

SUPREME COURT OF NIGERIA
16TH FEBRUARY, 2001. SC. 87/2000
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, A. I. IGUH,
A. I. KATSINA-ALU, E. O. AYoola, JJSC

ASIMIYU ALARAPE & 3 ORS. APPELLANTS
V.
THE STATE RESPONDENT

CRIMINAL LAW - Common intention - Its proof may be inferred - From circumstances described in the evidence - And not only from the express agreement of the accused persons.

CRIMINAL LAW - Common intention - Test for liability under - S.8 Criminal Code Law of Ogun State - Is whether the act is a probable consequence - Of the prosecution of the joint unlawful act or common intention.

CRIMINAL PROCEDURE - Common intention - Being armed with a gun - For an illegal operation - Shows a common intention to use force - If necessary to effect the common design.

CRIMINAL PROCEDURE - Common Intention - Once established - All involved parties are responsible for any offence - Which is a probable consequence of the execution of their common intention.

CRIMINAL PROCEDURE - Confessional statement - Is sufficient to ground and support conviction - Without corroboration - If court is satisfied of its truth.

CRIMINAL PROCEDURE - Confessional statement - Test for its veracity - Is by seeking any other evidence - That makes its truth probable.

CRIMINAL PROCEDURE - Murder - Cause of death - Proof - By Medical evidence - Is not essential in certain circumstances.

EVIDENCE - Confessional statement - If resiled or denied - Is not *ipso facto* inadmissible

EVIDENCE - Confessional statement - Objection to its voluntariness - Should be raised at the time it is sought to be tendered - And not as an after thought.

JUDICIAL PRECEDENTS - Distinguishing - The distinction between common intention and common object - As held in *R. v. Ofor* - Does not apply to this case.

FACTS

The appellants were charged with murder and arraigned before the High Court of Justice, Ogun state. The substance of the prosecution's case was that the appellants were members of a group of armed robbers who on an operation to recover loots hidden away by them on a previous armed robbery operation were accosted by a vigilante group set up by the residents of Oke Alafia quarters of Ijebu-Igbo. The group of thieves comprising about 7 persons on being accosted by the vigilante group (said to be unarmed) ran off in different directions and were hotly pursued by the vigilante group. In the process one of the members of the vigilante group was shot and died instantly on the spot. The pursuit was thus ended and the matter reported to the police who took the corpse of the deceased to the mortuary for postmortem examination. The prosecution alleged that the appellants had been arrested during the course of investigations and made voluntary confessional statements to the police, admitting that the 1st appellant was the culprit that shot the deceased. At the trial they however totally denied the charge and the confessional statements, challenging its voluntariness and denying knowledge of its content.

The trial judge after reviewing the evidence found the appellants guilty of murder and sentenced them to death having found the evidence of the prosecution cogent and reliable and satisfied with the truth of the

confessional statements. The defendants were dissatisfied and appealed to the Court of Appeal which unanimously dismissed the appeal. They have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether the Court of Appeal was not wrong in affirming the conviction of the Appellants for murder when there was no certainty as to who was actually responsible for the gun shot that killed the deceased.

(2) Whether the Court of Appeal was not wrong when it affirmed the conviction of the Appellants based on alleged confessional statements without any due regard to the other material facts and circumstances of the case. Etc. see p. 558

HELD : (Dismissing the appeal per lead judgment of IGUH JSC, KUTIGI JSC dissenting)

Confessional statements - If retracted or denied.

1. The first point I desire to make is that retraction of or resiling from a confessional statement or denial by an accused person of his having made such a statement does not ipso facto render it inadmissible in evidence. (p. 562 F)

Confessional statements - Sufficient to ground a conviction

2. A confessional statement, so long as it is free and voluntary and it is direct, positive and properly proved, is enough to sustain a conviction. The court should not, however, act on the confession without first testing the truth thereof. But so long as the court is satisfied with its truth, a confessional statement alone is sufficient to ground and support a conviction without corroboration. (p. 562 G)

Confessional statement - Test for its veracity

3. The test, however, for determining the veracity or otherwise of a confessional statement is to seek other evidence, be it slight, of circumstances which make it probable that the confession is true. See R. v. Sykes (1913) 8 C.A.R.233 at 236 where Ridley, J. suggested the tests

to be applied to an accused person's confession in the determination of its veracity. The above tests have been accepted and consistently applied by this court over a long period of time in a number of cases. (p. 563 B)

B *Confessional statements - Objection to its voluntariness*

4. At all events, it ought to be noted that the said statements were tendered without any objection from the defence. None of the prosecution witnesses was cross-examined as to their involuntariness. It was not until the prosecution had closed its case and the appellants were testifying in their own defence in the witness box that the issue was belatedly raised. The question of the voluntariness of a statement is tested at the time the statement is sought to be tendered in evidence. I think the learned trial Judge was right to dismiss this aspect of the defence case as an after thought, having regard to the qualitative evidence tendered by the prosecution and accepted by the trial court on the subject. (p. 565 C)

E *Common intention - Proof*

5. There can be no doubt that the above findings by both courts below on the common intention of the gang in the matter of their operation in issue are totally justifiable and irresistibly warranted by the evidence. In this connection, I need hardly point out that "common intention" in criminal law may be inferred from circumstances described in the evidence led before the court and need not be provable only by the express agreement of the accused persons. (p. 568 E)

G *Common intention - Test for liability*

6. The test of liability under section 8 of the Criminal Code Law of Ogun State, 1978 is not whether the other accused persons counselled or procured the principal offender to use the lethal weapon that caused the death of the deceased but whether it was a probable consequence of the prosecution of their joint unlawful act or common intention. So, where two or more persons set out to steal, as is the case in the present appeal, and one of them is known by the others to be armed with a lethal weapon,

all of them may be held criminally responsible for any consequences which result from the use of the weapon by the one who carried it, even if there is no evidence to show that there was any express pre-concerted agreement that he was to use it. (p. 568 G)

B

Common intention - Once established

7. The point that needs be emphasised in these sorts of cases is that once it is firmly established that two or more persons formed the necessary common intention to prosecute an unlawful purpose and in the prosecution of such purpose, an offence of such a nature that its commission was a probable consequence of the prosecution of such purpose is committed, each of them is deemed to have committed the offence. In such circumstances, the court, once the execution of the common intention or design is established, would be right in asserting that it did not matter on such facts which of the accused person did what. This is for the simple reason that under such circumstances a fatal blow, though given by one of the accused persons involved, is deemed in the eyes of the law to have been given by the rest of his co-accused persons. The person actually delivering the blow is said to be no more than the hand by which the others all strike. See Ogu Ofor and Another v. The Queen (supra).

In the present case all four appellants after their meeting in the house of the 1st appellant went out together at mid-night for an unlawful purpose in conjunction with one another. In other to foster or achieve their common intention, one of them carried a lethal weapon, a dane gun, which the 1st appellant successfully used to facilitate or aid their escape and avoid being caught or arrested when they were disturbed and hotly chased by the deceased and the other night guards. I think that this is a proper case where section 8 of the Criminal Code Law of Ogun State, the provisions of which are in pari materia with those of section 8 of the Criminal Code, Cap. 77, Laws of the Federation of Nigeria, 1990 must apply. In my view, the gun, though fired by the 1st appellant at all material times, is deemed in the eyes of the law to have been fired by the rest of his gang. The 1st appellant was no more than the hand by which the other appellants struck and all are liable to be convicted for the murder

of the deceased. (pp. 569 F/570 E)

Common intention - Being armed with a gun

8. One may ask why the appellants after their meeting in the house of the
 B 1st appellant proceeded directly to execute their common design armed
with a gun. It was this gun that the 1st appellant used in the course of
 the execution of their common intention and as a result of which the
 deceased was shot dead to facilitate the escape of the gang. It seems to
 C me plain that the straight answer to the above question is that the appel-
 lants had intended, if necessary, to use force in effecting their common
 design. Force they did eventually use and they must in law be held
 criminally responsible for their conduct. (p. 571 B)

D Judicial precedents - Distinguishing

9. There can be no doubt that in the context of section 8 of the Criminal
 Code Law of Ogun State, ibid. the common intention of accused person
 must be distinguished from their common object. The findings of the
 E courts in the above three cases seem to me clear. These are that the
 killings of the deceased persons were not probable consequence of the
 prosecution of the unlawful purpose to which all the accused persons
 were a party. Under such circumstances there can be no doubt that the
 F facts of those cases relied upon by learned counsel for the appellants are
 easily distinguishable from those of the present case. (pp. 571 F/572 C)

