

SUPREME COURT OF NIGERIA
9TH MAY, 2008 SC. 118/2007
CORAM:- S. U. ONU, A. I. KATSINA-ALU, D.
MUSDAPHER, G. A. OGUNTADE, S. A. AKINTAN, JJSC

DOTUN FATILEWA APPELLANT
V.	
THE STATE RESPONDENT

EVIDENCE - Exclusion of - Criminal trial - Wrongly admitted evidence - Effect - Having excluded Exhibit E from the record - Court of Appeal ought to specifically identify other pieces of evidence - Upon which the conviction of accused may stand - Or the conviction must fail (H1)

CRIMINAL PROCEDURE - Confession - By a co-accused - Effect on co-accused's case - It is inadmissible against co-accused - Unless expressly adopted by him - Trial court should warn itself on this principle - Or the conviction may be quashed (H2)

FACTS

The Appellant was the 2nd of two accused persons who were arraigned for the offence of culpable homicide punishable with death before Kuserki, J, at the Abuja High Court. They were alleged to have caused the death of one Moshudi Atanda Arogundade, the father of the 1st accused. Central to the case of the prosecution was the evidence of PW.5, an Assistant Commissioner of Police. According to PW. 5, he was on a routine round to suspects detained in the Police Stations under his control when he met the 1st accused sitting down with his eyes wide open at about 2.00am. It appears that the 1st accused had been arrested earlier following the death of his father. Upon being queried by PW. 5 on why he was not asleep, 1st accused told him that he could not sleep as he kept seeing the image of his late father whenever he closed his eyes. Then followed a long discussion in the course of which the 1st accused volunteered a confessional statement in which he admitted killing his father. He however said that the act was perpetrated with the help and connivance

of the Appellant. P.W. 5 caused the 1st accused to be moved from Nyanya to Garki Police Station, when the 1st accused told him that the Appellant was in Abuja. From Garki Police Station, upon the request of P. W. 5, 1st accused was taken to the house of the Appellant where he identified the Appellant who was then arrested and detained at the Police Station. P.W. 5 went to the cell and spoke with the Appellant, allegedly confronting him with the story told by the 1st accused. However, P.W. 5 did not state whether or not the Appellant admitted the story of the 1st accused. But he stated that the Appellant made a statement, purportedly confessional, which P.W.5 endorsed. At trial, Appellant did not call any evidence but the prosecution called six witnesses.

After trial, the learned trial judge found the Appellant guilty as charged and accordingly sentenced him to death. Dissatisfied, Appellant brought an appeal before the Court of Appeal against the judgment of the trial court. The appeal was dismissed. The Court of Appeal had however expunged from the record the said confessional statement of the Appellant, marked Exhibit E as inadmissible in its judgment before dismissing the appeal. Appellant has brought this appeal to the Supreme Court contending that in the absence of Exhibit E there was insufficient credible evidence to sustain his conviction.

ISSUES FOR DETERMINATION

“1. Whether the Honourable Court of Appeal having expunged Exhibit ‘E’ the purported confessional statement, was right to have relied on any other evidence particularly the P.W.5’s evidence to affirm the conviction and sentencing of the appellant? (Ground 1).

2. Whether the Honourable Court of Appeal was right to have held that the evidence of P.W. 1 - P.W.6 proved all the ingredient(s) (sic) of the offence against the appellant contrary to the finding of the Honourable trial court that the evidence of P.W.1-P.W.6 proved only the 1st ingredient of the offence? (Ground 4).”

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)
EVIDENCE - Exclusion of - Criminal trial

1. The important question to ask is - Having excluded Exhibit E from the record, what was the evidence available against the appellant?

The court below in its leading judgment never specifically identified the pieces of evidence upon which it relied, to affirm the guilty verdict of the trial court against the appellant.

Although, P.W.5 said in the above passage of his evidence that he confronted the appellant with what the 1st accused had told him, he did not say that the appellant admitted the truth of what the 1st accused might have said. He went further to say that the appellant later made a statement. But since the court below had ruled the said statement Exhibit 'E' inadmissible, and there is no appeal on the point before this court, it is not for this court to speculate on the contents of a statement or exhibit not in evidence. The consequence is that there was not a shred of admissible evidence against the appellant as to his complicity in the murder of the deceased.

