

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 2005. SC. 54/2004
CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, D. O. EDOZIE, I.
C. PATS-ACHOLONU, G. A. OGUNTADE, JJSC

OZANA UBIERHO APPELLANT

V.

THE STATE RESPONDENT

CRIMINAL PROCEDURE - Confession - Definition - Conviction can be based solely on one's confession - Where circumstances confirm its truth (H1)

CRIMINAL PROCEDURE - Confessional statement - Where retracted and denied - The court can still convict based on it (H2)

CRIMINAL PROCEDURE - Murder - Cause of death - Burden of establishing that the act of appellant caused the death - Is discharged - Where common intention is proved (H3)

FACTS

The appellant and others were arraigned before the Warri High Court on a one count charge of murder of one Mrs. Uwarah. The offence was committed in the month of July, 1985. Before the trial commenced 4 of the accused persons died in custody while 3 others were discharged on a no case submission. The trial proceeded against the 4th accused (appellant) alone. The evidence revealed that the appellant with 3 other boys dragged the deceased to a bush where they killed her. They removed her hunch back for the purpose of consulting a native doctor who would prepare prosperity charm for them. Appellant made a confessional statement Exhibit K which was relied upon by the trial court in finding him guilty for the offence of murder.

But as he was then about 14 years old, the court ordered that he be detained in prison at the pleasure of the Military Administrator of Delta

State. Because the body of the deceased was at an advanced stage of decomposition, the medical doctor that examined it saw natural death as a possibility. Appellant's appeal to the Court of Appeal was dismissed. He has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether on the totality of evidence adduced, the learned Justices were right in holding that prosecution proved the case beyond reasonable doubt?

HELD (Unanimously dismissing the appeal per **KATSINA-ALU JSC**)

Confession - Definition

1. Now a confession is an admission made at any time by a man charged with a crime stating or suggesting that he committed the crime. It is now settled law that a man may be convicted solely on his confession. There is surely no law against it. It is however desirable to have some evidence of circumstances which make it probable that the confession was true. The principles upon which a man may be convicted on his own confession alone were enunciated in the English case of *R. v. Sykes* (1913) 8 CAR 233. At p. 236 of the report, the Court of Criminal Appeal 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. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?”

These principles have been adopted and followed in this country.

(p. 551 E)

Confessional statement - Where retracted and denied

2. Both the trial court and the Court of Appeal held that Exhibit K is clearly a confessional statement.

The appellant, however, in his defence retracted his confessional statement, Exhibit K. He said in his evidence that he did not make Exhibit K.

I dare say that there is nothing sacrosanct about a retraction of a confession. The law is that a man may be convicted on his own confession alone provided that there is anything outside it to show that it was true. Exhibit K gave a detailed and graphic description of how the deceased was killed. The account of those events could only be recounted by a person who was an active participant of what happened on the fateful day.

From the foregoing it can be seen clearly that Exhibit K is a free and voluntary confession. It is direct and positive. The evidence of P.W.1, P.W.2 and P.W.3 show plainly that it was true. (p. 552 D / 554 A)

Murder - Cause of death

3. It has been contended for the appellant that it was not proved that it was the act of the appellant that caused the death of the deceased. It was further said that in murder cases, the burden is not discharged unless the prosecution established not only the cause of death, but also that the act of the appellant caused the death of the deceased.

This court has held that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence: See *Muonwem v. The Queen* (1963) 1 All NLR 95; *Okor v. The Queen* (1995) 15 WACA 4.

In the English case of *Rex v. Grant and Gilbert* 38, Cr. App. R. 107 it was held that if several persons embark on an enterprise to commit a felony and have also the preconceived common intention to use violence, of any degree, if necessary, for the purpose of overcoming resistance, and death results from such violence, all are guilty of murder.

In Rex v. Bretts and Ridley 22 Cr. App. R. 148 it was held that in the case of a common design to commit robbery with violence if one prisoner causes death while another is present aiding and abetting the felony, as a principal in the second degree, both are guilty of murder.

B In my judgment, the prosecution has proved the case against the appellant beyond reasonable doubt. (p. 554 B)

NOTABLE POINTS OF INTEREST

C OGUNTADE JSC

1. *How to assess quality of a confessional statement*

Now, it is settled law that the fact that an accused has retracted a confessional statement does not mean that the court cannot act upon it.

