

SUPREME COURT OF NIGERIA
10TH DECEMBER, 2004. SC. 218/2002
CORAM:- I. L. KUTIGI, A. KATSINA-ALU, U. A. KALGO, I. C.
PATS-ACHOLONU, G. A. OGUNTADE, JJSC

1. DANIEL NSOFOR APPELLANTS
2. ETHELBERTALAEGBU
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Murder - Confessional Statement - Where merely denied - It is admissible without requiring a trial within trial (H1)

CRIMINAL PROCEDURE - Murder - Conviction - First appellant was rightly convicted - Based on his confessional statement (H2)

CRIMINAL PROCEDURE - Courts - Confessional statement - Where alleged to be signed by force - Trial within trial was necessary (H3)

CRIMINAL PROCEDURE - Murder - Conviction - That was based on an indivisible confession - Will be set aside (H4)

FACTS

The appellants were two of four accused persons arraigned before the High Court Benin City upon an information for conspiracy to commit murder, and murder contrary to ss. 324 and 317 (1) CC. The four accused persons lived in Ekpan village with the deceased, Maria Imariagbe. She was a trader. She was known to have traveled with the accused persons in the same vehicle on 29 - 11 - 1992, to a nearby village called Ehor. At about 7.15 p.m. the accused persons disembarked from the vehicle at the same spot in Ehor, as did the deceased. The accused persons attacked the deceased, strangled her and dispossessed her of her money. When 1st appellant was next seen by PW3 with whom he lived, it was discovered that he had freshly acquired a very big radio

cassette player, some new trousers and shoes.

The appellants later made confessional statements to the police. It was therein revealed how the plan to kill deceased was hatched and executed. The statement of 1st appellant was marked exhibit 'A' whilst that of 2nd appellant was marked exhibit 'E'. At the close of trial, the trial court acquitted two of the four accused persons but convicted the appellants for the offence of murder. Appellants' appeal before the Court of Appeal was dismissed. They have further appealed to the Supreme Court raising four proliferated issues.

ISSUES FOR DETERMINATION

1. Whether the confessional statements upon which the appellants were convicted were proved to have been made voluntarily.

2. Whether there was any credible evidence outside Exhibits A and E linking the appellants to the scene of the crime and with the crime to justify their conviction.

3. Whether the Court of Appeal was right in the circumstances in convicting the appellants on the strength of their alleged confessions.

4. Whether the guilt of the appellants was proved beyond all reasonable doubt by the prosecution.

HELD (Unanimously dismissing 1st appellant's appeal but allowing 2nd appellant's appeal per **OGUNTADE JSC**)

Confessional Statement - Where merely denied

1. I think that the trial court and the court below were correct in their view that the statement of the 1st appellant was receivable in evidence.

Under Section 27(2) of the Evidence Act the requirement of the law is that a confessional statement to be relevant must be voluntary. In the instant case, it was never the contention of the 1st appellant that he was forced to make Exhibit 'A'. Rather, he said he did not make the statement. In such situation, the statement is admissible and it remains for the trial Judge at a later stage in the proceeding to determine whether or not it was the appellant who made it. It would only have necessitated the holding of a trial within trial if appellant's contention had been that he did not voluntarily make the statement. In *R. v. Middleton* (1974) 2 All ER 1190 which

was followed by this court in *Owie v. The State* (1985) 4 S.C. 1 at 27, the court said:

“It is well settled that where the objection to the admissibility of an accused person’s statement is merely that it was not read over to him and on the ground that he did not make it but not that it was not voluntarily made, and that he was coerced or induced to make it, the statement is voluntarily made and admissible.” (p. 2422 B)

First appellant was rightly convicted

2. The trial Judge in the case on hand meticulously tested the proven and ascertained facts in the proceedings against the contents of Exhibit ‘A’.

The Judge found sufficient cause to rely on the contents of Exhibit ‘A’ as basis for the conviction of the 1st appellant. In *R. v. Walter Sykes* (supra), Ridley, J., said of confessional statements:

“I think the Commissioner put it correctly, he said:

‘A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive and is properly proved a jury may, if they think fit, convict him of any crime upon it.’

I am satisfied that the 1st appellant was rightly convicted on his confessional statement. It may be said that he deserved nothing less than the verdict of guilt pronounced by the court of trial. The appeal of the 1st appellant has no merit. I would therefore dismiss it. (p.2425D/2426F/2427A)

Confessional statement - Where alleged to be signed by force

3. The trial court ought to have conducted a trial within trial to determine whether or not the 2nd appellant voluntarily made Exhibit E. Rather than do this the trial court erroneously accepted that the challenge made to Exhibit ‘E’ by 2nd appellant’s counsel did not necessitate the conduct of a trial within trial. This clearly was a mistake. The court below should have held Exhibit ‘E’ inadmissible in the manner it was admitted. (p. 2429 A)

Conviction - That was based on an indivisible confession

4. The question that follows is whether there was sufficient evidence left on

record after excluding Exhibit ‘E’ which could have sustained the verdict of guilt returned by the trial court.

