

SUPREME COURT OF NIGERIA

13TH JULY, 2001. SC. 178/2000

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI, A. I. KATSINA-
ALU, O. ACHIKE, U. A. KALGO, JJSC**

AKPAN BEN AKPAN APPELLANT

V.

STATE RESPONDENT

APPEALS - Confessions - Failure of trial court - The Court of Appeal rightly relied on the confessions - Though the trial court did not do so - Due to a misapplication of the law (H 8)

APPEALS - Issues - Defences raised - Which are not contained in the issues for determination - Will not be considered (H 3)

APPEALS - Issues - Must be based on the grounds of appeal filed - And in the absence of such grounds - The issues cannot be considered - By the court (H 2)

EVIDENCE - Circumstantial Evidence - Must be positive compelling and irresistible - Leading to a conclusion that the accused is guilty - In order to ground a conviction (H 9)

EVIDENCE - Circumstantial Evidence - There is conclusive and compelling evidence - Of the guilt of the accused in this case (H 10)

EVIDENCE - Confessions - An incriminating admission - Short of full confession - Is covered by s.27(1) Evidence Act - And is admissible (H5)

EVIDENCE - Confessions - Once a confession is admitted - The court must determine its probative value - And act upon it - Even if it has been retracted (H 6)

EVIDENCE - Confessions - The appeal court rightly acted on the con-

fessions - As other evidence made its truth probable - As far as can be tested (H 7)

EVIDENCE - Corroboration - Interested persons - Relationship by blood per se - Is not sufficient to disqualify the evidence of a witness (H 1)

EVIDENCE - Extra judicial Statements - Inconsistency Rule - As enun-
ciated in the cases - Does not apply to retracted extra-judicial confes-
sions - But applies to extra- judicial statements which are not confessions
(H 4)

FACTS

The appellant was arraigned with one Regina Ukpong at the Eket High Court Akwa Ibom for the offences of murder and accessory after the facts of murder. At the end of the trial the 2nd accused was acquitted while the 1st accused was convicted and sentenced to death.

The facts are that the appellant was at the disco dance at Udokop mansion guest house Abat, on the night of 1st October 1987. The deceased was also there with Pw 2, Pw 3 and Pw 4. The appellant had sought to dance with Pw3 but the deceased refused to grant his permission for the dance. This resulted in a quarrel in which the appellant threatened and vowed that he would kill the deceased that night. As the deceased and his companions PW2, PW3 and PW4 decided to leave to avoid further trouble, the appellant ran past them and caught up with the deceased and then ran away from the deceased. On arriving at the scene the deceased was dead lying in a pool of blood.

The appellant led evidence to the fact that he had been slapped by the deceased outside the disco hall and in the ensuing fight the deceased had brought out a dagger to use on the appellant on which he later fell and died . He equally made two extra judicial statements to the police in one of which he admitted stabbing the deceased. The learned trial judge after considering all the evidence convicted him and sentenced him to death. His appeal to the Court of Appeal was dismissed and he has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(1) *Whether the learned Justices of the Court below were right in treating Exhibit B,B1 as a confessional statement and using the same to affirm the conviction of the Appellant.*

(2) *Whether the learned Justices of the Court below were right in holding that the circumstantial evidence of PW2, PW3, and PW4 was direct and compelling as to unequivocally and irresistibly fix the appellant with a motive to kill the deceased."*

HELD (Unanimously dismissing the appeal per lead judgment of **KARIBI-WHYTE JSC**)

Corroboration - Interested persons

1. On the submission that PW2, PW3 and PW4 were interested persons whose evidence required corroboration and warning, it was argued that relationship by blood per se is not sufficient to disqualify the evidence of a witness - See Oguonze v The State (1998) 5 NWLR (pt.551) 521. This is a correct proposition of law, and the learned trial Judge was right in the evaluation of the evidence. (p. 2779 D)

Appeals - Issue

2. The issues formulated must be based on the grounds of appeal filed. Accordingly any argument which is not founded on the grounds of Appeal, from which the issues for determination have been formulated is not a matter arising from the grounds of appeal. The Court is only obliged to consider challenges to the judgment based on the alleged errors of law or misdirection of facts. In the absence of such complaints the court is not entitled to consider issues not subject matter of dispute. (p. 2781 A)

Appeals - Issues - Defences raised

3. Learned Counsel to the Respondent is therefore correct in the submission that the issues of the defences raised which are not contained in the formulation of the two issues for determination before us which are the determination of the propriety of Exhibit B-B1 as a confessional statement and relying on circumstantial evidence for the conviction of the

Appellant. Consideration of any defences were not raised as issues. I therefore will not consider the issue. (p. 2781 C)

