admissibility.

Learned counsel for the respondents pointed out the undisputed fact and I agree entirely that Exhibit A was never recorded in Yoruba language necessitating tendering it in Yoruba language through PW3 who interpreted in Yoruba into English language, as stated in *Ajidahun v. The State* (1991) 9 NWLR (Pt.213) 33; *Shivero v. The State* (1976) All NLR 230. The method of obtaining the statement Exh. A in the instant case was acceptable in law to ensure that appellant understood what he signed and agreed that it was his statement by thumb-printing the statement See *Akpan v. The State* (1992) 6 NWLR (Pt.248) 439.

It is true as is required that the evidence of the interpreter should relate to the question or questions he put to the appellant on behalf of the interviewing police officer and the answers given to him by the appellant. This is obviated by the acceptance of the appellant that the statement is a correct version of what he told the interpreter.

I agree with the submission of learned counsel to the respondent that Exhibit A did not fall within the hearsay rule as enunciated in *Shivero v. The State* (supra) where the interpreter neither testified at the trial, nor was the interpretation of the admission recorded in writing. Similarly, *Zakwakwa v. Queen* (1960) SCNLR 36.

Again in *R. v. Gidado* (1949) 6 WACA 60, the statements were not confirmed and established by the person acting as interpreter. This was regarded as fatal to the conviction since the learned trial Judge did not appreciate the inadmissibility of the statement.

Exhibit A in the appeal before us is clearly different and distinguishable from the facts of all the other cases cited before us. The statement Exhibit A was made in Yoruba language, interpreted into English language and recorded in the English language. It was interpreted into Yoruba language to appellant who agreed it was correct and signed the statement so translated as Exhibit A. It is not disputable that the statement tendered by PW6, which was signed by appellant as a correct version of what he said to PW3, cannot in the circumstance be regarded as evidence of a statement made to a witness by a person who is not called as a witness. It is in my considered opinion not hearsay evidence.

The correctness of Exhibit A was not challenged by appellant when it was tendered at the trial. There is therefore no juridical basis on which Exhibit A could be expunged from the record. The observation of the court in *R. v. Ogbuewu* (supra) that statements should be whenever practicable recorded in the language in which it was made is a practical wisdom directed to avoid the kind of technical arguments even if unreasonable capable of being raised by learned Counsel. It is not an invariable practice; but a practice to ensure correctness and accuracy of the statements made by accused persons.

It is pertinent to state that in *R. v. Ogbuewu*, (supra), the situation which is identical as in the instant case, there was proof, as in this case, not only that appellant's statement was correctly recorded, but also that appellant agreed it was so. The police constable who wrote it down in English gave evidence that he read it over in Ibo language to the appellant. In this case also Exhibit A, recorded in English language

was read over to appellant in Yoruba language. Appellant admitted he had been correctly recorded. In Ogbuewu's case appellant was taken before the District Officer who caused the statement to be read to him in the Ibo language and the interpreter did so, and gave evidence that appellant admitted that he had made the statement. Similarly in the instant case appellant was taken before a Superior Police Officer, Mr. Stephen Taverro where Exhibit A was read over to him by PW3 and he signed that it was correct. The difference in this case was that PW3 who gave evidence at the trial, did not give evidence of the confession and Exhibit A.

The absence of the interpreter of a statement made through an interpreter is merely a question of proof of the correctness of the statement made, it is not one of admissibility since the fact that the statement was made is not disputed and not an issue. The statement Exhibit A is not hearsay and is properly admissible in evidence as the statement of the appellant. I therefore reject the submissions of learned counsel to the appellant to expunge Exhibit A from the proceedings. I now turn to the consideration of the contention that the defence of the appellant was not fully considered.

It was learned counsel to the appellant's submission that the defence of appellant was not considered. He referred to the first statement Exhs. E & F of appellant made when the event was fresh in his mind, which he described as exculpatory, and a denial of the charge and the second statement, Exh. A. as confessional. It was contended that only Exhibit A was considered by the trial Judge and the court below as if that was the only evidence before the court. All evidence before the court must be considered. No where in the trial court was the defence of appellant evaluated before the court arrived at its conclusion. Learned Counsel relied on *Adamu v. The State* (1991) 4 NWLR (pt.187) 530; *R. v. Itule* (1961) 1 All NLR (Reprint) 481, (1961) 2 SCNLR 183; *R. v. Braimah* (1945) 9 WACA; *Opayemi v. The State* (1985) 2 NWLR (Pt.5) 101; *Bozin v. The State* (1985) 2 NWLR (pt.8) 465; *Laoye v. The State* (1985) 2 NWLR (pt.10) 832.

It was submitted that non-consideration of Exh. E & F is a breach of appellant's constitutional rights. *Onifade v. Olayiwola* (1990) 7 NWLR (pt.161) 130. I do not think learned counsel is correct in his

criticism that the statements of the appellant, Exhibits E & F were never considered by the courts below. It is relevant for this purpose to consider the finding of the learned trial Judge and his consideration of the evidence before him. I therefore agree with the submission of learned counsel to the respondent that the two lower courts considered the other statement of the appellant beside Exhibit A in arriving at the decision convicting appellant.