The 1st appellant in his confessional statement materially implicated the 2nd appellant. But it is settled law that a man’s confession is only evidence against him and not his accomplices. See *R. v. Ajani Ors.* (1936) 3 WACA 3. In any case the 2nd appellant never adopted the statement of the 1st appellant as his own.

The result is that, when the statement Exhibit ‘E’ is excluded from the evidence, as it should be, the inevitable conclusion is that the guilt of the 2nd appellant on the offence of conspiracy and murder was not established. The 2nd appellant must therefore be discharged and acquitted. (p. 2429 B)

NOTABLE POINTS OF INTEREST

D KALGO JCS

1. Confession - When trial within trial will be necessary

There is no doubt that PW. 7 testified that the 2nd appellant made the statement Exhibit ‘E’ to him. But the 2nd appellant denied making any statement. If the 2nd appellant had stopped at not making the statement Exhibit ‘E’ then the learned trial Judge and the Court of Appeal would be perfectly right in accepting Exhibit ‘E’ in evidence as having been properly made by the 2nd appellant. See *Ejinima v. The State* (1991) 6 NWLR (Pt.200) 627; *Itule v. The State* (1961) 2 S.C. NLR 183. But when the 2nd appellant added that he was forced to sign Exhibit ‘E’ and has explained the circumstances surrounding the signing of Exhibit ‘E’ in his defence. It is my respectful view that it should have occurred to the learned trial Judge that the voluntariness of Exhibit ‘E’ must be in question and he should have conducted a trial-within-trial to decide this even after the defence of the 2nd appellant, especially as the prosecution did not even find it necessary to cross-examine the 2nd appellant on the signing of Exhibit ‘E’ when testifying in his defence. I think it was wrong in the circumstances, for the learned trial Judge to hold and for the Court of Appeal to confirm that Exhibit ‘E’ was properly admitted in evidence as a confession and to act upon it to convict the 2nd appellant without conducting a trial-within-trial to determine its voluntariness. I am also of the view that there is no evidence direct or

circumstantial on record to support the convictions of the 2nd appellant of conspiracy to murder and murder and the totality of the evidence of PWs. 2, 3, 4 and 6 only raised some suspicion which however strong does not constitute proof of a criminal offence. (p. 2431 B)

B

PATS-ACHOLONU JSC

2. Statement to the police - Need for proper scrutiny by court

I wish to add however that it will be to the eternal growth and further or marked development of jurisprudence if our High Courts, which are the triers of facts, since we have no jury system, would systematically and painstakingly subject all facts contained both in the accused's statement to the Police, and evidence in court to pitiless and scrupulous scrutiny. This is more so where there are allegations made by the accused persons as in this case that the felony committed by them was at the behest of someone else whose own seeming confessional statement as put down by the Police was enough to be disregarded by the trial court, and gained acquittal and discharge by the trial court, while an accused who said he was a mere messenger "*of death*" got a conviction. It would seem that the mode of trial and ascription of the weight and substantiality of evidence by the trier of facts, to wit, the High Court, in my opinion leaves much to be desired. (p. 2432 C)

F

REPRESENTATION

D. O. Okoh Esq., (with him, Miss N. P. Edogun), for the Appellants.
M. O. Omozeghian, Esq., Assistant Chief Legal Officer, Ministry of Justice, Edo State (with him, Mrs. F. N. Edokpolor, Legal Officer, Ministry of Justice, Edo State), for the Respondent.

G

CASES REFERRED TO

Ahmed v. The State (2001) 12 S.C. (Pt.I) 135; (2001) 8 NWLR (Pt.746) 622
R. v. Middleton (1974) 2 All ER 1190
Babalola v. The State (1989) 7 S.C. (Pt.1) 94
Queen v. Obiasi (1962) 1 All NLR 651

H

Saidu v. State (1982) 4 S.C 41

Reg. v. Chart wood (1980) 1 WLR 874

Owie v. The State (1985) 4 S.C. 1 at 27

Ejiminima v. The State (1991) 6 NWLR (Pt.200) 627

B Itule v. The State (1961) 2 S.C. NLR 183

STATUTES REFERRED TO

Criminal Code Law of Bendel State ss. 317 & 324

C Evident Act 1990 s. 27(1) & (2)

LEAD JUDGMENT BY OGUNTADE JSC

The appellants were two of the four accused persons arraigned before the Benin High Court of Edo State upon an information for conspiracy to commit murder and murder contrary to Sections 324 and 317(1) respectively of the Criminal Code Law of Bendel State of Nigeria Cap. 48 applicable in Edo State. Before the said High Court, the 1st and 2nd appellants were the 1st and 4th accused persons respectively. At the close of trial, the trial Judge, Idahosa, J., on 19th June, 1996, discharged and acquitted the 2nd and 3rd accused persons on the two counts. The appellants were each found guilty of the offence of murder and sentenced to death.