Extra judicial statements - Inconsistency rule

- B 4. The question whether the principle in these cases enunciated above applied to the evidence of accused persons including their confessional statements was decided in the case of Egboghonome v The State (1993) 7 NWLR (pt.306) 383, where it was held that the inconsistency did not apply to retracted extra-judicial confession of an accused person. The implication is that it applied to extra-judicial statements which are not confessions. (p. 2783 F)

Confessions - Incriminating admission

- D 5. Learned Counsel for the Appellant has argued in his brief of argument that Exhibit B, B1 was neither positive nor direct and is equivocal, and did not come within the definition of a confession in section 27 of the Evidence Act. I am sure this alone did not exclude the statement from being E admissible in evidence. Section 27 (1) of the Evidence Act has defined "Confession", as "*an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime*". This definition is wide enough to cover both extra-judicial and F judicial confessions. Extra-judicial Confessions are those made otherwise than in the course of judicial proceedings, such as Exhibit B,B1. It seems to me perfectly proper to read section 27(1) of the Evidence Act to include an incriminating admission all short of full confession because it was not direct, positive. In R v Udo Eka Ebong (1947) 12 WACA 139, G an accused statement made before he was charged was held to amount to a confession. That the accused retracted or denied making the confession did not necessarily make it in admissible. (p. 2784 C)

Evidence - Confessions

6. The present state of the law is that once a confessional statement is admitted in evidence it becomes part of the case for the prosecution which the Judge is bound to consider for its probative value. The fact

that a confession had been retraced did not mean that it cannot be acted upon, and relied upon for the conviction of the accused - see Nkwuda Edamine v The State (1996) 3 NWLR 530. (p. 2784 G)

Confessions - Appeal court

7. The Court of Appeal was right to have taken Exhibit B,B1 into account in determining the guilt of the Appellant, since it was part of the case of the prosecution. There is no doubt in the instant case, the evidence of PW2, PW3 and PW4 make it probable that the confession is true. The Court of Appeal considered that the admission of Appellant in Exhibit B,B1 was corroborated by the evidence of PW2, PW3 and PW4. The retracted evidence made in the admission in the light of the totality of the evidence are most likely to be true as far as can be tested, and consistent with the other facts ascertained and established. There is no doubt the Appellant had the opportunity to commit the offence. The Court below was therefore right to have come to its decision. (p. 2785 B)

Appeals - Confessions - Failure of trial court

8. The submission that the court of Appeal should not have done so because the Learned trial did not do so is a misunderstanding of the correct legal position

The Learned trial Judge did not correctly apply the inconsistency rule. The subsequent oral testimony of the Appellant was a retraction. The Court below was therefore right in relying on Exhibit B, B1, in affirming the conviction of the Appellant. (p. 2785 H)

Circumstantial evidence - Must be positive

9. Section 149 of the Evidence Act permits the court to draw inferences from relevant established facts. In criminal cases, the force of circumstantial evidence lies in the unmistakable aim of the totality of the evidence which by an undesigned coincidence point in the direction of the guilt of the accused. Hence it has been said, the circumstance relied upon for conviction in the absence of direct eye witness testimony, must be positive, compelling and irresistible, leading to the conclusion that the

person accused is guilty. (p. 2786 H)

Circumstantial evidence - Conclusive and compelling

10. The circumstance of this case fits perfectly within the principles formulated for conviction on grounds of circumstantial evidence. Every circumstance other than the stabbing of the deceased has been established by direct positive evidence of PW2, PW3 and PW4. There is undisputed evidence including the evidence of Appellant that only Appellant had a fight with the deceased. Appellant admitted stabbing the deceased. The evidence in this case is not merely strong circumstantial evidence which should lead to the irresistible presumption of guilt. There is in this case conclusive and compelling evidence of the guilt of the accused. (p. 2787 B)

REPRESENTATION

Mr. O. R. Ulasi for the Appellant.

Mr. C. J. Udoh, Senior State Counsel, Akwa-Ibom For the Respondent.

CASES REFERRED TO

- Afolabi v. C.O.P. (1961) All NLR (pt. 4) 654
- Jimoh Yusufu v. The State (1976) 6 SC. 167
- Nwebonyi v. The State (1994) 5 NWLR 138
- Akinmoju v. State (2000) 6 NWLR (pt. 662) 608 at 630
- Uluebuka v. The State (2000) 7 NWLR (pt. 665) 404
- Egboghonome v. The State (1993) 7 NWLR (pt. 306) 383
- Bature v. The State (1994) 1 SCJ 19 at p. 21
- Oguonze v. The State (1998) 5 NWLR (pt. 551) 521
- Bakare v. The State (1986) 1 NSCC 261 at 275
- Patrick Oforiete v. The State (2000) F. W. L. R. (pt. 12) 2081 at 2084
- R. v. Ukpong (1961) 1 SCNLR 53
- Onubugu v. The State (1974) 9 S.C. 1
- Jizurumba v. The State (1961) 3 SC
- Saka Oladejo v. The State (1987) 3 NWLR (pt. 61) 419

STATUTE REFERRED TO

Evidence Act - SS.27, 149

LEAD JUDGMENT BY KARIBI-WHYTE JSC

On the 11th May 2000, the Court of Appeal, Calabar Division B dismissed the appeal of the Appellant against his conviction on the 24th June, 1999 for murder by the Akwa -Ibom High Court sitting at Eket. Appellant dissatisfied has further appealed to this Court.