This is evident from the statement of the learned trial Judge at P.36 lines 31-33 of the record of proceedings as follows “I have carefully considered the evidence led by the prosecution and the defence “ At page 47 lines 10-12 after stating that he preferred the evidence led by the prosecution to that of the defence he concluded he had no doubt regarding the veracity of the evidence of the prosecution witnesses. This is clear evidence that the learned trial Judge had considered the case as a whole.

Again, it is clear on the record of proceedings that the court below considered other evidence beside Exhibit A at page 93 lines 5-35 of the record of proceedings, led by the prosecution especially the evidence of PW1 and came to the conclusion that the totality of the evidence led by the prosecution, which incidentally includes exhibits E & F, is sufficiently probative of the offence with which the accused was charged.

The findings of the court below on the same issues tantamount to concurrent findings in the two courts below. There is no basis for disturbing these findings the acceptance of which I am satisfied do not lead to any miscarriage of justice. - See *Ukut v. The State* (1995) 9 NWLR (Pt.420) 392 at p.403-4.

I dismissed the appeal for the reasons I have given in this judgment.

ONU JSC

On 20th September. 2001 I dismissed this appeal and confirmed the conviction and sentences passed on the appellant. I indicated then that I would give my reasons for so doing today. Hereunder are my reasons.

The facts of the case have been fully and meticulously adumbrated in the leading judgment of my learned brother, Ogundare, JSC to need any repetition herein.

Although a lone issue was formulated at the appellant's instance by his counsel for the determination of this court, to wit:

"Whether the Learned Justices of Appeal were right in affirming the conviction of the appellant by the learned trial Judge."

Argument has, however, been proffered on it in four sub-divisions, namely (1) identification of the appellant; (2) the confessional statement; (3) non-consideration of appellant's defence and (4) the weight of evidence of 1st PW as a tainted witness.

I shall begin by considering the first sub-division.

1st SUB-DIVISION

Identification of the appellant: As it became stark clear as daylight that learned counsel for the appellant, Mr. Fashanu, found it impossible to pursue his argument in this regard - several extracts from the record some salient ones which are clearly set out in the judgment of my learned brother, Ogudare, JSC, the abandonment of the argument at that stage of this issue by the learned counsel did not come to me as a surprise and the non-application of the decision of the Court of Appeal (England) in Raymond Turnbull V. The Queen (1976) 63 Cr. App. r132 at 137 which did help to quicken the arrival at such a conclusion. This is the moreso because PW1 had testified and the learned trial Judge believed her (a decision which the Court of Appeal later affirmed), that not only was appellant well known to her but that appellant stated categorically that he knew the deceased not only as his father's friend but that both PW.I and him (deceased) always visited him quite apart from the fact, that he always bought pellets from her thus strengthening the prosecution's case. The resort to the submission of failure on the part of the learned trial Judge to consider the issue of illumination of the room and scene of crime given the time of its commission (1 a.m.), it would appear to me to make the case of Turnbull v. R (supra) to this case of no relevance since the requirements laid down in that case as well as in State v. Aibangbee & Anor. (1988) 3 NWLR (pt.84) 548, were duly satisfied.

That the identity of the appellant was established at the trial beyond doubt may be deciphered from the following pieces of evidence.

In her testimony, PW1 stated inter alia thus:

B *"I know the accused and Rabiun Kassim now deceased, he was my husband.*

On 3 1/8/88 at about 3 years ago the accused knocked at the door of the house where I live forcibly. I woke up at the time, he finally broke the door, and shot my late husband who was fast asleep, the deceased died on the spot after shooting. The accused dragged me to the bed and raped me. He later took a machete which he used to wound me on the left face and right shoulder (witness demonstrates and right palm which I raised in defence).

D *I became conscious (sic), when I later recovered, the accused was not around and my wares and belongings were missing."*

After alluding to several portions in the testimony of witnesses that made the holding of an identification parade vide *Turnbull v. The Queen* (supra) unnecessary, the court below (per Adekeye, J.C.A.) E held as follows:

"The 1st PW had ample opportunity to see and identify the accused - who is well-known to her, as he shot the deceased attempted to rape her and inflict machete cuts on her."

F The prosecution in order to establish this case of murder beyond reasonable doubt against the appellant adduced evidence.

(i) that the deceased had died;

(ii) that the death of the deceased resulted from the act of appellant and

G (iii) that the act of the appellant was intentional with the knowledge that death or grievous bodily harm was its probable consequence. See *Ogba v. The State* (1992) 2 NWLR (Pt. 164) 198; *Sakare v. The State* (1987) 1 NWLR (pt.52) 579 at 582 and 595.