Dissatisfied with their convictions the appellants brought an appeal before the Court of Appeal Benin (hereinafter referred to as the court below) and that court (coram Baa'ba, Ibiyeye and Akaahs, JJCA.) in an unanimous judgment delivered on 8th March, 2002, dismissed the appeals. The appellants have come before this court on a further appeal. In their Notices of Appeal they each raised three grounds of appeal. They have from those grounds of appeal distilled four issues for determination in a joint brief, namely these:

1. Whether the confessional statements upon which the appellants were convicted were proved to have been made voluntarily.
- H 2. Whether there was any credible evidence outside Exhibits A and E linking the appellants to the scene of the crime and with the crime to justify their conviction.
3. Whether the Court of Appeal was right in the circumstances in

convicting the appellants on the strength of their alleged confessions.

4. Whether the guilt of the appellants was proved beyond all reasonable doubt by the prosecution.

The respondent in its brief adopted the issues as formulated. The appellants's 4th issue above would appear to be the same with their 2nd issue. Proof beyond reasonable doubt as raised in issue 4 above connotes sufficiency of evidence as raised in the 2nd issue. The appellants' counsel, it must be observed, has needlessly proliferated the issues.

Before I consider the issues, it is important to examine the broad facts as presented by the prosecution before the trial court. The appellants and the two accused persons charged along with them lived in the same village called Ekpan with the deceased Maria Imariagbe in Edo State. The deceased was a trader. She was known to have travelled in the same vehicle with the appellants from Ekpan on 29th November, 1992, to a nearby village called Ehor. The appellants and the two other accused persons (before the trial court) disembarked from the vehicle at the same spot in Ehor as did the deceased. The time was about 7.15 p.m. The appellants and two others then set upon the deceased. They attacked and strangled her. They dispossessed her of the money she had with her. The corpse of the deceased was found in a bush near the road at Ehor Village. The appellants made a hurried departure from Ekpan village the same night they were seen to have travelled in the same vehicle with the deceased. The 1st appellant ran away to his native town Awomama in Imo State. The 2nd appellant ran away to a place called Emese in Mbano Local Government of Imo State. When 1st appellant was next seen by P.W.3 with whom he lived at Ekpan, it was discovered that he had freshly acquired "*a very big radio cassette player, some new trousers and shoes*". The appellants later made "*confessional*" statements to P.W.7. In the statements it was revealed how the plan to kill the deceased was hatched and the manner of the execution of the plan. The statement of the 1st appellant was received in evidence as Exhibit 'A' whilst that of the 2nd appellant was tendered as Exhibit E.

In the appellants' brief before this court, it was argued that the confessional statements alleged to have been made by the appellants were not shown to have been voluntarily made. It was submitted that the pros-

ecution had a duty to show that the statements credited to the appellants were voluntarily made. Counsel referred to Section 27(1) of the Evidence Act, 1990; *R. v. Sykes* (1913) CAR 233; *Adekambi v. A-G. Western Nigeria* (1966) 1 All NLR 47. It was further submitted that the trial Judge ought to have conducted a trial within trial when the prosecution sought to tender in evidence the appellants' statements in order to determine whether or not they were voluntarily made. Counsel argued that the prosecution needed to show that there were other established facts outside the alleged confessional statements, which would show that the contents of the statements were true. Finally, appellants' counsel argued that even if the prosecution was relying on statements allegedly confessional, it was still not relieved from the burden of establishing the guilt of the appellants on the standard beyond reasonable doubt - *Kareem v. F.R.N. (No.2)* (2002) 8 NWLR (Pt.770) 664 at 682-685; *Mbenu v. The State* (1988) 3 NWLR (Pt.84) 615; *Kanu v. R.* (1952) 14 WACA 30; *R. v. Omokoro* (1941) 7 WACA 146; *Koya v. State* (1971) 1 All NLR 150 and *Akpan v. State* (1986) 3 NWLR (Pt.27) 225.