Murder - Cause of death

10. I think I need emphasise that while medical evidence to prove the
 G cause of death is desirable in homicide cases, this is not absolutely essen-
 tial, but, to make the accused criminally liable in a case of murder, there
 must be clear evidence that the death of the deceased was the direct
 result of the act of the accused. Medical evidence in proof of death is not
 H essential in circumstances where:-

- (i) There is evidence of the death of the deceased; and
- (ii) There is evidence that the death is as a result of the unlawful
 and intentional act of the accused person. Death can be established by

sufficient evidence other than medical evidence showing beyond reasonable doubt that death resulted from the particular act of the accused. In my view, on the accepted evidence before the court, it is beyond doubt that there was proper identification of the deceased at all material times and that his cause of death was the gun shot injuries he received from the 1st appellant. B

Although Exhibit K is covered by the provisions of section 42(1)(a) of the Evidence Act, there is additional cogent circumstantial evidence which confirms the identity of the deceased and his cause of death. Issue 3 is hereby resolved against the appellants. (p. 573 G) C

NOTABLE POINTS OF INTEREST

IGUHJSC

1. *Confirmation by a superior police officer is not a legal requirement for admissibility of confessional statement* D

In this connection, it ought to be stressed that it is not the requirement of any law that if a confessional statement has not been read over and confirmed before a superior Police Officer, it will ipso facto cease to be effective or be rendered inadmissible. Such a confirmation simply makes proof of its voluntariness easier and no more. The practice has however been commended in many cases. (p. 564 G) E

KUTIGIJSC (DISSENTING) F

2. *Accused can be convicted on his confession alone but not with co-accused*

The logical conclusion on this issue therefore is that if there was any confession in these proceedings at all it ought to have been Exhibit D, the statement of the 1st accused person only. And the law is quite clear on the point and that is that the 1st accused could be convicted on his confession alone once it is found to have satisfied other laid down tests as found by the lower courts. G H

The lower courts were therefore wrong to have convicted 2nd, 3rd & 4th accused persons on non existent confessions. And even in Exhibit D, the 1st accused made it clear that he was the only one who

fired the shot. He did not implicate or mentioned any other person in exhibit D. (p. 580 G)

3. *Common intention to kill does not exist in this case*

B The facts in this case are quite clear. While I agree with the lower courts that the appellants had the common intention to collect their stolen goods from where they had kept them, I cannot safely say that they also had a common intention to kill the deceased, who as revealed by the evidence they did not even see before the gun was fired by the 1st accused person!
C The gun was never aimed at any particular person or even at particular vigilante group! . A shot in the air? May be.

And if the 1st accused had to collect the gun first from the 4th accused, that in my view goes to show that they had no common intention to kill anyone. The intention to kill must have been that of the 1st accused only and which should not be imputed to other accused persons in my view. (p. 581 D)

E 4. *Common intention - Should not be presumed too readily*

It is to be stressed that although common intention may be inferred from circumstances disclosed in the evidence and need not be express agreement, a presumption of common intention should not be too readily applied (see for example R. VS OFOR & OFOR (1955) 15 W.A.C.A. 4. I am clearly of the view that the death of the deceased herein was not carried out in concert by all the accused persons in circumstances pointing irresistibly to common intention. There were no materials from which to infer common intention in this case. (p. 582 A)

REPRESENTATION

Mr. N. O. Oke, with him U. A. Adeniyi Esq. for the appellants.
Chief O. Oyebolu, Attorney-General, Ogun State, with him A. O. Asenuga
H (Mrs.) for the respondent.

CASES REFERRED TO

Adeyemi v The State (1990) 6 N.W.L.R. (Part 195) 1 at 42

Egboghanome v The State (1993) 7 N.W.L.R.(Part 306) 383

Ikpo v The State (1995) 5 N.W.L.R (Part 421) 540

R v John Itule (1961) All N. L. R. 462

R v Sapele and Another (1957) 2 F. S. C. 24

Bature v The State (1994)1 N .W. L. R (Part 320) 267

B

Jafiya Kopa v The State (1971) 1 All N. L. R 150

Jimoh Yesufu v The State (1976) 6 S. C 167

Edet Obosi v The State (1965) N. M. L. R 119

R. v Ajayi Omokaro (1941) 7 W.A.C. A 146

C

STATUTES REFERRED TO

Criminal Code Law of Ogun State s.8

Criminal Code, Cap. 77, Laws of the Federation of Nigeria 1990 s.8

D

LEAD JUDGMENT BY IGUH JSC

The appellants, Asimiyu Olanrewaju Alarape, Adebayo Kehinde, Olorunwa Adubuleja and Aliu Rasaki were on the 31st day of October, 1996 jointly arraigned before the High Court of Justice, Ogun State, holden E at Ijebu-Igbo, charged with the offence of murder contrary to section 316 and punishable under section 319(1) of the Criminal Code Law, Cap. 29, Vol. 11, Laws of Ogun State of Nigeria 1978.

The particulars of the offence charged are as follows:-

F

" Asimiyu Olanrewaju Alarape (m), Adebayo Kehinde (m), Olorunwa Adubuleja (m), Aliu Rasaki (m) on or about the 22nd day of September, 1993 at Oke Alafia Area of Ijebu-Igbo in the Ijebu-Igbo Judicial Division murdered one Safiriyu Oshineye."

Each of the accused persons pleaded not guilty to the charge G and the prosecution called a total of 11 witnesses and tendered some Exhibits at the trial. The accused persons testified on oath on their own behalf and jointly called one witness

The substance of the case as presented by the prosecution is H that following incessant raids and/or attacks the Oke Alafia Quarters of Ijebu-Igbo was subjected to by armed robbers, the residents set up organised night-watch service by themselves over the area. This night-

watch service was commonly referred to by the people as "vigilante" duty. The purpose was to check and to ward off the said menace of armed robbers. The night guards were usually armed with cutlasses, sticks, whips, protective juju and torch lights. They were under strict injunction never to carry guns. They were also under strict directive to bring any suspects caught or arrested to the elders who in turn would hand them over to the police

In the night of the 22nd day of September, 1993, P.W. 2 Lateef. Osineye, P.W. 3 Kabiru Karimu together with many other members of the vigilante group were on night patrol duty at Oke Alafia Quarters of Ijebu-Igbo. The team carried out their night-watch patrol operation in different groups. None of them on duty that night was armed with a gun.

At about midnight, precisely at 12.30 a.m. of the 23rd September, 1993, one of the vigilante groups at the northern side of Oke Alafia Quarters comprising of six men and in which P.W. 2 served sighted a group of armed robbers from where they laid ambush. In this group of thieves, was the 1st appellant, Asimiyu Olanrewaju Alarape. The 1st appellant was identified from the security light in from of the house near where this group of night guards laid ambush. This group of night guards on sighting the robbers raised an alarm, shouting "thieves, thieves". As a result, the thieves which comprised about 7 persons tried to escape and ran in different directions but were hotly pursued. P.W. 2, in particular, with his group pursued one of the said robbers. The other groups of the night guards raced towards the direction the alarm came from. These included the group manned inter alia by P.W. 3 Kabiru Karimu, the deceased Safiriyu Osineye and others. This particular group were watching the southern end of Oke Alafia Quarters. P.W. 3 and the deceased led their group in the chase although the deceased ran ahead of P.W. 3 by some two metres. The next that was heard was a gun shot from the direction they were running to. The deceased had been shot on his chest and he instantly fell down and died on the spot. The other group then ran to the scene where the deceased was shot down and, observing that the robbers had killed him, proceeded to the house of P.W. 1, the Ward Head

of Oke Alafia area to report the incident. A report of the murder was later made to the police that night. The police visited the scene of crime and observed the gun shot injuries to the chest and ribs of the deceased. His corpse was taken to the Ijebu-Igbo mortuary where the Doctor performed post mortem examination on the body.

