

SUPREME COURT OF NIGERIA

29TH JUNE, 2001. SC. 7/2000

**CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU, S. U. ONU, U.
A. KALGO, S. O. UWAIFO, JJSC.**

SAMSON EMEKA APPELLANT

V.

STATE RESPONDENT

CRIMINAL PROCEDURE - Evidence - Confession - Trial within trial - Burden of proof shifts to the accused - Only if he alleges some irregularity within his knowledge (H 2)

CRIMINAL PROCEDURE - Evidence - Murder - Voluntary statement of appellant implicated him in the murder - But cannot incriminate his co-accused - In the absence of corroboration (H 1)

FACTS

The appellant was jointly charged with two others and arraigned before the High Court of Plateau State holden at Jos for culpable homicide punishable with death under S.221 of the Penal Code. The appellant and the two others were found guilty and sentenced to death by hanging. On appeal to the Court of Appeal the two co-accused were discharged and acquitted but the conviction and sentence of the appellant was affirmed.

The facts before the trial court are that the appellant and his co-accused had met one Mashodari Chiroma a juju man living at Kura falls some distance from Jos who had agreed to concoct some potions for them for making money. However the main ingredient for the potions was to be real human eyes plucked from the victim and not one from the cemetery. In the search for the human eyes they contacted the PW5 who informed the police and steps were taken to monitor the accused and his friends. In early January 1986 the accused procured a powerful tranquilizer 'Atran' or torazepan and armed with it went to a beer parlour "Gentle men beer parlour" in Katako Jos. He met the deceased, Salamatu

Mohammed, a prostitute and took a room for the night with her. The next morning the door to the room had to be forced open and the lifeless body of the deceased with her eyes no more there was found. The appellant had disappeared but was later arrested with his others friends. They all tendered statement some of which were confessional. The confessions were resiled from by the appellant claiming involuntariness but the trial court convicted and sentenced the appellant and his co-accused. The Court of Appeal allowed the appeal of the co-accused and the appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether from all the evidence adduced at the trial, there was any material upon which it can be conclusively held, as was done by their Lordship, the learned Justices of the Court of Appeal that it was the act of the Appellant alone that caused the death of the deceased as to make the circumstances of his case to be different, and to be so differently treated from those of the other acquitted persons.

2. Whether or not the decision of the court of appeal confirming the Appellant's conviction and sentence for culpable homicide punishable with death is not unreasonable, unwarranted and manifestly unsupportable in the circumstances of this case when the major plank upon which the same is based was the several extra judicial statements made by him and later on retracted at the trial".

HELD: (Unanimously dismissing the appeal per lead judgment of **BEL-GORE JSC**)

Criminal procedure - Voluntary statement

1. The matter before the trial court is not as difficult as the issues formulated seem to indicate. Did any act of the appellant contribute to the death of the deceased? The voluntary statement of the appellant clearly showed how he procured the tranquilizer; 'Atvan' and how he dropped the potent tablets into Salamatu's drink. It is his voluntary statement that seems to incriminate others as those holding down the deceased and using screwdriver to gouge out her eyes. The appellant's statements clearly show he was at least an active participant in the killing of the

deceased. It does not matter in law who did what, what is important is the common purpose. The desire to have the deceased eyes gouged out after stupefying her is grievous enough and could lead to death which is what happened in this case. The appellant fulfilled his desire: he had the human eyes and he was responsible for administering the tranquilizer on the deceased. Whether it was he that removed the eyes is immaterial. What is certain is that the appellant alone entered into the room with the deceased. He procured the tranquilizer and left the room after obtaining the eyes he wanted. R.V. Nwobiko Obodo & Ors. (1958) 4 FSCI. The confession of the appellant is against him and his incrimination of the co-accused, unless corroborated by other evidence, is not against them. (p. 2196 C)