H In the instant case where the deceased was attacked with a lethal weapon i.e. a gun resulting in his (deceased's) death instantaneously, on the spot, it is hardly necessary to prove the cause of death by medical evidence. Once a nexus is established between the act of the appellant and the death of the deceased - see *Lori v. The State*

(1980) 8 - 11 SC 81 - proof beyond reasonable doubt is attained. See Esangbedo v. The State. (1989) 4 NWLR (Pt. 113) 57 and a conviction proceeding thereon ought not to be lightly disturbed or set aside. This court has decided that for an accused person to be entitled to the benefit of doubt, the doubt must be a genuine and reasonable one arising from some evidence before the court. See State v. Aibangbee (1988) 3 NWLR (part 84) 548. Although it is the law that any lingering doubt must be resolved in favour of the accused person - see Kalu v. State (1988) 4 NWLR (part 90) 503; Lortim v. State (1997) 2 NWLR (part .490) 711 in the instant case, more heinous acts were shown to have been perpetrated by the appellant before the door to the house of the deceased opened, appellant was shown not only to have forced it open while the deceased was still asleep, but that he shot the deceased while he was fast asleep, leading to his death on the spot. Thereafter, the appellant dragged PW1 to the bed and raped her. He later inflicted matchet cuts on the left side of her face, right shoulder and right palm, which she raised to defend himself. In the cases of Zekeri Abudu v. The State (1985) 1 NWLR (Pt. 1) 55; Ajibade v. The State (1987) 1 NWLR (Pt. 48) 205 and Asakitikpi v. The State (1993) 5 NWLR (pt. 296) 641 relied on by the appellant's counsel for the view that there was weakness in the identification evidence, I agree with the respondent that these are cases where the identity of the accused was in doubt and the prosecution's case there depended solely on identification of the accused which if weak, one must approach it with caution to obtain a conviction and not as in the instant case where the identification of the appellant by PW1 was spontaneous, unequivocal, positive, direct and undiscredited. In which case, the finding by the trial on the appellant's identity and its affirmation by the trial court being unassailable ought not, in my view, to be disturbed.

2ND SUB-DIVISION

Appellant's confessional statement: The first plank of the appellant's grievance in respect of his confessional statement received as Exhibit "A" is that heavy reliance was placed on it. The court below took the view that the admissibility of Exhibit 'A' could no longer be vouch-saved and so should be expunged. This conclusion was arrived at because of the fact that it (Exhibit "A") was made through an interpreter whose statement was not recorded in the language he obtained

it and so it amounted to hearsay and thereby was rendered inadmissible

In as, much as PW.3 had testified that it was one Sgt. Patrick Linus, the investigating Police Officer (IPO for short) that obtained Exhibit “A..” from the appellant in the English language and that PW.3 who acted as interpreter between the IPO and the appellant, the evidence of PW.3 that he interpreted and explained what appellant thumb-printed and PW.3 signed as interpreter of the statement it was the same procedure that was adopted during the attestation of Exhibit “A” before a Superior Police Officer - Mr. Taverro - I agree with the appellant’s contention that even though Exhibit “A” was never taken in Yoruba language, which Yoruba version should have been tendered through PW.3 together with Exhibit “A” as laid down in judicial authorities vide *Shiveto v. The State* (1976) All NLR 230, it is not, in my respectful view, fatal to the prosecution’s case. See *Akpan v. The State* 1992) 6 NWLR (Pt. 248) 439 at 467 paragraphs D where this court (per Karibi- Whyte, JSC) held as follows:

“It is desirable that a statement should be recorded in the language it was made, it is not ipso facto inadmissible merely because this practice was not followed. See Udo v. The Queen (1964) 1 All NLR 21. Appellant’s case is not that he did not understand the language in which the statements were recorded. There was evidence that he made his statement in Ibibio. The statement was interpreted to him in Efik language which he perfectly understood. At least he did not at any stage protest that he did not understand what was communicated to him,”

Exhibit “A” is admissible and it constituted enough evidence as demonstrated earlier on, to arrive at the view that appellant’s conviction thereon was well grounded. Besides, the prosecution in discharging the proof of the ingredients of the offence of murder set out hereinbefore, adduced direct evidence through its witnesses, in particular through the deceased’s wife (PW.1). Such direct evidence which was confirmed in appellant’s own testimony under cross-examination ran thus:

“I know the deceased as my father’s friend. I know the deceased’s wife..PW.1 and the deceased used to visit my dad and I know her.”

Also, the evidence of PW8, Rafiu Buraimo confirming the evidence of PW.1 to the effect that:

“ *I do not know the accused not Rafiu Kassim. This woman (indicated PW.1) called at Fowosere Village at about 1 a.m. I found matchet Wounds on her cheek, back and all over the body. The Bale of the Village questioned here and she replied that Lekan killed her husband and matcheted her. The men in the Village trooped out on trail of Lekan whom we got hold that morning. This is Lekan (indicate the accused) whom we arrested that morning and he was led to the Police Station, Ijebu-Igbo.*”