The respondent in its brief argued that once there was evidence from the prosecution that the confessional statements Exhibits A and E were voluntarily made, the onus shifted to the appellants to show that the statements were not voluntarily made and it was when the defence had done this that the court would be disposed to conduct a trial within trial: *R. v. Onabanjo* (1936) WACA; *R. v. Kassi* (1939) 5 WACA 154; *R. v. Eguabor* (1962) 1 All NLR 287; *Nwangbomu v. The State* (2001) ACLR 9 at 12; *Obibodo v. The State* (1987) 12 S.C. 74; *Felix Okoro v. The State* (1993) 3 NWLR (Pt.282) 425 at 429. Counsel submitted that a confessional statement did not become inadmissible just because an accused denied making it. *Queen v. Nwango* (1960) 5 FSC 55; *Queen v. Itule* (1961) ANLR 462 and *Madjemu v. State* (2001) ACLR 445. Respondent's counsel further argued that when an accused person objected to the admissibility of a confessional statement on the ground that it was not read over to him or that he did not make it as against an assertion that the statement was not voluntarily made, the court would still receive the statement in evidence: *Ovie v. State* (1985) 4 S.C. (Pt. 2) at 22. It was finally argued that a confessional statement even if retracted was still admissible: *Ikpo v. State* (1993) 33 LRN 587 at 589;

Egboghonome v. State (1993) 7 NWLR (Pt.306) 385 at 387:

I observe here that the alleged confessional statement of the 1st appellant was received in evidence in circumstances different to that of the 2nd appellant. It is, therefore, desirable for clarity to consider each of the two statements Exhibits 'A' and 'E' separately. B

Exhibit 'A', that is, the statement of the 1st appellant was tendered on 26th May, 1995. The relevant proceedings at page 19 of the record read:

"On 22/12/92, I now brought out 1st accused person having earlier arrested him. I now charged him with the offence of murder, cautioned him in English language and he volunteered a statement in English Language which I recorded. I read it over to him and he signed it as correct. I signed as the recorded. This is the statement now shown to me. C

Ohiowe: I seek to tender it.

Akinyele Esq.: I am objecting to the admissibility of the statement on ground that it was not made by the accused person. D

Ohiowe: The statement was made by the accused who was cautioned before he made it. He signed the statement. He has not said that it was made under threat or promise. He merely said he did not make the statement. See Nwangbonu v. The State (1994) Nig. App. Cases Report 91 at 92. The issue of voluntariness has not been raised. I urged the court to admit this statement. E

Court: The situation has been stated and restated by the Supreme Court and Court of Appeal that the question whether the accused made the statement in issue sought to be tendered does not really affect the admissibility but goes to weight. The objection is therefore overruled. F

The statement of the 1st accused made on 22/12/92 is admitted and marked as Exhibit 'A'." G

In the appeal brought before the court below, the appellants had raised the same issue now raised before this court concerning the procedure adopted by the trial court in the reception in evidence of the confessional statement of the 1st appellant (Exhibit A). The court below, per Baa'ba, JCA., who wrote the lead judgment, after referring to Uche Obidiogo & Ors. v. The State (supra) where a passage from R. v. Igwe (supra) was quoted, said:

"It is well settled that where the objection to the admissibility of

accused's statement is merely that it was not read over to him and on the ground that he did not make it but not that it was not voluntarily made, he was coerced or induced to make it, the statement is voluntarily made and admissible. The rule with respect to conducting trial within trial operates only in cases questioning the voluntariness or otherwise of confessions. It does not apply to questions of weight to be attached to them."

I think that the trial court and the court below were correct in their view that the statement of the 1st appellant was receivable in evidence. Section 27(1) and (2) of the Evidence Act provides:

"27(1) 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 persons who make them only."

In R. v. John Agagariga Itule (1961) All NLR 462 at 465 this court per Brett, Ag. CJF., said:

"A confession does not become inadmissible merely because the accused person denied having made it and in this respect a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession. The fact that the appellant took the earlier opportunity to deny having made the statement may lend weight to his denial but it is not in itself a reason for ignoring the statement."

Under Section 27(2) of the Evidence Act reproduced above, the requirement of the law is that a confessional statement to be relevant must be voluntary. In the instant case, it was never the contention of the 1st appellant that he was forced to make Exhibit 'A'. Rather, he said he did not make the statement. In such situation, the statement is admissible and it remains for the trial Judge at a later stage in the proceeding to determine whether or not it was the appellant who made it. It would only have necessitated the holding of a trial within trial if appellant's contention had been that he did not voluntarily make the statement. In R. v. Middleton (1974) 2 All ER 1190 which was followed by this court in Owie v. The State (1985) 4 S.C. 1 at

27, the court said:

“It is well settled that where the objection to the admissibility of an accused person’s statement is merely that it was not read over to him and on the ground that he did not make it but not that it was not voluntarily made, and that he was coerced or induced to make it, the statement is voluntarily made and admissible.” B

See also R. v. Obidiozo & Or. v. The State (supra)