Confessions - Trial within trial

2. The appellant resiled from his statement to the police contending they were not voluntary. There was trial within trial to establish the voluntariness of the statements. Learned Counsel to the appellant faulted the procedure whereby the burden was placed on the appellant to prove involuntariness of the statement because he was called upon first to testify before the police. Learned counsel seems to overlook the evidential burden of proof. The duty of the prosecution in criminal cases is to prove the guilt of the accused beyond reasonable doubt. But in cases where the accused proffers a reason where some evidence pertinent to the prosecution's case should not be admitted due to some irregularity known to him, then that is within the knowledge of the accused and it is then the burden shifts to him to prove those facts. This is because whoever asserts must prove. Section 135 (1), sections 139 Evidence Act and S. 141 (1) Evidence Act. Thus it was the assertion of the appellant that he never made statements containing the confessions voluntarily, but in this case the prosecution called evidence to disprove that assertion in the trial within trial. (p. 2196 H)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. Failure to conduct trial within trial

The law is that when an accused person contends that a confessional statement sought to be tendered in evidence was not made by him voluntarily, it is the duty of the judge to test the confession by conducting a trial within a trial, in order to determine whether infact the statement was voluntarily made. Failure of the learned trial judge to do so renders the statement inadmissible and all evidence admitted by virtue of the statement should be expunged. See *Obidiozo v. The State* (1987)4 NWLR (Pt.67) 48. (p. 2198 C)

2. Trial within trial - Prosecution should be called upon first to start

When there is a trial within a trial, the onus is on the prosecution to prove that it was free and voluntary. In order that evidence of a confession may be admissible, it must be affirmatively proved that the confession was free and voluntary. See *Yusufu v. The State* (1976)6 SC. 167 and *Martin Priestly* (1966)5 Cr. App. R.183. It is the prosecution who should start. See *Auta v. The State* (1975)4 SC.125. In that case there were many irregularities in the manner the trial within a trial was conducted other than the fact that the accused was first called upon to begin. (p. 2198 E)

3. Trial within trial - The irregularity in calling the defence first did not prejudice the fair trial

I am also satisfied that the prosecution discharged the onus placed on it to prove that the statement was voluntarily made by the appellant. The fact that the appellant was first called upon to testify before the prosecution, though irregular, was not prejudicial to the fair trial of the issue and did not lead to any miscarriage of justice. The procedure adopted did not affect the cogency and quality of the evidence adduced by the prosecution in proof of the voluntariness of the statement. The appellant had ample opportunity to cross-examine the prosecution witnesses during the trial within a trial and he did so exhaustively. (p. 2199 C)

4. Confession - It is desirable to have other evidence to corroborate a

confessional statement

There is a long line of judicial authorities which establish that in Nigeria a free and voluntary confession by a person if direct and positive, duly made and satisfactorily proved, is sufficient to ground a conviction. It is however, desirable to have outside the appellant's confession to the police, some evidence however slight, of the circumstances which made it probable that the confession was true. B

The confessional statements of the appellant are corroborated by independent testimony of witnesses for the prosecution which confirms that the crime was committed and that the appellant committed it, e.g. there was evidence that the deceased was seen in the same room in the Gentleman's Hotel, Katako, Jos with the appellant at 7 p.m. the very night she was doped, strangled in the said room and her two eyes plucked with a screw driver and evidence that the appellant ordered for three bottles of rock beer while in the room with the deceased. These are evidence outside the appellant's confessional statement which implicated him with the offence. (p. 2199 E) D

REPRESENTATION

K. T. Turaki Esq. for the Appellant

Mrs. H. Fwangehi, D.P.P., Plateau State, for the Respondent. E

CASES REFERRED TO

R. V. Nwobiko Obodo & Ors. (1958) 4 FSCI

Papoola V. C.O.P. (1964) NMLR 1

Ariche V. State (1993) 6 NWLR (Pt. 302) 752

Valentine Adie V. The State (1982) 1 NCR 375

Adekanbi v. Attorney-General, Western Nigeria (1966) 1 All NLR. 47

Obidiozo v. The State (1987) 4 NWLR (Pt. 67) 48

Yesufu v. The State (1976) 6 SC. 167

Martin Priestly (1966) 5 Cr. App. R. 183

Auta v. The State (1975) 4 SC. 125

Obase v. The State (1965) NMLR 118

Onochie & Ors. v. The Republic (1966) NMLR 307

R. v. Kanu & Or. 14 WACA 30

Ikemson v. The State (1987) 3 NWLR (Pt. 110) 455 at 482 para. H-B

Oka v. The State (1975) 9-11 SC. 17

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

STATUTES REFERRED

Penal Code s. 221

Evidence Act ss. 135 (1), 139, 141 (1)