I agree with the respondent's contention that Exhibit “A” was never taken Yoruba language which Yoruba version should have been tendered through PW3 together with Exhibit “A” as propounded in judicial authorities. However, the procedure adopted in obtaining Exhibit “A” was sufficient in law to ensure that the appellant understood what he thumb-printed. See Akpan v. The State (supra). PW3 gave evidence on the role played in obtaining Exhibit “A” and that he did not record any statement but merely acted as interpreter. The appellant through his counsel at the trial court did not object to his statement (Exhibit “A”) being tendered. I also share the respondent's view that Exhibit “A” did not fall into the category of hearsay evidence as enunciated in Shivero v. The State (supra). Furthermore, the appellant's counsel did not cross-examine PW.3 as to the truth, voluntariness or otherwise of Exhibit “A” hence this court cannot entertain the complaint here. I am further of the view that PW.3 testified during trial when Exhibit “A” was tendered, unlike in cases where the interpreter was never called as a witness at the trial, which ipso facto make such evidence hearsay. See Zakwakwa v. Queen (1960) 5 FSC 12, (1960) SCNLR 36. It is my firm view therefore that it will be wrong to expunge Exhibit “A”. I therefore hold that the trial court and the court below were right in considering Exhibit “A” part and parcel of the prosecution's case. This court has held times without number that the statement of an accused is not inadmissible merely because it is taken down in a different language from the language of the person making it. See Queen v. Hobo Haske (1961) 1 All NLR 330 at 333. Thus, when the learned Justices of the court below held that the objection to

admissibility of Exhibit “A” could no longer be entertained, they were right. This is because it is trite law that when an accused person alleges that confessional statement credited to him is not voluntary, objection must be raised to its admissibility when the statement is sought to be tendered in evidence and not after it had been admitted in evidence vide *Akpan v. The State* (supra) and *Mohammed v. The State* (1991) 5 NWLR (Pt. 192) 438 at 57. In the appeal herein, neither the appellant nor his counsel objected to the admissibility of Exhibit “A” at the trial court. Thus, it is not in this court on appeal that the voluntariness or otherwise of Exhibit “A” can be challenged by the appellant. This is the more so in that Exhibit “A”, as earlier pointed out, is direct, positive and unequivocal of the admission of guilt by the appellant. It is enough, in my view, to ground the conviction of the appellant, though it was retracted at the trial. See *Salawu v. The State* (1971) NMLR 735. Indeed, it is the law that a confession made to the police by a person under arrest is not to be treated differently from any other confession. See *The Queen v. John Agariga Itule* (1961) 1 An NLR (Pt. 3) 462, (1961) 2SCNLR 183; *Egboghonome v. The State* (1993) 7 NWLR (Pt. 306) 383 and *Michael Peter v. The State* (1997) 3 NWLR (Pt. 496) 625; (1997) 12 NWLR (Pt. 531) 1.

In the light of the foregoing, I am of the respectful view that Exhibit “A” was rightly admitted.

Last but not the least are SUB-ISSUES 3 and 4 of non-consideration of appellant’s defence and 1st PW, as a tainted witness.

In the light of what I have just stated above, the question of the non-consideration of the appellant’s defence would, in my view, no longer appeal to be of any moment as an issue for consideration and the relevance of the cases of *R. v. Ogbuwu* 12WACA 483; *Zemba Shivero v. The State* (supra), *The Queen v. Zakwakwa* (supra), *Attard v. R.* (1959) 4 Crim. App. 90 and *R. v. Gidado* 6 WACA 60 at 62 in relation to admissibility of Exhibit “A” of any application.

On the argument as to whether or not 1st PW1 is a tainted witness. It is neither a rule of law or practice that the evidence of relations of victims of a crime need corroboration. They are neither “tainted” witnesses (see *R v. Omisade* (1964) NMLR 67) nor wit-

nesses who have their own purpose to serve (see *Idahosa & Ors. v. R.* PW1 could neither be held out as such a witness (being a victim herself) nor is she shown to be an accomplice.

Moreover, in the instant case, 1st PW as a near fatal victim from the injuries inflicted on her by the appellant, the evidence from her being direct, clear and unequivocal could neither be regarded as that of an accomplice (See *Garbo Mailayi v. The State* (1968) 1 All NLR 116 at 123 and *Ishola v. The State* (1978) 9-10 SC 81 at 91, 100 nor that of a person whose testimony ought to have been received with caution or examined with a tooth comb. See *The State v. Aibangbee* (1988) 3 NWLR (pt. 84) 548 at page 592. The two courts below rightly in my view accepted Exhibit “A” as voluntary, and admissible.

It is for these reasons that I too summarily dismissed the appeal of the appellant on 20th September, 2001 and stated that I would give my reasons for so doing today as indeed I have now done.

UWAIFO JSC

On 20 September, 2001, I gave judgment dismissing this appeal in limine after perusing the record and the briefs of arguments and hearing oral submissions of counsel. I reserved reasons for my judgment till today.

The appellant went to the residence of Adebisi Rabi P.W. 1 at Fowosere village and her husband (now deceased) at 1 a.m. on 31 August, 1988. He broke down the door and entered. He shot dead the deceased who was sleeping in bed. He then dragged down PW1, raped her and inflicted matchet cut on her face. She became unconscious. The appellant escaped, taking with him from that house a dane gun, hunter’s lamp, gun powder, radio, pomade, N1,000.00 and other items. As soon as PW1 regained consciousness she reported the incident to the villagers. She was taken to the nearest police Station from where the police took her to the General Hospital, Ijebu Ode.