It is part of the prosecution's case that in the course of investigation of the case, all four appellants were arrested, charged and cautioned. They respectively made voluntary statements to the police. In Exhibit D, D1 which would appear to be confessional in nature, the 1st appellant stated that at about midnight on the 22nd September, 1993, he and the 2nd, 3rd and 4th appellants together with one Leke and Mufutau went to Oke Alafia Quarters of Ijebu-Igbo for the removal of items of property they had stolen the previous night but had hidden in the bush in the area. The 4th appellant was carrying a dane gun as they left for this operation. They had in fact recovered the stolen goods and were returning to their base when they were challenged by the night guards who raised an alarm and shouted "thieves, thieves". The gang consequently took to their heels but were pursued by the night guards as they tried to escape. They night guards caught Leke but he managed to escape. As the night guards continued to pursue them, the 1st appellant turned and shot the deceased who slumped on the ground. Following this development, the 1st appellant and his gang abandoned their loot, ran in different directions and managed as a result to escape. The 1st appellant shot the deceased night guard with the dane gun which the 4th appellant and Leke brought along with them for the operation. The thieves subsequently reassembled at about 4.30 a.m. in their base at Odo Area, Oke Alafia, Ijebu-Igbo.

The prosecution also relied on the written statements of the 2nd, 3rd and 4th appellants under caution. In Exhibit E, E1, the 2nd appellant explained how all four appellants with two others set out for their operation in question from the house of the 1st appellant at midnight of the 22nd September, 1993. They were to recover certain properties they stole the previous night and had hidden some where in the bush there. So, too, the 3rd appellant in his statement Exhibit F, F1 stated how all six

of them embarked on their operation in issue following a meeting they held in the house of the 1st appellant at about 8.00 p.m. of that night in connection with the operation. Thereafter, they set out for Oke Alafia Quarters to execute their operation at about mid night of that same day.

B Essentially the details in the written statements of the 2nd and 3rd appellants are the same as those of the 1st appellant in all material particulars and it is unnecessary to recount them all over again.

C There was finally the statement of the 4th appellant, Exhibit H, H1. This, strictly speaking, is not confessional in that he denied that the gang was armed with a dane gun for the operation or that they shot or killed any of the night guards. He, however, admitted that he knew the 1st - 3rd appellants as thieves. He also confessed that he had been carrying out joint stealing raids with the 3rd appellant and that their last operation was in 19993 when, together, they raided a certain farm at Osun Area of Ijebu-Igbo and stole palm products. He also confessed that he took part in the mid night operation of the 22nd September, 1993 along with the 1st-3rd appellants and two others.

E The case for the defence in their testimony before the court was a total denial of the charge. The 1st appellant testified that he knew nothing about the murder of the deceased in the night of the 22nd September, 1993. In particular, he denied making any confessional statement to the police in connection with the murder of the deceased. F He admitted his signatures in exhibit D. D1 but claimed that he did not know their contents. He was tortured and threatened before he signed them. He also denied firing the gun shot that killed the deceased.

G The 2nd appellant similarly denied the charge and stated that he signed his statement to the police without knowing its contents after he was tortured. He did not participate either with the 1st appellant or any other persons in the killing of the deceased or any one else in the night of the 22nd September, 1993 or at any other time before or after that date. H He denied making any confessional statement to the police in connection with this charge.

In the same vein, the 3rd appellant denied he was involved in any way with the murder of the deceased. He signed some documents, the

contents of which he knew nothing about. He denied telling the police in his statement that it was the 1st appellant that shot and killed the deceased.

The 4th appellant, for his own part, denied joining any one in the murder of the deceased in the night of the 22nd September, 1993. He also denied telling the police in his statement that it was when they were returning from their stealing expedition that the incident, the subject of this charge happened. He did not accept that he was the one that supplied the dane gun used by the 1st appellant in killing the deceased.

The appellants called D.W. 5 as their common witness. According to this witness, at about 10.30 p.m. on the material date, there was a gun shot from an accidental discharge by one Baba Nosi. This instantly killed one man he called Rodi. He claimed that on each occasion they were on neighbourhood night watch, they were usually armed with a gun. He did not know how the appellants came to be connected with the murder of the said Rodi.

The learned trial Judge, Ogunade, J. after an exhaustive review of the evidence on the 30th day of July, 1997 found all four appellants guilty of the murder of the deceased and accordingly sentenced them to death as prescribed by law. In his findings, the learned trial Judge was fully satisfied with and accepted the evidence of the prosecution witnesses as cogent and reliable. In his view, the confessional statements of the 1st, 2nd and 3rd appellants, Exhibits D.D1; E, E1, and F1 which were recorded by P.W. 5, read over to and signed by them and subsequently re-confirmed before a superior Police Officer, P.W. 6, were the voluntary and true statements of the appellants. So, too, the trial court held that Exhibit H, H1, the statement of the 4th appellant was his free, voluntary and true statement to the Police. He said:-

"The 1st, 2nd 3rd accused persons were alleged by the prosecution to have made statements in which they confessed to the charge. The 1st, 2nd and 3rd accused persons by their evidence seemed to have resiled from their statements. The said statements were Exhibit A (for the 1st accused) Exhibit E (for the 2nd accused) and Exhibit F (for 3rd accused person). At the trial, the 1st, 2nd and 3rd accused persons re-

tracted these statements at the time they were making their defence. The statements were received in evidence without any objection at the time they were tendered. Learned counsel for the accused persons had urged me to regard the statements as unreliable as the accused persons have
 B retracted them. I am not sure that by merely retracting a confessional statement at the trial the statement becomes unreliable,.....
 There is evidence, which I accept that before P.W. 6 endorsed Exhibits D, E & F as confessional statements he had meticulously taken all pre-
 C cautions to ascertain the voluntariness of the statements. I therefore hold that Exhibits D, E and F are confessional statements in that their con-
 D tents are consistent and unequivocal in material parts with the evidence of P.W. 2 and P.W. 3 to the extent that between 11.00 p.m. of 22/9/93 and 1.00 a.m. of 23/9/93 the 1st, 2nd and 3rd accused persons were among
 D the men seen by the witnesses in a gang of robbers and that on that day a member of the neighbourhood night-watch patrol was shot by the 1st accused in the company of the 2nd and 3rd accused persons and it was that gun shot that killed the deceased.I therefore hold that Ex-
 E hibits D, E and F were voluntarily made by the 1st, 2nd and 3rd accused persons"

With regard to the statement of the 4th appellant, the learned trial Judge commented:-

F "The statement of the 4th accused person does not amount to a confessional statement to the murder of deceased but he admitted in that statement that he was in the group of men which included the 1st - 3rd accused persons who went to the scene of crime on that day and himself
 G and the others took to their heels when they were chased by some men. I do not believe his story under cross-examination that he was not aware that a gun shot was fired on that day or that he did not tell the police that the incident occurred when he was coming back with the gang carrying stolen goods."

H He went on:-

"When the statements of the accused persons are viewed side by side with the evidence of P.W. 3 they show some consistency with the fact that on the day in question the accused persons went on their stealing

mission aware that one them was armed and that it was the gun shot from the gun carried by the 1st accused person which was fired by him that killed the deceased.

There is not doubt that the killing was unlawful."

The learned trial Judge next considered the entire evidence of D. W. 5 and proceeded to dismiss the same as false. Said he :-

"I am not in the least impressed by the evidence of D.W.5, virtually all he had said in this case, apart from his name, contradicted all the facts stated even by the accused persons. He lied unashamedly on all material issues. He strikes me as someone who had his own purpose to serve. I reject his evidence in its entirety."

On the common intention of the appellants, the learned trial Judge held that there was no doubt about the common intention of the four appellants. This was the recovery and removal of divers goods the gang had stolen the previous night and hid in the area the night guards were keeping watch over and to achieve this common intention, if necessary, by the use of force to facilitate their escape and prevent their being arrested or caught by the night guards. As a result, they embarked on the operation armed with a gun which was used by one of them to make good their escape. He was of the view that all four appellants must take full responsibility for the death of the deceased. As already stated the appellants were found guilty of the offence of the murder of the said Safiriyu Oshineye and were accordingly sentenced to death.

Dissatisfied with this judgment of the trial court, the appellants appealed against their convictions and sentences to the Court of Appeal, Ibadan Division which court on the 14th March, 2000 in a well considered judgment dismissed the appeals and affirmed the convictions and sentences passed on the appellants. It is against this judgment of the Court of Appeal that all four appellants have now appealed to this court.

Both the appellants and the respondent filed and exchanged their written briefs of argument. In the appellants' brief of argument, the under mentioned issues were set out for the determination of this court, namely:-

"(1) Whether the Court of Appeal was not wrong in affirming

the conviction of the Appellants for murder when there was no certainly as to who was actually responsible for the gun shot that killed the deceased.