LEAD JUDGMENT BY BELGORE JSC

C The appellant, Samson Emeka, also known as Samson Madu
Emeka, was arraigned before Oyetunde J, in the High Court of Plateau
State, sitting at Jos for culpable homicide punishable with death under S.
221 of Penal Code. He was jointly charged with two others. After all the
D evidence the appellant and the two others, to wit, Barnabas Idakula and
Asota Otis Fortunatus, were found guilty and convicted whereby they
were sentenced to death by hanging. On appeal to Court of Appeal, the
conviction and sentence of the appellant were affirmed but his two co-
E accused were discharged and acquitted as their conviction and sentence
were set aside. The appellant has therefore appealed to this Court against
the decision of Court of Appeal.

The evidence before the trial court was that the appellant was
F frustrated as his life was not a success. To him, success meant acquisi-
tion of money and wealth. It was in the course of discussing his frustra-
tion that he met Barnabas Idakula and Asota Otis, Fortunatus, and later
with Idi Abdullahi and Mashodari Chiroma. It was Idi Abdullahi that
introduced the appellant and his two homicide co-accused to Mashodari
G Chiroma who lived at Kura Falls, some distance from Jos. Chiroma was
introduced as a juju man who would concoct some potions for making
money. He told the appellant, as promised him already by Idi Abdulahi,
that the main ingredient for the potion was human eyes. It had to be real
H human eyes plucked from the victim, not the ones stolen from graveyard
or cemetery. The appellant was apparently convinced about the efficacy
of such potion and he went about seeking how to obtain human eyes. In
the anxiety of the appellant and his friend, one Samuel who is at large, the

PW5, Boniface Okeke, was asked for help. PW5 informed the police who, incredible as the story was, took steps to monitor the accused and his friends. The police helped the PW5 to procure from the abattoir a goat head whose eyes were plucked, but they were rejected because it was alleged it came from somebody who died naturally. B

On or about 14th January 1986 the appellant went to a beer parlour called "*Gentle Man Beer Parlour*" at 68 Laranto Katako, Jos where he met the deceased, Salamatu Mohammed, a prostitute, already drinking beer. He approached her and they decided to take a room for the night. PW1, Miss Elizabeth Amagharonu, was the receptionist at the beer parlour and she knew Salamatu as a prostitute and a regular visitor. C
Meanwhile the appellant, between early and second week of January, 1986 went to medicine shop run by PW3, Fabian Adinnu, to buy a drug whose trade name is "*Atvan*". The appellant bought ten tablets of this drug "*Atvan*". According to Victor Okpomo PW7, a government analyst at Government Chemist Kaduna, "*Atvan*" is a very potent tranquillizer and that the chemical name is "*Lorazepan*". He said it could send anybody taking it into deep sleep within minutes of taking it. D E

The appellant, having secured a room into which he and Salamatu were to spend the night sent to PW1 to bring more beer. He dropped some tablets of "*Atvan*" into Salamatu's drink and in time she was fast asleep. This is contained in the voluntary statements the appellant made. F
The next morning, the door to the room at the beer parlour occupied by appellant and Salamatu had to be forced open. The appellant was nowhere to be found but the lifeless body of Salamatu, with her eyes no more there, was found. The appellant and others were arrested, except Samuel who had disappeared. G

The appellant and his co-accused made statements to the police, in some cases the statements were confessions. The appellant during trial resiled from his statements, claiming they were involuntary. The trial court convicted and sentenced the appellant and his co-accused. H
Court of Appeal allowed the appeal of the co-accused persons. As the state has not appealed against the discharge and acquittal of the co-accused, I need not advert to them. The appellant, on his grounds of

appeal, formulated the following issues for determination:

"1. Whether from all the evidence adduced at the trial, there was any material upon which it can be conclusively held, as was done by their Lordship, the learned Justices of the Court of Appeal that it was the act of the Appellant alone that caused the death of the deceased as to make the circumstances of his case to be different, and to be so differently treated from those of the other acquitted persons.