Clearly in my view, the court below, which had itself ruled that the only evidence against the appellant. Exhibit 'E' was inadmissible was in error to have affirmed the conviction of the appellant. This is why in my view the court below was unable to specifically identify the pieces of evidence which it relied upon as establishing the guilt of the appellant. In a simple and direct language, there was no such evidence. (pp. 2020 A/2021 G)

Confession - By a co-accused - Effect

2. I think with respect that the court below did not incisively examine the evidence called by the prosecution witnesses to determine whether or not the case against the appellant was established as required by law.

In the evidence of P.W.5, there is no doubt that he told the trial court what the 1st accused told him as to how the appellant assisted him to kill the deceased. But whatever the 1st accused had told P.W.5 in the absence of the appellant was inadmissible evidence against the appellant. Such evidence could not be relied upon by the prosecution to sustain the conviction of the appellant unless there was evidence that the appellant adopted the statements made by the 1st accused. In *R. v. Ajani & Ors.* (1936) 3 WACA 3 at 4, the court per Kingdon, C.J., observed:-

“So far as the admissibility of evidence is concerned, throughout the trial statements made by one accused implicating others were

admitted without any record being made, either at the time of admission that such statements were not admissible as evidence against accused who were not present, or in a summing up or judgment that the trial Judge had warned himself to disregard such against whom they were inadmissible. This court is of opinion that for the sake of safety and clarity it is desirable that such a note should be made in both places, though it is sufficient if the record makes it appear in one or the other that such statements were not wrongly considered. But when, as in this case, there is nothing in the record to make it so appear, this court might well feel compelled to quash a conviction, even though there were sufficient admissible evidence to support it."

The result is that the evidence of PW.5 as to what the 1st accused said to him (PW.5) could not be used as evidence against the appellant. (p. 2020 F)

REPRESENTATION

Chukwuma-Machukwu Ume, (with him; C. U. Ekomaru; I. M. Njaka; C. I. Mbaeri and U. J. Chukwu), for the Appellant.
R. N. Chenge, D.D.P. P., Federation, (with him; G. E. Odegbaro, C.S.C. Federation and S.H. Barkun, C.S.C. Federation) for the Respondent.

CASES REFERRED TO

Peter v. State (1997) 12 NWLR (Pt.53l) 1
Ofola v. State (1974) 1 All NLR 411
Onungwa v. State (1976) 12 S.C. 169
Obidiozo v. The State (1987) 2 NSCC 1239
R. v. Ajani & Ors. (1936) 3 WACA 3 at 4
Auta v. State (1975) 4 S.C. (Reprint) 92; (1975) All NLR (Pt.I) 165
Peter v. State (1997) 12 NWLR (Pt.53l) 1 at 22
Ofola v. State (1974) 1 All NLR 411
Onungwa v. State (1976) 12 S.C. 169
Obidiozo v. The State (1987) 2 NSCC 1239

STATUTE REFERRED TO

Evidence Act, s. 27(2)

LEAD JUDGMENT BY OGUNTADE JSC

The appellant was the 2nd of two accused persons who were arraigned for the offence of culpable homicide punishable with death on 19-4-90, before Kuserherki, J., at the Abuja High Court. The accused persons were alleged to have caused the death of one Moshudi Atanda Arogundade who was the father of the 1st accused. B

At the trial, the prosecution called six witnesses. The appellant elected not to call any evidence. On 12/11/92, the trial court in its judgment found the appellant guilty as charged and accordingly sentenced him to death. The appellant was dissatisfied with the judgment of the trial court. He brought an appeal against it before the Court of Appeal, Abuja (hereinafter referred to as 'the court below'). On 12-04-06, the court below dismissed the appeal. The appellant D has now brought a final appeal before this court. In the appellant's Brief filed, two issues for determination in the appeal were identified.

The issues are:

"1. Whether the Honourable Court of Appeal having expunged Exhibit 'E' the purported confessional statement, was right to have relied on any other evidence particularly the P.W.5's evidence to affirm the conviction and sentencing of the appellant? (Ground 1). E

2. Whether the Honourable Court of Appeal was right to have held that the evidence of P.W. 1 - P.W.6 proved all the ingredient(s) (sic) of the offence against the appellant contrary to the finding of the Honourable trial court that the evidence of P.W.1-P.W.6 proved only the 1st ingredient of the offence? (Ground 4). F

The respondent formulated two alternative issues for determination. The issues are: G

"1. Whether from the totality of the facts and circumstances of this case, the court below was right when it affirmed the decision, conviction and sentence of the trial court on the ground of circumstantial evidence. H

2. Whether issue No.1, the role issue in the appellant's Brief is a fresh issue having not been brought and decided before the lower court."

