

SUPREME COURT OF NIGERIA
4TH APRIL, 2008 SC. 334/2001
CORAM:- S. U. ONU, D. MUSDAPHER, M. A.
MUKHTAR, I. F. OGBUAGU, P. O. ADEREMI, JJSC

HENRY ODEH APPELLANT
V.	
FEDERAL REPUBLIC OF NIGERIA RESPONDENT

APPEALS - Issues - Competence - Leave to argue an additional ground of appeal - Where not obtained - An issue that is not related to any ground of appeal - Must be discountenanced (H1)

CRIMINAL PROCEDURE - Conviction - Appeals - Lesser or different offence - With which accused was not charged - He can be convicted for it by appellate court - Where appropriate and available evidence supports it (H2)

CRIMINAL PROCEDURE - Conviction - Appellate court - Powers - Drug law offences - Appellant who was charged with dealing in Indian hemp - Was properly convicted by Court of Appeal - For the lesser offence of being in possession of the drug (H3)

CRIMINAL PROCEDURE - Charges - Purpose of - Withdrawal of 2nd count that was subsumed in the 1st - Is immaterial - As there must be unlawful possession - Before one could deal with or sell drugs (H4)

CRIMINAL PROCEDURE - Conviction - Lesser offence - Courts have power under s.179(1) CPA - To convict for a lesser offence - Where only such particulars were proved - As rightly done by the Court of Appeal (H5)

CRIMINAL PROCEDURE - Conviction - Basis - Withdrawn charge - Was not the offence for which appellant was convicted on appeal - Though Court of Appeal can even convict on withdrawn charge where appropriate (H6)

CRIMINAL PROCEDURE - Confessional statement - That is free, voluntary, direct, positive and properly proved - Can sustain a conviction - Without need of other corroborative evidence - If court is satisfied with its truth (H7)

FACTS

Before the Lagos Zone of the Miscellaneous Offences Tribunal, the appellant was arraigned on a two count charge. Count one was offering for sale 290.15 kg of Indian hemp, while count two was about being in unlawful possession of the drug, contrary to ss. 10(c) & 10(h) respectively of the National Drug Law Enforcement Agency Decrees 1989 & 1992. The second count was withdrawn upon an application by the prosecution. At the trial, the prosecution called Five witnesses, appellant gave evidence but called no other witness. The trial tribunal found appellant guilty on count one and sentenced him to 10 years imprisonment.

Being dissatisfied, appellant appealed to the Court of Appeal, Ibadan, which set aside his conviction and sentence in count one. But however, the appeal court convicted appellant on a different offence of being in unlawful possession of the Indian hemp under s. 10(d) of the NDLEA Act, which it found proved. It enhanced the sentence from 10 to 15 years imprisonment. Still aggrieved, appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the learned Justices of the Court of Appeal were right in law when they convicted and sentenced the appellant to 15 years imprisonment after setting aside his conviction by the trial court (tribunal) in count one of the charge.

2. Whether the learned Justices of the Court of Appeal were right in law when they relied on Exhibit 7 to convict the appellant for being in possession after count two of the charge dealing with possession had been withdrawn and struck out by the trial court (tribunal).

3. Whether Section 17(6) of the NDLEA Act, Cap.253, Laws of the Federal Republic of Nigeria, 1990, is inconsistent with the provision of Section 6(6)(a) and (b) of the Constitution of the Federal

Republic of Nigeria, 1999 and therefore null and void to the extent of its inconsistency."

HELD (Unanimously dismissing the appeal per **MUSDAPHER JSC**)

Appeals - Issues - Competence - Leave

1. At the hearing of this appeal before this court, the learned counsel for the appellant conceded that the third issue for determination recited above is not covered by any of the grounds of appeal. At page 2 paragraph 1.04 of the appellant's Brief, the appellant indicated his desire to seek leave to argue an additional ground of appeal. The appellant had not sought for the leave to argue any additional ground of appeal. It is now settled law which does not require any authority, that issues for determination cannot be formulated outside the grounds of appeal. Issues for determination formulated must be related to the grounds of appeal.

Every issue for determination must be formulated from and related to or distilled from a competent ground of appeal. In other words, an issue not distilled from any of the grounds of appeal, is incompetent and must be discountenanced together with the argument or arguments advanced thereunder. I accordingly strike out the third issue and all the arguments canvassed by the appellant on it. (p. 1626 C)

Conviction - Appeals - Lesser or different offence

2. It is the law that an appellate court can convict and impose a sentence on an appellant for lesser offence than that for which he was convicted by the trial court if from the circumstances of the case, the latter conviction should have been the proper one.

Where an accused person is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged, he may be convicted of the offence which he is shown to have committed by the evidence regardless of the fact that he was not charged with that particular offence.

It is now settled law that an appellate court such as the Supreme Court or the Court of Appeal may where an appellant has been charged and convicted for an offence and the court that tried him

could on the information or charge have found him guilty of some other offence, and on the finding of the lower court, it appears to the appellate court that the lower court must have been satisfied of the fact which proved him guilty of that other offence, the appellate court may instead of allowing or dismissing the appeal, substitute for the verdict found by such court, a verdict of guilty of such other offence and pass the sentence in substitution for the offence passed at the trial as may be warranted in law. (p. 1630 D)

C Conviction - Appellate court - Powers

3. An appellate court in determining an appeal before it possesses all the powers of the court of trial. See Section 16 of the Court of Appeal Act. The mere fact that an appellate court exercised its statutory power to substitute a conviction of one offence for the other under Section 179 of the Criminal Procedure Act, does not ipso facto breach the appellant's rights to fair hearing nor does it occasion any miscarriage of justice.

Now, Section 179(1) of the Criminal Procedure Act, applicable to these proceedings provides:-

"In addition to the provisions herein before specifically made, whenever a person is charged with an offence consisting of several particulars a combination of some of which constitute a complete lesser offence in itself and such combination is proved but the remaining particulars are not proved, he may be convicted of such lesser offence or may plead guilty thereto although he was not charged with it."

The Court of Appeal found that there was no evidence properly adduced to prove that the appellant was selling or "dealing in" the drugs, but beyond any dispute that the appellant was knowingly in unlawful possession of the Indian hemp. The offence for which he was charged was more grievous, the prosecution must prove (1) he was knowingly in unlawful possession and (2) he was dealing with the substance such as selling it. The offence of being in unlawful possession is clearly a lesser offence and carries less sentence. It is of no moment when the trial tribunal mistakenly sentenced the appellant for dealing in the indian hemp to merely 10 years imprisonment. The Court of Appeal would have the power to pass appropriate sen-

tence permitted by law.

An appeal court may, where the ends of justice may be properly met, reduce or increase the sentence imposed by the trial court.
(p. 1631 B)

Charges - Purpose of

4. In my view, it is immaterial that the prosecution withdrew the charge on the 2nd count. As mentioned above the charge in the second count was clearly subsumed in the first count. There must be unlawful possession of the drugs before one could "deal with it or sell it." In Adebayo v. The Republic (supra), it was held that where there are charges against an accused person and one charged includes the other, the two charges should be treated as if they are in the alternative. The main purpose of a charge is to give the accused person notice of the case against him. (p. 1632 B)

Conviction - Lesser offence

5. A trial court and an appeal court both have power under Section 179(1) of the Criminal Procedure Act, to substitute a conviction for a lesser offence on a charge for an offence containing several particulars where only such particulars as made up of the lesser offence were proved.

In the instant case, the appellant clearly confessed to the unlawful possession of bags of Indian hemp. In my view he was rightly convicted by the Court of Appeal by invoking the provisions of Section 179(1) of Criminal Procedure Act. (p. 1632 F)

Conviction - Basis - Withdrawn charge

6. Suffice it for me to say that the conviction of the appellant was not based on the count two which was withdrawn. Count two which was withdrawn and struck out was punishable under Section 10(h) of the NDLEA Act as amended, while the appellant was convicted under Section 10(d) of the Act by the Court of Appeal. This clearly shows that there is no connection between the withdrawn charge and the offence for which the appellant was convicted. In any event when the Court of Appeal was seized with the matter by the provisions of Section 179 (1) and (2) of the Criminal Procedure Act, the court can

substitute a conviction for a lesser offence whenever it is appropriate to do so. (p. 1634 E)

Confessional statement - That is free

B 7. The other point is whether a court can convict on the basis of confession alone. I have alluded above that the evidence of PW.1, PW.4 and PW.5 go to show that the voluntary statement of the appellant in Exhibit 7 was true. The Court of Appeal was clearly justified to act on it. In the Ihuebeka case (supra), this court stated:-

C *"In the case of Silas Ikpo v. The State (1995) 33 LRCN 587 at 587, a free and voluntary confession of guilt whether judicial or extra judicial if it is direct and positive and properly established, is sufficient proof of guilt and enough to sustain a conviction so long as the court is satisfied with the truth of such confession."*

D The law is fairly settled that a free and voluntary confession which is direct and positive and properly proved is sufficient to sustain a conviction and generally without any need of other corroborative evidence so long as the court is satisfied with its truth. A cursory glance at Exhibit 7 shows that it is a direct, positive, voluntary and an unambiguous admission by the appellant that the bags of Indian hemp were found in his possession. The evidence of the other witnesses clearly established the truth of the statement of the appellant in Exhibit 7. (p. 1634 H)

F ***NOTABLE POINTS OF INTEREST***
ONU JSC

1. Confessional statement - Admissibility of

G As the appellant did directly, expressly and unequivocally consented to the tendering instead of objecting to the admissibility of Exhibit 7 on appeal, the appellant's claim in the course of his defence that the statement was dictated to him was nothing but an after thought.