2. Whether or not the decision of the court of appeal confirming the Appellant's conviction and sentence for culpable homicide punishable with death is not unreasonable, unwarranted and manifestly unsupportable in the circumstances of this case when the major plank upon which the same is based was the several extra judicial statements made by him and later on retracted at the trial".

The matter before the trial court is not as difficult as the issues formulated seem to indicate. Did any act of the appellant contribute to the death of the deceased? The voluntary statement of the appellant clearly showed how he procured the tranquilizer; 'Atvan' and how he dropped the potent tablets into Salamatu's drink. It is his voluntary statement that seems to incriminate others as those holding down the deceased and using screwdriver to gouge out her eyes. The appellant's statements clearly show he was at least an active participant in the killing of the deceased. It does not matter in law who did what, what is important is the common purpose. The desire to have the deceased eyes gouged out after stupefying her is grievous enough and could lead to death which is what happened in this case. The appellant fulfilled his desire: he had the human eyes and he was responsible for administering the tranquilizer on the deceased. Whether it was he that removed the eyes is immaterial. What is certain is that the appellant alone entered into the room with the deceased. He procured the tranquilizer and left the room after obtaining the eyes he wanted. *R.V. Nwobiko Obodo & Ors.* (1958) 4 FSCI. The confession of the appellant is against him and his incrimination of the co-accused, unless corroborated by other evidence, is not against them.

The appellant resiled from his statement to the police contending they were not voluntary. There was trial within trial to establish the voluntariness of the statements. Learned Counsel to the appellant faulted the procedure whereby the burden was placed on the appellant to prove involuntariness of the statement because he was called upon first to testify before the police. Learned counsel seems to overlook the evidential burden of proof. The duty of the prosecution in criminal cases is to prove the guilt of the accused beyond reasonable doubt. But in cases where the accused proffers a reason where some evidence pertinent to the prosecution's case should not be admitted due to some irregularity known to him, then that is within the knowledge of the accused and it is then the burden shifts to him to prove those facts. This is because whoever asserts must prove. Section 135 (1), sections 139 Evidence Act and S. 141 (1) Evidence Act. Thus it was the assertion of the appellant that he never made statements containing the confessions voluntarily, but in this case the prosecution called evidence to disprove that assertion in the trial within trial.

The sum total is that there is no substance in this appeal. I dismiss the appeal and affirm the decision of Court of Appeal which upheld the conviction of the appellant and sentence of death passed on him under S. 221 of the Penal Code.

OGWUEGBU JSC

I have had a preview of the judgment in this appeal of my learned brother Belgore, J.S.C. and I agree with him that this appeal ought to be dismissed.

It was the contention of the learned appellant's counsel that the alleged confessional statements made by the appellant to the police which were later retracted at the trial, were not made voluntarily within the contemplation of section 27 of the Evidence Act. Learned counsel cited and relied on the case of Adekanbi v. Attorney-General, Western Nigeria (1966)1 All NLR. 47. It was his further submission that the decision of the court below in confirming the appellant's conviction and sentence

principally on the bases of Exhibits 14, 23, 25, 26, 27 and 28 was unreasonable and unwarranted in the circumstances of this case. It was further submitted in the appellants' brief that:

"From the evidence produced at the trial by the prosecution, the Appellant was said to have upon his arrest, volunteered to make statements to the police which he kept updating up to the time he was eventually arraigned before the trial court along with others. At the trial, the Appellant argued that these statements were not made voluntarily, and he called evidence which tended to show that the statements were made after he had undergone series of beatings and tortures in the hand of the police. One contention is that the reasons adduced in adjudging the voluntariness of the said statements of the Appellants in the trial within trial did not take into account his state of health after the torture and serious beating he received from the police in order to force him to confess that he committed the offence."