Let me observe here that the respondent's 2nd issue above is

a misconceived one in this appeal. The appellant's issue 1 above is a complaint against the judgment of the court below as to whether the court below was right to have affirmed the conviction of the appellant by the trial court after it had held that Exhibit 'E' a confessional statement said to have been made by the appellant was inadmissible.

B The said issue is indeed the major issue to be decided in this appeal and the same arose directly from the judgment of the court below. It is not a fresh issue in the appeal as the respondent contended.

C I observed earlier in this judgment that before the trial court, the prosecution called six witnesses. Of these witnesses, only P.W.5 testified concerning the appellant (who was the 2nd accused before the trial court).

D Because of the importance of the evidence of P.W.5 in the determination of this appeal, I reproduce hereunder a substantial part of it from pages 25-27 of the record of proceedings. P.W.5 said:-

"As a routine, I went to visit suspects detained by my men in all the Police Stations. I met him sitting down with his eyes wide open around 2.00a.m. I asked him to know (sic) why he was still awake. He told me he was not able to sleep and that I should help him to pray because whenever he closed his eyes, he was seeing the image of the father whom he killed. I asked him of his religion. He told me that he was a Muslim. I told him that it was late at night. I then asked him whether he really killed his father. He said he was the one who killed him. I asked him why he killed his father. He told me that it was the work of a devil. The matter became interesting so I brought him out of the cell to one of the Police Station Officers. I asked him how he killed his father. He said that it was the devil's work and that he was not alone. I insisted that he should tell me how it all happened. He said that the idea was brought by the 2nd accused. I asked further how they planned it. He said that they went to a Chemist shop to buy sleeping pills. I ask him the name of the pills. He gave me the name as Mogadon. I asked him how he administered it on his father. He said that the father asked him to go and buy him pounded yam and that he should warm the stew they had at home. He warmed the soup and put about 5 tablets in it. Before then he said that the 2nd accused had come to the house. I asked him what 2nd accused was doing. He told me that the deceased had earlier asked the 2nd

accused to leave the house as it was getting late. The food was served. At that time the 2nd accused pretended to have left the house, but that he hid himself behind a cupboard. By then, the tablets had started getting (sic) the system of the father and he started dosing. After making sure that the deceased was fast asleep, 2nd accused asked the 1st accused to soak a towel in water. At that time, 2nd accused was holding a club (a wooden handle of a hoe). I asked him why the towel was soaked. He told me that the towel was to be used to cover the mouth of the deceased so that he would not shout whilst being hit. That was what they did according to 1st accused. I asked him that we saw a rope twine round the deceased neck. He told me that they used the rope to strangle the deceased who did not die in time. He then said that 2nd accused gave him the idea of allowing the 2nd accused to go and that he had forgotten something and that 2nd accused came along with an injection which he used on the deceased and the 2nd accused took the remaining along with him. I asked him the whereabouts of the 2nd accused, he told me that 2nd accused was in Abuja. I asked him the house. He identify (sic) the house to me.

I then removed the 1st accused from Nyanya to Garki Police Station. I then asked him to be taken to the house of the 2nd accused where he identified the 2nd accused. 2nd accused was arrested and brought to Police Station where he was detained. I went to the cell and spoke with him. I asked him why he was in cell. He said that he would speak to me privately. I confronted him with what was told to me by the 1st accused. The statements of the 2nd accused were taken under the words of caution. They confessed and I endorsed the statements. I can identify the statement. I then briefed my Commissioner on the case. Investigation then continued.”

It is important to observe here that when P.W.5 had the dialogue narrated in court by him with the 1st accused, the appellant was not present. It was after the said dialogue that P.W.5 caused the arrest of the appellant.

The trial court in the assessment of the evidence against the 1st accused and the appellant said at pages 45-46 of the record :-

“Asst. Sup. of Police Abayomi Jones in the cause of his testimony tendered documentary evidence which turned up to be con-

fessional statements made by the 2nd accused persons standing trial in this case. They were admitted as Exhibits D and E, for the 1st and 2nd accused respectively. There were admitted in evidence when at the conclusion(sic)

I have satisfied myself that the statements were voluntarily made by the two accused persons. The exhibits tendered and admitted and marked Exhibits A1-A9: (wooden handle of a hoe, the twine, the blood soaked Kaftan, the blanket, the towel, the white bed-sheet, the white pairs of trousers (all stained with blood) and the iron hoe) go a long way to corroborate the confessional statements of the 2 accused persons. It is the law under Section 27(2) of Evidence Act, that confession, if voluntary, are deemed to be relevant facts as against the persons who made them only. Hence each statement is considered as against its make alone and this is well determined in the trial within trial. The confessional statements of the two accused persons are clear and explacite (sic) on how the deceased was drugged leading was to sleep off, (sic) gagged with soaked towel, hit with the handle and a hoe and strangled with a twine to finalise the berious (sic) act of causing his death. These cumulatively proves the second ingredient of the offence charged against the 2 accused persons beyond reasonable doubt.