Appellant with Regina Ukpung were arraigned before Udofia J. C sitting at the Eket High Court for the offences of murder contrary to section 316(1), and punishable under section 319(1) of the Criminal Code, and as accessory after the facts of murder under section 322 of the Criminal Code respectively. Both accused persons pleaded not guilty to the indictment. After trial, in which the prosecution called seven witnesses/the accused persons, gave evidence on their own behalf and called D no witnesses. The learned trial judge held that the charge against the 2nd accused having not been proved acquitted the 2nd accused. The 1st accused was convicted to death. E

The facts in support of the charge are that Appellant was on the night of the 1st October, 1987 at a Disco dance at Udokop Mansion Guest House Abat in Onna Local Government Area. Also at the dance were the deceased, PW2, PW3, PW4. The deceased invited and was F accompanied by PW3 to the Dance. While PW2 was dancing with PW4, Appellant requested to dance with PW4. PW2 obliged and left the dance hall. When Appellant approached PW3, for a dance, she referred him to the deceased for permission. The deceased did not give PW3 permission G and asked Appellant to look for someone else. This resulted in a quarrel between the Appellant and the deceased. Appellant threatened and vowed that he would kill the deceased that night, and that he should not be called "one one" any more if he did not do so.

PW3, then advised the deceased that they should go home to H avoid trouble. The Deceased agreed. The deceased in front PW3, PW2 and PW4 started going out of the Dance Hall in that order. According to the evidence of PW3, as they were going, they saw Appellant run past

them, and caught up with the deceased. They also saw him running away from the deceased. When they arrived at the scene they found the deceased on the ground in a pool of blood dead.

In his own defence, Appellant admitted attending the Disco dance on the 1st October 1987, and that he met PW2, PW3, PW4. and the deceased. He admitted also dancing with PW3. It was after he had danced with PW3 a second time that the deceased confronted him as to why Appellant should dance with PW3 a second time. According to Appellant, he left PW3 and went outside to ease himself. Whilst outside he saw the deceased, PW2 and others unknown to him come out of the dance hall. He said that the deceased slapped him and a fight ensued between them.

During the fight the deceased brought out a dagger threatening to use it on Appellant. In the attempt by appellant to disarm the deceased, both of them fell down resulting in the deceased being wounded by the dagger.

Appellant made two extra judicial statements to the Police. Exhibit A-A1 dated 4/10/87 and exhibit B-B1 dated 14/10/87. In Exhibit A-A1, Appellant did not admit stabbing the deceased. In Exhibit B-B1, he admitted stabbing the deceased.

The second accused in her own defence stated that on 4/10/87 appellant who she had never seen before ran into her house and bolted the door from behind as he was being pursued by a group of persons. The persons pursuing appellant later returned with a Policeman who forced the door of the 2nd accused where appellant was hiding open and arrested the appellant. As I stated earlier, the second appellant was acquitted and discharged on the charge of being an accessory after the fact of the murder of the deceased. Appellant was convicted and sentenced to death for murder on the first count.

Appellant's appeal against his conviction for murder and sentence to death to the Court of Appeal was dismissed by the Court of Appeal. He has further appealed to this Court on three grounds of appeal alleging errors of law in excluding the statements of the accused, accepting motive of the accused as admissible evidence and fixing the guilt of

the appellant on the circumstantial evidence of PW2, PW3, and PW4.

Learned Counsel for the Appellant has formulated only two issues as arising from the grounds of appeal. These issues have been adopted also by learned counsel for the Respondent.

The two issues are as follow:-

B

(1) Whether the learned Justices of the Court below were right in treating Exhibit B-B1 as a confessional statement and using the same to affirm the conviction of the Appellant.

(Ground 1)

(2) Whether the learned Justices of the Court below were right in holding that the circumstantial evidence of PW2, PW3, and PW4 was direct and compelling as to unequivocally and irresistibly fix the appellant with a motive to kill the deceased."

C

(Ground 2 and 3)

D

I shall now consider the submissions of learned counsel on the issues for determination.

Issue I which relates to the first ground of appeal challenges the treatment of Exhibit B-B1 as a confessional statement and relying on it to affirm the conviction of the appellant.

E

Learned Counsel submitted that in Exhibit A,A1 a previous extra judicial statement made on the 4th October 1987 appellant admitted there was a fight between someone else and the deceased in which Appellant joined; In statement Appellant stated that Kobina held the deceased who held a knife from behind. During the struggle for the knife, the knife stabbed the deceased near his belly, and he fell down on the ground. He stated that he fought with deceased alone and it was he who stabbed the deceased; but that he did not do so voluntarily.