B (2) *Whether the Court of Appeal was not wrong when it affirmed the conviction of the Appellants based on alleged confessional statements without any due regard to the other material facts and circumstances of the case.*

C (3) *Whether the Court of Appeal was not wrong when it affirmed the conviction of the Appellants for murder when there was no identification of the deceased to the Medical Doctor before a post mortem examination was conducted by the Doctor.*

D (4) *Whether the Court of Appeal was not wrong when it affirmed the conviction of the 4th Appellant for murder on the ground that he formed a common intention with the 1st, 2nd and 3rd Appellants to prosecute an unlawful purpose when the prosecution in fact adduced no evidence, direct or circumstantial, to establish such a common intention.*

E (5) *Whether the Court of Appeal was right in confirming the conviction of the 4th Appellant for murder based on the confessional statements of the 1st - 3rd Appellants which statements were not adopted by the 4th Appellant."*

F The respondent, for its own part, similarly submitted five issues in its brief of argument for the resolution of this appeal. These issues are framed thus:-

G "(i) Whether the Learned Justices of the Court of Appeal were right in affirming the conviction of the Appellants for murder, when there was no direct evidence as to who fired the gun shot that killed the deceased.

H (ii) Whether the Court of Appeal was right in upholding the conviction of the Appellants by the trial Court on the basis of the confessional statements of the 1st, 2nd and 3rd Appellants and other material facts and circumstances of the case.

(iii) Whether the Court below was right in affirming the conviction of the Appellants for murder, when there was no direct evidence of identification of the body of the deceased to the Medical Doctor before a

post mortem examination was conducted by the Doctor.

(iv) Whether the Court of Appeal was right in its decision in upholding the conviction of the 4th Appellant on the ground that sufficient evidence was adduced by the prosecution to show that the 4th Appellant formed a common intention with the 1st, 2nd and 3rd Appellants to prosecute an unlawful act; to wit: Murder. B

(v) Whether the Lower Court was right in confirming the conviction of the 4th Appellant, despite the fact that he did not adopt the confessional statements of the 1st to 3rd Appellant." C

It is evident that both sets of issues touch essentially on the same questions and it will make no difference which of them is adopted for the determination of this appeal.

At the oral hearing of the appeal on the 23rd November, 2000, learned leading counsel for the appellants, N.O.O. Oke Esq. adopted the appellants' brief of argument and made oral submissions in amplification thereof. He pointed out that issues 1-3 were of general application to all the four appellants as against issues 4 and 5 which only covered the 4th appellant. Dealing with issues 1 and 2 together, learned appellants' counsel submitted that the prosecution failed to prove its case beyond reasonable doubt that it was the act of the appellants to the exclusion of all other persons that caused the death of the deceased. He contended that two possibilities would appear to arise from the evidence before the trial court. The first possibility was that any of the escaping thieves might have fired the gun shot to prevent their being caught. He added that a second and more plausible possibility is that the gun might have been fired by any member of the vigilante groups which might have mistakenly taken the deceased to be one of the escaping felons. He submitted that the heavy reliance placed on the retracted statements of the appellants both by the trial court and the court below without looking for an independent credible evidence establishing the guilt of the appellants is fatal to the case of the prosecution. In this regard, reliance was placed on the decision in Adeyemi v. The State (1991) 6 N.W.L.R. (Part 195) 1 at 42. D E F G H

On issue 3, learned counsel argued that the medical report, Exhibit K, was irrelevant and that the reliance on it in proof of the death of

the deceased occasioned a miscarriage of justice as there was no conclusive evidence connecting the document with the body of the deceased.

Finally, on issues 4 and 5, learned counsel submitted that the affirmation by the court below of the conviction of the 4th appellant for allegedly forming the common intention in issue with the 1st-3rd appellant is erroneous on point of law and unsupportable by evidence. In this regard, learned counsel called in aid the decision of this court in Akinkumi and others v. The State (1987) 3 S. C. 152. He pointed out, in particular, that the 4th appellant, unlike the 1st appellant, did not confess to the murder. He therefore urged the court to allow the appeal of all the four appellants.

Chief O. Oyebolu, learned leading counsel for the respondent and Attorney-General, Ogun State, similarly adopted the respondent's brief of argument and proffered oral submissions in support thereof. He contended that there was evidence before the court which was accepted by the learned trial Judge and affirmed by the court below that the appellants, armed with a gun, set out to recover certain items of house-hold effects which they stole the previous night but had hidden in a nearby bush. The gang set out for their operation in the night of the 22nd September, 1993 after a meeting they held in the house of the 1st appellant at about 8.00 p.m. with regard to the modalities for this criminal adventure. There was also accepted evidence that as this gang of thieves which included the appellants were disturbed and hotly chased by the night guards and one of them called Adeleke was almost apprehended, the 1st appellant with a view to facilitating their escape turned the gun with which they went for the operation on the deceased, the night guard who ran closest to them in the chase, and shot him. The deceased immediately slumped on the ground and died on the spot from the gun shot injuries to his chest. Learned counsel stressed that there was concurrent finding of fact by both courts below that no member of the vigilante group carried any gun at all material times. He referred the court to the decisions in Eghoghanome v. The State (1993) 7 N.W.L.R. (Part 306) 383 and Ikpo v. The State (1995) 5 N.W.L.R. (Part 421) 540 and submitted that a confessional statement does not become inadmissible as

evidence merely because the accused denied having made it. It is an issue of fact whether or not the confession was made by the accused. So long as the confession was made by the accused and the court, having regard to all the circumstance of the case, is satisfied with the truth thereof, it may base conviction thereon. On the issue of the identity of the deceased and the cause of death, learned counsel submitted that medical evidence is not a pre-requisite for establishing these issues of fact. He submitted that there is no doubt that the deceased died of the gun shot injuries he received from the 1st appellant who was a member of the appellants' gang of armed robbers. He pointed out that the deceased whose identity was never in doubt died on the spot as soon as he was shot by the 1st appellant.

On the issue of the common intention of the appellants, learned counsel submitted that the appellants, on the evidence, set off for their unlawful operation with a common intention to recover and remove the property which they stole the previous night and had hidden in the bush in the area of operation of the vigilante group. He stressed that the appellants in order to achieve their common intention held a meeting before they embarked on their operation armed with a gun. This was obviously with a view to use force, if necessary, in the execution of their common purpose or design. The gun was indeed used by the 1st appellant to resist their arrest and to aid their escape from the scene. Learned counsel argued that it did not matter that the dane gun the gang carried for the operation was fired by the 1st appellant. He submitted that all the appellants in the circumstances of the case must be held responsible for the death of the deceased which resulted from the said shooting. Learned Attorney- General drew the attention of the court to section 8 of the Criminal Code Law, cap. 29, Laws of Ogun State of Nigeria and he urged the court to dismiss this appeal.

Upon a close study of the issues submitted on behalf of the parties for determination in this appeal, it seems to me that issues 1, 2, 4 and 5 are inter-related. I propose therefore to consider them together in this judgment. I will finally conclude with issue 3.

Turning now to issues 1, 2, 4 and 5, it is evident that the case for

the prosecution was founded on both the testimony of the night guards who were eye witnesses to the incident and the statements of the appellants to the Police. These statements are Exhibits D, D1; E, E1; F, F1 and H, H1. It is also clear that the prosecution relied additionally on circumstantial evidence on the issue of the group that shot and killed the deceased. While the night guards testified most unequivocally that it was a member of the appellants' fleeing gang that shot and killed the deceased who had almost intercepted one of them in their escape bid, the appellant's discredited witness, D., W. 5, whose testimony was rejected by the trial court claimed that it was the night guards that shot the deceased. In this regard, the prosecution further relied on circumstantial evidence and asserted that none of the night guards, at all events carried any gun whatever on the night in question. There were also statements of the 1st, 2nd and 3rd appellants, Exhibits D, D1; E, E1; and F, F1 to the effect that the four appellants with two others actually planned and set out for the operation in issue. This they did with a gun in their possession which the 1st appellant eventually used to fire at the deceased as the latter tried to intercept and catch them. It was the finding of the learned trial Judge as affirmed by the Court of Appeal that the prosecution's version of the incident had been established beyond reasonable doubt. Learned counsel for the appellants did however attack this finding on the ground that the said statements were inadmissible in evidence as they were retracted by the appellants at the trial.