D *It is however desirable to have some evidence outside the retracted confession before a conviction is recorded based on the retracted confession: See Olusegun Olufale & Ors. v. The State (1968) NMLR 261 and Sule Iyanda Salawu v. The State (1971) 1 NMLR 249.*

E (Pt.343) 138 at 150, this court reiterated the approach to be followed in assessing the quality of a confessional statement whether retracted or not thus:

F “i. *Is there anything outside the confession which shows that it may be true?*

ii. *Is it corroborated in anyway?*

iii. *Are the relevant statements of fact made in it most likely true as far as they can be tested?*

G iv. *Did the accused have the opportunity of committing the offence?*

v. *Is the confession possible?*

vi. *Is the alleged confession consistent with other facts that have been ascertained and established?”* (p. 560 A)

H

2. *Murder - Effect of failure to establish cause of death medically*

Appellant’s counsel has submitted that because the cause of death of the deceased was not established, the prosecution had not proved its case.

With respect to counsel, I am unable to agree with his submission on the point. The appellant in his statement Exhibit ‘K’ has said that the deceased was killed and her hunch back removed with matchets. At the time P.W.4 did the post mortem, the body of the deceased was at an advanced state of decomposition. The sum total of the evidence of P.W.4 was that because of the state of the body of the deceased, it was not possible to ascertain the true cause of death. It was for this reason that he put the cause of death as natural cause. B

In *Omonuju v. State* (1976) 5 S.C. (Reprint) 1; (1976) 5 S.C. 1 at pages 8-9 this court per Idigbe, JSC., said: C

“It is good law that medical evidence is not always essential though desirable to prove cause of death but the evidence must in any case be such as to show that the death of the deceased was caused by the act of the appellant”. (p. 562 A) D

REPRESENTATION

Mr. C. A. Ajuyah, for the Appellant.

Mr. A. A. Utuama, Hon. A-G. Delta State, (with him, Messrs. Ochuko Pedro and Ekeme Ohwovoriole), for the Respondent. E

CASES REFERRED TO

Saidu v. The State (1982) 4 S.C. (Reprint) 26; (1982) 4 S.C. 41 F
Sunday Onungwa v. The State (1976) 1 S.C. (Reprint) 74; (1976) 2 S.C. 169

R. v. Sykes (1913) 8 CAR 233

Omonuju v. State (1976) 5 S.C. (Reprint) 1; (1976) 5 S.C. 1 G
Emmanuel Nwaegbonyi v. The State (1994) 5 NWLR (Pt.343) 138 at 150
Rex v. Bretts and Ridley 22 Cr. App. R. 148

Muonwem v. The Queen (1963) 1 All NLR 95

Okor v. The Queen (1995) 15 WACA 4

Egboghonome v. The State (1993) NWLR (Pt.306) 383 H

Olusegun Olufale & Ors. v. The State (1968) NMLR 261

STATUTEREFERREDTO

Criminal Code of Bendel State s. 319(1)

LEADJUDGMENTBYKATSINA-ALUJSC

B The appellant, Ozana Ubierho, and seven others were arraigned before the Warri High Court on a one count charge of murder of one Miemie Uwarah contrary to Section 319(1) of the Criminal Code, Cap.48 Volume 11 Laws of Bendel State of Nigeria.

C Before the trial commenced four (4) of the accused persons died in custody while three (3) others were discharged on a no case submission. The trial proceeded against the 4th accused alone.

D At the trial, the prosecution called four (4) witnesses. The accused person gave evidence in his defence. At the close of trial, the learned, trial Judge found the charge against the accused proved. However, because he was only 14 years old at the time he committed the offence with which he was charged, the learned trial Judge ordered that he be detained in prison at the pleasure of the Military Administrator of Delta State.

E Ozana Ubierho’s appeal to the Court of Appeal was dismissed on 18th December, 2003. The present appeal to this court is against the dismissal of his appeal by the Court of Appeal.

F Both parties filed their respective briefs of argument. Based upon the grounds of appeal filed, the appellant submitted three issues for determination and they read as follows:

I. Whether the learned Justices were right in affirming the ruling of the trial court which rejected the no case submission made on behalf of 4th accused person?