In Nwangbomu v. The State (2000) 2 ACLR 9 at page 14, this court held that:-

H *"Where an extrajudicial confession has been proved to have been made voluntarily and it is positive and unequivocal and amounts to an admission of guilt, it will suffice to ground a finding of guilt regardless of the fact that the maker reciled therefrom or retracted it*

altogether at the trial, in as much as such a u-turn does not necessarily make the confession inadmissible."

I have carefully glanced at Exhibit I. It shows that it is direct, positive and voluntary as well as an unambiguous confession or admission of guilt by him to the effect that the bags of Indian hemp under reference were found in his possession. (p. 1645 G) B

OGBUAGU JSC

2. Confessional statement - Definition - When to raise objection against its admissibility C

It is noted by me, that Exhibit 7 was admitted in evidence without any objection from the learned defence counsel. It was at the address stage that it was raised. It is now firmly settled that the appropriate time to raise the involuntariness of a confessional statement is when it is about to be tendered in evidence and especially, where as in the instant case leading to this appeal, the accused person, was represented by counsel who it is assumed to know or ought to know what to do at each stage of the proceedings. D

Raising the objection during the address stage, in my respectful view, will be an after-thought and the effect, is that it will be too late to do so. E

A confessional statement, is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. If voluntary, it is deemed to be a relevant fact as against the person who made it only. See Section 27 of the Evidence Act. F

Confessions, are relevant and therefore, admissible in evidence. They are evidence upon which the court can act, once admitted in evidence even if subsequently retracted. (pp. 1651 B/1652 A) G

REPRESENTATION

George M. Oguntade, for the Appellant.

Femi O. Oloruntoba, (with him, O. Alhaji, Legal Officer NDLEA), for the Respondent. H

CASES REFERRED TO

Ahmed v. The State (1999) 5 S.C. (Pt. II) 39

- Okeke v. The State (1999) 12 S.C. (Pt.II) 101
State v. Aibangbee (1988) 7 S.C. (Pt.I) 96
Oladipupo v. State (1993) 6 NWLR (Pt.298) 131
Udoh v. State (1993) 5 NWLR 295
Akwule v. The Queen (1963) 1 All NLR 193
B Bande v. The State (1972) 10 S.C. 79
Adebayo v. The Republic (1967) NMLR 391
Onogwu v. The State (1995) 6 NWLR (Pt.401) 276
Ogu v. The Queen (1963) NSCC 191 at 192
C Ekpenyong v. The State (1967) All NLR 285
Gano v. The State (1965) 1 All NLR 352
Mohammadu v. C.O.P. (1969) 1 All NLR 465
Okoroh v. The State (1988) 12 S.C. (Pt. II) 83
Obidiozo v. The State (1987) NWLR (Pt.67) 748

D

STATUTES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1999, s. 6 (6), (a), (b)
Court of Appeal Act, 1976, s. 16
E Criminal Procedure Act, s. 179 (1), (2)
Evidence Act, Cap. 112, Laws of the Federation, 1990, s. 27 (c)
National Drug Law Enforcement Agency Act, Cap. 253, Laws of the Federal Republic of Nigeria, 1990, s.17 (6)
F National Drug Law Enforcement Agency Decree, No. 15 of 1992, ss. 10(c), (b), (h), 104
National Drug Law Enforcement Agency Degree, No. 48 of 1989, s. 10 (c), (d)
Penal Code Law, ss. 167, 221

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LEAD JUDGMENT BY MUSDAPHER JSC

The appellant herein and some Policemen were arraigned before the Lagos Zone of the Miscellaneous Offences Tribunal. The appellant was charged with the following offences:-

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Count One

"That you Henry Odeh on or about the 24th day of March, 1995, at Imaba Compound, Igando, Lagos, dealt in to wit offering for sale 290.15kgs. of Indian hemp (cannabis sativa) a drug similar to

heroin cocaine or (LSD) without lawful authority and thereby committed an offence contrary to and punishable under Section 10(c) National Drug Law Enforcement Agency Decree, No.48 of 1989."

Count Two

"That you, Henry Odeh, on or about the 24th day of March, 1995, at No.24, Imaba Compound Igando, Lagos knowingly had in your possession 290.15kgs. of Indian hemp (cannabis sativa) a drug similar to cocaine, heroin (LSD) without lawful authority and thereby committed an offence contrary to and punishable under Section 10(h) of the National Drug Law Enforcement Agency Decree, No. 15 of 1992."

The 2nd to the 6th accused who stood trial with the appellant were jointly charged in the 3rd count with aiding the appellant to "deal" 290.15kgs. of Indian hemp (cannabis sativa) contrary to Section 10 (c) of the National Drug Law Enforcement Agency Act, aforesaid and punishable under Section 10(d) of the same Act.

There was also a fourth charge against the 2nd-6th accused persons. At the trial the prosecution called five witnesses in all and the appellant and the other accused persons gave evidence but called no other witness. The second count against the appellant was withdrawn upon an application requesting the withdrawal of the charge by the prosecution on the 30th day of April, 1998. The trial tribunal found the appellant guilty on count one and sentenced him to 10 years imprisonment. The appellant being dissatisfied with his conviction appealed to the Court of Appeal, Ibadan, which set aside the conviction and sentence of the appellant in count one of the charge but however convicted the appellant on a different offence of being in unlawful possession of the 290.15kgs. of Indian hemp under Section 10(d) of the NDLEA Act, which the Court of Appeal found proved. This led to the enhancement of the punishment of the appellant from 10 years to 15 years as provided by Section 10(H) of the NDLEA Act of 1992. It is against that decision that the appellant has appealed to this court. The Notice of Appeal contains three grounds of appeal which read thus:-

"Ground One

1. The Honourable Court of Appeal erred in law in holding that Exhibit 7 was a confessional statement and thereby convicted

the appellant for possession of 290.15kgs. Indian hemp (cannabis sativa) and thereby occasioning a miscarriage of justice.

Particulars of Error

- (a) *The appellant had explained the circumstance, under which Exhibit 7 was obtained and yet the court attached so much weight to Exhibit 7 even in the absence of other corroborative evidence.*

(b) *Exhibit 7 was not a confessional statement as to the commission of the offence for which the appellant was charged and in view of Section 27(c) of the Evidence Act, Cap. 112, Laws of the Federation, 1990, the learned Justices of the Court of Appeal ought to have discountenanced or disregarded it.*

(c) *Exhibit 7 is in respect of previous arrest of the appellant by some unarmed Police Officers and does not relate to the charge preferred against the appellant.*

(d) *Exhibit 7 was not consistent with other facts that were proved in the course of the proceedings.*

(e) *The learned Justices of Court of Appeal did not properly evaluate the whole evidence that was before the tribunal while considering Exhibit 7.*

(f) *It is trite that an extra judicial statement (whether confessional or otherwise) made by an accused person and admitted in evidence as an exhibit with or without objection whether made voluntarily or not is not a statement of truth of all that happened."*

"Ground Two

The Honourable Court of Appeal erred in law and on the fact when it held the appellant guilty of the offence of possession of Indian hemp.

Particulars of Error

(a) *The prosecution failed to prove the essential ingredients of the offence of possession of Indian hemp under Section 10(h) of the NDLEA Decree No. 15 of 1992, to wit knowingly had in your possession 290.15kg of Indian hemp (cannabis sativa) without lawful authority.*

(b) *There was evidence before the lower court which was not controverted that No.24, Imaba Street Igando, Lagos is accessible to other tenants living at that premises with or without the appellant's consent. There is therefore no conclusive proof that the 46 bags were*

deposited by the appellant at the rooftop.

(c) The prosecution failed to call material witness one Mr. Christopher who allegedly recovered the 46 bags and who would have resolved the issue of ownership or possession one way or the other.

(d) The evidence of PW.1 and PW.4 in respect of the ownership of the 46 bags is of no probative value since they were not the persons that recovered the substance and therefore their evidence is hearsay evidence which is not admissible on this point. B

(e) Exhibit 7, the alleged confessional statement which the Honourable Court below heavily relied on in convicting the appellant of possession is not conclusive on this point and the circumstances under which the said exhibit was obtained had been satisfactorily explained by the appellant. C

(f) Exhibit 7 was not corroborated."

"Ground Three D

The Honourable Court of Appeal erred in law in convicting the appellant for knowingly being in possession of 290.15kgs. of Indian Hemp - the charge having been withdrawn by the prosecution itself and was accordingly struck out by the tribunal. E

Particulars of Error

(a) The prosecution did not substitute, at any time during trial, the said charge withdrawn by it and struck out by the Honourable Tribunal.

(b) The offence knowingly being in possession of Indian hemp is not a lesser offence to that of offering for sale Indian Hemp without lawful authority. F

(c) The withdrawal of the said charge without any substitution, is an admission by the prosecution that it could not sustain or prove the charge. G

(d) The prosecution did not file any cross-appeal on the said charge struck out in the Honourable Tribunal."