The first point I desire to make is that retraction of or resiling from a confessional statement or denial by an accused person of his having made such a statement does not ipso facto render it inadmissible in evidence. See R.v. John Itule (1961) All N.L.R. 462, R.v. Sapele and Another (1957) 2 F.S.C. 24, Egboghonome v. The State (1993) 7 N.W.L.R. (Part 306) 383 at 431. Bature v. The State (1994) 1 N.W.L.R. (Part 320) 267 etc. **A confessional statement, so long as it is free and voluntary and it is direct, positive and properly proved, is enough to sustain a conviction. The court should not, however, act on the confession without first testing the truth thereof.** See Jafiya Kopa v. The State (1971) 1 All N.L.R. 150, Jimoh

Yesufu v. The State (1976) 6 S.C. 167, Edet Obosi v. The State (1965) N.M.L.R. 119, R.v. Ajayi Omokaro (1941) 7 W.A.C.A. 146. **But so long as the court is satisfied with its truth, a confessional statement alone is sufficient to ground and support a conviction without corroboration.** See R.V. Sykes (1913) 8 C.A.R. 223, Edet Obosi v. The State (supra), Jimoh Yesufu v. The State (supra). **The test, however, for determining the veracity or otherwise of a confessional statement is to seek other evidence, be it slight, of circumstances which make it probable that the confession is true. See R. v. Sykes (1913) 8 C.A.R.233 at 236 where Ridley, J. suggested the tests to be applied to an accused person's confession in the determination of its veracity.** These consist of the following:-

1. Whether there is anything outside the confession to show that it is true.
2. Whether the statement is corroborated, no matter how slightly.
3. Whether the facts contained therein, so far as can be tested, are true.
4. Whether the accused person had the opportunity of committing the offence.
5. Whether the confession of the accused person was possible.
6. Whether the confession was consistent with other facts which have been ascertained and proved in the matter.

The above tests have been accepted and consistently applied by this court over a long period of time in a number of cases. See Ikpasa v. Attorney v. Attorney-General of Bendel State (1981) 9 S.C.7, Onochie v. The Republic (1966) N.W.L.R. 307, Akpan v. The State (1992) 6 N.W.L.R. (Part 248) 439 at 460.

In this regard it is evident from the records that the learned trial Judge adequately tested the truth of the said statements before acting on them. He did also look outside the statements for some corroborative evidence of circumstances which make it probable that the fact therein stated are true. In his view, when those statements of the appellants are considered side by side with the evidence of the prosecution witnesses, some degree of consistency on the facts are indicated. The following

may be noted, namely:-

(1) That the appellants admitted that they were at the scene of crime at mid-night of the material date to recover the loot from the previous night's stealing.

B (2) That the items stolen were bottles, shoes and other personal effects and these were what the police recovered from the scene of crime.

C (3) The appellants took the police to where they were confronted by the night guards which tallied with the situs of the scene of crime.

(4) The appellants took the police to where they abandoned the stolen items and where the deceased was shot dead by them.

D (5) The 1st-3rd appellants in their statements mentioned the same names of the six persons that took part in their operation of that night.

(6) That it was the 1st appellant who fired at the deceased.

E (7) That the appellants showed P.W. 8, Sgt. Okereke where the deceased tried to intercept them before he was killed.

There can be no doubt that the learned trial judge gave the statements of the appellants very close consideration along the guidelines prescribed by law and found them to be their free voluntary statements.

F One more significant point must be made with regard to Exhibits D, D1; E, E1 and F, F1. This is the fact that despite the very lucid evidence of the Police Officer who recorded the statements of the first three appellants and testified as to their voluntariness and that they were made without any threat, promise or inducement, the appellants were G nonetheless taken before P.W. 6, a superior Police Officer before whom the correctness and voluntariness of their statements were further confirmed.

H In this connection, it ought to be stressed that it is not the requirement of any law that if a confessional statement has not been read over and confirmed before a superior Police Officer, it will ipso facto cease to be effective or be rendered inadmissible. Such a confirmation simply makes proof of its voluntariness easier and no more. See Akpan

v. The State (1992) 6 N.W.L.R. (Part 248) 439 at 472. The practice has however been commended in many cases. See Chungwom Kim v. The State (1992) 4 N.W.L.R. (Part 233) 17, R.v. Omerewure Sapele, (supra), Nwigboke and others V.R. (1959) 4 F.S.C. 101.

As to the statement of the 4th appellant, Exhibit H, H1; I have earlier on in this judgment observed that the same, too, was found by the trial court, on very sound grounds, to be his free and voluntary statement to the Police. This finding of the trial court was affirmed by the court below. I need only state that I can find no reason to fault these concurrent findings of both courts below.

At all events, it ought to be noted that the said statements were tendered without any objection from the defence. None of the prosecution witnesses was cross-examined as to their involuntariness. It was not until the prosecution had closed its case and the appellants were testifying in their own defence in the witness box that the issue was belatedly raised. The question of the voluntariness of a statement is tested at the time the statement is sought to be tendered in evidence. See Ikemson v. The State (1980) 3 N.W.L.R. (Part 110) 455 and Okaroh v. The State (1988) 3 N.W.L.R. (Part 81) 214. I think the learned trial Judge was right to dismiss this aspect of the defence case as an after thought, having regard to the qualitative evidence tendered by the prosecution and accepted by the trial court on the subject. I will now deal with the question of the real parties to this case of the murder of the deceased, Safiryu Oshineye. Put differently, are the 4 appellants criminis participes to this grave offence and therefore liable to conviction as charged.

In this regard, the learned trial Judge observed thus:-

"I think in the circumstances of this case the decision in R. vs. Gyang & Nfam (1954) 12 W.A.C.A. 584 in which murder was committed by one thief to enable the other to escape is apposite to the facts of the case. There is no doubt about the common intention of the four accused persons to remove the goods which they have stolen the previous night kept in the area the deceased and the others were watching. In order to achieve their common intention they went there armed with a gun which

was used by one of them to make good their escape from the scene of crime. I therefore hold that upon the totality of the evidence before me the deceased had been unlawfully killed by the four accused persons, and for the reasons already stated in this judgment, I am satisfied that the prosecution has proved the case beyond reasonable doubt. I find the four accused persons guilty as charged in the information."

The court below, relying on the provisions of section 8 of the Criminal Code Law, Cap. 29, Laws of Ogun State of Nigeria, 1978, was also of the same view.

Section 8 of the Criminal Code Law of Ogun State, *ibid*, provides as follows:-

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose, an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

A close analysis of the above section of the law discloses the following requirements or preconditions that must be established before a conviction based thereunder may be sustained. These requirements are as follows:-

- (1) There must be two or more persons.
- (2) They must form a common intention.
- (3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another.
- (4) An offence must be committed in the process.
- (5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose."

See Akinkunmi and others v. The State (1987) 1 N.S.C.C. 305 at 310.

It seems to me apparent from the appellants' brief of argument that no issue was joined by them on the establishment, by the prosecution, of the first four ingredients above stated, having regard to the facts of this case. The contention of their learned counsel is that in so far as the 4th appellant is concerned, there was no legal evidence to show that he sanctioned the act of the 1st appellant who shot the deceased to

death. He also submitted that there was a common intention by the appellants to prosecute with one another. He described this common intention simply as the act of removing already stolen goods. He argued that the offence that was committed which was murder was not pursuant to the prosecution of the common intention to remove stolen goods but to escape lawful arrest. He posed the question:-

"The question arises; what bearing has the common intention to remove already stolen items with the case of murder".

Learned counsel relied on the decisions in R.v. Ofor and Another (1955) 15 W.A.C.A. 4 and Akinkunmi and others v. The State (1987) 3 S.C. 152 and he urged the court to allow the appeal of the 4th appellant, quash his conviction and sentence and enter a verdict of acquittal and discharge in his favour.

Learned counsel for the respondent in his reply submitted that the court below was right in upholding the findings of the trial court which rightly held that the common intention of the appellants was to recover and remove the stolen goods in question if necessary by the use of force to facilitate their escape and prevent their arrest or apprehension by the night guards. He contended that the statements of the 1st-3rd appellants are virtually the same. All three are ad idem on the issue that they all took part in the operation and that it was the 1st appellant who pulled the trigger of the dane gun they employed in the operation which killed the deceased. The 4th appellant himself admitted in his statement, Exhibit H, H1 as follows:-

"Four of us including Asimiyi Olorunwa, Adebayo and myself went and carried the load on that night. As we were coming to Asimiyu's house with the load, some people pursued us and we dropped the load and ran away".