During investigation, the police found those items the appellant had taken away in her house The appellant made two statements, one

of which was confessional. He made them in Yoruba through an interpreter and they were recorded in English. They were confirmed by him before a superior police officer. The recorder of the statements and the interpreter testified. The appellant was convicted for murder and sentenced to death. His appeal to the Court of Appeal failed. He
B appealed to this court on one issue namely:

“Whether the learned Justices of the Court of Appeal were right in affirming the conviction of the appellant by the learned trial Judge.”

The evidence against the appellant is both direct and circum-
C stantial. There is no doubt that PW1 saw him shoot her husband. She was able to recognize him. There was every opportunity for this because apart from the shooting, he raped the woman. He himself agreed that PW1 would be able to recognise him whether by day or by night. The learned trial Judge believed her evidence. There is also the evi-
D dence of the articles stolen by the appellant from PW1’s house which were recovered from his house within a couple of hours. That is circumstantial evidence against him. Finally, he made a confessional statement which is Exhibit A. The Court of Appeal found nothing wrong
E with the way the learned trial Judge reached his decision nor do.

I have read the reasons given by my learned brother Ogundare JSC for dismissing this appeal on 20 September, 2001. I wish, however,
F to express my views briefly on whether Exhibit A was properly admitted at the trial. Sgt. Linus Patricks (p.w.6) was the officer who recorded the statement of the appellant. The appellant spoke in Yoruba language and p.w.6, acting through an interpreter, Aremu Adeosun
G (p.w.3), recorded the statement in English Language. That was how Exhibit A, the said statement, came into existence.

Now, p.w. 3 testified that he interpreted between p.w.6 and the appellant. Thereafter he read the statement as written in English language by interpreting it to the appellant who agreed it was correctly
H recorded. He said the appellant thumb-printed Exhibit A and he, the interpreter, signed it as did p.w.6, the recorder of the statement. Furthermore, the appellant was brought before a superior police officer for the purpose of confirming or denying the statement as recorded. Again, p.w.3 interpreted the statement to the appellant in Yoruba lan

guage when the said superior officer read it out in English Language. The appellant once more agreed that the statement was correctly recorded and that he made it voluntarily.

At the trial court, no objection was taken to the voluntariness of the statement, or any other objection at all. At the lower court on appeal, an objection as to voluntariness was taken but the court overruled it on the basis, quite rightly, that the proper forum for that was the trial court. B

The objection now taken in this court is that the statement C (Exhibit A) is hearsay evidence. It is now being submitted that there is no evidence to show what question p.w.6 put to the appellant and in what language, and the appellant's answers to them; and the suggestion is that p.w.3 did not say enough to make Exhibit A admissible. With the greatest respect, what I understand the authorities in this country D to establish is that where an interpreter has been used in taking down a statement, both the person who wrote down the statement and the person who interpreted it must be called as witnesses: see *R. v. Gidado* (1940) 6 WACA 60; *R v. Ogbuewu* (1949) 12 WACA 483. E

In the case of the person who recorded the statement, he would, of course, state in evidence the procedure he took in the process. That was done in the present case. As for the person who interpreted, he would need to be presented as a witness to testify that he interpreted. It is then open to the defence to cross-examine him: see *Zakwakwa of Yarra v. The Queen* (1960) SCNLR 36 at 38. It is in such circumstance that the interpreter, under cross-examination, will need to give evidence in relation to the question or questions put to the accused he is properly cross-examined towards that end. Obviously, when asked G as to such questions he would be entitled to refresh his memory from the document (or statement) he interpreted since, usually, it might have taken a long time and his main concern would be what he interpreted, and perhaps under what condition.

I cannot see how what is contained in Exhibit A in the present case would be different to what p.w.3 interpreted. I cannot also imagine what more he was expected to say from the evidence he gave if he H

was not cross-examined or the cross-examination was not properly directed to relevant questions. I am therefore satisfied that the prosecution called the necessary witnesses who gave sufficient evidence in the present case to make Exhibit A admissible. To require the prosecution to do more will, in my respectful view, lead to unnecessary details, and perhaps confusion, of what they are expected to prove in that regard. I do not think the decision in *Attard v. R.* (1959) 43 Cr. App. R. 90 in all the circumstances of that case is persuasive enough to render Exhibit A inadmissible in view of *Zakwakwa* since the interpreter testified and was available for cross-examination. The objection that it was hearsay is not well founded and I overrule it.

It was for the above-stated reasons I dismissed this appeal earlier on and affirmed the conviction for murder and sentence to death of the appellant.

EJIWUNMI JSC

At the hearing of this appeal, after hearing learned counsel for the appellant, it was not considered necessary to hear the learned Attorney General for the State, who appeared for the State. The appeal was then dismissed summarily. My reasons for dismissing the appeal are as follows:

The appellant was on 13th December 1993, found guilty of the offence of murder in that, on the 31st day of August 1988, he murdered one Rabiū Kassim. To establish the guilt of the appellant, the prosecution relied upon the evidence of PW1 who saw the appellant commit the offence and the confessional statement allegedly made by the appellant during police investigation into the case. With regard to evidence of PW1, who was the wife of the deceased, it is not disputed that she was the only eye witness of the events that led to the death of the deceased. On the night of this event, PW1 stated that she was in the room sleeping with her deceased husband when she heard loud knocks on the door of their room, she got up and opened the door. The appellant was the one at the door. He immediately entered the room forcibly and shot the husband who was still sleeping. He then dragged PW1 to the bed where he raped her and left her unconscious. Before

that event, he inflicted matchet cuts on her face and hands as she tried to ward off his attacks. Thereafter, he proceeded to ransack their room and left with various personal belongings of the deceased and PW1. These included, radio, pomade, gun powder, hunter's lamp, blades, the deceased's dane gun and the sum of N1,000. When PW1 regained B consciousness, she went to the neighbouring village, Fowosere, where she reported the incident to the villagers. In the course of her narration of the events, she told them that it was the appellant who killed the deceased and also inflicted matchet cuts on her. She was taken to the C ljebe Igbo Police Station, and later to ljebe-Ode General Hospital where she was hospitalized for about two months.

PW 1, in the course of police investigations, identified the appellant as her assailant to the police and as the person who killed her husband. The appellant made two statements one Exhibit F, which is D not confessional, and the other, Exhibits A- A1, confessional. The learned trial Judge accepted the evidence led before him, and the appellant was consequently convicted mainly upon the evidence of PW1, and the confessional statement, Exhibits A-A1. The appeal of the appellant E to the court below was unsuccessful, hence he has further appealed to this court.

Apart from the original grounds filed, pursuant to this appeal, the appellant was granted leave to file an amended notice of appeal consisting of the following grounds. F

They are as follows:

Having found as follows:-

“(a) “The issue of identification of the appellant was considered, as the time of incident was put as 1 a.m. the issue of illumination of the room was not considered by the learned trial Judge”. G

The Learned Justices of Appeal erred in law when they thereafter held that:

“The 1st PW had ample opportunity to see and identify the H accused who is well known to her, as he shot the deceased, attempted to rape her and inflict matchet cuts on her”.

Particulars:

- (i) A court must be consistent in its holdings and findings.
- (ii) The two findings are inconsistent.
- (iii) The court below failed to make findings on the illumination of the room and thereby came to a wrong conclusion.

B (b) The learned Justices of the Court of Appeal erred in law in affirming the adoption of the appellant's confessional statement by the trial court when the said confessional statement was not recorded in the language in which it was obtained but a translation of what was C purportedly obtained.

(c) The learned Justices of Court of Appeal erred in law in affirming the conviction of the appellant when his defence was not considered or given adequate consideration.

Particulars:

D (i) Neither the trial court nor the Court of Appeal considered Exhibit "F".

(ii) The trial court merely found the appellant's defence as an after thought.

E (d) The learned Justices of Court of Appeal erred in law in failing to consider adequately the danger manifest in convicting the appellant upon the uncorroborated evidence of PW1 when -

(i) The evidence shows that the PW1 was the wife of the deceased.

F (ii) Exhibits 'C', 'H' and 'K' belonging to PW1 could not act as corroboration to the evidence of PW1 as erroneously found by the learned trial Judge."

G From the briefs filed on behalf of the appellant and the respondent, similar issues were raised for the determination of the appeal. The issue raised in the brief for the appellant and which would be the focus in this appeal reads thus:

H *"Whether from the totality of the evidence adduced at the trial, the Court of Appeal rightly affirmed that the charge of murder against the appellant was proved beyond reasonable doubt in accordance with section 138 of the Evidence Act (Cap. 112) Laws of the Federation of Nigeria, 1990".*

However, in the appellant's brief and reply brief, the argument of counsel in support of the view that the appellant was not convicted beyond reasonable doubt, revolved around three main questions.

They are:

"(i) Whether the appellant was properly identified as the assailant of PW 1 and the person who killed the deceased

(ii) Whether Exhibit A, the confessional statement of the appellant ought to have been accepted by the court below to convict the appellant; and

(iii) Whether the conviction of the appellant was rightly upheld by the court below having regard to the evidence of PW1, whose evidence is that of a tainted witness".

On the question of whether the appellant was rightly identified as the killer of the deceased and the assailant of PW1, the learned counsel for the appellant argued in the appellant's brief that the court below made contradictory statements on the evidence on record. He therefore submitted that the court below was wrong to have based its judgment upon such contradictory statements. The contention of learned counsel must in my view be regarded as misconceived. While it is clear from the records that the court below, per Adekeye JCA, did note that the offence allegedly took place, at 1 a.m. but the court did not go to consider whether there was enough illumination for PW1 to have had the opportunity of seeing that it was the appellant who committed the offence. But the evidence before the court shows clearly that the appellant was well known to PW1 before the event. The appellant himself admitted in the course of his evidence that the deceased and his wife were well known to him. I do not therefore consider that the failure of the court below to advert to whether or not there was enough illumination in the room to identify the appellant is a valid argument to reach the conclusion that the wrong person was identified by PW1. It is also in evidence that soon after PW1 recovered from the attack on her, she went immediately to the neighbouring village where she slated categorically that it was the appellant who assaulted her. And as the court below was satisfied with the evidence of PW1 and Exhibits G,H,J ,K which corroborated the story of PW 1, the court

below was right to have upheld the trial court upon that evidence with which it concluded that it was the appellant who committed the offence.