In his Brief of Argument for the appellant, the learned counsel has identified, formulated and submitted three issues for the determination of the appeal. The issues read as follows:- H

"1. Whether the learned Justices of the Court of Appeal were right in law when they convicted and sentenced the appellant to 15 years imprisonment after setting aside his conviction by the trial court

(tribunal) in count one of the charge.

2. Whether the learned Justices of the Court of Appeal were right in law when they relied on Exhibit 7 to convict the appellant for being in possession after count two of the charge dealing with possession had been withdrawn and struck out by the trial court (tribunal).

3. Whether Section 17(6) of the NDLEA Act, Cap.253, Laws of the Federal Republic of Nigeria, 1990, is inconsistent with the provision of Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 and therefore null and void to the extent of its inconsistency."

At the hearing of this appeal before this court, the learned counsel for the appellant conceded that the third issue for determination recited above is not covered by any of the grounds of appeal. At page 2 paragraph 1.04 of the appellant's Brief, the appellant indicated his desire to seek leave to argue an additional ground of appeal. The appellant had not sought for the leave to argue any additional ground of appeal. It is now settled law which does not require any authority, that issues for determination cannot be formulated outside the grounds of appeal. Issues for determination formulated must be related to the grounds of appeal.

Every issue for determination must be formulated from and related to or distilled from a competent ground of appeal. In other words, an issue not distilled from any of the grounds of appeal, is incompetent and must be discountenanced together with the argument or arguments advanced there under. I accordingly strike out the third issue and all the arguments canvassed by the appellant on it.

The learned counsel for the respondent adopted more or less the remaining two issues. Before discussing the issues for the determination of the appeal, I think it is desirable at this juncture to recount briefly the facts of the case.

Acting on an information received by the chairman of the NDLEA, in Lagos, P.W.1 and P.W.4 along with some other officials of the NDLEA, went to the appellant's house at 24, Imaba Street, Igando, Lagos on the 24/3/1995. The information received was that the ap-

pellant was dealing in hard drugs. On arrival at the premises, the witnesses said they met the appellant, the men were led by the appellant into his room, they searched the appellant's room but nothing incriminating was found. One of the men climbed into the roof through the ceiling of the appellant's room and on the roof top recovered 46, bags of Indian hemp. They carried the appellant and the 46 bags to their office at Ikoyi, Lagos. It was in the course of interrogating the appellant that the appellant revealed that he had earlier been arrested by five Policemen from Idimu Police Station on the 22/3/1995 but was later released along with the drugs seized from him after he had paid the Policemen some money. P.W.5 a commercial bus driver stated how he was on 22/2/95, stopped by Policemen and asked to dislodge his passengers. His vehicle was used in loading and taking 46 bags from the appellant's residence to Idimu Police Station in company of the appellant and later he was told to return the bags with the appellant to the appellant's residence. The Policemen were arrested and were arraigned with the appellant as stated above.

The appellant made a statement to the NDLEA shortly after his arrest. The statement was admitted in evidence without any objection as Exhibit 7. In Exhibit 7, the appellant stated:-

"xxxxxxxxxxxxx I joined carpentry work in 1984 and that is the work I am doing right now. I am a carpenter but that does not help me fetch much money; that is why I entered drug business. I started drug business in 1989, when I married my wife Comfort. Unfortunately on 22/3/1995, Police Officers from Idimu in Lagos came to my house and arrested my wife when I was out for my business, when I came back, I was told by a friend of mine that Police came and look for me but I was not in and they have arrested my wife. So I went to the Police Station and we discussed settlement with them at N30,000.00 of which I have given them 21,000.00 and remain a balance of N9,000.00. I paid the sum of N1,500 for the vehicle they hired in conveying the drugs back to my house. They said they are retaining 4 bags since I have not brought the remaining balance of N9,000.00.

On 24/3/1995, some officers came to my house again and introduced themselves that they are from NDLEA and they reached my house and found some bags of drugs which I hid on top of ceiling

and packed everything and also took me to their office."

In his evidence before the tribunal, the appellant denied telling the NDLEA that he had anything to do with the bags of Indian hemp and that he did not know any of the Policemen who stood trial with him. He also stated that Exhibit 7, his statement to NDLEA was not made voluntarily by him and that it was dictated to him by the NDLEA. The tribunal found the appellant guilty of count one. As mentioned above, the appellant appealed to the Court of Appeal where the conviction in count one was set aside and in its place, the appellant was convicted for the offence of possession punishable under Section 10(d) of the NDLEA Act.

I shall now deal with the remaining two issues submitted to this court for the determination of the appeal.

Issue No. 1

It is submitted by the learned counsel for the appellant, that the Justices of the lower court acted in error when they convicted and sentenced the appellant for 15 years imprisonment after setting aside his conviction and sentence by the tribunal on the only count of the charge. The Court of Appeal also acted in error after holding that the charge in count 2 against the appellant which was for knowingly being in unlawful possession of the drugs was withdrawn by the prosecution and struck out by the tribunal. It is submitted that the lower court was in error to resurrect the charge in count two and convict the appellant on it. When the prosecution had withdrawn and the trial tribunal had struck out the charge. It is again submitted that the court below erroneously invoked the provision of Section 179(1) of the Criminal Procedure Act, to "convict the appellant of a lesser offence and thereby sentenced him to 15 years as against 10 years given by the trial tribunal." It is further stressed that having withdrawn the charge which was struck out by the tribunal, the Court of Appeal was in error to convict the appellant on the same count that was withdrawn. Learned counsel referred to and relied on the case of *Okeke v. The State* (1999) 12 S.C. (Pt.II) 101; (1999) 2 NWLR (Pt.590) 246. *Ahmed v. The State* (1999) 5 S.C. (Pt. II) 39; (1999) 7 NWLR (Pt. 612) 641. It is further argued that the Court of Appeal relied on speculation rather than on the legal evidence adduced by the prosecution to convict the appellant for the offence of

unlawful possession of Indian hemp. It is submitted again, that the prosecution failed to adduced evidence beyond reasonable doubt that the appellant committed the offence for which he was found guilty. Learned counsel referred to and relied on the case of *State v. Aibangbee* (1988) 7 S.C. (Pt.I) 96; (1988) 3 NWLR (Pt.84) 549.

The learned counsel for respondent on the other hand, submitted that the Court of Appeal was right in finding the appellant guilty of the offence he was convicted by it, even though it discharged him of the count of dealing in the drug of Indian hemp. It is argued that the ingredients of the offence of possession under Section 10(c) of the NDLEA Act, were proved by evidence and the court was justified in convicting the appellant and punishing him under Section 10(d). It is submitted further that the Court of Appeal properly evaluated the evidence led before the tribunal and correctly came to the conclusion that the offence was undoubtedly committed. The offence of knowingly being in possession of the drugs is subsumed in the offence of dealing with the substance.

It is further argued that the Court of Appeal convicted the appellant in a lesser offence and sentenced the appellant to 15 years in prison which is the minimum prescribed by law.

It is further argued that the Court of Appeal properly guided itself by Section 179(1) of the Criminal Procedure Act. It is submitted that there was no miscarriage of justice in convicting the appellant for possession under the overwhelming evidence. The jurisdiction of the court to consider for a lesser offence when determining the guilt of accused person has been settled in many cases. The learned counsel referred to the cases of *Oladipupo v. State*. (1993) 6 NWLR (Pt.298) 131; *Udoh v. State* (1993) 5 NWLR 295.

On the issue of proof beyond reasonable doubt as raised by the appellant in his Brief, the learned counsel for the respondent submitted that the argument is misplaced. The prosecution adduced overwhelming evidence which placed the appellant in actual or constructive possession of the drugs and that the appellant had knowledge that the drugs were in his possession unlawfully. There was the evidence of P.W.1, P.W.4 and also the confession of the appellant in Exhibit 7. The Court of Appeal in its judgment upheld the findings of fact by the tribunal that Indian hemp was found on the roof top of

the appellant and that in Exhibit 7, the appellant admitted the possession of the drugs. It is further argued that an accused person can be convicted on his confessional statement alone. See *Ikemson v. State* (1989) 6 S.C. (Pt.I) 160; (1989) 1 ACLR 80. It is further argued that the onus of proving irregularity and miscarriage of justice is
B entirely on the appellant and the appellant in the instant case has failed to do so. See *Cyril Udeh v. The State* (2001) 2 ACLR 356.

It is further argued that even if some technical flaws exist, they cannot avail the appellant as justice dispensation on the basis of technicalities is no longer fashionable. See *Effiom v. State* (2003) 3 ACLR,
C 192.

Now, there is no doubt that the Court of Appeal discharged the appellant against the offence of "dealing in" with drugs a more serious offence which clearly carries a life imprisonment under Section 10(c) as amended with an offence punishable under Section
D 10(d) which carries a sentence of imprisonment for a term of not less than 15 years. ***It is the law that an appellate court can convict and impose a sentence on an appellant for lesser offence than that for which he was convicted by the trial court if from the***
E ***circumstances of the case, the latter conviction should have been the proper one.*** See *Akwule v. The Queen* (1963) 1 All NLR 193, *Bande v. The State* (1972) 10 S.C. 79; (1972) 10 S.C (Reprint) 64; *Adebayo v. The Republic* (1967) NMLR 391.