It only remains to consider in relation to the 1st appellant whether Exhibit ‘A’ was sufficient a basis to convict him of the offence of murder. The said Exhibit ‘A’ reads thus: C

“I am a native of Awo-Omamma in Oru LGA of Imo State. I started Iseke Primary School in 1980 and finished primary six in 1987. After my primary school in 1987 I was at home doing nothing. At times I did some jobs in our market. In 1988, I went to Kwale in Delta State and stayed with my sister called Chinedu Josephine. In 1991 travelled to Ekpan village to do jobs. I knew the woman whom we killed, they used to call her Akokeme. I know one Ibo boy called Emeka at Ekpan also Etele. I know one Friday from Ekpan. On the 29/11/92 around 3 p.m. I followed Emeka and Etele to Ehor. On our way back to Ekpan village, myself Daniel Nsofo, Emeka, Etele and the deceased entered the same vehicle to Ekpan village. When we came down from the motor at Irue village, four of us including the woman started tracking (sic) to Ekpan village. Between Irue village and Ekpan, Etele called Emeka that he should remember what Friday sent them. It was round 8 p.m. So I asked Etele what Friday sent them. Etele told me that Friday sent them to kill the woman because the woman owed him N1,000.00. I told Etele that it is not good to kill the woman, but Etele said to me that they must kill her. Emeka brushed the woman down while Etele gave her fixed blows and later tied her neck with a cloth. I held the woman while Emeka held her by the neck and the woman died. After the death of the woman, we took her money the sum of N5,945.00, We took the money to Friday’s house at Ekpan and shared it. They gave me N1,300.00, Emeka N1,300.00, Friday N1,000.00 and Etele collected the rest because he was the senior. We left Friday’s house 1.30 a.m to Erue/Ehor Road. Etele told Marcus and Lucky to follow us leave Ekpan that night because Police will D E F G H

arrest them if they fail to come. Marcus and Lucky followed us to Ehor. They did not know anything about the killing of the woman and we did not tell them. Five of us slept on the road along Irue and Ehor road. We left Ehor road around 4.30 a.m. We reached Ehoh park 7.30 a.m. and moved
 B to Benin. We reach Ikpoba Hill around 9 a.m. At Ikpoba Hill, we came down and warned Marcus and Lucky not to go back to Ekpan Village. We gave them N10.00 each to transport themselves to their brother in another place. Then three of us went in to the town and bought radio each. I bought
 C my radio at N350.00, Emeka bought his own at N350.00 while Etele claimed the one which his brother got before. I also bought a traveling bag with a shirt and trouser before we left to Imo State. Emeka bought a handbag, shirt and trouser including wrapper for his mother. Nobody heard or followed us to kill the woman. Only Friday who sent us knows about it.”

D In *Dawa v. State* (1980) 8-11 S.C. 236 at 267-268, this court per Obaseki, JSC., discussed the test to be applied in determining the weight to be given to a retracted confessional statement thus:

“On the issue of weight to be attached to confessional statements
 E retracted or not retracted, the tests to be applied and or followed were laid down in *R. v. Sykes* (1913) 8 CR. Appeal Report 233 and approved by the West African Court of Appeal in *Kanu v. The King* (1952/55) 14 WACA 30 and I regard them as sound and golden. The questions a Judge must ask
 F himself are:

- (1) Is there anything outside the confession to show that it is true?
- (2) Is it corroborated?
- (3) Are the relevant statements made in it of facts true as far as they
 can be tested?
- G (4) Was the prisoner one who had the opportunity of committing the murder?
- (5) Is his confession possible?
- (6) Is it consistent with other facts which have been ascertained and
 H have been proved?”

If the confessional statement passes these tests satisfactorily, a conviction founded on it is invariably upheld unless other grounds of objection exist. If the confessional statement fails to pass the tests, no conviction

can properly be founded on it and if any is founded on it, it will be hard to sustain.

Since Kanu v. King (supra) authorities abound in this country where the highest court, the Supreme Court decreed that a free and voluntary confession alone, properly taken, tendered and admitted and proved to be true is sufficient to support a conviction provided it satisfies the 6 tests enumerated above. Among the long line of authorities may be mentioned:

“(1) *The Queen v. Obiasa* (1962) 1 All NLR 651

(2) *Edet Obosi v. The State* (1965) NMLR 117

(3) *Paul Onochie & 7 Ors. v. The Republic* (1966) NMLR 327. C

(4) *Obue v. The State* (1976) 2 S.C. 141.

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

(6) *Ebdmien & Ors. v. The Queen* (1963) 1 All NLR 365.”

