

SUPREME COURT OF NIGERIA
6TH FEBRUARY, 2009. SC. 206/2007
CORAM:- N. TOBI, M. MOHAMMED, W. S. N.
ONNOGHEN, P. O. ADEREMI, J. O. OGEBE, JJSC

SULEIMAN OLAWALE APPELLANT
AROGUNDARE
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Oral confessions - Admissibility - Being an admission made by a person - Suggesting that he committed the offence - It is a relevant fact against him and admissible under s. 27 of Evidence Act (H1)

EVIDENCE - Admissibility - Crime - Hearsay - Applicability - Where a witness before whom an oral confession is made - Testifies in the open court as to what he was told - It is not hearsay but a direct evidence of what he was told (H2)

EVIDENCE - Circumstantial evidence - Effect of - Where there is circumstantial evidence conclusively pointing to guilt of accused - It raises a presumption of guilt - To be rebutted by accused - Which accused herein failed to do (H3)

FACTS

The appellant was a co-accused with another person together with whom he was arraigned and tried for the offence of culpable homicide at the high court of the Federal Capital Territory. The accused persons were alleged to have killed the appellant's father.

The evidence against the accused persons were mainly their respective written confessions, Exhibits D and E, and the testimony of PW5, a police officer to whom the appellant had voluntarily made an oral confession while in custody. The trial court found the accused persons guilty as charged. Their appeal to the Court of Appeal was dismissed though Exhibits D and E were expunged from the record as inadmissible. The Court of Appeal had held that besides exhibit D and E there was sufficient evidence on record to sustain the convic-

tion. Dissatisfied, appellant has further appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether in the absence of the confessional statement expunged by the Court of Appeal, the court was right to have confirmed the conviction and sentencing of the appellant on the evidence of P.W.5 or any other evidence circumstantial or otherwise.”

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

Oral confessions - Admissibility

1. An admission made at any time by person charged with an offence (even before it had been decided to formally charge him with committing a crime without administering a caution) suggesting that he committed the offence is a relevant fact against him.

A critical look at the evidence of P.W.5 Ajuji Yola, - Assistant Commissioner of Police at Pages 25 - 27 of the printed record showed that the appellant made a purely voluntary unsolicited confession of his crime to him. He made this confession to P.W.5 before his confessional statement in Exhibit ‘D’ which was expunged was ever recorded. This voluntary confession made to P.W.5 and given graphically before the trial court without any challenge by the appellant or his counsel was clearly admissible under Section 27 of the Evidence Act. (pp. 305 E/ 306 A)

EVIDENCE - Admissibility - Hearsay

2. The submission of the learned counsel for the appellant that the evidence of P.W.5 is hearsay is totally misconceived. P.W.5 gave direct evidence of what the appellant told him confessing to a serious offence before the trial court in the presence of the appellant and his counsel who for reasons best known to them failed to challenge it. The confession is so graphic and vivid that its veracity is not in doubt. (p. 306 D)

Circumstantial evidence - Effect of

3. Apart from the evidence P.W.5 there was this circumstantial evidence pointing to the guilt of the appellant in that the appellant reported that his father was killed by armed robbers, but when the Police arrived at the scene it was discovered that the house was not broken into and only the appellant who led them into the father’s

bedroom to find him dead in his pool of blood could account for his father's death.

In the case of Akinmogu v. The State (2000) 6 NWLR (Pt. 662) 608 at page 629, Iguh JSC had this to say on circumstantial evidence. *Where, as in the present case, the evidence conclusively points at the accused as the perpetrator of the crime for which he is charged, and the evidence is duly tested scrutinized and accepted by the court, the onus is on the accused to rebut the presumption of guilt or to cast a reasonable doubt on the case of the prosecution by preponderance of probabilities.*

I adopt the words of my learned brother in holding that the appellant was properly convicted by the lower court based on the evidence of PW.5 and circumstantial evidence which pointed irresistibly to his guilt and for which he made no attempt to counter the case of the prosecution. (pp. 306 E/ 307 A/C)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Evidence given in court is different from confessional statement