Where an accused person If charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged, he may be convicted of the offence which he is shown to have committed by the evidence regardless of the fact that he was not charged
F ***with that particular offence.*** See *Onogwu v. The State* (1995) 6 NWLR (Pt.401) 276. In the case of *Ogu v. The Queen* (1963) NSCC 191 at 192, this court substituted a conviction of the appellant for culpable homicide punishable with death contrary to Section 221 of the Penal Code Law, with that of screening an offender punishable
G under Section 167 of the same Penal Code Law. ***It is now settled law that an appellate court such as the Supreme Court or the Court of Appeal may where an appellant has been charged and convicted for an offence and the court that tried him could***
H

on the information or charge have found him guilty of some other offence, and on the finding of the lower court, it appears to the appellate court that the lower court must have been satisfied of the fact which proved him guilty of that other offence, the appellate court may instead of allowing or dismissing the appeal, substitute for the verdict found by such court, a verdict of guilty of such other offence and pass the sentence in substitution for the offence passed at the trial as may be warranted in law. It is also settled law that, **an appellate court in determining an appeal before it possesses all the powers of the court of trial. See Section 16 of the Court of Appeal Act. The mere fact that an appellate court exercised its statutory power to substitute a conviction of one offence for the other under Section 179 of the Criminal Procedure Act, does not ipso facto breach the appellant's rights to fair hearing nor does it occasion any miscarriage of justice.**

Now, Section 179(1) of the Criminal Procedure Act, applicable to these proceedings provides:-

"In addition to the provisions herein before specifically made, whenever a person is charged with an offence consisting of several particulars a combination of some of which constitute a complete lesser offence in itself and such combination is proved but the remaining particulars are not proved, he may be convicted of such lesser offence or may plead guilty thereto although he was not charged with it."

The Court of Appeal found that there was no evidence properly adduced to prove that the appellant was selling or "dealing in" the drugs, but beyond any dispute that the appellant was knowingly in unlawful possession of the Indian hemp. The offence for which he was charged was more grievous, the prosecution must prove (1) he was knowingly in unlawful possession and (2) he was dealing with the substance such as selling it. The offence of being in unlawful possession is clearly a lesser offence and carries less sentence. It is of no moment when the trial tribunal mistakenly sentenced the appellant for dealing in the Indian hemp to merely 10 years imprisonment. The Court of Appeal would have the power to pass appropri-

ate sentence permitted by law. See *Nworie v. C.O.P.* (1960) 5 FSC 124, *Ogidi v. C.O.P.* (1960) 5 FSC 251, *Nwobu v. C.O.P.* (1962) All NLR 382. **An appeal court may, where the ends of justice may be properly met, reduce or increase the sentence imposed by the trial court.** See also *Ekpenyong v. The State* (1967) All NLR 285, *Gano v. The State* (1965) 1 All NLR 352, *Mohammadu v. C.O.P.* (1969) 1 All NLR 465, *Ekpo v. The State* (1982) 6 S.C. 22; (1982) 6 S.C. (Reprint) 10.

In my view, it is immaterial that the prosecution withdrew the charge on the 2nd count. As mentioned above the charge in the second count was clearly subsumed in the first count. There must be unlawful possession of the drugs before one could "deal with it or sell it." In *Adebayo v. The Republic* (supra), it was held that where there are charges against an accused person and one charged includes the other, the two charges should be treated as if they are in the alternative. The main purpose of a charge is to give the accused person notice of the case against him. See *Faro v. Ige* (1964) 1 All NLR 6.

On the issue of proof of unlawful possession, the evidence tendered by the prosecution is overwhelming. The evidence of P.W.1, P.W.4 and P.W.5 stood unchallenged and uncontradicted by the appellant and further more the appellant categorically admitted in Exhibit 7, of being in unlawful possession of the bags of Indian hemp. In my view considering all the circumstances of this case, there is no irregularity in the approach by the Court of Appeal occasioning any miscarriage of justice.

A trial court and an appeal court both have power under Section 179(1) of the Criminal Procedure Act, to substitute a conviction for a lesser offence on a charge for an offence containing several particulars where only such particulars as made up of the lesser offence were proved. See *Queen v. Nwaugoagwu* (1962) All NLR 294, *Shoshimo v. State* (1974) 10 S.C 91; (1974) 10 S.C. (Reprint) 69, *Onasile v. Sami* (1962) 1 All NLR 272, *Wilson v. Queen* (1959) 4 FSC 175.

In the instant case, the appellant clearly confessed to the unlawful possession of bags of Indian hemp. In my view he was rightly convicted by the Court of Appeal by invoking the

provisions of Section 179(1) of Criminal Procedure Act.

I accordingly find no merit in this issue and I resolve it against the appellant.

Issue 2

The second issue submitted by the appellant is whether the conviction of the appellant for possession by the Court of Appeal based on Exhibit 7 can be sustained. It is submitted that the Court of Appeal was in error to have found the appellant guilty of the offence of possession and to sentence him to 15 years imprisonment. It is further submitted that the withdrawal of the charge on count 2 before the tribunal completely brought the case against the appellant to an end. Learned counsel referred to the case of *James v. Nigeria Airforce* (2000) 13 NWLR (Pt.684) at 410. B C

It is again stressed that the charge of possession against the appellant came to an end on the 30th day of April, 1998 and the Court of Appeal acted without jurisdiction when it convicted the appellant and sentenced him to 15 years imprisonment for being in possession of Indian hemp on the 12/7/2001. It is again argued that Exhibit 7, was predicated on Count No. two and having struck out Count No. two, Exhibit 7 cannot stand alone there was therefore no premise or pedestal to predicate or base Exhibit 7 on. It is further argued that Exhibit 7 is not conclusive on the point of possession by the appellant of the Indian hemp. Learned counsel relied on the case of *Nasiru v. The State* (1999) 1 S.C. 1; (1999) 2 NWLR (Pt.569) 87 at 97. D E F

The learned counsel for the respondent on the other hand, argued that the Court of Appeal was right when it convicted and sentenced the appellant for the offence of unlawful possession of the bags of Indian hemp even though count 2 of the charge was withdrawn by the prosecution and struck out by the tribunal. It is submitted that the conviction of the appellant by the Court of Appeal was premised in the power granted the court by Section 179(2) of Criminal Procedure Act. G

It is argued that the charge withdrawn against the appellant was one contrary to Section 10(h), while the Court of Appeal found the appellant guilty under Section 10(d). It is further stressed that the Court of Appeal after finding that the appellant was not guilty of the H

offence of "selling" or "dealing" with Indian hemp found him guilty of a lesser offence by invoking its power pursuant to Section 179(1) and (2) of the Criminal Procedure Act. It is again argued that the conviction of the appellant to the lesser offence by the Court of Appeal was not done in pursuance of count two but on the bona fide exercise of the powers granted under Section 179 of the Criminal Procedure Act.

It is further argued that a criminal court can convict an accused person on the voluntary confession alone. Learned counsel referred to the cases of *Ihuebeka v. The State* (2000) 4 S.C. (Pt. I) 203; (2000) NSCOR Vol.2 (Pt. I) 1286 at 189, *Akinmoju v. The State* (2000) 4 S.C. (Pt. I) 64; (2000) NSCOR Vol.2 (Pt. I) 90 at 93.

It is submitted that Exhibit 7 the voluntary statement of the appellant was tendered at the trial without any objection, if the appellant wanted to object to the admissibility of the statement he should have objected to it when it was tendered in evidence. It was too late in the day for the appellant to object to its admissibility. It is an after thought to claim now that it was "dictated to me." See *Nwangbomo v. State* (2000) ACLR 9 at 14.

I have discussed all the points raised by both the appellant and the respondent in issue two in some detail while considering the first issue. **Suffice it for me to say that the conviction of the appellant was not based on the count two which was withdrawn. Count two which was withdrawn and struck out was punishable under Section 10(h) of the NDLEA Act as amended, while the appellant was convicted under Section 10(d) of the Act by the Court of Appeal. This clearly shows that there is no connection between the withdrawn charge and the offence for which the appellant was convicted. In any event when the Court of Appeal was seized with the matter by the provisions of Section 179 (1) and (2) of the Criminal Procedure Act, the court can substitute a conviction for a lesser offence whenever it is appropriate to do so.** See *Queen v. Nwaugoagwu* (supra), *Onasile v. Sami* (supra).

The other point is whether a court can convict on the basis of confession alone. I have alluded above that the evidence of PW.1, PW.4 and PW.5 go to show that the voluntary

statement of the appellant in Exhibit 7 was true. The Court of Appeal was clearly justified to act on it. In the Ihuebeka case (supra), this court stated:-

"In the case of Silas Ikpo v. The State (1995) 33 LRCN 587 at 587, a free and voluntary confession of guilt whether judicial or extra judicial if it is direct and positive and properly established, is sufficient proof of guilt and enough to sustain a conviction so long as the court is satisfied with the truth of such confession."