F

G

Similarly in Exhibit B made on the 14th October, 1987, Appellant admitted fighting with the deceased alone and that no other person was involved. He admitted stabbing the deceased with knife which he had thrown away.

H

Learned Counsel referred to Archbold's Pleading, Evidence and Practice in Criminal Cases 35th Edition para. 1104 as to when extra judicial confession is made. He cited section 27(1) Evidence Act Cap.112 L/

2776 Akpan v. State (2001) 7 KLR Karibi-Whyte JSC
N,1990 as to the definition of "*Confession.*"

It was the submission of learned counsel that a confession to support a conviction must not only be direct and positive, a trial court has to be satisfied of the truth of the admission made by an accused person before basing a conviction on it, Afolabi v C.O.P. (1961) ALL NLR (pt.4) 654; Dr. Korki v The state (1976) ASC.107 were cited and relied upon. It was submitted citing JumohYusufu v The State (1976) 6 SC.167 Nwebonyi v The State (1994) 5 NWLR 138; Akinmoju v State (2000) 6 NWLR (pt.662) 608 at 630. Uluebuka v The State (2000) 7 NWLR (pt.665) 404, that a confessional statement , if it is positive and direct and satisfactorily proved, is sufficient to sustain a conviction without any corroborative evidence.

The trial judge having found that there were inconsistencies between the two statements of the Appellant to the Police, and his testimony in court, held that these discrepancies in his description of the incident rendered his evidence unreliable. He therefore as against the evidence of PW2, PW3, and PW4 as to the incident preferred their evidence. Learned counsel to the Appellant submitted that this approach indicated that the learned trial judge did not regard the evidence of the Appellant in Exhibit B-B1 as a confessional statement. It was submitted that the learned trial judge did not believe the truth of the said confession because it was not direct and positive. He regarded the statement as some admission to the Police and from his evidence in court and not a positive confession to the commission of the crime. Learned Counsel for the Appellant accordingly submitted that there was no confession on admission of murder in Exhibit B1 within the meaning of section 27(1) of the Evidence Act. He argued that it is only where there is a direct and positive confession that the trial court has a duty to test the truth of such confession by examining it in the light of the other credible evidence before the court see Akinmoju v The State (2000) 6 NWLR (pt.662) 608 at p.630.

Learned Counsel criticized the judgment of the Court below on this issue for holding that the finding of the learned trial judge was predicted on the inconsistency rule of the admission of the evidence for

witnesses. He referred to the decision in Egboghonome v The State (1993) 7 NWLR (pt.306) 383 where this Court held that inconsistency did not apply to retracted extra-judicial confession of an accused person.

Learned Counsel distinguished Egboghonome v The State from the instant case. In Egboghonome v The State there was a direct positive confession to the murder of the deceased. In the instant case the statement Exhibit B1 is equivocal, neither positive nor direct, and not a confessional statement strictu sensu because it at once denies and admits that Appellant stabbed the deceased. Again the confessional statement was not attested to by the senior Officer. In the Egboghonome v The State the learned trial judge was satisfied with and acted on the confession. In the instant case the learned trial Judge was not so satisfied with Exhibit B-B1 and correctly disregarded it, the court below, it was submitted was wrong to rely on Exhibit B1 in affirming the conviction of the appellant when the learned trial judge neither believed nor relied on it.

In answer to the submissions of learned counsel to the Appellant, learned counsel to the Respondent submitted that it is common ground that the deceased was stabbed to death. The issue is who stabbed him to death and whether Exhibit B-B1 could properly be regarded as a confession to the issue. It was submitted that the court below referred to Exhibit B-B1 where Appellant admitted he alone fought with the deceased and that he stabbed the deceased.

Learned Counsel submitted that the Court below properly considered the evidence of the Appellant in Exhibit B-B1 having regard to the decision in Egboghonome v The State (supra) which overruled the application of the inconsistency rule in the cases of the defence. Counsel relied on Bature v The State (1994) 1 SCNJ 19 at p.21 that an extra judicial confession which is positive and direct and has been proved to have been made voluntarily it will suffice to ground a finding of guilt. The fact that the maker had resiled from or retracted altogether from the statement at the trial, will not render the statement inadmissible. Learned Counsel urged on us to answer the first issue positively and to dismiss the appeal on this ground.

The second issue relates to the conviction of the accused based

on circumstantial evidence of PW2, PW3, and PW4. This was the finding of the learned trial Judge and affirmed by the court below. Relying on the evidence of PW2, PW3, and PW4, the Court of Appeal concluded that Appellant was not only at or within the vicinity of the scene of crime, but that he also had the motive to commit murder, which could be inferred from his declaration to kill the deceased when the latter did not allow him dance with PW3.