The confessional statements of the two accused persons are instructive (sic) as to the determination of the two accused persons to cause such bodily injury on the deceased with the probable consequence of causing his death. Sleeping pills were first administered on the deceased. This he ate in his food and slept off. The accused used wooden handle to hit hard on his head with the resultant fracture of his skull and hemorrhage. Seeing that the deceased did not die in time they use twine to strangle him by the neck. This is a direct pointer to the fact that the accused meant to see that the deceased was completely dead. The aim of and objective of the accused was complete on seeing that life had gone out of the body of the deceased. As for the motive behind the action of the accused all these are in their statement. 1st accused wanted better things of life which his late father refused to give him and the 2nd accused with the hope of gaining something from him after his father died.”

It is manifest from the extract of the judgment of the trial court

that the appellant was found guilty on the basis of what the 1st accused told the P.W.5 in the absence of the appellant; and the alleged confessional statement of the appellant.

Before the court below, the appellant by his counsel contended that the allegedly confessional statement credited to him and received in evidence as Exhibit 'E' was inadmissible. In reacting to arguments on the admissibility in evidence of Exhibits D and E, the court below at pages 84-86 of the record said:-

"In the case in hand, the procedure followed by the learned trial Judge in the trial within a trial was defective and substantially so. He ought to, in the trial within trial started with the evidence of the prosecution before the defence, that is the evidence of the accused/appellants. The learned trial Judge was swayed into shifting of the burden of proof from where it actually resided with the prosecution and placed it on the defence. That is not our law or our practice. That flaw was fundamental and vitiated the trial within trial and therefore the admission of the two confessional statements cannot be sustained. See Auta v. State (1975) 4 S.C. (Reprint) 92; (1975) All NLR (Pt.I) 165.

A confessional statement becomes proof of an act when it is true, positive and direct. A voluntary statement stating or suggesting the inference that an accused committed an offence for which he is charged is relevant and admissible against him provided the statement was not made as a result of any threat, promise or inducement from a person in authority. Also, any voluntary information given by the accused at anytime during investigation which leads to the discovery of any fact material to the charge against him is equally admissible. See Peter v. State (1997) 12 NWLR (Pt.531) 1 at 22 paragraph E-F; Ofola v. State (1974) 1 All NLR 411. Onungwa v. State (1976) 12 S.C. 169; (1976) 1 S.C. (Reprint) 74.

The inadmissible evidence does not reasonably affect the decision of the trial court against the appellants if there are other evidence outside those confessional statements rejected in evidence upon which a conviction can be based upon. See Obidiozo v. The State (1987) 2 NSCC 1239.

In the light of the foregoing, I answer issue No. 1 in the affirmative and state without difficulty that the admission in evidence of

Exhibits D and E was wrong.”

The important question to ask is - Having excluded Exhibit E from the record, what was the evidence available against the appellant? The court below in its leading judgment never specifically identified the pieces of evidence upon which it relied, to affirm the guilty verdict of the trial court against the appellant. At pages 104-105, the court below said:-

*“As I said earlier there is a surfeit of circumstantial evidence which are of such a mathematical accuracy that no other explanation can be given than that the accused/appellant committed the offence for which they were convicted and sentenced. The clever posturing of the learned counsel would not cure the situation of the defence who inspite of the damning evidence of the prosecution especially that of P.W.5, Ajuji Yola the Assistant Commissioner of Police chose not to defend themselves against his statements in evidence or to debunk them. In my view, the appellants chose to gamble by relying only on shooting down the confessional statements and no more. Well they successfully shot down the extra-judicial statements based on procedural irregularity which was fundamental but failed to do anything about the other pieces of evidence which alone were sufficient in proof of the charge of murder beyond reasonable doubt. I have no difficulty in finding as the learned trial Judge did that not only was the deceased killed but was killed by the act of the accused/appellant. See *The State v. Ogubunjo*.”*

I think with respect that the court below did not incisively examine the evidence called by the prosecution witnesses to determine whether or not the case against the appellant was established as required by law.