G II. Whether on the totality of evidence adduced, the learned Justices were right in holding that prosecution proved the case beyond reasonable doubt?

H III. Whether the learned Justices were right in holding that the prosecution proved the culprit and cause of death of the deceased?

For its part, the respondent raised two issues which are similar or identical with the appellant’s issues one and two.

I think the real question for resolution in this appeal is the parties’

issue No.2 which is whether the prosecution proved its case against the appellant beyond reasonable doubt.

Now the short facts of the case as related by the prosecution witnesses are these. P. W. 1, Rowland Uwarah, was the son of the deceased and was living in Warri at the time of the incident. He told the court that he was informed that his mother, who had a hunch back, was missing. He made a fruitless search for her. Thereafter, on enquiry, he was informed that Okpako Ebe and Isaac Osiki (both deceased) had been seen in their compound. He went to their compound but could not see them. Subsequently, he reported to the Police which led to their arrest and the arrest of one Anthony Oboh (3rd accused) by P.W.3, the investigating police officer. Those arrested suspects then led the police to the bush where the corpse of the deceased was found. P.W.1 said he identified his mother's corpse. He testified that he observed that his mother's hunch back had been removed. P.W.2, Joshua Kubi, a native doctor testified that he was consulted by four boys who wanted medicine to promote their trade and to protect them from witches and wizards. He further told the court that he saw a bag containing meat which the 3rd accused put inside a hole outside his house. He disclosed that he was arrested by the police who took him and the 3rd accused to 3rd accused person's compound where the piece of meat buried in the ground was recovered.

P.W.3, the investigating police officer, confirmed that the P.W.2 and the 3rd accused took him to where the hunch back was buried. He recovered it and sent it to the Forensic Laboratory, Oshodi for analysis and report. He testified that 1st and 3rd accused persons later took him to a bush where he recovered the corpse of the deceased and took it to the General Hospital, Warri where P.W.4 carried out post mortem examination on it. He said he later arrested the 4th accused, appellant herein, who volunteered a statement in Pidgin English which he recorded in Pidgin English. The said statement was received in evidence as Exhibit K.

P.W.4, Dr. Macaulay Azebokhai, confirmed that he performed post mortem examination on the corpse of the deceased after it had been identified to him by P.W.1. The corpse, he said, was in a decomposed state. He added that he saw no hunch back.

In his defence the 4th accused, Ozana Ubierho, denied that he killed the deceased. He also denied making Exhibit K.

As I have earlier indicated, the question that calls for resolution is whether the prosecution proved its case against the appellant beyond reasonable doubt.

The case for the prosecution, as developed at the trial, depended entirely on Exhibit K, the statement the appellant gave to the police. It was the basis of the proceedings against the appellant. Exhibit K, it must be noted, was tendered without objection from the defence. Exhibit K is without doubt the evidence, supplied by the appellant himself, that linked him with the commission of the offence with which he was charged. Exhibit K reads in part as follows:

“.....Anthony come tell me say Okpako tell am say one woman got hunch back for Ekrota village. He come tell me say when he drop me finish, he go check am for Ekrota when I de come from court, naim Anthony see me, he come tell me say he don see the woman say since all these days, he no know say such person de Ekrota. Anthony come ask me say which solution we go take get the woman? He come tell me say them Joshua Aweyu, Isaac Osiki and Albert Obadere them go come today 12/7/95 come perform Oracle from one man take call the woman from her house for afternoon of that day, the boys them come come. Them come go meet the man wey won do the Oracle for them for Ukpeibheie but them no meet the man for house. Them come meet me for my house say them no see the man say them won go now. When them won go them come tell me, Ikpako and Anthony say make we find one way take kill the woman wey de Ekrota say them de go Oto-Ido go draw rain. Say if the rain de fall make we go kill the woman. For evening of 14/7/85 when the rain they fall, we come go the woman house. The woman name na Miemie. When we reach the woman house, Okpako Ebe come climb the house from backyard come enter house. When we enter the house, the woman de sleep. Anthony come hold the neck, Okpako come hold the leg them come carry am go outside. Anthony come tie rope for the woman neck, I come hold the hand we come carry am go bush. When we reach where we won kill the woman, Okpako come hold the neck come carry am up raise am up take nack ground then