The law is that when an accused person contends that a confessional statement sought to be tendered in evidence was not made by him voluntarily, it is the duty of the judge to test the confession by conducting a trial within a trial, in order to determine whether infact the statement was voluntarily made. Failure of the learned trial judge to do so renders the statement inadmissible and all evidence admitted by virtue of the statement should be expunged. See *Obidiozo v. The State* (1987)4 NWLR (Pt.67) 48. When there is a trial within a trial, the onus is on the prosecution to prove that it was free and voluntary. In order that evidence of a confession may be admissible, it must be affirmatively proved that the confession was free and voluntary. See *Yusufu v. The State* (1976)6 SC. 167 and *Martin Priestly* (1966)5 Cr. App. R.183. It is the prosecution who should start. See *Auta v. The State* (1975)4 SC.125. In that case there were many irregularities in the manner the trial within a trial was conducted other than the fact that the accused was first called upon to begin.

At the close of the trial within a trial the learned trial judge held as follows;

"I also reject his counsel's allegation that the said statement was

not made voluntarily. The burden of proof is on the prosecution to prove that the 1st accused made the said statement voluntarily. The contents of the said statement are such that can only be volunteered by the 1st accused. The statement contains his history and background. The evidence on them is categorical on this. I hold that the accused was not beaten or kicked by anybody before or after making the statement or in order that he might make the said statement. The allegation of beating and kicking made by the 1st appellant is an afterthought and I reject it. I hold that the 1st accused made the said statement voluntarily.”

The learned trial judge after hearing evidence on the issue, came to the conclusion that the appellant made the statement voluntarily and the court below agreed with that finding. I have also read the proceedings of the trial within a trial and I have no reason to come to a conclusion different from those of the lower courts. I am also satisfied that the prosecution discharged the onus placed on it to prove that the statement was voluntarily made by the appellant. The fact that the appellant was first called upon to testify before the prosecution, though irregular, was not prejudicial to the fair trial of the issue and did not lead to any miscarriage of justice. The procedure adopted did not affect the cogency and quality of the evidence adduced by the prosecution in proof of the voluntariness of the statement. The appellant had ample opportunity to cross-examine the prosecution witnesses during the trial within a trial and he did so exhaustively.

There is a long line of judicial authorities which establish that in Nigeria a free and voluntary confession by a person if direct and positive, duly made and satisfactorily proved, is sufficient to ground a conviction. It is however, desirable to have outside the appellant” confession to the police, some evidence however slight, of the circumstances which made it probable that the confession was true.

The confessional statements of the appellant are corroborated by independent testimony of witnesses for the prosecution which confirms that the crime was committed and that the appellant committed it, e.g. there was evidence that the deceased was seen in the same room in the Gentleman’s Hotel, Katako, Jos with the appellant at 7 p.m. the very

night she was doped, strangled in the said room and her two eyes plucked with a screw driver and evidence that the appellant ordered for three bottles of rock beer while in the room with the deceased. These are evidence outside the appellant's confessional statement which implicated him with the offence.

Considering the confession together with the other evidence in the case, they are in my opinion consistent with and not contradicted by other evidence. They make it probable that the confession of the appellant was true. See *Obase v. The State* (1965) NMLR 118, *Onochie & Ors. v. The Republic* (1966) NMLR 307 and *R. v. Kanu & Or.* 14 WACA 30.

I therefore affirm the conviction of the appellant. He was rightly convicted. The murder was gruesome and the evidence against the appellant, overwhelming. I also dismiss the appeal.

ONU JSC

I had the advantage to read in draft the judgment of my learned brother Belgore, JSC just delivered. I am in full agreement with it that the appeal lacks merit and it is accordingly dismissed by me.

I only wish to say by way of elaboration that the gravamen of the Appellant's grouse borne out by his two issues for determination-the same which the Respondent by and large appears to have adopted, are:

1. Whether the statement of the Appellant and the evidence adduced by the prosecution constitute sufficient admissible evidence to be relied upon in affirming or confirming the conviction of the Appellant.
2. Whether the extra-judicial statements of the Appellant which veracity was tested during the trial-within-trial and found to be positive in addition with compelling circumstantial evidence even though retracted by the Appellant during trial, was sufficient to ground conviction.