Learned Counsel for the Appellant has criticized the finding that the evidence of PW2, PW3, and PW4 relied upon for the conviction of the Appellant are not circumstantially cogent and compelling as to come to the conclusion that no other rational hypothesis can explain how the deceased came to his death. It was submitted that there are other compelling inferences which can be drawn from the disputed facts in this case which displace the only inference drawn by the Court below.

In disputing the inference drawn from the evidence of PW2, PW3, and PW4, Learned Counsel to the Appellant submitted that Appellant was not the only person at the scene of crime at all times material to the murder of the deceased. PW2 testified that there were many people there. He raised so many queries such as who were these people and what were they doing there? Why did not any of them make statement to the Police or testify in court as to what happened at the scene?. Why did PW2, PW3, PW4, not raise alarm if it is Appellant who stabbed the deceased? Or why did they not pursue Appellant when he ran passed them? PW2, PW3, and PW4 are either related to each other or to the deceased to make them interested persons whose evidence required corroboration. It was submitted that neither the court below nor the trial court adverted to this fact and to the need to warn themselves that the evidence of PW2, PW3 and PW4 who are not eye witnesses was to be treated with caution.

Learned Counsel to the Appellant submitted that there was no evidence of motive on the part of the Appellant to murder the deceased as alluded to by the court below. Appellant and the deceased met for the first time on the 1st October, 1987 and at a Dance Hall. There was no previous quarrel between them.

In his reply to the submissions of Learned Counsel to the Appel-

lant, Learned Counsel to the Respondent submitted that it was not necessary to call more witnesses for the prosecution than was called, since in law, a single witness if believed is sufficient to establish the guilt of the accused - see Okonofua v The State (1981) Vol.12 NSCC 233. The unchallenged evidence of the prosecution witnesses which was believed B by the trial court was sufficient for the conviction of the Appellant and affirmed by the court below.

It is not correct that Appellant was not pursued at the scene of crime on the night of it's commission on the 1st October, 1987. The evidence of the 2nd accused Regina Ukpung at the trial gave evidence C how Appellant was pursued to her house and how those pursuing subsequently came with a Policeman and arrested the Appellant. I agree entirely with the submission of Counsel to the Respondent.

On the submission that PW2, PW3 and PW4 were inter- D
ested persons whose evidence required corroboration and warning, it was argued that relationship by blood per se is not sufficient to disqualify the evidence of a witnesses - See *Oguonze v The State* (1998) 5 NWLR (pt.551) 521. This is a correct proposition of law, E and the learned trial Judge was right in the evaluation of the evidence.

Learned Counsel for the Respondent submitted that the circumstantial evidence relied upon by the court below to affirm the conviction F and sentence against the Appellant possessed the "*legal qualities*." These are unchallenged facts believed by the learned trial judge and affirmed by the court below.

- (i) The earlier threat by Appellant to the life of the deceased.
 - (ii) The running up to the deceased by Appellant to the notice of G PW3 and PW4.
 - (iii) The holding up of the deceased by PW3 and Appellant to the notice of PW3 and PW4.
 - (iv) The subsequent shouting of "*one one*" (referring to the H Appellant) has killed somebody.
 - (v) The deceased seen lying in the pool of his blood.
- These are concurrent findings in the two courts below. Appel-

lant has not sought and obtained leave of the court to appeal against these concurrent findings of facts. No arguments can therefore be addressed in respect of these issues. Furthermore these were not issues in the court below and they are not findings of that court.

B Learned Counsel for the Respondent concluded that the evidence of the prosecution witnesses established that

1. The deceased died from a stab wound from a dagger/
2. That the unchallenged evidence of PW2, PW3 and PW4 af-

C fixed the Appellant with the commission of the crime. Appellant admitted stabbing the deceased to death with a dagger in Exhibit B1.

3. Appellant had threatened to kill the deceased that night and he sworn to do so. This suggests motive as required by section 16 of the Evidence Act Cap, 112 Laws of the Federation 1990. In law intent can
D be proved by the declaration of the accused - see Bakare v The State (1986) 1 NSCC, 261 at 275.

It was submitted that Appellant did not challenge the evidence of the prosecution witnesses. The presentation of the accused side of the
E story in his defence cannot in law be said to be a challenge to the facts alleged by the prosecution - see Patrick Oforiete v The State (2000) F.W.L.R. (pt.12) 2081 at 2084. The appeal should be dismissed.

Learned Counsel for the Respondent submitted that the issues of
F defences raised in Appellant's brief of argument were neither canvassed in the Courts below nor are they related to any of the issues for determination formulated on from the grounds of appeal in the Appellants brief of argument. The court was urged to discountenance the submissions.