The trial Judge in the case on hand meticulously tested the proven and ascertained facts in the proceedings against the contents of Exhibit ‘A’. At pages 80-81 of the record the trial Judge in the performance of his duty observed: D

“It is clear from the case of the prosecution that the 1st accused had the opportunity to commit the offence. He was placed at the scene by the evidence of RW.4, which I have no reason to disbelieve. P.W.4 is a witness who has nothing in common with 1st accused. He came out to help the Police when he heard of the murder of the deceased. The confession of the 1st accused, Exhibit A, is positive, unequivocal and direct. It is clear as to the role played by 1st accused. In *Ikpo v. The State*. (1995) 33 LCRN 587 the Supreme Court approved the test laid down in *R. v. Sykes* (1913) 18 CAR 233, in testing the truth or otherwise of a confession - See p.600 of the report in *Ikpo’s* case. In this regard the court would consider issues such as:- G

(i) Whether there is anything outside the confession to show that it is true.

(ii) Whether the statement is corroborated.

(iii) Whether the statement of facts made in the confessional statement so far as can be tested is true. H

(iv) Whether the accused person had the opportunity of committing the offence charged.

(v) *Whether the confession of the accused person was possible.*

(vi) *Whether the confession was consistent with other facts which have been ascertained and proved at the trial.*

Applying this test to Exhibit 'A', it can be seen that there are facts outside Exhibit 'A' which tend to show that it is true. The evidence of P.W.3 and 4 locate 1st accused at Ekpan and Ehor respectively. P.W.4 further put 1st accused along with the deceased at Irue junction, where the 1st accused disembarked with the deceased from the vehicle of PW.4.

Again, the testimony of P.W.6 is in complete agreement with Exhibit 'A' in respect of the method used to kill the deceased as described by 1st accused.

The sudden disappearance of 1st accused from the village, when his work as a jobman had not been completed for the year is in my view a fact in support of the contents of Exhibit 'A'. P.W.3's testimony as to what he saw when he visited 1st accused in his village, i.e. the new items the 1st accused had acquired viz: radio cassette player, shirts, trousers, etc. also supports the contents of Exhibit 'A'.

All these are pieces of evidence, outside Exhibit A, which support and lend credence to Exhibit A. I am particularly impressed by the fact that Exhibit A contains information about the 1st accused which the P.W.7 would not have known if the 1st accused did not disclose them. It is therefore, not correct that 1st accused did not make Exhibit A. I accept it as true and correct and I no (sic) as a fact that 1st accused made Exhibit 'A'."

A close perusal of the above passage reveals that **the Judge found sufficient cause to rely on the contents of Exhibit 'A' as basis for the conviction of the 1st appellant. In R. v. Walter Sykes (supra), Ridly, J., said of confessional statements:**

"I think the Commissioner put it correctly, he said:

'A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive and is properly proved a jury may, if they think fit, convict him of any crime upon it.'

See also Queen v. Obiasi (1962) 1 All NLR 651; Saidu v. State (1982) 4 S.C 41; Reg. v. Chart wood (1980) 1 WLR 874; James Obi Achabua v.

The State (1976) 12 S.C 63 at 68 and Jimoh Yesufu v. State (1976) 6 S.C. 167 at 173.

I am satisfied that the 1st appellant was rightly convicted on his confessional statement. It may be said that he deserved nothing less than the verdict of guilt pronounced by the court of trial. The appeal of the 1st appellant has no merit. I would therefore dismiss it.

I now come to the appeal by the 2nd appellant. The relevant proceedings of the trial court when the statement of the 2nd appellant Exhibit 'E' was tendered is to be found on page 21 of the record and goes thus:

"I arrested the 4th accused, charged him with the offence of conspiracy and murder. Cautioned him in English language and he volunteered a statement in English language which I recorded in English Language. I read it over to him and he said it was correct and he signed it. I also signed as the recorder. This is the statement now shown to me.

Ohiowole: I seek to tender it.

Akinyele: The 4th accused says he did not make any statement and that he was forced to sign this one.

Court: As I have said earlier, this is not a ground against the admissibility of a statement. Statement dated 5/3/93 is admitted and marked Exhibit 'E'." (Underlining mine).

The court below agreed with the trial Judge in his conclusion above that Exhibit 'E' was admissible in evidence without the necessity to first conduct a trial within trial to determine the voluntariness of the statement. In a portion of Exhibit 'E', the 2nd appellant was said to have stated thus:

"We used hands to kill her and also tied her mouth and the neck with cloth. I used one of her clothes to tie her. It was Daniel Nsofor who removed her money. I did not know the amount. After killing her, we carried her corpse to a pineapple farm and covered up with leaves. We left to Friday's house that night and informed him that we have killed the woman Maria Imariagbe. The money we removed from the woman was shared by Friday Aigbedion equally. I got N1,300.00. Friday N1,300.00, Daniel N1,300.00 and Uchechukwu N1,300.00. I was the one who collected the balance because I was the senior among them. The total amount was N5,945.00."