As the two issues are clearly interwoven and palpably overlap, I wish to consider them together as follows:

On whether the prosecution proved its case beyond reasonable doubt, the prosecution, in my firm view, satisfied or rather met the prerequisite for securing the conviction of Appellant for the offence of cul-

pable homicide punishable with death under section 221 of the Penal Code. The evidence adduced by the prosecution clearly consisted of the confessional and circumstantial evidence. These admittedly constitute two of the three ways or method of proving the guilt of accused person, the third method being the evidence of eye witnesses - which in the instant case, is conspicuously not available. *See Oka v. The State (1975) 9-11 S.C. 17.* On the confessional statements said to have been made by the Appellant the salient issue for determination is whether the Appellant made them and their admissibility, the truth of their contents as well as their reliability can ground a conviction. On the admissibility of the confessional statements made by the Appellant, I am satisfied that the learned trial judge sufficiently complied with the conditions precedent before admitting them, notwithstanding the fact that objection thereto was raised that they were not voluntary. The learned trial judge after concluding trial within a trial, rightly in my view, ruled in favour of admitting them in evidence as exhibits, to wit, Exhibits 14, 23, 25, and 27, wherein the Appellant confessed by narrating how he and others met and killed the deceased (Salamat Mohammed). The evidence of PW1, PW4, PW9 and PW11 confirms the confessional statement of the Appellant, particularly Exhibits 23 which confirms that the Appellant as among those looking for human eyes; thus proving the corroboration evidence sufficient to ground the conviction. *See Ikemson v. The State (1989) 3 NWLR (part 110)455 at 482 paragraph H-B.*

The trial court and the court below were therefore right, in my view, in treating the statements of the Appellant as confessional, albeit that there as an attempted retraction of them (see *Egboghonome v. The State (1993) 7 NWLR (part 306) 383*). For instance, the Appellant admitted in Exhibit 23 that he and others strangled the deceased and removed her eye, acts which led to her death. The Appellant's statements were accordingly rightly treated as being not only voluntary, but also positive, unequivocal and amount to admission of guilt. The retraction of these confessional statements by the Appellant dose not necessarily make the confession inadmissible. *See Egboghonome v. The State (supra).*

I am also of firm view that apart from the confessional state-

ments of the Appellant, which could, without more, be relied upon in convicting him, there are other pieces of evidence which would corroborate his confessional statements as found by the court of trial and affirmed by the court below as direct, positive and irresistibly pointing to the guilt of the Appellant. Thus, as held by this court in *Achabua v. The State* (1976)12 S.C. 63 at 68;

"The secrecy with which criminals perpetuate crime has tended to deprive the prosecution in some cases of eye witnesses, hence confession alone even without corroboration can support a conviction as long as the court is satisfied of the truth."

Other pieces of the evidence led through witnesses called by the prosecution sufficiently corroborate the statements made by the Appellant. For instance, in one of the statements, the Appellant said that after the two eyes of the deceased were removed, he handed them to the 4th accused on 15/1/86. The 4th accused for his part admitted that the Appellant handed the two eyes to him and that these were in turn recovered from him. I take the firm view that these pieces of evidence even though not direct, constitute sufficient circumstantial evidence that is strong and irresistibly points to guilt of the Appellant. See *Ogwa Nweke Onah v. The State* (1985) 3 NWLR (part 12) 236. Thus, where as in the instant case, the Appellant was the last person to be seen in the deceased's company and circumstantial evidence is not only overwhelming but leads to no other conclusion, it leaves no room for acquittal. See *Edet Obosi v. The State* (1965) NMLR 129, *R.V. Tepper* (1952) A.C 480 at 489; *R. V. Taylor, Weaver and Donovan* 21 Cr.App.R20 at 21; *Elijah Ukoh v. The State* (1971) 1 NMLR 140 at 143 and *Nwaeze v. The State* (1996) 2 SCNJ 42. In the not-too-dissimilar cases of *Peter Igho v. The State* (1978) 3 S.C. 87 and *Uche v. The State* (1973) 1 All NLR (part 11) 181, this court upheld the inference that the accused (as in the instant case) killed the deceased. The two courts below were therefore, in my opinion, right in relying on similar findings of fact that the Appellant was guilty as charged. See *Akimoju v. The State* (1995) 7 NWLR (part 406)204 at 205.