the woman come die. Anthony come de cut the woman hunch back with cutlass wey Anthony bring. As Anthony de cut the hunch back, he no fit cut am finish naim Okpako come take the cutlass from Anthony come cut the woman comot. When them cut am finish, Anthony come take left hand carry the hunch back put for paper bag before he come put am inside bag wey Okpako bring. I come carry one slippass, Okpako carry the cutlass and Anthony come carry the bag wey the hunch back de. I come de front, Okpako follow me and Anthony de back. Anthony come talk say he nor go use the cutlass again say make Okpako give am the cutlass then he come throway the cutlass for inside bush. Na Anthony fit show where the cutlass de. We come carry the hunch back go Udu road go give them Joshua Aweyu alias Shegbelegbe, Isaac Osiki and Albert Opadere.....”

It will be seen clearly that Exhibit K gave a graphic description of how the deceased was dragged out of her house and how she was killed in a nearby bush and dumped there after removing the lump on her back. It gave a detailed account of events that could only be recounted by an active participant in the killing of the deceased on that fateful day.

Now a confession is an admission made at any time by a man charged with a crime stating or suggesting that he committed the crime - Saidu v. The State (1982) 4 S.C. (Reprint) 26; (1982) 4 S.C. 41; Sunday Onungwa v. The State (1976) 1 S.C. (Reprint) 74; (1976) 2 S.C. 169. It is now settled law that a man may be convicted solely on his confession. There is surely no law against it. It is however desirable to have some evidence of circumstances which make it probable that the confession was true. The principles upon which a man may be convicted on his own confession alone were enunciated in the English case of R. v. Sykes (1913) 8 CAR 233. At p. 236 of the report, the Court of Criminal Appeal 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. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in court, and the

first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"

These principles have been adopted and followed in this country: See *Ntaha v. The State* (1972) 4 S.C. (Reprint) 1; (1972) 4 S.C. 1; *Yesufu v. The State* (1976) 6 S.C. (Reprint) 109; (1976) 6 S.C 168; *Achabua v. The State* (1976) 12 S.C (Reprint) 41; (1976) 12 S.C 63; *Ikemson v. The State* (1989) 6 S.C (Pt.I) 114; (1989) 3 NWLR (Pt.110) 455.

Both the trial court and the Court of Appeal held that Exhibit K is clearly a confessional statement.

The appellant, however, in his defence retracted his confessional statement, Exhibit K. He said in his evidence that he did not make Exhibit K. He denied killing the deceased. He reasoned that he was implicated in the murder of the deceased because of the previous quarrel between the Ekrota Community and his grandmother who founded Saint Joseph's Anglican Church Okrota over the worship of Juju called Ojiri.

I dare say that there is nothing sacrosanct about a retraction of a confession. The law is that a man may be convicted on his own confession alone provided that there is anything outside it to show that it was true. Exhibit K gave a detailed and graphic description of how the deceased was killed. The account of those events could only be recounted by a person who was an active participant of what happened on the fateful day.

Now the evidence of P.W.1, P.W.2 and P.W.3 corroborate the account given in Exhibit K. A few examples will suffice. P.W.1 testified that his mother - the deceased, had a hunch back. When the deceased's corpse was recovered, the hunch back had been removed. P.W.2 witnessed the burial of the hunch by the third accused in the third accused's compound. P.W.3 recovered the buried hunch and sent it to the

Forensic Laboratory, Oshodi. In Exhibit K, the appellant recounted how he and his companions in crime killed the deceased and cut off the hunch.

The appellant in Exhibit K spoke of how they dragged the deceased to a bush near her house where she was killed. The 1st and 3rd accused persons led P.W.3 to this bush where he recovered the body of the deceased. B

The appellant spoke of how they dragged the deceased into the bush. The police found pieces of her clothes in the bush near her house.