In the extract from the alleged statement of the 2nd appellant re-

produced above, there could be no doubt that the maker intended to and did admit the ingredients of the offence of murder. The statement without any iota of doubt was confessional having regard to the admissions made therein. It could under Section 27(1) of the Evidence Act only be relevant to the proceedings and therefore admissible if it was established that it was voluntarily made. But as shown in the relevant court proceedings reproduced earlier in the judgment, the 2nd appellant's counsel had said when the statement was to be tendered:

C “The 4th accused says he did not make any statement and that he was forced to sign this one.”

It is apparent from the statement of 2nd appellant's counsel that the voluntariness of the statement ascribed to the 2nd appellant was being contested. Counsel specifically said that the 2nd appellant was forced to sign the statement. This brings to mind the statement of this court per Obaseki, D JSC., in *Dawa v. State* (supra) at page 258:

E “It has long been established as a positive rule of law which has found a healthy place in our statutes (Section 28 Evidence Law of Northern Nigeria 1963 L/N.N. See also Section 28 Evidence Act L/FN 1958) that no statement by an accused is admissible against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it was not obtained from him by the fear of prejudice or hope of advantage exercised F or held out to him by person in authority. The principle is as old as *Hale* and in this country since the reception of English law into our legal system. Voluntariness is only a test of admissibility. It is not an absolute test of the truth.”

Those are clear words which sign-post a great crest in our criminal G justice system. The principle encapsulated in the statement is not only time honoured but has remained immutable. Indeed the court below stated the principle correctly when it referred to the case of *Uche Obidiozo & Ors. v. The State* (supra). It is a thread that has run through several of the cases H decided by the Nigerian courts on the admissibility in evidence of confessional statements. Regrettably however, the court below failed to apply it when considering the appeal of the 2nd appellant in relation to the voluntariness of Exhibit E.

The trial court ought to have conducted a trial within trial to determine whether or not the 2nd appellant voluntarily made Exhibit E. Rather than do this the trial court erroneously accepted that the challenge made to Exhibit ‘E’ by 2nd appellant’s counsel did not necessitate the conduct of a trial within trial. This clearly was a mistake. The court below should have held Exhibit ‘E’ inadmissible in the manner it was admitted. B

The question that follows is whether there was sufficient evidence left on record after excluding Exhibit ‘E’ which could have sustained the verdict of guilt returned by the trial court. Looking through the record, there was the evidence of P.W.3 to the effect that the 2nd appellant disappeared from Ekpan the same night the deceased was killed. There was also the evidence of RW.4 that he saw the 2nd appellant when he boarded the vehicle from Ekpan to Ehor and disembarked at the same point with the 1st appellant, another person and the deceased. These pieces of evidence do not establish the guilt of the 2nd appellant. At the highest, they raise only a suspicion. C D

Further the 1st appellant in his confessional statement materially implicated the 2nd appellant. But it is settled law that a man’s confession is only evidence against him and not his accomplices. See R. v. Ajani Ors. (1936) 3 WACA 3. In any case the 2nd appellant never adopted the statement of the 1st appellant as his own.’ E F

The result is that, when the statement Exhibit ‘E’ is excluded from the evidence, as it should be, the inevitable conclusion is that the guilt of the 2nd appellant on the offence of conspiracy and murder was not established. The 2nd appellant must therefore be discharged and acquitted. G

In the final conclusion, the appeal by the 1st appellant fails and is dismissed. I affirm his conviction and the sentence of death imposed on him. The appeal by the 2nd appellant is allowed. The conviction of the 2nd appellant and the sentence imposed on him are set aside. The 2nd appellant is discharged and acquitted. H

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Oguntade, JSC. I agree with him that the appeal of the 1st appellant (Daniel Nsofor) lacks merit and therefore fails. It is dismissed. Conviction and sentence are affirmed. I also agree with him that there is merit in the appeal of the 2nd appellant (Ethelbert Alaegbu). His appeal is hereby allowed. He is discharged and acquitted

C

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Oguntade, JSC., in this appeal. I entirely agree with it and, for the reasons he gives, I, too, dismiss the appeal of the 1st appellant Daniel Nsofor and allow the appeal of the 2nd appellant Ethel Alaegbu. Accordingly the conviction and sentence of the 2nd appellant are set aside. He acquitted and discharged.