The law is fairly settled that a free and voluntary confession which is direct and positive and properly proved is sufficient to sustain a conviction and generally without any need of other corroborative evidence so long as the court is satisfied with its truth. A cursory glance at Exhibit 7 shows that it is a direct, positive, voluntary and an unambiguous admission by the appellant that the bags of Indian hemp were found in his possession. The evidence of the other witnesses clearly established the truth of the statement of the appellant in Exhibit 7. I accordingly also resolve the second issue against the appellant.

In the result, this appeal fails and I dismiss it. I affirm the decision of the Court of Appeal.

ONU JSC

Having been privileged to read before now the judgment of my learned brother, Musdapher, JSC., just delivered, I am in complete agreement therewith that the appeal lacks merit and I too accordingly dismiss it.

By way of expatiation, I wish to add as follows:-

The appellant was arraigned with five others on 23rd February, 1995, on a four count charge, the first two out of which read as follows:-

Count One

"That you Henry Odeh on or about the 24th day of March, 1995, at No.24, Imaba Compound, Igando, Lagos, knowingly had in your possession 290. 15kgs. of Indian hemp (cannabis sativa) a

drug similar to heroin, cocaine or LSD without lawful authority and thereby committed an offence contrary to and punishable under Section 10(c) National Drug Law Enforcement Agency Decree, No.48 of 1989."

Count Two

B *"That you, Henry Odeh, on or about the 24th day of March, 1995, at No.24 Imaba Compound Igando, Lagos, knowingly had in your possession 290.15kgs. of Indian hemp (cannabis sativa) similar to heroin, cocaine or LSD without lawful authority and therefore committed an offence contrary to and punishable under Section 10(h) of the National Drug Law Enforcement Agency Decree, No. 15 of 1992, etc."*

All the appellants who were represented by counsel of their choice respectively, pleaded not guilty to the charge against them.

D Count two of the charge was accordingly withdrawn and struck out upon the application of the prosecution on 30th April, 1998.

Upon conclusion of trial, the Tribunal found the appellant guilty on count one and sentenced him to ten (10) years imprisonment while the five (5) others were convicted on count 3 and sentenced to E 15 years imprisonment each.

The appellants being dissatisfied with their convictions and sentence appealed to the Court of Appeal, Ibadan which heard the appeal. The Court of Appeal discharged and acquitted the five (5) other F appellant on 12th day of July, 2001, but affirmed the conviction of the appellant and enhanced his sentence from ten (10) to fifteen (15) years imprisonment. The Court of Appeal found that the evidence led in support of count one for which the 1st appellant was tried and convicted could not be supported, but the court found that G a different offence of unlawful possession of 290.15 kilogrammes of Indian hemp which carries a minimum punishment of 15 years imprisonment under Section 10 (d) of NDLEA Act, was proved. This led to the enhancement of the-punishment of the appellant from 10 years to 15 years as provided by Section 10(h) of NDLEA Decree of H 1992.

The appellant being dissatisfied with the judgment of the Court of Appeal has appealed to this Honourable Court. The grounds of appeal are contained at pages 310-313 of respondent's Brief, Vol.2.

Issues For Determination

The appellant has formulated three issues for determination as arising from the grounds of appeal before this court.

The respondent submits that only issues No. 1 and 2 as formulated by the appellant arise from the grounds of appeal filed, to wit:

a. Whether the learned Justices of the Court of Appeal were right in law when they convicted and sentenced the appellant to 15 years imprisonment after setting aside his conviction by the trial court on count one of the charge. B

b. Whether the learned Justices of the Court of Appeal were right in law when they relied on Exhibit 7 and convicted the appellant for being in possession after count two of the charge of possession had earlier been withdrawn by the prosecution and struck out by the trial court. C

Argument On Issue One

This issue queries whether the learned trial Justice (sic) of the Court of Appeal were right in law when they convicted and sentenced the appellant to 15 years imprisonment after setting aside his conviction by the trial court on count one of the charge. The respondent's submission in answer thereto is that the learned Justices of the Court of Appeal were right in law when they convicted and sentenced the appellant to 15 years imprisonment after setting aside his conviction and sentence by the trial court on count one. The learned Justices of the court below proffered as reason for arriving at that conclusion by stating that the evidence led by the prosecution in the course of trial had proved the ingredients of the offence of possession under Section 10(d) but not those of dealing under Section 10(c) for which the appellant was charged, convicted and sentenced. D E F

In expatiation on the point, the court below held thus:- G

"It is clear from the express provisions of Section 10(c) of the Act that the prosecution must prove that an accused person charged under that subsection was earlier selling or buying or offering for sale any of the prohibited drugs without lawful authority. It is therefore erroneous to say that the prosecution could discharge the onus of proof placed on it by merely proving that the accused was in possession of the prohibited drugs." H

For the purpose of clarity, Section 10(c) of the NDLEA Act under

which the appellant was charged provides as follows:-

"Any person who without lawful authority sells, buys, expresses or offers for sale or otherwise deals in or with the drugs popularly known as cocaine, LSD, heroin or any other similar drugs shall be guilty of an offence and liable upon conviction to be sentenced to imprisonment for life."

The court below juxtaposing the above provision vis-a-vis the evidence led by the prosecution, came to the conclusion that the ingredient of the offence of dealing in Indian hemp (otherwise known as cannabis sativa) had not been established or proved against the appellant.

In further evaluation of the evidence led by the prosecution in the course of trial, the court below held inter alia that:-

"The evidence in support of count 1 for which the 1st appellant was convicted is that 46 bags of Indian hemp were found in possession of the appellant in that they were recovered from the ceiling of his house. No evidence was led to the effect that he offered to sell or exposed for sale any of the said drugs found in his possession to any body. It is therefore erroneous to hold that prosecution has proved the charge in count one. The charge in count one as drafted speaks of dealing into wit, offering for sale 290.15 kilogrammes of Indian hemp. Since no evidence was led by the prosecution to the effect that the 1st appellant offered any of the drugs found in his possession for sale to anybody, he could not therefore rightly be convicted of selling as charged in count one."

Accordingly, the conviction and sentence passed on the appellant in count one for selling the drugs were rightly set aside.

The court below therefore came to the conclusion that the evidence led by the prosecution had proved the offence of unlawful possession of Indian hemp (cannabis sativa) under Section 10(d) of the NDLEA Act against the appellant.

Section 10 (d) of the NDLEA Act, provides as follows:-

"Any person who without lawful authority knowingly possessed or uses the drugs popular known as cocaine, LSD, heroin or any other similar drugs.....shall be guilty of an offence and liable on conviction to imprisonment for a term not less than fifteen years but not exceeding twenty five years"

It is noteworthy that the appellant was in fact charged at the tribunal in count two of the charge for knowingly being in possession of the drugs under Section 10 (h) but the charge was withdrawn and struck out on the application on the prosecution of 30th April, 1998.

Notwithstanding the above, the Court of Appeal found that the evidence led by the prosecution was in fact in support of the offence of possession already withdrawn at the tribunal. B

The Court of Appeal also found that the offence of possession was subsumed in the offence of dealing in count one of the charge. This accounted for the reason why the Court of Appeal then relied on Section 179 of the Criminal Procedure Act, to convict the appellant of a lesser offence of possession under Section 10(d) and sentenced him to 15 years imprisonment which is the minimum prescribed by the said Section 10(d) of NDLEA Act. The said Section 179(1) of the Criminal Procedure Act, provides:- C

"In addition to the provisions hereinbefore specifically made, whenever a person is charged with an offence consisting of several particulars in combination is proved but the remaining particulars are not proved, he may be convicted of such lesser offence or may plead guilty hereto although he was not charged with it." D E

The Court of Appeal in considering the above provisions in relation to this case held that:-

"One can say that the prosecution needs to prove that an accused charged with selling under Section 10(c) of the NDLEA Act, had possession of the drugs he was selling or about to sell. In other words, the ingredients which must be proved to sustain a conviction under Section 10(d) of the NDLEA Act, which is possession, is one of those which must be established before a conviction under Section 10(c) could be sustained." F G

Similarly, where-as the sentence presented under Section 10 (c) is imprisonment for life; the one prescribed in Section 10(d) is imprisonment for a term not less than 15 years but not more than 25 years.

It is therefore assumed that the offence under Section 10(d) is lesser than that in Section 10 (c) of the NDLEA Act. The appellant could therefore be safely convicted of the lesser offence of possession of 290.15 kilogrammes of Indian hemp." H

The gravamen of the appellant's complaint in issue 1 is that it

amounts to a miscarriage of justice for the Court of Appeal to have convicted and sentenced the appellant for the offence of possession of 290.15 kilogrammes of Indian hemp contrary to Section 10(d) of the NDLEA Act. The appellant further contends that it is more injustice when the charge of possession had in fact been withdrawn the prosecution on 30th April, 1998.

I agree with the respondent's submission that there has been no miscarriage of justice by the Court of Appeal in this case for the following

(i) The trial tribunal as well as the Court of Appeal had the power and jurisdiction under Section 179 (1) of the Criminal Procedure Act, to convict the appellant for possession of 290. 15 kilogrammes of Indian hemp whether the appellant was charged with the offence or not.