In Exhibit K, the appellant stated that the other accused persons went to consult a native doctor but that the man was not at home. The native doctor turned out to be P.W.2. He gave evidence and said that when they came he was not at home. They left a message with his son that he should meet them at the compound of the 3rd accused which he did. C

In this regard the learned trial Judge said: D

“I have to state that there was abundant evidence to link the accused with the commission of the crime especially the evidence of P.W.1, P.W.2 and P.W.3 that the deceased had hunch back but was not seen by P.W.1 who examined her. The requirement of the law that it is desirable to have outside the confession, some evidence of circumstances which make it probable that the confession was true was amply satisfied in this case. See Paul Onochie & Ors. v. Republic (1966) NWLR page 307. In the instant case, taking the confessional statement of the accused with other evidence against him, I am quite satisfied that he took part in the commission of the offence with which he was charged. I accept and believe the evidence of prosecution witnesses. I totally reject the defence of the accused that this offence was trumped up against him because of the previous quarrel between his late grandmother and the people of his village, Ekrota.” E F G

For its part the court below was in total agreement with the trial court. In its judgment the court below per Muntaka-Coomassie, JCA., observed as follows:

“In the instant case, and from the findings of the trial court quoted H above, it is evident that the trial court adequately tested the truth of the statement as contained in Exhibit K before acting on it. He had also looked outside the statement for some corroborative evidence like the evidence of

P.Ws.1, 2 and 3, which make it probable that the facts therein stated are true. No doubt the learned trial Judge gave Exhibit K close consideration along with the guidelines prescribed by law and found it to be free and voluntary.”

B From the foregoing it can be seen clearly that Exhibit K is a free and voluntary confession. It is direct and positive. The evidence of P.W.1, P.W.2 and P.W.3 show plainly that it was true.

C One more point. It has been contended for the appellant that it was not proved that it was the act of the appellant that caused the death of the deceased. It was further said that in murder cases, the burden is not discharged unless the prosecution established not only the cause of death, but also that the act of the appellant caused the death of the deceased.

D The evidence before the trial court shows clearly that there was a common intention to cause death to the deceased, Miemie Uwarah. It must be observed here that the appellant in Exhibit K stated the part he played in this dastardly act. He said:

E “Anthony come tie rope for the woman neck, I come hold the hand we come carry am go bush. When we reach where we wan kill the woman..... We come carry the hunch back to Udu road.....”

F This court has held that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence: See Muonwem v. The Queen (1963) 1 All NLR 95; Okor v. The Queen (1995) 15 WACA 4.

**G In the English case of Rex v. Grant and Gilbert 38, Cr. App. R. 107 it was held that if several persons embark on an enterprise
H to commit a felony and have also the preconceived common intention to use violence, of any degree, if necessary, for the purpose of overcoming resistance, and death results from such violence, all are guilty of murder.**

In Rex v. Bretts and Ridley 22 Cr. App. R. 148 it was held that in the case of a common design to commit robbery with violence if one prisoner causes death while another is present aiding and abetting the felony, as a principal in the second degree, both are guilty of murder.

B

In my judgment, the prosecution has proved the case against the appellant beyond reasonable doubt. In the result this appeal fails and is dismissed. The appellant's conviction and sentence are hereby affirmed.

C

KUTIGIJSC

I read in draft the judgment just delivered by my learned brother, Katsina-Alu, JSC. I agree with the conclusion that the appeal lacks merit and ought to be dismissed. The appeal is hereby dismissed. The judgments of the lower courts are affirmed.

D

EDOZIEJSC

E

I was privileged to have read before now the leading judgment of my learned brother, Katsina-Alu, JSC. I agree that the appellant's appeal lacks substance.

The confessional statement of the appellant, notwithstanding its retraction, and the corroborative circumstances of that statement establish beyond reasonable doubt the guilt of the appellant. The trial court was right in convicting him and the court below justified in affirming that conviction. There is nothing useful canvassed in this appeal to persuade me to disturb the impeccable judgments of the two courts below.

F
G

The appeal lacks substance and is accordingly dismissed.

PATS-ACHOLONUJSC

H

From all parameters of this case on appeal to this court, the facts show convincingly that the appellant was both directly (from his confessional statement) circumstantially and inferentially (from the evidence of

the prosecution witnesses) neck deep in the brutal murder of the deceased. His sole aim was to use the hunchback to prepare medicine. Such a primitive and primordial concept and belief that is asinine, revolting and nauseating in the extreme bespeaks of the nadir our people have sunk in their inordinate and demonic desire to make money. The detailed story, so patently clear in his description, shows the lower level of animalistic tendencies in him. He deserves the punishment fixed for him in the court of first instance. The likes of him should never be allowed to exist amongst civilized, cultured and hardworking people who do not have to murder or maim people to become rich. By this judgment I would state as Shakespeare aptly portrayed Macbeth in the following words;

“This judgment invites you Ozana Ubierho. Hear it and read it for it is a knell that summons you to hell or heaven”

I agree with the lead judgment of my learned and noble Lord, Katsina-Alu, JSC., and I too dismiss the appeal and affirm the earlier judgments of the lower courts.