E

KALGO JSC

I have the privilege of reading in advance the judgment just delivered by my learned brother, Oguntade, JSC., in this appeal. I entirely agree with him that the appeal of the 1st appellant Daniel Nsofor has no merit at all as his confessional statement to the Police Exhibit “A” was properly admitted in evidence as voluntary and was fully supported by other evidence on record which makes the confession true. His conviction for conspiracy to murder and for murder, contrary to Sections 324 and 317(1) of the Criminal Code Cap. 48 of Law of Bendel State 1976 was properly upheld by the Court of Appeal. See Afolabi v. Commissioner of Police (1961) 1 All NLR 654; Kanu v. King 14 WACA 30; Ejinima v. The State (1991) 6 NWLR (Pt. 200) 627.

The 2nd appellant Ethelbert Alaegbu denied making any statement to the Police and he said so clearly in his defence at the trial that -

“At the State Intelligence and Investigation Bureau S.I.I.B., Benin City, I did not make a statement. I see Exhibit ‘E’. I signed it after I was

hand cuffed behind my back and hang on a pole between two tables. I told P.W.7 that I did not know what was in the paper but he insisted that I signed it and I had to sign it to survive. After I signed the paper, he i.e. PW.7 took me into the cell and that was where I saw 1st, 2nd and 3rd accused."

The 2nd appellant was extensively cross-examined by the prosecution but nowhere was he asked about the statement Exhibit 'E' or how he signed it. There is no doubt that PW. 7 testified that the 2nd appellant made the statement Exhibit 'E' to him. But the 2nd appellant denied making any statement. If the 2nd appellant had stopped at not making the statement Exhibit 'E' then the learned trial Judge and the Court of Appeal would be perfectly right in accepting Exhibit 'E' in evidence as having been properly made by the 2nd appellant. See *Ejinima v. The State* (1991) 6 NWLR (Pt.200) 627; *Itule v. The State* (1961) 2 S.C. NLR 183. But when the 2nd appellant added that he was forced to sign Exhibit 'E' and has explained the circumstances surrounding the signing of Exhibit 'E' in his defence. It is my respectful view that it should have occurred to the learned trial Judge that the voluntariness of Exhibit 'E' must be in question and he should have conducted a trial-within-trial to decide this even after the defence of the 2nd appellant, especially as the prosecution did not even find it necessary to cross-examine the 2nd appellant on the signing of Exhibit 'E' when testifying in his defence. I think it was wrong in the circumstances, for the learned trial Judge to hold and for the Court of Appeal to confirm that Exhibit 'E' was properly admitted in evidence as a confession and to act upon it to convict the 2nd appellant without conducting a trial-within-trial to determine its voluntariness. I am also of the view that there is no evidence direct or circumstantial on record to support the convictions of the 2nd appellant of conspiracy to murder and murder and the totality of the evidence of PWs. 2, 3, 4 and 6 only raised some suspicion which however strong does not constitute proof of a criminal offence. See *Ahmed v. The State* (2001) 12 S.C. (Pt. 1) 135; (2001) 8 NWLR (Pt.746) 622; *Babalola v. The State* (1989) 7 S.C. (Pt.1) 94; (1989) 4 NWLR (Pt. 115) 264; *Onah v. The State* (1985) 3 NWLR (Pt. 12) 236; *Bozin v. The State* (1985) 2 NWLR (Pt.8) 465. I therefore also agree with Oguntade, JSC., that on the whole, there was no cogent and admissible evidence to support the conviction of

the 2nd appellant for conspiracy to murder and murder of the deceased. His appeal must therefore be allowed.

Finally, for the above and the more detailed reasons given by my learned brother, Oguntade, JSC., in the leading judgment, I also dismiss the appeal of the 1st appellant and allow the appeal of the 2nd appellant. The conviction and sentence passed on the 2nd appellant are hereby set aside and he is hereby acquitted and discharged.

C **PATS-ACHOLONU JSC**

I have read the judgment of my learned brother, Oguntade, JSC., and I agree with him. I wish to add however that it will be to the eternal growth and further or marked development of jurisprudence if our High Courts, which are the triers of facts, since we have no jury system, would systematically and painstakingly subject all facts contained both in the accused’s statement to the Police, and evidence in court to pitiless and scrupulous scrutiny. This is more so where there are allegations made by the accused persons as in this case that the felony committed by them was at the behest of someone else whose own seeming confessional statement as put down by the Police was enough to be disregarded by the trial court, and gained acquittal and discharge by the trial court, while an accused who said he was a mere messenger “*of death*” got a conviction. It would seem that the mode of trial and ascription of the weight and substantiality of evidence by the trier of facts, to wit, the High Court, in my opinion leaves much to be desired.

The judgment in the High Court from which the appeal ultimately came to this court does not appear to resonate with legal erudition and intellectual consideration. This observation notwithstanding, I dismiss the appeal of the first appellant and allow the appeal of the 2nd appellant.

H