It was submitted that the defences of self-defence and provocation raised, are not open to the Appellant because on the finding of fact
G by the learned trial judge and affirmed by the court below, it was Appellant that had the dagger, and stabbed the deceased to death when the deceased was not proportionally armed. Finally, it was submitted that
H the proven circumstances as enumerated positively, irresistibly and conclusively affix the Appellant as required by section 137 of the Evidence Act Cap. 112 Law of the Federation, 1990.

The above summarizes the submissions of learned Counsel in

their briefs of argument in this appeal.

I shall now consider the contentions of Learned Counsel in the light of the issues formulated from the grounds of appeal.

The issues formulated must be based on the grounds of appeal filed. Accordingly any argument which is not founded on the grounds of Appeal, from which the issues for determination have been formulated is not a matter arising from the grounds of appeal. The Court is only obliged to consider challenges to the judgment based on the alleged errors of law or misdirection of facts. In the absence of such complaints the court is not entitled to consider issues not subject matter of dispute.

Learned Counsel to the Respondent is therefore correct in the submission that the issues of the defences raised which are not contained in the formulation of the two issues for determination before us which are the determination of the propriety of Exhibit B-B1 as a confessional statement and relying on circumstantial evidence for the conviction of the Appellant. Consideration of any defences were not raised as issues. I therefore will not consider the issue.

I now turn to the issues properly formulated from the grounds of appeal. It is necessary to observe that the essential facts of the case of the prosecution against the Appellant remain undisputed in several respects. These essential aspects are the circumstances and the facts leading to the death of the deceased by stabbing with a dagger on the night of the 1st October, 1987.

Concisely stated, shorn of embellishment and subjective interpretation of Learned Counsel to the Appellant of the circumstances leading to the death of the deceased, the facts stated simply are as follows - Appellant, the deceased, PW2, PW3 and PW4, met at a dance hall at Udokop Mansion Guest House at Abat in Eket. The deceased was accompanied to the Disco dance by PW2, PW3 and PW4. There were disagreement when Appellant asked PW3 for a dance, after PW3 referred Appellant to seek permission from the deceased who brought her to the dance. The deceased did not grant the permission and a quarrel

arose between them. Appellant issued threats of fatal consequences to the deceased. PW3 counselled that the deceased, PW2, PW3 and PW4 should leave the dance hall and return home in the light of the development.

B This they agreed to do. The deceased in front and ahead of them, PW3, PW2 trailing a few yards behind started their journey out of the dance hall. They were outside when Appellant ran passed them, caught up with the deceased in front, and immediately ran passed them again, PW3, PW2, observed the deceased slump in his own pool of blood and was dead. Those around raised alarm that "*one-one*" the nick name
C for which Appellant was known has killed some one.

Immediately, Appellant was pursued to the house of Regina Ukpogon, the second accused where he took refuge and locked himself.
D It was after the intervention of a Police Officer invited to the house, and who forced open the door, was Appellant arrested.

The only departure from the above scenerio were the two different accounts in the statement of Appellant to the Police on the 4th
E October, 1987, Exhibits A-A1, B-B1 respectively. In the statement of the 4th October, 1987, Appellant introduced the story of a fight between himself and the deceased in which they were joined by another. The dagger was that of the deceased on which the deceased fell when Appellant and the deceased were struggling for its possession.
F

On the statement of the 14th, i.e. Exhibit B-B1 he admitted he alone fought with the deceased. The dagger he used in stabbing the deceased was his own. He stabbed the deceased and he had thrown away the dagger. The common factor in the two accounts was that the
G deceased died from a encounter with the Appellant.

It is on this evidence of the prosecution witnesses and the Appellant that the learned trial Judge was to determine from the evidence before him whether the Appellant was responsible for the death of the
H deceased. After analysis of the evidence before him, the learned trial Judge disbelieved the evidence of the Appellant that there was a fight between him and the deceased. He held that the death of the deceased was the result of an unprovoked attack or assault by the Appellant fol-

lowing the anger or threat by the Appellant in the Dancing hall.

The learned trial Judge rejected the evidence of the Appellant at the trial on grounds of unreliability,. He stated the reasons as follows:-

"In parts of his statements to the Police he denied stabbing the deceased, Still in one of these statements he agreed that he fought alone with the deceased and stabbed him and threw away the knife. In his evidence in court he said that is was when the deceased fell down that the knife wounded him" (see p. 39). It is on account of these inconsistencies in the evidence of Appellant that the learned trial Judge rejected the evidence as unreliable, in preference to the evidence of PW2, PW3 and PW4, having resolved the little variations in the movement of the witnesses during the period.

The Court of Appeal held the view that by disregarding the extra judicial statements of the Appellant and his testimony at the trial, the learned trial Judge was applying the inconsistency rule which enabled the court to reject the evidence of a witness at the trial where this was in conflict with an earlier extra-judicial statement. The testimony at the trial is to be treated as unreliable, while the statement is not to be regarded as evidence on which the court can act - see R v Ukpong (1961)1 SCNLR 53, Onubugu v The State (1974) 9 S.C., Jizurumba v State (1961) 3 SC., Saka Oladejo v The State (1987) 3 NWLR (pt.61) 419; R v Golder (1960)1 NWLR. 119.