In passing I cannot help saying that the co-accused people were lucky to have escaped the hangman’s noose due to the sloppy way the case was handled in the High Court.

OGUNTADEJSC

The appellant was one of the eight persons arraigned before the High Court of Effurum in the old Bendel State upon an information for the offence of murder punishable under Section 319(1) of the Criminal Code Law, Cap.48 Vol.II, Laws of the Bendel State of Nigeria. In the particulars of the offence, it was stated that the appellant who was originally the eighth accused person together with the seven others in the month of July, 1985, at Ekrota village murdered a woman, Miemie Uwarah.

Four of the accused persons died whilst in police custody. Four lived to face their trial. The appellant became the fourth accused person. At the trial the prosecution called four witnesses after which counsel representing each of the four accused persons made a no-case submission. On 24-04-95, Akpiroroh, J, (as he then was), in his ruling discharged

the 1st to 3rd accused under Section 286 of the Criminal Code Law.

The appellant testified in his own defence. He did not call any witness. On 24-10-95, the trial Judge in his judgment found the appellant guilty of the offence of murder. Because the appellant claimed to be 16 years of age at the time of his arrest for the offence, it was ordered that he be detained at the pleasure of the Military Administrator of Delta State. B

The appellant appealed against his conviction before the Court of Appeal, Benin Division, (hereinafter referred to as “*the court below*”). The court below on 15/12/03 in its unanimous decision dismissed the appeal. The appellant has now brought a further appeal before this court. In the appellant’s brief filed, the issues for determination in the appeal were identified as the following: C

“i. *Whether the learned Justices were right in affirming the ruling of the trial court that rejected the no-case submission made on behalf of 4th accused person?* D

ii. *Whether on the totality of evidence adduced, the learned Justices were right in holding that the prosecution proved the case beyond reasonable doubt?* E

iii. *Whether the learned Justices were right in holding that the prosecution proved the culprit and cause of death of the deceased.”*

My learned brother, Katsina-Alu, JSC., has in the lead judgment just delivered considered these issues for determination. I entirely agree with the manner he treated these issues and his conclusion on them. Without any intention to put a gloss on a sound judgment, I intend to react briefly to react briefly to an aspect of the third issue for determination. In doing so, I do not intend to further discuss the facts except to the extent strictly necessary for me to make my opinion intelligible and easy to follow. G

In the appellant’s brief, counsel submitted that the learned Justices of the court below were wrong in placing reliance on Exhibit ‘K’, the statement of the appellant. It was submitted that there was no independent evidence on record to corroborate the contents of Exhibit K. It was argued H that Exhibit ‘K’ was therefore unreliable and ought to have been rejected. Counsel relied on *Francis Asanya v. State* (1991) 3 NWLR (Pt. 180) 422 and *Mbenu v. State* (1988) 7 S.C. (Pt.III) 71; (1988) 3 NWLR (Pt.84) 618.

Counsel further submitted that the court below could not as they did disregard the medical evidence available unless there was direct evidence establishing the cause of death, and as the medical evidence had shown that the deceased died a natural death, the court below could not draw an inference as to cause of death different from that given by the medical officer from a retracted statement of the appellant - *Gabriel v. State* (1989) 12 S.C. 129; (1989) 5 NWLR (Pt. 122) 457 at 468. Counsel quoted a passage from *Gabriel v. State* (supra) where this court per Nnaemeka-Agu, JSC, observed:

"I think it is well settled that the duty of the prosecution in a case like this is to prove not that the act of the appellant could have caused the death of the deceased but that it did. In doing so on the facts of this case, the prosecution has an option. They could ask the court to draw the inference that on the facts stated above, the appellant killed his wife.....This first option arises from the settled principle that medical evidence is not always a sine qua non for proof of cause of death in a case of murder.....or, as there was no eye witness to the act of killing, they could use the nature of the wound as proved by medical evidence to deceased. The prosecution appeared to have adopted this latter option in this case. Having done so, I do not think it is still open to them to go back on it and argue that inference of cause of death could be drawn from other circumstances, as the learned counsel for the respondent has urged on us. This to my mind appears to be the necessary inference from the decision of this court in the case of Frank Onyenakeya v. The State (1964) NMLR 34"

Counsel finally submitted that the appellant ought to have been given the benefit and discharged of the offence charged - *Oge v. The State* (1972) NSCC 627; (1972) 11 S.C. 23.