In the evidence of P.W.5, there is no doubt that he told the trial court what the 1st accused told him as to how the appellant assisted him to kill the deceased. But whatever the 1st accused had told P.W.5 in the absence of the appellant was inadmissible evidence against the appellant. Such evidence could not be relied upon by the prosecution to sustain the conviction of the appellant unless there was evidence that the appellant adopted the statements made by the 1st accused. In *R. v. Ajani & Ors. (1936) 3 WACA 3 at 4*, the court per Kingdon,

CJ., observed:-

“So far as the admissibility of evidence is concerned, throughout the trial statements made by one accused implicating others were admitted without any record being made, either at the time of admission that such statements were not admissible as evidence against accused who were not present, or in a summing up or judgment that the trial Judge had warned himself to disregard such against whom they were inadmissible. This court is of opinion that for the sake of safety and clarity it is desirable that such a note should be made in both places, though it is sufficient if the record makes it appear in one or the other that such statements were not wrongly considered. But when, as in this case, there is nothing in the record to make it so appear, this court might well feel compelled to quash a conviction, even though there were sufficient admissible evidence to support it.”

The result is that the evidence of P.W.5 as to what the 1st accused said to him (P.W.5) could not be used as evidence against the appellant. What other evidence was available against the appellant? In concluding his evidence before the trial court, P.W.5 said:-

“I then removed the 1st accused from Nyanya to Garki Police Station. I then asked him to be taken to the house of the 2nd accused where he identified the 2nd accused. 2nd accused was arrested and brought to Police Station where he was detained. I went to the cell and spoke with him. I asked him why he was in cell he said that he would speak to me privately. I confronted him with what was told to me by the 1st accused. The statements of the 2nd accused were taken under the words of caution. They confessed and I endorsed the statements. I can identify the statement. I then briefed my Commissioner on the case. Investigation then continued.”

Although, P.W.5 said in the above passage of his evidence that he confronted the appellant with what the 1st accused had told him, he did not say that the appellant admitted the truth of what the 1st accused might have said. He went further to say that the appellant later made a statement. But since the court below had ruled the said statement Exhibit ‘E’ inadmissible

sible, and there is no appeal on the point before this court, it is not for this court to speculate on the contents of a statement or exhibit not in evidence. The consequence is that there was not a shred of admissible evidence against the appellant as to his complicity in the murder of the deceased.

B *Clearly in my view, the court below, which had itself ruled that the only evidence against the appellant. Exhibit 'E' was in admissible was in error to have affirmed the conviction of the appellant. This is why in my view the court below was unable to specifically identify the pieces of evidence which it relied upon as establishing the guilt of the appellant. In a simple and*
C *direct language, there was no such evidence.*

In the final conclusion, I hold that this appeal is meritorious. I allow it and pronounce the appellant not guilty of the offence brought D against him. He is accordingly discharged and acquitted.

ONU JSC

E I had the privilege to read before now the judgment of my learned brother, Oguntade, JSC. I agree with him that the appeal is meritorious and ought therefore to succeed. I have nothing useful to add thereto than a verdict of discharge and acquittal.

F KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Oguntade, JSC. I agree with it and for the reasons he gives, I too allow the appeal. The appellant is G accordingly acquitted and discharged.

MUSDAPHER JSC

H I have read before now, the judgment of my Lord, Oguntade, JSC., just delivered and for the same reasons so eloquently discussed in the aforesaid judgment, which I adopt as mine, I too, allow the appeal and set aside the decisions of the lower courts. I pronounce the appellant not guilty of the offence brought against him,

the appellant is accordingly discharged and acquitted.

AKINTAN JSC

The appellant was arraigned and tried at Abuja High Court for the offence of culpable homicide punishable with death. He pleaded not guilty and at the conclusion of his trial he was convicted as charged and sentenced to death. His appeal to the Court of Appeal was dismissed. The present appeal is against the judgment of the Court of Appeal dismissing his appeal. The parties filed their respective Briefs of Argument in this court. The main issue raised in this court is whether there was sufficient evidence to support the conviction of the appellant. The facts relied on by the trial court were based principally on the alleged admissions made by a co-accused which the appellant did not adopt and a confessional statement by the appellant. But the court below rejected the said confessional statement. With the rejection of the confessional statement made by the appellant and the insufficiency of the evidence of the co-accused, there would be no enough credible evidence left to support the conviction.

In conclusion therefore and for the reasons I have given above and the fuller reasons given in the leading judgment written by my learned brother, Oguntade, JSC., the draft of which I have read, I allow the appeal and make an order setting aside the conviction of the appellant and replace same with an order of not guilty, discharged and acquitted.

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