He admitted that he took part in the mid-night operation in question with the 1st-3rd appellants. He admitted that they were disturbed as they were carrying their loot to the house of the 1st appellant. Learned counsel stressed that all four appellants in the process of fostering their common intention that night carried a dane gun for their operation. The gun was used by the 1st appellant to facilitate the escape of the appellants

from the scene of crime and to prevent being arrested or caught by the night guards. This gun shot resulted in the death of the deceased. He contended that by section 8 of the Criminal Code Law of Ogun State, 1978, each of the appellants is in the circumstances deemed to have committed the offence which, in the instant case, is murder.

Adverting briefly once more to the simple facts of this case as accepted by the learned trial judge and affirmed by the Court of Appeal, the appellants with two others now at large assembled at about 8.00 p.m. of the night of the 22nd September, 1993 where they jointly held a meeting in the house of the 1st appellant. This meeting was in connection with the unlawful operation planned for that night by the gang for the recovery and removal of divers goods they stole the previous night and had hidden some where in the bush at Oke Alafia Quarters, Ijebu-Igbo. On the findings of the learned trial Judge, as affirmed by the Court of Appeal, the common intention of the gang was the recovery and removal, if necessary, by the use of force, of the goods aforementioned which they kept in the area the deceased and others were keeping watch over and in order to achieve their common intention, the gang set out from the house of the 1st appellant at about mid-night after their meeting armed with a dane gun which was used to facilitate or make good their escape from the scene of crime and prevent being arrested. **There can be no doubt that the above findings by both courts below on the common intention of the gang in the matter of their operation in issue are totally justifiable and irresistibly warranted by the evidence.**

In this connection, I need hardly point out that "common intention" in criminal law may be inferred from circumstances described in the evidence led before the court and need not be provable only by the express agreement of the accused persons. See Ogu Ofor and Another v. The Queen (1955) 15 W.A.C.A. 4 at 5. The test of liability under section 8 of the Criminal Code Law of Ogun State, 1978 is not whether the other accused persons counselled or procured the principal offender to use the lethal weapon that caused the death of the deceased but whether it was a probable conse-

quence of the prosecution of their joint unlawful act or common intention. So, where two or more persons set out to steal, as is the case in the present appeal, and one of them is known by the others to be armed with a lethal weapon, all of them may be held criminally responsible for any consequences which result from the use of the weapon by the one who carried it, even if there is no evidence to show that there was any express pre-concerted agreement that he was to use it. See Jide Digbehin and 2 others v. The Queen (1963) All N.L.R. 394. In the same vein, in the case of Abot Gyang and Another v. The Queen (1954) 14 W.A.C.A 584 the two accused persons, like in the present appeal, went out together in the night with the intention of committing a felony, namely, to steal from the compound of the deceased. The 2nd accused had a knife. They were challenged by the deceased who suddenly knocked the 1st accused person over and held him down on the ground. In the ensuing struggle, the 2nd accused who had run a short distance away returned and stabbed the deceased and both accused persons made their escape. The West African Court of Appeal, quite rightly in my view, held as regards the 1st appellant that he went to commit felony with the 2nd appellant who had a knife which he subsequently used to aid their escape and that he was rightly convicted for the offence of the murder of the deceased. So, too, was the 2nd appellant who actually did the stabbing.

The point that needs be emphasised in these sorts of cases is that once it is firmly established that two or more persons formed the necessary common intention to prosecute an unlawful purpose and in the prosecution of such purpose, an offence of such a nature that its commission was a probable consequence of the prosecution of such purpose is committed, each of them is deemed to have committed the offence. In such circumstances, the court, once the execution of the common intention or design is established, would be right in asserting that it did not matter on such facts which of the accused person did what. This is for the simple reason that under such circumstances a fatal blow, though given by one of the accused persons involved, is deemed in the eyes of the law to have

been given by the rest of his co-accused persons. The person actually delivering the blow is said to be no more than the hand by which the others all strike. See Ogu Ofor and Another v. The Queen (supra)

B In Igyegh Atanyi v. The Queen (1955) 15 W.A.C.A. 34, the appellant with another person went out at night to steal. It was not in dispute that the appellant's companion was armed with a knife. They were disturbed while carrying out their common purpose to steal by the deceased who was stabbed to death by one of the two thieves. The trial
C Judge found on the evidence that it was the appellant who stabbed the deceased and the court upheld his finding on the facts. On appeal, the West African Court of Appeal held, again rightly in my view, that in the circumstances of the case, it could fairly be assumed that both accused
D persons intended, if necessary, to use force in effecting their common purpose as in the present appeal and that in the case of a common design to commit robbery with violence, if one prisoner causes the death of one who has disturbed them in carrying out the execution of their common
E purpose, they both will be guilty of murder.

In the present case all four appellants after their meeting in the house of the 1st appellant went out together at mid-night for an unlawful purpose in conjunction with one another. In other to
F foster or achieve their common intention, one of them carried a lethal weapon, a dane gun, which the 1st appellant successfully used to facilitate or aid their escape and avoid being caught or arrested when they were disturbed and hotly chased by the deceased and the other night guards. I think that this is a proper case where
G section 8 of the Criminal Code Law of Ogun State, the provisions of which are in pari materia with those of section 8 of the Criminal Code, Cap. 77, Laws of the Federation of Nigeria, 1990 must apply. In my view, the gun, though fired by the 1st appellant at all mate-
H rial times, is deemed in the eyes of the law to have been fired by the rest of his gang. The 1st appellant was no more than the hand by which the other appellants struck and all are liable to be convicted for the murder of the deceased.

Learned counsel for the appellants did submit, quite unconvincingly in my view, that the offence of murder that was committed was not in the course of the prosecution of the common intention of the appellants to remove stolen goods but to escape lawful arrest. With respect, I find it difficult to accept this proposition as well founded. **One may ask why the appellants after their meeting in the house of the 1st appellant proceeded directly to execute their common design armed with a gun. It was this gun that the 1st appellant used in the course of the execution of their common intention and as a result of which the deceased was shot dead to facilitate the escape of the gang. It seems to me plain that the straight answer to the above question is that the appellants had intended, if necessary, to use force in effecting their common design. Force they did eventually use and they must in law be held criminally responsible for their conduct.**

Learned counsel for the appellants placed heavy reliance on the decisions in R.v. Ofor and Another (supra), Onnegbe v. Queen (1957) 2 F.S.C. 10, and Akinkunmi and others v. The State (1987) 3 S. C. 152. He submitted that common intention must be distinguished from common object and that where the crime committed is unrelated to the common intention of the accused persons, such a case cannot come under section 8 of the Criminal Code Law of Ogun State, 1978.

There can be no doubt that in the context of section 8 of the Criminal Code Law of Ogun State, ibid, the common intention of accused person must be distinguished from their common object. In R. V. Ofor and Another (supra), for instance, the common object of the accused persons was merely to expel the deceased and others from the father's camp without more. Clearly this intention to expel the deceased did not, on the evidence, as presented by the prosecution, amount to the same thing as the intention to kill the deceased. It appeared that the intention of each appellant in the matter of the death of the deceased was suddenly formed and formed independently of each other as a result of which section 8 of the Criminal Code, the provisions of which are in pari materia with those of section 8 of the Criminal Code Law of Ogun State,

1978 could hardly apply. Similarly in Onuegbu v. Queen (supra) no proof of common intention by the accused persons relative to the charge of murder was established. It was held by this court, and quite rightly, that as the evidence clearly negated a common intention or design to effect the felonious purpose, if necessary, by the use of violence, the 1st three appellants ought to have been acquitted. So, too, in Akinkunmi and others v. The State (supra) the 4 appellants had a common intention to steal free roaming goats from the highway without more. It was held on the facts that the common intention to steal a goat did not necessarily include escaping in the manner of the action of the 2nd appellant that resulted in the deceased being found with broken skull. It was further held that the murder of the deceased was not a probable consequence of stealing the goats. **The findings of the courts in the above three cases seem to me clear. These are that the killings of the deceased persons were not probable consequence of the prosecution of the unlawful purpose to which all the accused persons were a party. Under such circumstances there can be no doubt that the facts of those cases relied upon by learned counsel for the appellants are easily distinguishable from those of the present case.** It is by virtue of all that I have stated above that issues 1, 2, 4 and 5 must be and are hereby resolved against the appellants.