I think it provides a useful starting point for a consideration of the argument of appellant's counsel on the 3rd issue for determination to reproduce a part of the statement of the appellant's Exhibit 'K'. It reads:

".....Anthony come tell me say Okpako tell am say one woman got hunch back for Ekrota village. He come tell me say when he drop me finish, he go check am for Ekrota when I dey come from court, naim

Anthony see me, he come tell me say he don see the woman say since all these days, he no know say such person de Ekrota. Anthony come ask me say which solution we go take get the woman? He come tell me say them Joshua Aweyum, Isaac Osiki and Albert Obadere them, go come today 12/7/95 come perform oracle from one man take call the woman from her house for afternoon of that day, the boys them come come. Them come get meet the man wey won do the oracle for them for Ukpeibheie but them no meet the man for house. Them come meet me for my house say them no see the man say them won go now. When them won go them come tell me, Okpako and Anthony say make we find one way take kill the woman wey de Ekrota say them de go Oto-Ido go draw rain. Say if the rain de fall make we go kill the woman. For evening of 14/7/85 when the rain de fall, we come go the woman house. The woman name na Miemie. When we reach the woman house, Okpako Ebe come climb the house from backyard come enter house. When we enter the house, the woman de sleep. Anthony come hold the neck, Okpako come hold the leg them come carry am go outside. Anthony come tie rope for the woman neck, I come hold the hand we come carry am go bush. When we reach where we won kill the woman, Okpako come hold the neck come carry am up raise am up take nack ground then the woman come die. Anthony come de cut the woman hunch back with cutlass wey Anthony bring. As Anthony de cut the hunch back, he no fit cut am finish naim Okpako come take the cutlass from Anthony come cut the woman comot. When them cut am finish, Anthony come take left hand carry the hunch back put for paper bag before he come put am inside bag wey Okpako bring. I come carry one slippass, Okpako carry the cutlass and Anthony come carry the bag wey the hunch back de. I come de front, Okpako follow me and Anthony de back. Anthony come talk say he nor go use the cutlass again say make Okpako give am the cutlass then he come throway the cutlass for inside bush. Na Anthony fit show where the cutlass de. We come carry the hunch back go Udu road go give them Joshua Aweyu alias Shegbelegbe, Isaac Osiki and Albert Opadere,.....”

In the above extract of the appellant’s statement Exhibit ‘K’, appellant volunteered the gory and grisly details as to how the deceased was taken from her house to the point where she was killed and her hunch

carved out from her body. He also stated what part he played in the whole dastardly act. At the trial, the appellant retracted Exhibit ‘K’.

Now, it is settled law that the fact that an accused has retracted a confessional statement does not mean that the court cannot act upon it. In *Edamine v. The State* (1996) 4 NWLR (Pt.438) 530 at 537, this court, per *Ogwuegbu, JSC.*, observed:

“The learned trial Judge found that the appellant made Exhibits “A” and “B” voluntarily and this finding was upheld by the court below. Both statements having become part of the case for the prosecution, the learned trial Judge considered their probative values in the light of their retraction. See Nwagbonu v. The State (1994) 2 NWLR (Pt.327) 380 and Egbogbonome v. The State (1993) NWLR (Pt.306) 383.

The confessional statements were well proved. They are positive, unequivocal and amount to admission of guilt. They are sufficient to ground the finding of guilt and it is immaterial that the appellant resiled from them during his trial. See R. v. Kanu & Ors. (1952) 14 WACA 30, and Mumuni & Ors. v. The State (1975) 6 S.C. 79 at 94”.

It is however desirable to have some evidence outside the retracted confession before a conviction is recorded based on the retracted confession: See Olusegun Olufale & Ors. v. The State (1968) NMLR 261 and Sule Iyanda Salawu v. The State (1971) 1 NMLR 249.