B In upholding the conviction; the court below as argued by the learned Attorney General for the respondent in his brief, applied properly the principle enunciated in the English case of *Turnbull v. Queen* (1976) 63 CAR 132 at 137 that there must be evidence showing what opportunity the witness had to identify the appellant as the assailant
C and or the perpetrator of the alleged offence. This principle has since been quoted with approval in such Nigerian cases as *Abudu v. The State* (1985) 1NWLR (Pt. 1) 55; *Ajibade v. State* (1987) 1NWLR (Pt.48) 205 at 210; *Asakitikpi v. State* (1993) 5 NWLR (Pt.296) 641. In this
D connection, there can be no doubt that the appellant must have been clearly seen by PW1 who saw him shoot her husband and then went on, to physically attack her with a machet in the process of raping her. It seems to me clear, after due consideration of the evidence of PW1 and the exhibits found in the appellant's residence, I do not think that
E there is any merit in the contention made by the appellant that PW 1 was mistaken as to the identity of the appellant. That question must therefore be resolved against the appellant.

It is, I think, convenient to consider at this juncture the question raised by the appellant as to whether the PW1 should not have
F been treated as a tainted witness by the court below. It is argued for the appellant that though the court recognized that PW1 was the witness who gave eyewitness account of the incident, yet as she was the wife of the deceased, the court failed to treat her evidence as that of a
G tainted witness. It is therefore argued for the appellant that it is not enough to treat the evidence of PW1 upon the principle that a court can convict upon the evidence of a witness if the witness is not an accomplice in the commission of the crime. And that the evidence of
H the witness is sufficiently probative of the offence with which the accused is charged. In respect of PW1, it is the submission of learned counsel for the appellant that the evidence of PW1, being that of a tainted witness, required corroboration by an independent witness. As support for that proposition, reference was made to the following cases:

State v. Dominic Okolo (1974) 2 SC 73; Onafowokan v. State (1987) 3 NWLR (pt. 23) 496 at 503.

The learned Attorney General for the respondent, has, however argued in the respondent's brief that the court below was right not to have treated PW1 as a tainted witness. It is his further submission that the appellant's conviction was properly upheld upon the evidence of PW1. He also argued, if there be need for corroborative evidence, the various articles that belonged to the deceased and his wife, PW1, that were found in the residence of the appellant, afford such corroboration. While there is considerable force in that submission, I would in the consideration of the argument prefer to first consider whether PW1 should be treated as a "tainted witness". The meaning that ought to be ascribed to this kind of witnesses was considered by this court in Jimoh Ishola (Alias Ejigbadero) v. The State (1978) 9-10 SC 81 where at P.100 Idigbe JSC, delivering the judgment of the court said:

As we observed in Garbo Mailayi & Usman Sokoto v. The State (1968) 1 All NLR 116 at 123

"Recently there has been a tendency among criminal lawyers to create a category of 'tainted witness' we however observe that the expression 'tainted' is very loose and if its application is not kept within proper bounds a great deal of confusion will be unleashed into an area of evidence which even now is fraught with difficulties "

"We think it is proper to confine this category of witness (i.e. tainted) to one who is either an 'accomplice' or, by the evidence he gives, (whether as witness for the prosecution or defence) may and could be regarded as "having some purpose of his own to serve". Viewed in this way, there is less likelihood of bringing unnecessary confusion into this area of evidence.. "

See also Ogunlana v State (1995) 5 NWLR (Pt.395) 266 at 284. Applying the principles so ably enunciated. I cannot upon the facts disclosed in the instant case regard PW1 as a tainted witness. This witness on the awful day was faced with an assailant when she opened the door of their room, and saw the appellant who is well known to her before the incident, enter their room. The appellant thereafter shot her husband dead, then attacked her with a matchet in the process of forc

ing her to have unlawful sexual intercourse with her. Upon the evidence, PW1 was clearly a victim of the appellant, and her evidence cannot by any stretch of imagination be regarded as proceeding from the mouth of a tainted witness. For all I have said above, I must hold
 B that there is no merit in the contention of the appellant that the court below was wrong not to have treated PW1 as a tainted witness.

I will now consider whether Exhibit A, the confessional statements made by the appellant is inadmissible and should have been expunged by the court below. The contention of learned counsel to the
 C appellant is that Exhibit A, be expunged or that no weight be attached to it if it is considered that Exhibit A should not be expunged from the record. The reason for this contention is that Exhibit A by reason of how it came about, must be regarded as hearsay in respect of the
 D proceedings. The statement was made in Yoruba to the IPO; PW6 who had to have an interpreter, PW3 to translate the statement into the English Language. The interpreter, it is argued, should have been called to testify as to what he translated to the English Language, and which
 E the appellant accepted as his voluntary statement to the interpreter in Yoruba Language. See *R v. Gidado* 6 WACA 60 at 62 where the West African Court of Appeal observed:

*“It seemed to us that this failure on the part of the trial
 F Judge to appreciate the inadmissibility as evidence of alleged statements by the appellant, when such statements were not confirmed and established by the persons acting as interpreters, was fatal to the conviction herein in that the learned trial Judge misdirected
 G himself in accepting such statements as having been proved”.*