A confessional statement is different from evidence given by a witness in court. While a confessional statement is a pre-trial matter, made by an accused person mostly in pre-trial custody, evidence given by a witness in court is before the face of the trial court. One cannot be substituted for the other. The mere fact that the contents by way of facts of both are similar or the same, do not in law make them the same as the legal incidents of acceptability or otherwise of the two are quite different. In confessional statements, the test is its voluntary nature. In evidence in court, the test is relevance, veracity or authenticity. I therefore entirely agree with the Court of Appeal in rejecting the confessional statement and accepting the evidence of PW.5 in court. (p. 309 E)

ONNOGHEN JSC

2. Testimony of PW5 is not hearsay evidence

In the case of Subramaniam vs Public Prosecutor, (1956) 1 WLR 965 at 969, hearsay evidence was described in the following terms:-

"Evidence of a statement made to a witness called as a witness may or may not be hearsay. It is hearsay and inadmissible when the

object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made."

B From the above, it is clear that the purpose for which a state-
ment made by a person to the witness is tendered in court deter-
mines its admissibility since if the intention of introducing the evi-
dence is to establish the truth of the statement/evidence it would be
hearsay and inadmissible but would be admissible if the purpose or
C intention is to establish the fact that the statement was made by the
person concerned.

In the instant case, is the evidence of P.W.5 hearsay evidence?
I think it is not particularly as it was to confirm the fact that the appel-
lant made the statements credited to him to P.W.5. (p. 312 H)

D
3. Testimony of P.W.5 is a positive and direct evidence

The second and very important aspect of the evidence of P.W.5 is
that it constitutes an oral or verbal confession of the appellant as to
the commission of the offence of murder - the confession as narrated
E by P.W.5 was made voluntarily by the appellant to P.W.5 a superior
police officer.

The testimony of P.W.5 as to what the appellant told him is
positive and direct - it is a direct evidence of what the appellant said
or confessed to P.W.5 which was narrated to the court in the presence
F of the appellant who failed to challenge it as to either the making of
the statement attributable to him or the truth of its contents.
(p. 313 E/H)

G *4. Inadmissibility of a written confession may not render its oral ver-
sion inadmissible*

The learned counsel for the appellant is under the erroneous impres-
sion that the original written confessional statement of the appellant
having been expunged from the record on whatever grounds, the
H oral confession made by the appellant to P.W.5 is thereby rendered
inadmissible without the appellant raising a separate objection to its
admissibility. A confession may be either oral or in writing. In the
instant case, it was both oral and in writing. *Does the expunging of
the written confession render inadmissible the oral version of the con-*

fession of the appellant to PW5 - who was not the person before whom the written confession was made?

I do not think so. It was the duty of learned counsel for the appellant to have challenged the testimony of PW5 but he did not. It is at the moment too late in the day to make the attempt. (p. 314 A) **B**

REPRESENTATION

Chukwuma-Machukwu Ume Esq. for the appellants with him are Messrs. C. U. Ekomaru; I. M Njaka; S. O. Olabode and P. N. Ume (Mrs.). **C**

R. N. Chenge, Esq. DDPP Fed. Min. of Justice, for the respondent with him is Mrs. G. E. Odegbaro, C.S.C- Fed. Min. of Justice, Abuja.

CASES REFERRED TO

R. V Jackson (1953) 1 All ER. 872 **D**
 R. V Bathurst (1968) 52 Cr. App. R. 251
 R, V Mutch (1972) 57 Cr. App. R. 196
 R. V. Gilber (1977) 66 Cr. App. R. 237
 Judicial Service Committee V. Omo 1990 6 NWLR (Pt.157) 407 **E**
 Achara V. Attorney-General Bendel State, 1990 7 NWLR (Pt. 160) 92
 Okhuorobo V Aigbe 2000 9 NWLR (771)39.
 Onungwa v. The State 1976 NSCC (Vol. 10) 27
 Akinmogu v. The State (2000) 6 NWLR (Pt. 662) 608 **F**