(ii) What the Court of Appeal required in exercising its jurisdiction under Section 179(l) of the Criminal Procedure Act, is not whether the appellant was charged or not with possession of the drug but whether the offence of possession was a lesser offence and if there was evidence before the court to prove the offence.

(iii) The fact that the appellant was charged with possession and the charge was withdrawn on 30th April, 1998, did not derogate from the power of the trial tribunal and the Court of Appeal, more so that the charge withdrawn against the appellant was under Section 10 (h) of the NDLEA Act, while the appellant was convicted by the Court of Appeal under Section 10 (d) of the NDLEA Act.

The jurisdiction of the court to convict for a lesser offence when determining the guilt of an accused person has been settled in such cases as *Oladipupo v. State* (1993) 6 NWLR (Pt.298) page 131 at page 147, where *Ogwuegbu, JSC.*, held that:-

"Where an offence is charged and facts are proved which reduce it to a lesser offence, the accused may be convicted of the lesser offence although he was not charged with it."

Similarly, in the case of *Udoh v. State* (1993) 5 NWLR (Pt.295) page 556 at 560, *Ayoola, JCA.*, as he then was held that:-

"A court of law in exercise of its power under Section 179 of the Criminal Procedure Act, can convict an accused person appearing before it for a lesser offence than that charged."

The respondent further contended that the authorities of *Okeke*

v. State (1999) 12 S.C. (Pt. II) 101; (1999) 2 NWLR (Pt.590) 240 at 259 ratio 34, Ahmed v. State (1999) 5 S.C. (Pt. II) 39; (1999) 7 NWLR (Pt.612) 641 at 650, ratio 4, cited by and relied upon by the appellant are irrelevant and ought to be discountenanced.

The question is, Did the prosecution prove its case beyond reasonable doubt? B

It is the further contention by the appellant that the prosecution did not prove its case beyond reasonable doubt as required in law. I agree with the respondent that the appellant's submission is misplaced in that the prosecution proved all the ingredients of possession as required by the Evidence Act. This is because in a charge of possession of 290.15 kilogrammes of Indian Hemp, what the prosecution need to prove are as follows:- C

a. That the drugs were in actual/constructive possession of the convict. D

b. That the convict had knowledge that the drugs were in his possession.

The prosecution adduced overwhelming evidence in proof of the charge of possession against the convict. There was the evidence of P.W.1 and P.W.4 to the effect that the 46 bags of Indian Hemp weighing 290.15 kilogrammes were recovered from the ceiling of the convict. There was also the confession of the convict in Exhibit 7. E

Thus, the Court of Appeal in its judgment upheld the findings of the trial tribunal that the 46 bags of Indian hemp were found in the ceiling of the appellant. The Court of Appeal also upheld the findings of the trial tribunal that Exhibit 7, the statement of the appellant wherein he admitted possession of the drugs, was sufficient proof. F
In this regard the Court of Appeal held:-

"That the learned trial Judge was right in holding that the 1st appellant's confessional statement was made voluntarily and that since he admitted being in possession of the bags of Indian hemp recovered from his house. That admission is enough to sustain his conviction for possession of the Indian hemp but since the prosecution failed to prove that the 1st appellant offered the drugs found in his possession for sale to anybody, the 1st appellant could not be found guilty of selling the said drugs found in his possession. The conviction and sentence passed on him in count one for selling the drugs are hereby H

set aside. In their place, I hereby find him guilty of being in possession of the said 290.15 kilogrammes of the Indian hemp found on him."

In Ikemson v. State (1989) 6 S.C. (Pt. I) 160; (1989) 1 ACLR 80 at 85, ratio 45, the Supreme Court per Belgore, JSC, (as he then was), held that:-

"An accused person can be convicted on his confessional statement alone. He may also be convicted where the confession is consistent with other ascertained facts, which had been proved."

I am of the view that the decision in Ikemson v. State (supra), epitomizes the totality of the transactions that gave rise to the conviction and sentencing of the appellant for the offence of knowingly being in possession of the said 290.15 kilogrammes of Indian hemp.

I agree with the respondent that this court will not lightly interfere with concurrent findings of two lower courts vide the case of Ojo v. Anibire (2004) 5 S.C (pt. I) 1; (2004) 18 1 NSCQR 208 at 211, wherein this court held that:-

"It is an established principle that as a matter of policy, once it is clear that the findings of the courts below are reasonably justified by the evidence and that no error in law substantive or procedural that leads to a miscarriage of justice has been made, this court cannot interfere with such concurrent findings of fact but must treat them with due respect."

In this regard, I entirely agree with the respondent that the onus of proving irregularity and miscarriage of justice is entirely on the appellant.

In this case of Cyril Udeh v. State (2001) 2 ACLR, 356 at page 360, the Supreme Court per Ayoola, JSC., held that:-

"The law is well settled that where-as in the present case, irregularity has been alleged in a trial, the burden is on the appellant to establish that the alleged irregularity has led to substantial miscarriage of justice. Where the appellant does not show that the presumption of irregularity has led to a miscarriage of justice, it will be assumed that there was none. See Peter Locknan & Anor. State (1972) 5 S.C. 22; (1972) 5 S.C. (Reprint) 13."

The appellant in my view, has not discharged this burden since a critical scrutiny of the contentions show no other feature than an

attempt to hide under the guise of technicality in order to escape the punishment he richly deserves.

Assuming but not conceding that such technical flaws exist, same cannot avail the appellant as justice dispensation on the pedestal of technicalities is no longer fashionable.

Thus, in the case of *Effiom v. The State* (2003) 3 ACLR 192 at page 214, the Supreme Court held that:-

"The attitude of courts has been that cases should not be decided on the basis of technicalities. See also Chief of Air Staff v. Iyen (2005) 1 S.C. (Pt. II) 121; (2005) 21 NSCQR 645 at 653."

In conclusion, I hold and agree with the respondent that the appellant was rightly convicted and sentenced by the Court of Appeal for a lesser offence of knowingly possessing 290.15 kilogrammes of Indian hemp, otherwise known as cannabis sativa pursuant Section 10(d) of the NDLEA Act.

Issue one, it was finally urged, should be resolved in favour of the respondent.

Issue 2, contends whether the learned Justices of the Court of Appeal were right in law when they relied on Exhibit 7 and convicted the appellant for being in possession after count two of the charge of possession had been withdrawn and struck out by the trial court.

First of all, I agree with the respondent's submission that the conviction of the appellant by the Court of Appeal was a positive exercise of the power conferred on the court by section 179(1) and (2) of the Criminal Procedure Act.

Section 179(2) of the Criminal Procedure Act, provides:-

"When a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it." (Underlining is for emphasis).

I agree with the respondent that the above provision is intrinsically clear and unambiguous although it does not by any stretch of the imagination presuppose that the conviction of an accused for a lesser offence proved must be based on any existing charge to that effect.

It however presupposes that an accused person, as in the instant case, could validly be convicted and sentenced by the court for

a lesser offence even though he was not charged with that offence. Even though the respondent conceded to the appellant's contention in paragraph 6.05 that the withdrawal and striking out of count 2 of the charge on 30th April, 1998, brought an end to the charge of being in possession of Indian hemp as contained in that count on
B 30th April, 1998.

The respondent however submits that even though the charge of unlawful possession of 290.15 kilogrammes withdrawn and struck out came to an end on 30th April, 1998, that did not bring to an end
C or extinguish the offence of being in possession of Indian hemp committed by the applicant. This is more so that the charge withdrawn against the appellant was one contrary to Section 10(h) while the court found him guilty under Section 10(d).

Thus, the Court of Appeal after a critical evaluation of the evidence led by the prosecution convicted the appellant for a lesser offence of unlawful possession of 290.15 kilogrammes in exercise of the powers under Section 179(1) and (2) of the Criminal Procedure Act - the two provisions which by their tenor empower the court to convict an accused person for a lesser offence even if he has not
E been charged for the lesser offence at all. Be it noted that the conviction of the appellant for the offence of unlawful possession was not a recourse to count 2 of the charge which had been withdrawn and struck out by the trial court on 30th April, 1998, but on the bona fide
F exercise of its power under Section 179(1) and (2) of the Criminal Procedure Act, to convict for any lesser offence proved by the evidence in the course of trial. I agree with the respondent to discountenance the appellant's contention in paragraph 6.06 that because count 2 of the charge was struck out on 30th April, 1998, the Court of
G Appeal acted without jurisdiction when it convicted and sentenced the appellant to 15 years imprisonment for being in possession of Indian hemp on 12th July, 2001.

I also agree that this argument is neither trendy nor tenable. Nor do I approve of appellant's Brief that his conviction for a lesser
H offence of unlawful possession of Indian hemp based on Exhibit 7 is erroneous, misguided and not legally tenable.

Innumerable authorities abound where-in the Supreme Court has consistently held that a free and voluntary confession alone, prop-

erly taken, tendered and admitted as well as proved to be true, is sufficient to support a conviction. See the cases of Ihuebeka v. The State (2000) 4 S.C. (Pt.I) 203; (2000) NSCQR Vol.2, part 1, page 186, where Ogwuegbu, JSC., endorsing Kalgo, JSC. (as he then was), held that:-

"In the case of Silas Ikpo v. The State (1995) 33 LRCN 587 at 589, a free and voluntary confession of guilt whether judicial or extrajudicial if it is direct and positive and properly established is sufficient proof of guilt and enough to sustain a conviction so long as the court is satisfied with the truth of such confession."