In this context, may I also refer to *R v. Ogbuwu* 12 WACA 483 where the West African Court of Appeal said:

*“It is obviously better that such statements should be writ-
 H ten down in the language in which they were made, but we do not agree that a statement, which is admissible in all other respects, is inadmissible on the ground that it was taken down in English and not in Ibo or whatever other language may have been “used by*

the person it. What has to be proved is that what was written down is in effect and meaning the statement made by the accused person and, of course, the nearer it is proved to be his very words the more the weight which can be attached to it; and the way of getting it nearest to the very words is to write it down in the language in which it was spoken. It is, however, not always possible to do this in this large and varied country owing to the great number of languages and dialects used and the illiteracy still prevailing in most parts". "It often happens that statements have to be made to Police through an illiterate interpreter and so cannot be written down in the language in which made. What this court has said, as have other courts also on innumerable occasions, is that, where an interpreter has had to be used in the taking down of a statement, the statement is inadmissible unless the person who interpreted it is called as a witness, as well as the person who wrote it down. This necessity is frequently overlooked and it may be that rejections of statements for this reason have given rise to a belief that statements are inadmissible unless written in the language in which made. But this is not so; it is a matter of proof and not of admissibility. This is one of the reasons, which make it better (as we have already said) that statements should be written down in the language used whenever it is practicable to do so".

See also *Iyu v. State* (1965) 1 All NLR 203 where Bairaman, JSC at page 209, said, "Before closing this judgment we too should like to say that it is always wise to call the person who interpreted at the taking of an accused person's statement to the police, to verify it when tendered at the trial".

From the above statements from the earlier decisions of this court that where an interpreter has had to be used in the taking down of a statement, the statement is inadmissible unless the person or persons who interpreted it are called as witnesses as well as the person who wrote it down. See also *R v. Awip* (1957) 2FSC 24; *Zakwakwa v. Queen* (1960) 5 FSC 12.

As it has been argued for the respondent that the police officer PW3, who interpreted the statement made in Yoruba language to PW6, the IPO gave evidence during the trial, it is deemed proper to

refer to the evidence of these witnesses at the trial.

The relevant evidence of PW3, reads thus:”

On 7.9.88 a case of murder was referred to Sgt. Patrick Linus for investigation. I acted as an interpreter between the said Sgt. and the accused. The Sgt. obtained the accused’s statement, read same to him and he admitted that it was true and correct. I read the accused confessional statement to him and he admitted that it was true. He thumb printed the said statement. I signed the statement as the interpreter along with the IPO”.

And that o f PW6 read thus:

“On 6th day of November, 1988 (sic) I was on duty at the State Directorate of Investigation Bureau Abeokuta when a case of murder transferred from Ijebu-Igbo Police Station was referred to me along with the accused Person for further investigation. On 7th September 1988 the accused person was re-arrested, cautioned and charged with the offence of murder through the medium of an interpreter. He volunteered his statement in Yoruba language, recorded the statement in English through an interpreter same was read over to him through the interpreter; he accepted it to be true and correct before affixing his thumb print. The interpreter and myself signed the statement. This is the statement (No objection indicates Identification A). I put it in evidence (No objection by learned defence counsel tendered, read and marked Exhibit A)”.

A careful perusal of the pieces of evidence quoted above reveal in my humble view, that PW3 did not state the contents of the statement that the appellant made in the Yoruba language, which he interpreted to PW6, the Investigating Police Officer. The Investigating Police Officer, PW6 though he acknowledged that PW3 was the interpreter, did not go beyond that assertion before the statement of the appellant was tendered and accepted as Exhibit A.

Bearing in mind that the prosecution has the burden of proving the guilt beyond reasonable doubt of the appellant, it is my humble view that the prosecution should have approached the proof of the statement of the appellant strictly with this burden in mind. Therefore, the prosecution should have not only called the interpreter as they did as a witness, but the interpreter should have been made to go through the

statement, Exhibit A, in full view of the court in order for him to explain to the court that that was the statement which he interpreted to the appellant. It is that statement which properly should have been written down in the language in which the appellant made the statement before it was translated by the investigating police officer as Exhibit A. If that procedure was strictly followed, then the statement Exhibit A would have been in accordance with the law and practice relevant to the taking of the statement of an accused person. I must therefore hold the view that for the reasons set out above, Exhibit A, having not been properly admitted in evidence, ought to be expunged, and it is hereby expunged from the record.

Now, the appeal would not necessarily succeed because Exhibit A, the confessional statement of the appellant is no longer available for consideration in this appeal. Earlier in this judgment, I had come to the firm conclusion that the evidence of PW1, was properly admitted by the trial court. That evidence was also affirmed by the court below to uphold the judgment of the trial court. The argument advanced for the appellant has not persuaded me that the courts below were wrong in their conclusion. It is manifest that the evidence of PW1, though alone, proved beyond reasonable doubt the guilt of the appellant. Moreso, when it is viewed with the various items of properties that belonged to the deceased and his wife (PW1) that were found soon after the incident in the residence of the appellant.

It is for all of the above reasons that I dismissed the appeal of the appellant summarily on the 20th day of September, 2001.

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