Finally, and reverting to confession, I hold the view that the Appellant did not in any way rebut or contradict the prosecution evi-

dence; neither did he advance any credible evidence that he was in fact tortured or that he did not volunteer the statements credited to him. The confession of the Appellant in his various statements I hold as voluntary and so are consequently admissible since the rules and law governing the methods for making them were complied with fully. The confessional statements hereinbefore alluded to are consequently good evidence, having been admitted in evidence. No form of retraction will therefore vitiate their admissibility as such voluntary statements. See Kim v. The State (1991)2 NWLR (Part 175)622 at 633 paragraph C.

It is for these reasons and the fuller ones given by my learned brother Belgore, JSC in his leading judgement, that I too, dismiss this appeal and confirm the decision of the court below which affirmed the decision of the trial High Court.

KALGO JSC

I have had the privilege of reading in advance the judgment of my learned brother Belgore JSC just delivered. I am in full agreement with his reasoning and conclusions reached therein. I find no merit in the appeal and I dismiss it.

It is common ground that there is no eye witness to the commission of the offence, but the evidence called by the prosecution against the appellant supported by the caution statements of the appellant and collaborated in material particulars, has provided cogent and sufficient circumstantial evidence which lead to nothing else but the guilt of the appellant. See Papoola V. C.O.P (1964) NMLR1; Ariche v. State (1993) 6 NMLR (Pt.302) 752; Valentine Adie V the State (1982) 1 NCR 375. I am satisfied from the credible evidence on record that the appellant was properly convicted of the offence of culpable homicide punishable with death contrary to section 221 of the Penal Code by the trial court and confirmed by the Court of Appeal as lacking in merit and affine the decision of the Court of Appeal delivered on the 25th of May 1998.

UWAIFO JSC

I read in advance the judgment of my learned brother Belgore,

JSC and agree with it that the appeal lacks merit. The evidence plainly shows that the appellant actively participated in the killing of the deceased with the sole purpose of removing her eyes. The chilling facts have been unambiguously stated by my learned brother Belgore JSC.

B The appellant made a confessional statement to the police which at his trial he alleged was not voluntarily made. A trial within a trial was conducted by the learned trial judge. The appellant was called upon to testify in trial within a trial. In fact he was the first witness. That was a technical error. It was for the prosecution to prove beyond reasonable doubt that the statement was voluntary and ought to begin by leading evidence in that regard. The trial judge should be satisfied about this from the totality of the evidence led in the trial within a trial that the prosecution proved that the confessional statement was voluntary. See C
D R. v. Kass (1939) 5 WACA 154; Ebhomien v. The Queen (1966) 1 All NLR 47 SC; Obidiozo v. The State (1987) 4 NWLR (pt.67) 748 SC; Gbadamosi v. The State (1992) 9 NWLR (pt.226) 465 SC; Ebagua v. A. G. Bendel State; In re Gabriel Osakwe (1994) 2 NWLR (pt.326) 273 E SC; Effioing v. The State (1998) 8 NWLR (pt.562) 362.

An accused person who alleges that the confessional statement attributed to him was not voluntary is a competent witness in the trial within a trial. If he elects to testify, his evidence is likely to contain facts and circumstances which he relies on as to the statement being involuntary. He will give in detail what was allegedly done or said to him that coerced or induced him to make the confessional statement. There is nothing on record to suggest that the appellant was compelled to testify. He was represented by counsel. Therefore, although he first gave evidence before other witnesses in that trial within a trial, I do not think this by itself led to a miscarriage of justice. The learned trial judge ruled that the statement was voluntary. If it had been found to be involuntary the confessional statement could not be part of the evidence upon which the court could act: see *Auta v. The state* (1975) 1 All NLR 163 at 169. In the end, the appellant was not convicted solely on the confessional statement. The learned trial judge said he relied on the "*overwhelming*" evidence before him.

I too find no merit in this appeal and therefore dismiss it. I uphold the conviction of the appellant and the sentence of death passed on him. There was indeed such overwhelming evidence sufficient to convict the appellant even without the confessional statement.