The question whether the principle in these cases enunciated above applied to the evidence of accused persons including their confessional statements was decided in the case of *Egboghonome v The State (1993) 7 NWLR (pt.306) 383*, where it was held that the inconsistency did not apply to retracted extra-judicial confession of an accused person. The implication is that it applied to extra-judicial statements which are not confessions. In addition, the consequence of the Egboghonome case is that where an accused makes an extra-judicial statement admitting the commission of the offence with which he is charged, the statement will still be considered or taken into account in the determination of his guilt, notwithstanding that he had rsiled from that evidence in his testimony at the trial, by giving

evidence contradictory to that evidence.

The Court below applied this principle to the facts of this case and held that Exhibit B, B1 in which Appellant confessed or admitted killing the deceased cannot be excluded from the evidence in the determination of the guilt of the Appellant, notwithstanding his contradictory evidence in court. The extra-judicial statement cleared the fog of doubt over the identity of the assailant in the court below and in this court. The admission in Exhibit B, B1 established beyond any reasonable doubt, that it was the Appellant who committed the murder of the deceased.

Learned Counsel for the Appellant has argued in his brief of argument that Exhibit B, B1 was neither positive nor direct and is equivocal, and did not come within the definition of a confession in section 27 of the Evidence Act. I am sure this alone did not exclude the statement from being admissible in evidence section 27 (1) of the Evidence Act has defined "Confession", as "an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime". This definition is wide enough to cover both extra-judicial and judicial confessions. Extra-judicial Confessions are those made otherwise than in the course of judicial proceedings, such as Exhibit B,B1. It seems to me perfectly proper to read section 27(1) of the Evidence Act to include an incriminating admission all short of full confession because it was not direct, positive, - see *Custome & Execise v Harz & Power* (1967) AC. 760, *In R v Udo Eka Ebong* (1947) 12 WACA 139, an accused statement made before he was charged was held to amount to a confession. That the accused retracted or denied making the confession did not necessarily make it inadmissible - see *R v Itule* (1961) ALL NLR 462.

The present state of the law is that once a confessional statement is admitted in evidence it becomes part of the case for the prosecution which the Judge is bound to consider for its probative value - *Egboghonome v The State* (1993) 7 NWLR 383. *Edet Offiong Ekpe v The State* (1994) 9 NWLR 263, *Nwangbonu v The State* (1994) 2 NWLR 90. The fact that a confession had been retraced did not

mean that it cannot be acted upon, and relied upon for the conviction of the accused - see *Nkwuda Edamine v The State* (1996) 3 NWLR 530.

There is no doubt that the admission in Exhibit B, B1, by Appellant that he alone fought with the deceased, and that he stabbed the deceased with knife, is an admission to the commission of the offence with which he was charged. Appellant's statement about stabbing the deceased was consistent. It is true the learned trial Judge did not rely on the evidence of Appellant because he regarded it as unreliable. **The Court of Appeal was right to have taken Exhibit B,B1 into account in determining the guilt of the Appellant, since it was part of the case of the prosecution. There is no doubt in the instant case, the evidence of PW2, PW3 and PW4 make it probable that the confession is true, - see *Otuforle & ors v The State* (1968) NMLR 261, *Iyanda v The State* (1971) 1 NMLR 249.**

The Court of Appeal considered that the admission of Appellant in Exhibit B,B1 was corroborated by the evidence of PW2, PW3 and PW4, see *Onochie & OB v The Republic* (1966) NMLR 307. The retracted evidence made in the admission in the light of the totality of the evidence are most likely to be true as far as can be tested, and consistent with the other facts ascertained and established. There is no doubt the Appellant had the opportunity to commit the offence. The Court below was therefore right to have come to its decision.

It is important to consider that there was no challenge to the voluntariness of the confession. The only missing ingredient of the identity of the person who stabbed the deceased to death, from the evidence of PW1, PW2, PW3, and PW4 was supplied in Exhibit B, B1, the extrajudicial statement of the Appellant.

The Court of Appeal was right on the authority of *Egboghonome v The State* (supra), to take Exhibit B,B1 into account in determining the probative value of the evidence of the prosecution.

The submission that the court of Appeal should not have done so because the Learned trial did not do so is a misunderstanding of

the correct legal position

The Learned trial Judge did not correctly apply the inconsistency rule. The subsequent oral testimony of the Appellant was a retraction. The Court below was therefore right in relying on Exhibit B, B1, in affirming the conviction of the Appellant.