In Akinoju v. The State (2000) 4 S.C. (Pt.I) 64; (2000) NSCQR, Vol.2, part 1, page 90 at page 93, the Supreme Court held that:-

"The law is fairly settled that a free and voluntary confession which is direct and positive and properly proved is sufficient to sustain a conviction without any corroborative evidence so long as the court is satisfied with its truth."

The Supreme Court has also held in the above case that the fact that is now opposing the admission does not make it inadmissible:-

"Referring to R. v. Hule (1961) All NCR 462, even where there is a confession the fact that it has been retracted does not preclude the court from acting on it to convict. See Edamine v. The State (1996) 4 NWLR 375."

When Exhibit 7 (statement of the appellant) was sought to be tendered by the prosecution in the course of the trial, neither the appellant nor his counsel objected to its admissibility.

In fact, at page 28 of the record of proceedings, appellant's counsel, one Mrs. B.C. Okolo was recorded as saying "I have no objection to the statement being admitted in evidence."

As the appellant did directly, expressly and unequivocally consented to the tendering instead of objecting to the admissibility of Exhibit 7 on appeal, the appellant's claim in the course of his defence that the statement was dictated to him was nothing but an after thought.

In Nwangbomu v. The State (2000) 2 ACLR 9 at page 14, this court held that:-

"Where an extrajudicial confession has been proved to have

been made voluntarily and it is positive and unequivocal and amounts to an admission of guilt, it will suffice to ground a finding of guilt regardless of the fact that the maker reciled therefrom or retracted it altogether at the trial, in as much as such a u-turn does not necessarily make the confession inadmissible."

B I have carefully glanced at Exhibit I. It shows that it is direct, positive and voluntary as well as an unambiguous confession or admission of guilt by him to the effect that the bags of Indian hemp under reference were found in his possession.

C In the result, issues 1 and 3 are also resolved in favour of the respondent.

It is for the foregoing reasons and those better articulated in the judgment of my brother, Musdapher, JSC., that I too dismiss this appeal.

D

MUKHTAR JSC

E I have had the opportunity of reading in advance the leading judgment delivered by my learned brother, Musdapher, JSC. I am in full agreement with the reasoning and conclusion reached that the appeal has no merit whatsoever. I will however by way of emphasis add my own contribution.

F In the respondent's Brief of Argument can be found the following statement:-

"Issue No.3 does not arise from the grounds of appeal contained at pages 320-313 of the record of appeal (sic)."

G At this prompting, the learned counsel for the appellant at the hearing of the appeal saw some wisdom in applying for the striking out of the said issue (3) in the appellant's Brief of Argument, the issue not being related to any of the grounds of appeal already filed. Since the law is settled that an issue raised for the determination of an appeal must be distilled from a ground of appeal, an issue that is not so connected becomes incompetent, and must be struck out by the court. The said issue No. (3) is therefore struck out. See *Chime v. Chime* (2001) 1 S.C. (Pt. II) 1; (2001) 3 NWLR (Pt.70) page 527, *Western Steel Works v. Iron and Steel Workers* (1987) 1 NWLR (Pt.49) page 284 and *Modupe v. State* (1988) 9 S.C. 1; (1988) 4

NWLR (Pt.87) page 130.

The surviving two issues are:-

"(1) Whether the learned Justice (sic) of the Court of Appeal were right in law when they convicted and sentenced the appellant to 15 years imprisonment after setting aside his conviction by the trial court on count 1 of the charge. B

(2) Whether the learned Justice (sic) of the court were right in Law when they relied on Exhibit 7 and convicted the appellant for being in possession after count 2 of the charge dealing with possession had been withdrawn and struck out by the trial court." C

On these issues lengthy arguments were proffered by learned counsel on both sides on the propriety or impropriety of the court below to convict the appellant on a charge that had been struck out by the trial court. I fail to see that the Court of Appeal erred when it convicted the appellant of the offence of being in possession of Indian hemp, when there is a provision of the law which empowers it to do so i.e. Section 179(1) of the Criminal Procedure Act, which provides thus:- D

"In addition to the provisions herein before specifically made, whenever a person is charged with an offence consisting of several particulars in combination of some only of which constitutes a complete lesser offence in itself and such combination is proved but the remaining particulars are not proved, he may be convicted of such lesser offence or may plead guilty hereto although he was not charged with it." E F

There was ample evidence in support of the conviction of being in possession of the drugs. Such evidence that abound is that of PW.4, a member of the Special Task Force of the NDLEA who testified inter alia thus:- G

"..... a team of officers led by Christopher Adeboyi (sic) to go to No.24, Imaba Compound, in Igando Village in Lagos State to effect the arrest and search the premises of the accused person in person of Mr. Henry Odeh (1st accused). On reaching there, the officers condone (sic) off the whole premises of the accused and he was arrested. Then the officers including me introduced ourselves and the motive of our being their (sic) to the accused person. Then we started to search the premises. In the process of conducting the H

search then we recovered 46 bags of substance suspected to be Indian hemp on top of his ceiling. From there, we removed the suspected substances and took the suspect and the substance to Shaw Road, Ikoyi Lagos for further investigation. We discovered the substances inside the ceiling of the accused house."

B The evidence of the witness under cross-examination was consistent. Then there was the confession of the appellant himself when in the caution statement to the Police Exhibit 7 he said:-

C *"On 24/3/95, some Police Officers came to my house again and introduced themselves that they are from N.D.L.E.A. and they searched my house and found some bags of drugs which I hid on top of ceiling and packed everything and also took me to their office."*

D There is no doubt whatsoever in my mind that these pieces of evidence are enough to ground the conviction of unlawful possession of Indian hemp contrary to Section 10(d) of the NDLEA Act, under which the appeal court convicted the appellant. It is a cardinal principle of law that a confessional statement, once it has been made voluntarily and freely and it is direct and positive, it is enough to sustain a conviction. See *Ntaha v. State* (1972) 4 S.C. page 1; (1972) E 4 S.C (Reprint) 1, *Queen v. Mboho* (1964) NMLR page 49 and *R. v. Sykes* 8 Cr. App R. 233."

The lower court was therefore right when in its lead judgment it found as follows:-

F *"In conclusion, therefore and for the reasons given above, the conviction of the 1st appellant for selling the drugs found on him is improper as the prosecution failed to prove all the ingredients needed to sustain a conviction under that sub-section of the NDLEA Act. He is however found guilty and convicted of being in possession of the G 290.15kgs. of Indian hemp found in his possession."*

H I believe Section 16 of the Court of Appeal Act, 1976, gives the Court of Appeal the power to convict the appellant of another offence other than the one he was charged, once the evidence adduced and available, proves and confirms the guilt of the appellant on alternative offence.

All in all I also affirm the judgment of the court below and dismiss the appeal.

OGBUAGU JSC

I have had the advantage of reading before now, the leading judgment of my learned brother, Musdapher, JSC. I agree with his conclusion that the appeal fails. However, by way of emphasis, I will make my own contribution. B

The two issues formulated by the appellant, have been adopted by the respondent. They read as follows:

"(1) Whether the learned Justice of the Court of Appeal were right (sic) in law when they convicted and sentenced the appellant to 15 years imprisonment after setting aside his conviction by the trial court on count 1 of the charge. C

(2) Whether learned Justice of the court were right (sic) in law when they relied on Exhibit 7 and convicted the appellant for being D in possession after count 2 of the charge dealing with possession had been withdrawn and struck out by the trial court."

When this appeal came up for hearing on 10th January, 2008, Oguntade, Esqr., - learned counsel for the appellant, after adopting the appellant's Brief, applied to withdraw their issue 3. The application, was granted and the said issue was accordingly struck out. The learned counsel, then submitted that count 2 having been withdrawn and struck out, the Court of Appeal (hereinafter called "the court below"), was wrong to substitute another charge and then convict on it. That there was therefore, no charge whatsoever upon which the court below could have been convicted. He urged the court to allow the appeal and set aside the judgment of the court below as, according to him, there was no basis for such finding. F

Leading learned counsel for the respondent Oloruntoba. Esqr., G after adopting the respondent's Brief, referred the court to page 11 thereof and submitted that the lesser offence, is not sentence, but on the point of the ingredient of the offence.

On issue 2, he submitted that an accused person, can be convicted on his confessional statement. That, that was what the trial court and the court below did. He urged the court to dismiss the appeal. Since Mr. Oguntade told the court that he had nothing more to add, judgment was reserved till today. H

I note that in the appellant's Brief at page 3 paragraph 2.04, the charge was not quite properly reproduced. The charge or count 2 that was withdrawn, was that, contrary to Section 10(h) of the NDLEA Decree, No. 15 of 1992, while the Court of Appeal, found the appellant guilty under Section 10(d) of the Act and not pursuant to count 2. Surely, and this is also settled that an appellate court, can convict on a lesser offence and impose a sentence in respect thereof than on that for which the trial court, convicted him of course, if the circumstances of the case so demand. See the cases of Shosimbo v. The State (1974) 10 S.C. 91; (1974) 10 S.C. (Reprint) 69 at 78 and Oladipupo v. The State (1993) 6 NWLR (Pt.298/131) at 146, 147; (1993) 6 SCNJ 233 and Section 179(2) of the Criminal Procedure Act. With respect, I find no irregularity in the stance or approach of the court below which has occasioned any miscarriage of justice. The evidence led by the prosecution, overwhelmingly, proved the ingredients of the offence of possession under Section 10(d) and not those of dealing under Section 10(c) of the Act. More importantly, there was the confessional statement in Exhibit 7 of the appellant. I too, find no merit in this issue and my answer to the same, is rendered in the affirmative.