There is finally issue 3 which questions whether the court below was right in affirming the conviction of the appellants for murder when there was no evidence of the identification of the deceased to the Medical Doctor at the post mortem examination on his body. The submission of learned counsel for the appellants is that failure by the prosecution to identify the body of the deceased by P.W. 9 at the post mortem examination was fatal to the conviction of the appellants.

In this regard, the finding of the trial court as affirmed by the court below is that the deceased, Safiriyu Oshineye, died instantly after he was shot by the 1st appellant. It is not in dispute that P.W. 9, an uncle of the deceased, joined the Police to convey the body of the deceased, Safiriyu Oshineye, from the scene of crime to the Hospital. P.W. 9 also testified, and his evidence was not challenged, that the Doctor gave him

the paper, Exhibit J, and informed him that he was performing post mortem examination on the body of his nephew. P.W.1,P.W.2, P.W.3. P.W.4 and P.W.11 testified, and their evidence was accepted by the trial court, that they saw Safiriyu Oshineye lying dead at the scene of crime. In particular, P.W. 2, Lateef Osineye, the brother of the deceased, was along with P.W. 3 and the deceased engaged at all material times in the night guard duty.Indeed P.W.3 was in the same group of the night guards as the deceased and was in his company when the deceased was shot dead.

In this regard, P.W. 4 testified thus:-

"The cloth of the deceased was soaked in his chest area and it showed gunshot wounds around the chest and rib area. The corpse was taken to the mortuary at Ijebu-Ode"

P.W.3 also testified as follows:-

"When I heard the gunshot I observed that Safiriyu Oshineye was hit by the gunshot and he fell down"

P.W.11, for his part, stated:-

"I went to the scene with the DCO and there we met the body of one Oshineye. I saw entrance of bullet into the body of the deceased and he was bleeding. The body was taken to the General Hospital, Ijebu-Igbo for post-mortem examination"

The testimony of the above witnesses was accepted by the trial court. In my view, it cannot be disputed that the identity of the deceased was at no time in doubt whether before or after he was shot dead by the first appellant.

It is also not in dispute that the deceased died on the spot at the scene of crime as a result of the gun shot injuries he sustained. It seems to me plain that neither the identity of the deceased nor the cause of his death was put in issue by the appellants at any time during their trial.

I think I need emphasise that while medical evidence to prove the cause of death is desirable in homicide cases, this is not absolutely essential, but, to make the accused criminally liable in a case of murder, there must be clear evidence that the death of the deceased was the direct result of the act of the accused. See R.v. Johnson Nwokocha (1949) 12 W.A.CA 453. Medical evidence in

proof of death is not essential in circumstances where:-

(i) There is evidence of the death of the deceased; and

(ii) There is evidence that the death is as a result of the unlawful and intentional act of the accused person. See Oko v. The State (1975) - 11 S.C. 17, Akpan v. The State (1994) 6 N.W.L.R. (Part 368) 347 at 351, Garuba v. The State (1996) 7 N.W.L.R. (Part 460) 279. **Death can be established by sufficient evidence other than medical evidence showing beyond reasonable doubt that death resulted from the particular act of the accused. See Azu v. The State (1993) 6 N.W.L.R. (Part 299) 303, Akpunya v. State 1976 11 S.C. 269 at 278, Ayinde v. State 1972 3 S.C. 153, Essien v. State 1984 3 S.C. 14 at 181, Adekunle v. State 1984 5 N.W.L.R. (Part 123) 505 at 516 etc. In my view, on the accepted evidence before the court, it is beyond doubt that there was proper identification of the deceased at all material times and that his cause of death was the gun shot injuries he received from the 1st appellant.**

Although Exhibit K is covered by the provisions of section 42(1)(a) of the Evidence Act, there is additional cogent circumstantial evidence which confirms the identity of the deceased and his cause of death. Issue 3 is hereby resolved against the appellants.

In the final result and for all the reasons I have given above, these appeals fail and are hereby dismissed. The convictions and sentences passed on the appellants by the trial court as affirmed by the court below are hereby further confirmed.

G **BELGORE JSC**

My learned brother, Iguh JSC has set out graphically the evidence before trial Court which led to the conviction of the appellants. Court of Appeal also had no reason to interfere with decision of trial Court on these appellants now before us. What is certain in this case, throughout, with the confessions which could not be displaced, is that all the accused persons, now appellants knew that some goods had been stolen and hidden in a safe place, so to say. The first appellant at a time

of the night thought more appropriate and to avoid detection, counselled the others to follow him to retrieve the hidden stolen goods, and in the process armed with dangerous weapon, which in the case is a gun. Surely he had a common purpose with other accused persons to retrieve the hidden stolen goods by all means, including force of arms. When the appellants retrieved the stolen goods, on their way out, they were accosted by the town's vigilante who were not armed with gun (had they been so armed, to my mind, it would not make any difference to the law). The gun allegedly held by 4th appellant was snatched by the 1st appellant who pulled the trigger and killed the deceased. The law is clear, all the appellants knew they were out for a criminal offence, to retrieve from criminal safe custody goods already stolen and in the process of prosecuting the offence had a dangerous weapon, a gun. They surely knew that a gun is not for joke because it could cause death or grievous hurt that may ultimately lead to death.

All the appellants were first and foremost, accomplices to carrying or treating stolen goods. They knew they were involved in handling stolen goods and were out to carry the goods to a safer place at the instance of 1st appellant. They knew they had at least a gun. The law, Criminal Code provides:-

"8 When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

The first appellant counseled the other appellants to join him to remove the goods they had stolen from where they were hidden and they consented and actually joined him in going to the place and helped remove the goods. They had a gun with them to the knowledge of all of them. This by itself is a criminal offence. But the section 8 of Criminal Code Law must be read in conjunction with S. 9 thereof providing:

"When a person counsel another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the

same as that counselled or a different one, or whether the offence is committed in a way counselled or a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

B *In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him"*

C When the appellants set out on the fateful night they not only knew they were out to commit an offence but armed in case they were confronted in carrying out their design. They were confronted by vigilantes, and the deceased, a member of the vigilantes was shot at point blank range by 1st appellant who took the gun from 4th appellant. That was the common purpose-to confront by any force whoever obstructed their escape. (R.V. Offor & Anor. (1955) XV WACA 4; R.V. Bada & Anor. X WACA 249. It does not matter which of the accused did what, so far there was a common purpose as the gang of these appellants went out fully armed to confront any person who would try to prevent or obstruct their escape (Alagba & Ors. v. The King (1950) 19 N.L.R. 129; R. v Atanyi (1955) XV WACA, 34; R V Gyang & Nfam (1954) XIV WACA 584; Munonwem & Others V R (1963) 1 All N.L.R. 95; Digbekin & Ors V. King (1963) 1 All NLR 388.

F It is for the foregoing reasons and the fuller reasons in the judgment of my learned brother, Igu JSC that I find no merit in this appeal. I dismiss it and uphold the decision of Court of Appeal.

G **KUTIGI JSC (DISSENTING)**

All the four accused persons herein were charged with the murder of one Safiriyu Oshineye punishable under section 319(1) of the Criminal Code of Ogun State. They all pleaded not guilty to the charge.

H The prosecution called eleven witnesses at the trial. Each of the appellants testified on oath in his own defence and called one common witness who testified as D. W. 5.

In a reserved judgment, the learned trial judge found the four

accused persons guilty of murder and sentenced each of them to death.

Aggrieved by the judgment of the High Court, the accused persons appealed to the Court of appeal holden at Ibadan. In a unanimous judgment, the Court of Appeal dismissed the appeals and confirmed the convictions and sentences passed on each of them.

Still dissatisfied with the judgment of the Court of Appeal, the appellants have further appealed to this court.

Briefly stated the facts of the case are that on 22nd September 1993 some men who were members of a "vigilante" group were on night patrol duty. They operated in groups. One of the groups sighted some people suspected to be thieves. The group raised an alarm shouting thieves, thieves as a result of which the suspected thieves ran in different directions. Other groups of the vigilante men on hearing of the alarm also ran towards the direction of the alarm. One of such groups ran after one of the thieves. In the confusion a gun shot was heard. It was discovered that the deceased herein who was a member of the vigilante group had been shot and fatally wounded. He died instantly. The matter was later reported to the Police. It was in the course of Police investigation that the four accused person were arrested. In fact the 3rd accused person was the first to be arrested and he supplied the names of the others to the Police who then effected the arrest.