The evidence relied upon by the prosecution for the conviction of Appellant did not contain any eye witness account of the stabbing which resulted in the death of the deceased. The learned trial judge relied on the evidence of the Pw2, PW3 and PW4 in proof of the case of the prosecution against the Appellation. The Learned trial Judge found on the evidence that the Appellant was seen by Pw2, PW3 and PW4 running pass them to where the deceased was walking and running back shortly after the deceased had been stabbed. Appellant admitted he alone had a fight with the deceased and that he stabbed the deceased with a dagger which he had thrown away. There is evidence that the deceased died immediately from his encounter with Appellant. These were the circumstantial evidence led by the prosecution and relied upon by the trial Judge in convicting Appellant for the offence of murder, which was affirmed by the court below.

Learned Counsel for the Appellant has submitted that the evidence of PW2, PW3 and PW4 as to the death of the deceased are not cogent, and compelling as to convince the trial Judge that there are no other competing inferences which can be drawn from the disputed facts in this case to displace the only inferences drawn by the court below.

It is important to emphasise that Appellant has not disputed any of the evidence of the circumstances surrounding the murder of the deceased. Indeed his admission in Exhibit B., goes beyond suspicion to supply the missing link in the evidence of PW2, PW3 and PW4 which raised a compelling conclusion that Appellant and no other person was the murderer of the deceased.

Section 149 of the Evidence Act permits the court to draw inferences from relevant established facts. In criminal cases, the force of circumstantial evidence lies in the unmistakable aim of the totality of the evidence which by an undesigned coincidence

point in the direction of the guilt of the accused - see *The State v Edebor* (1975) f 9-11 SC. 69. Hence it has been said, the circumstance relied upon for conviction in the absence of direct eye witness testimony, must be positive, compelling and irresistible, leading to the conclusion that the person accused is guilty. - see *Stephen Ukorah* (1980) 1-2 SC 116, *Muhammed Bello & OB v The State* (1994) 5 NWLR 177

The circumstance of this case fits perfectly within the principles formulated for conviction on grounds of circumstantial evidence. Every circumstance other than the stabbing of the deceased has been established by direct positive evidence of PW2, PW3 and PW4. There is undisputed evidence including the evidence of Appellant that only Appellant had a fight with the deceased. Appellant admitted stabbing the deceased. The evidence in this case is not merely strong circumstantial evidence which should lead to the irresistible presumption of guilt. There is in this case conclusive and compelling evidence of the guilt of the accused.

Having resolved both issues against the Appellant, I hold that the evidence before the learned trial Judge, which was affirmed by the Court below, is that the Appellant and no other was responsible for the death of the deceased and the offence of murder with which he was charged. I agree with the decision of the court below dismissing the appeal. The judgment of the court below is accordingly affirmed.

Appellants conviction for murder contrary to section 319 (1) of the Criminal Code and sentence of death is hereby affirmed.

KUTIGIJSC

I read in advance the judgment just delivered by my learned brother Karibi-Whyte, J.S.C. I agree with his reasoning and conclusion. There is clearly no merit in the appeal. The evidence against the appellant is overwhelming. He was rightly convicted by the trial court and his appeal was properly dismissed by the court of Appeal. I also dismiss the appeal and affirm the decision of the court below.

KATSINA-ALU JSC

I have had the privilege of reading in draft the judgment of my learned brother Karibi-Whyte JSC. in this appeal. I agree with it and for the reasons he has given, I would also dismiss the appeal. Consequently
B I also affirm the conviction and sentence of death.

ACHIKE JSC

I have had the privilege of reading in draft the judgment of my learned brother, Karibi-Whyte, J.S.C., in the appeal. I agree with it and
C for the reasons he has given, I would also dismiss the appeal. Consequently I also affirm the conviction and sentence of death.

KALGO JSC

D I have had the privilege of reading before now, the judgment of my learned brother Karibi - Whyte JSC in this appeal and I entirely agree with him that there is no merit in the appeal and it ought to be dismissed. I agree with the reasoning contained therein which I respectfully adopt
E as mine. There is doubt in my mind that the facts and circumstances of this case as proved by the prosecution and accepted by the trial court, have proved beyond reasonable doubt the death of the deceased and that the appellant was responsible for such death. The evidence of PW2,
F Pw3, and PW4 together with the extra - judicial statement of the appellant in Exhibits B - B1, have clearly supported the conviction of the appellant for the murder of the deceased contrary to S. 319 (1) of the Criminal code of Akwa - Ibom State. The court of Appeal was perfectly right in giving effect to Exhibits B - B1 to confirm the conviction of the appellant.
G The appellant has clearly failed to effectively challenge the prosecution evidence at the trial and the totality of the evidence both direct and circumstantial are conclusive and compelling proof of the guilt of the appellant.

H In the circumstances, I dismiss the appeal of the appellant and affirm the decision of the court of Appeal. The conviction and sentence passed on the appellant are hereby affirmed.