In respect of Exhibit 7 - the confessional statement of the appellant, I note that therein, the appellant, admitted being in possession of the bags of Indian hemp. For the avoidance of doubt, it is stated therein inter alia, as follows:

".....I joined carpentry work 1984 and that is the work I am doing right now. I am a carpenter but that does not help me fetch much money, that is why I entered into drug business. I started drug business in 1989, when I married my wife, Comfort. Unfortunately on the 22/3/95, Police Officers from Idimu in Lagos came to my house and arrested my wife when I was out for my business. When I came back, I was told by a friend of mine that Police came and look for me but I was not in and they have arrested my wife. So I went to Police Station and we discussed settlement with them at N30,000 of which I have given N21,000 and remain a balance of N9,000. I paid the sum of N1,500 for the vehicle they hired in conveying the drugs back to my house. They said they are retaining 4 bags since I have not brought the remaining balance of N9,000.

On 24/3/95, some officers came to my house again and introduced themselves that they are from NDLEA and they searched my house and found some bags of drugs which I hid on top of ceiling and packed everything and also took me to their office."

(The underlining mine)

Apart from the above, the evidence of the P.W.s 1, 4 and 5, B were unchallenged by the learned counsel for the appellant and uncontroverted by the appellant in his defence. It is noted by me, that Exhibit 7 was admitted in evidence without any objection from the learned defence counsel. It was at the address stage that it was raised. C It is now firmly settled that the appropriate time to raise the involuntariness of a confessional statement is when it is about to be tendered in evidence and especially, where as in the instant case leading to this appeal, the accused person, was represented by counsel who it is assumed to know or ought to know what to do at each stage of the proceedings. See the cases of Okoroh v. The State (1988) 12 S.C. D (Pt. II) 83; (1988) 3 NWLR (Pt.81) 214 at 219-220 and Obidiozo v. The State (1987) NWLR (Pt.67) 748; (1987) 11-12 SCNJ 103. Raising the objection during the address stage, in my respectful view, will be an after-thought and the effect, is that it will be too late to do so. E

A confessional statement, is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. If voluntary, it is deemed to be a relevant fact as against the person who made it only. See Section 27 of F the Evidence Act.

I note that Exhibit 7, was written by the appellant himself under caution and duly signed by him both after the caution and at the end of the said statement and P.W.4 counter-signed as is the usual practice designed by the Police. It is even not required by any rule of G law or procedure and it has been highly commended by the courts as it ensures fair play and justice to an accused person. See the cases of Kim v. The State (1992) 4 SCNJ 81 at 99 - citing the cases of R. v. O. Sapele 2 FSC 24, Nwagboke v. R. (1955) 4 FC 25, R. v. Igwe (1961) ANLR 330 at 335, Egboghonome v. The State (1993) 7 NWLR H (Pt.306) 383; (1993) 9 SCNJ (Pt.I) 1, Nwaebonyi v. The State (1994) 5 SCNJ 86 at 100 - per Iguh, JSC., and Edihigere v. The State (1996) 9-10 SCNJ 36 - per Mohammed, JSC.

Confessions, are relevant and therefore, admissible in evidence.

They are evidence upon which the court can act, once admitted in evidence even if subsequently retracted. See the cases of *Obosi v. The State* (1965) NMLR 119, *Ejinima v. The State* (1991) 7 S.C (Pt.III) 2; (1991) 6 NWLR (Pt.200) 637; (1991) 7 SCNJ 318, *Durugo v. The State* (1992) 7 NWLR (Pt.255) 525; (1992) 9 SCNJ 46. Thus, a properly admitted extra judicial confession, is part of the case of the prosecution. See the case of *Ikemson & 2 Ors. v. The State* (1989) 6 S.C. (Pt.I) 114; (1989) 3 NWLR (Pt.110) 455; (1989) 6 SCNJ 54.

It has therefore, been stated and restated in a line of decided authorities, that a court, is entitled to convict an accused person on his confessional statement. See the cases of *Yesufu v. The State* (1976) 6 S.C. 167 at 173; (1976) 6 S.C. (Reprint) 109, *Okagbu v. The State* (1984) 8 S.C. 65. So, where the confessional statement of an accused person, is direct, positive and unequivocal about his committal of the crime, he can be convicted for the offence. So long as the court is satisfied with the truth of such a confession. See the cases of *Ogugu & Ors. v. The State* (1990) 2 NWLR (Pt. 134) 539 CA, *Bature v. The State* (1994) 1 NWLR (Pt.320) 267; (1994) 1 SCNJ 19 at 29, citing several other cases therein *Ikpo & Anor. v. The State* (1995) 12 SCNJ 64 at 85, also citing some other cases therein; and *Hassan v. The State* (2001) 7 S.C. (Pt.II) 85; (2001) 7 SCNJ 643 at 652 - per *Katsina-Alu, JSC.*, and many others. The court below found and held that Exhibit 7, was made voluntarily and as such, its admission by the tribunal, was proper and in accordance with the law. I agree. It is from the foregoing and the more detailed leading judgment of my learned brother, *Musdapher, JSC.*, that I also, find no merit in this appeal which I also dismiss and I affirm the decision of the court below.

ADEREMI JSC

The appellant with some five others were charged before the Miscellaneous Offences Tribunal holden in Lagos for unlawful dealing in and aiding the 1st appellant to deal in 290.15 kilogrammes of Indian hemp contrary to and punishable under Section 10(c) of the NDLEA Decree, No.48 of 1989 and Section 10(c)&(b) of Decree

No. 15 of 1992 as amended. The tribunal in its judgment on the 19th of July, 1998, convicted and sentenced the appellant herein to ten years imprisonment on count one while the other five accused persons were convicted and sentenced to fifteen years imprisonment on count 3. Being dissatisfied with the verdict of the tribunal, the appellant and the five other convicts appealed to the court below which after taking arguments of counsel, in a reserved judgment delivered on the 12th of July, 2001, discharged and acquitted the five other appellants. The appellate court however affirmed the conviction of the appellant on other ground and proceeded to sentence him to 15 years as against the 10 years to which he was sentenced by the trial court. It is against this judgment that the appellant has approached this court for a reversal of the verdict. The final two count charge for which the appellant stood charged before the trial tribunal after the second count had been withdrawn by the prosecution are as follows:-

"(1) Count 1

Dealing in (by offering for sale 290.15 kgs. of Indian hemp (cannabis sativa) on or about the 24th day of March, 1995, at No.24, Imaka Compound, Igando, Lagos without lawful authority contrary to and punishable under Section 10(c) of the National Drug Law Enforcement Agency Decree, No.48 of 1989.

(2) Count II

Knowingly having possession of 290.15 kg of Indian hemp (cannabis sativa) on or about the 24th day of March, 1995, at No.24, Imaka Compound, Igando, Lagos punishable under Section 104 of the NDLEA Decree, No. 15 of 1992."

The court below had set the appellant free from the offence of 'dealing in' with drugs, a more serious offence which carries a life imprisonment under Section 10(c) of the Decree as amended with an offence punishable under Section 10(d) which carries a sentence of imprisonment for a term of not less than 15 years. The court below had found from the printed records that there was no evidence to establish that the appellant was selling or "dealing in" the drugs; but that there was and still on the record a clear evidence that the appellant was knowingly in unlawful possession of Indian hemp. The offence of selling or "dealing in" drugs for which the appellant was

charged and which count was struck out at the instance of the prosecution is more grievous and carries heavier penalty than that for knowingly being in unlawful possession of the Indian hemp.

Can the court below embark on such substitution of conviction? An answer to this question can be found in Section 179(1) of the Criminal Procedure Act, which is very much applicable to this case, provides:-

"In addition to the provision herein before specifically made, whenever a person is charged with an offence consisting of several particulars a combination of some of which constitute a complete lesser offence in itself and such combination is proved but the remaining particulars are not proved, he may be convicted of such lesser offence or may plead guilty thereto although he was not charged with it."

On a proper construction of the above provisions of the law, it is my view that both the trial court and the appellate court can substitute a conviction of one offence for the other. This view takes a cover and indeed support in the decisions of this court in *Ozigbo v. COP* (1976) 2 S.C (Reprint) 43; (1976) NMLR 150, *Okabichi v. State* (1975) 3 S.C. 135; (1975) 3 S.C (Reprint) 96 and *Ogu v. The Queen* (1963) All NLR 232.

It is for this little contribution, but most especially for the detailed reasoning of my learned brother, Musdapher, JSC., as set out in the leading judgment which reasoning I am in full agreement with and I beg to adopt as mine, that I here say that the appeal is unmeritorious. Consequently, I also dismiss it while I affirm the judgment of the court below.

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