In the Emmanuel Nwaegbonyi v. The State (1994) 5 NWLR (Pt.343) 138 at 150, this court reiterated the approach to be followed in assessing the quality of a confessional statement whether retracted or not thus:

i. Is there anything outside the confession which shows that it may be true?

ii. Is it corroborated in anyway?

iii. Are the relevant statements of fact made in it most likely true as far as they can be tested?

iv. Did the accused have the opportunity of committing the offence?

v. Is the confession possible?

vi. Is the alleged confession consistent with other facts that have

been ascertained and established?”

See R. v. Sykes (1913) 8 Cr App R 233.

The trial Judge in the judgment at pages 53-54 of the record of proceedings said:

“It is however settled, that before a conviction can be properly B founded on a retracted statement, it is desirable to have some evidence outside the confession which would make it probable that the confession was true. See Yesufu v. The State (1976) 6 S.C. page 167; Salawu v. State (1971) NMLR page 249; Grace Akinfe v. The State (1988) 3 NWLR C (Pt.85) 729 at 746. I have to state that there was abundant evidence to link the accused with the commission of the crime especially the evidence of P.W.1, P.W.2 and P.W.3 that the deceased had hunch back but was not seen by P.W.4 who examined her. The requirement of the law that it is desirable to have outside the confession some evidence of circumstances D which make it probable that the confession was true was amply satisfied in this case. See Paul Onochie & Ors. v. Republic (1966) NWLR page 307. In the instant case, taking the confessional statement of the accused with the other evidence against him, I am quite satisfied that he took part in the E commission of the offence with which he was charged. I accept and believe the evidence of prosecution witnesses”.

It is apparent from the passage above that the trial Judge properly directed himself as to the approach to be followed when dealing with a F retracted confessional statement. The appellant himself explained how the deceased was killed and how the hunch at the back of the deceased was removed. The court below affirmed the said findings of the trial court. There is therefore no basis for this court to interfere.

And finally is the argument that the cause of death of the deceased G was not properly established. P.W.4 was the medical practitioner who performed post mortem examination on the deceased. The post mortem examination was performed on 22-7-85. P.W.4 said in his evidence at page 20 of the record of proceedings: H

“There was no hunch back seen. After the examination, the diagnosis of quemed (?) natural death was made by me”

Under cross-examination P.W.1 said:

“It was not possible to ascertain the true cause of death.....It was not possible for me to ascertain the true cause of death.”

Appellant’s counsel has submitted that because the cause of death of the deceased was not established, the prosecution had not proved its case. With respect to counsel, I am unable to agree with his submission on the point. The appellant in his statement Exhibit ‘K’ has said that the deceased was killed and her hunch back removed with matchets. At the time P.W.4 did the post mortem, the body of the deceased was at an advanced state of decomposition. The sum total of the evidence of P.W.4 was that because of the state of the body of the deceased, it was not possible to ascertain the true cause of death. It was for this reason that he put the cause of death as natural cause.

In *Omonuju v. State* (1976) 5 S.C. (Reprint) 1; (1976) 5 S.C. 1 at pages 8-9 this court per Idigbe, JSC., said:

“It is good law that medical evidence is not always essential though desirable to prove cause of death but the evidence must in any case be such as to show that the death of the deceased was caused by the act of the appellant”.

And in *Akpuenya v. State* (1976) 9-10 S.C. (Reprint) 246; (1976) 11 S.C. 269, similarly this court said:

*“We also agree with the observation by the learned trial Judge that, apart from the medical evidence there is sufficient evidence to infer beyond reasonable doubt that the deceased died from the stab wound inflicted on him by the appellant. See *Tonara Buhari v. The State* (1965) NMLR 163.”*

See also *Lori v. State* (1980) 8-11 S.C. (Reprint) 52; (1980) 8-11 S.C. 51.

The conclusion to be arrived at is that, irrespective of what P.W.4 said, there was abundant evidence before the trial court as to how the deceased was killed and that the appellant was one of those who killed her.

I therefore agree with the lead judgment of my learned brother, Katsina-Alu, JSC. I would also dismiss this appeal and affirm the conviction and sentence imposed on the appellant.