The Appellants through their counsel filed a joint brief of argument in this appeal. The Respondent also filed a joint Respondent's brief. The briefs were adopted at the hearing.

In the Appellants' brief, five (5) issues were identified as arising for determination in the appeal. I am however, concerned with two issues only which in my view formed the basis for the convictions of the appellants. These are issues Nos. 4 & 5 which respectively complain about the alleged "common intention" and alleged "Confessional statements" of the appellants.

However before I delve into these issues, I shall make one point clear. And that is that there was no eye witness in this case as to who fired the deadly shot. And because there was no eye witness, the lower courts of necessity had to base the convictions of the appellants on al-

leged "confessions" by the Appellants as well as alleged "common intention" on their part. That much was clear from the lead judgment of the Court of Appeal. On page 165 of the record, the lead judgment reads-

B *"In this instant appeal there is ample evidence that between the night of the 22nd of September 1993 and the 23rd of September 1993 Safiriyu Oshineye died instantly of gun shot wound which he sustained while on night duty. The nagging question is who fired the gun where-upon the deceased met his death*

C *The issue had to be resolved before linking any of the appellants with the death of the deceased.*

The learned trial judge in his finding on page 101 lines 25-32 of that records held that-

D *"I therefore hold that Exhibits D, E and F are confessional statements in that their contents are consistent and equivocal in material points with the evidence of PW 2 and PW 3 to the extent that between 11 p.m. of 22/9/93 and I a.m. of 23/9/93, the 1st-3rd appellants were among the men seen by witnesses in a gang of robbers."*

E The judgment continued at the bottom of page 166 thus:-
"Evidence that one of these appellants carried gun and that the 1st appellant shot the gun come from the appellants themselves in Exhibit D, E and F their statements."

F Further down on page 178 the record reads:-
"The learned trial judge in finding the four appellants guilty of the murder of Safiriyu Oshineye relied on section 8 of the Criminal Code: He found that the appellants had a common intention to recover the goods which they have stolen the previous night and kept in the area the deceased and others were watching. In order to achieve their common intention they went there armed with a gun which was used by one of them to aid their escape from the scene. It did not matter that the fatal shot was fired by the 1st appellant. He concluded that the four
G *appellants had unlawfully killed the deceased."*
H

I will now proceed to treat the two issues identified above to have formed the basis for the convictions of the four appellants.

CONFESSIONS.

Under section 27 of the Evidence Act Cap. 112 Volume VIII Laws of the Federation of Nigeria, 1990, it is provided as follows:-

"27 (1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."

(2) Confessions if voluntary are deemed to be relevant facts as against the person who make them only.

(3) Where more persons than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, the court, or a jury where the trial is one with a jury, shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct."

Now, in Exhibit D, the 1st accused said amongst others as follows:-

*"I collected the dane gun held by Aliu (meaning the 4th accused) and I fired at the vigilante men, my bullet shot one of the vigilante men down to death:
After I have fired this same gun, Aliu collected it from me and take it away. I was the one that fired the deceased to death."*

I agree with the lower courts that the above statement amounted to a confession under subsection (1) of the law provided as above. It is also evidence against the maker, 1st accused, only. (See subsections (1) & (2) above).

In Exhibit E, the 2nd accused stated therein thus:-

"The night guards shot their gun, but it did not affect us. There Asimiyu Alarape (meaning 1st accused) fired his gun at one of the night guard who slumped. We all ran away."

This statement is not a confession under the law. There was no admission or suggestion that the 2nd accused shot anyone even though he was at the scene. Rather it was an incriminating statement against the 1st accused only. Exhibit E was in fact retracted in open court. The lower courts were therefore wrong to have treated Exhibit E as a confes-

sion by the 2nd appellant. It was not..

In Exhibit F also the 3rd accused said inter alia-

"Then Asimiyu Alarape (meaning 1st accused) brought out a gun and shot one the night guards and the latter slumped

B "

This statement too was not a confession by the 3rd accused that he committed the crime or fired the deadly shot. It cannot be suggested any where that he committed the crime even though he was present at the scene. The statement clearly implicated Asimiyu Alarape, the 1st accused only. The lower courts were therefore wrong again to have treated it as a confession. The statement was also retracted in open court by the 3rd accused.

D The position now is that neither Exhibit E nor Exhibit F can be used against the 1st accused/appellant because there was no compliance with subsection (3) of the law above.

The 4th accused person who was alleged to have possessed the gun before handing it over to the 1st accused who then shot the deceased E denied holding any gun on the day of the incident. He denied further that any of the accused persons shot or held a gun on the fateful day. In his statement to the Police Exhibit H, he said-

F *"We did not go with any gun. We did not shoot any person. I did not shoot any person. I did not know a vigilante man was killed. I do not know who killed the vigilante man".*

This was also what he said on oath in open court. It is therefore clear that there was no confession by the 4th accused person on which he could have been convicted either.

G The logical conclusion on this issue therefore is that if there was any confession in these proceedings at all it ought to have been Exhibit D, the statement of the 1st accused person only. And the law is quite clear on the point and that is that the 1st accused could be convicted on his H confession alone once it is found to have satisfied other laid down tests as found by the lower courts. (See for example YESUFU VS. THE STATE (1976) 6 S.C. 167 ACHABUSI VS THE STATE (1976) 12 S.C. 63, AKPAN VS. THE STATE (1992) 6 N.W.L.R. (PT. 320) 267, BATURE

VS THE STATE 1994 1 N.W.L.R. (PT 320) 267).

The lower courts were therefore wrong to have convicted 2nd, 3rd & 4th accused persons on non existent confessions. And even in Exhibit D, the 1st accused made it clear that he was the only one who fired the shot. He did not implicate or mentioned any other person in exhibit D. B

COMMON INTENTION

Proof of common intention is a condition precedent to conviction in this type of case. Was it proved? C

The lower courts held that:-

"The four accused persons had a common intention to prosecute remove the goods which they had stolen the previous night and kept in the area the deceased and the others were guarding."

And in order to achieve their common intention they went there armed with a gun which was used by one of them to make good their escape from the scene of the crime." D

The facts in this case are quite clear. While I agree with the lower courts that the appellants had the common intention to collect their stolen goods from where they had kept them, I cannot safely say that they also had a common intention to kill the deceased, who as revealed by the evidence they did not even see before the gun was fired by the 1st accused person!. The gun was never aimed at any particular person or even at particular vigilante group! . A shot in the air? May be. F

And if the 1st accused had to collect the gun first from the 4th accused, that in my view goes to show that they had no common intention to kill anyone. The intention to kill must have been that of the 1st accused only and which should not be imputed to other accused persons in my view. G

Further, section 8 of the Criminal Code provides thus-

"8. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence." H

It is to be stressed that although common intention may be inferred from circumstances disclosed in the evidence and need not be express agreement, a presumption of common intention should not be too readily applied (see for example R. VS OFOR & OFOR (1955) 15 W.A.C.A. 4, R VS MENSAH & ANOR (1941) 7 W.A.C.A. 212, R. VS BADA & ANOR (1944) 10 W.A.C.A. 249). I am clearly of the view that the death of the deceased herein was not carried out in concert by all the accused persons in circumstances pointing irresistibly to common intention. There were no materials from which to infer common intention in this case.

In conclusion the appeal of the 1st accused person fails and it is hereby dismissed. His conviction and sentence are therefore further affirmed.

The appeal of each of the 2nd, 3rd & 4th accused persons succeed and is hereby allowed. The conviction of each and sentence passed upon each are set aside. Each of the 2nd, 3rd & 4th accused person is discharged and acquitted. And this shall be the verdict of the courts below.

KATSINA-ALU JSC

My Lords, I have had the advantage of reading in draft the judgment of my learned brother Iguh JSC in this appeal. I agree with it and would also dismiss the appeal.

AYOOLA JSC

I have had the privilege of reading the draft of the leading judgment delivered by my learned brother, Iguh, J.S.C. I am in entire agreement with him that the appeal of each of the appellants should be dismissed. For the reasons he gives, I too would dismiss the appeal of each of appellants.