STATUTES REFERRED TO

Evidence Act, s. 27
 Penal Code, s. 221 **G**

LEAD JUDGMENT BY OGEBE JSC

The Appellant and one other were arraigned on the 19th of April 1990 at the High Court of Abuja, Federal Capital Territory, on a one count charge of culpable homicide punishable with death under Section 221 of a Penal Code for causing the death of his father, Noshude Atanda Arogundare. The trial Court convicted them of the offence based mainly on their confessional statements Exhibit 'D' and 'E'. Their appeal to the Court of Appeal was dismissed but their **H**

confessional statements were expunged from the record because the Court of Appeal was of the view that the procedure of the trial within trial to determine whether the statements were voluntary or not was irregular. It however, held that there was sufficient circumstantial evidence without confessional statements to support their conviction.

B The appellant has further appealed to this Court and the sole issue formulated in the appellant's brief reads thus:

C *"Whether in the absence of the confessional statement expunged by the Court of Appeal, the court was right to have confirmed the conviction and sentencing of the appellant on the evidence of PW.5 or any other evidence circumstantial or otherwise."*

The learned counsel for the respondent in the respondent's brief formulated 2 issues for determination as follows:

D (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."*

E (2) *Whether the court below was right to have affirmed the decision of the trial court in admitting the evidence of PW.5 having regard to the hearsay rule."*

There is only one issue in this appeal and that is the sole issue formulated in the appellant's brief.

F The learned counsel for the appellant submitted that without the confessional statement of the appellant which was rightly expunged by the lower court, there was no sufficient circumstantial evidence or otherwise to support the conviction.

He said that the evidence of PW.5 which contained the confession of the appellant was hearsay evidence and was inadmissible.

G He referred to a number of foreign cases such as:

"R. V Jackson (1953) 1 All ER. 872; R. V Bathurst (1968) 52 Cr. App. R. 251; R. V Mutch (1972) 57 Cr. App. R. 196; R. V Gilber (1977) 66 Cr. App. R. 237."

H With the greatest respect, we have sufficient Nigerian case law to help the learned counsel in making his submission on the legal principles necessary for a case of this nature and I consider it of no assistance in making a voyage into foreign cases.

The learned counsel submitted strongly that hearsay evidence is evidence which does not derive its value solely from the credit

given to the witness but which also rests in part on the veracity and competence of some other person. He relied on the cases of Judicial Service Committee V. Omo 1990 6 NWLR (Pt.157) 407 Achara V. Attorney-General Bendel State, 1990 7 NWLR (Pt. 160) 92 and Okhuorobo V Aigbe 2000 9 NWLR (771)39.

The learned counsel for the respondent submitted that there was sufficient circumstantial evidence apart from the appellant's confessional statement Exhibit 'D' to sustain the conviction and the sentence of the appellant. It is his contention that the evidence of P.W.5 was not hearsay evidence but a voluntary confession of the appellant to the witness that he killed his father with detailed account of the circumstances. He gave his evidence in the presence of the appellant himself and was not cross-examined. Not only that the appellant rested his case on the prosecution case and thus missed the opportunity of countering the damning evidence given against him.

He referred to the case of Niyi Akinmoju v. The State 2000 6 NWLR (Pt. 662) 608, to show that where evidence conclusively points at an accused person as the offender the onus is on the accused to rebut the presumption of guilt or to cast a reasonable doubt on the case of prosecution.

The Law is firmly established that a free and voluntary confession which is direct and positive and properly proved is sufficient to sustain a conviction. It is equally settled that ***an admission made at any time by person charged with an offence (even before it had been decided to formally charge him with committing a crime without administering a caution) suggesting that he committed the offence is a relevant fact against him.*** See Onungwa v. The State 1976 NSCC (Vol. 10) 27 and Akinmogu v. The State (2000) 6 NWLR (Pt. 662) 608.

A critical look at the evidence of P.W.5 Ajuji Yola, - Assistant Commissioner of Police at Pages 25 - 27 of the printed record showed that the appellant made a purely voluntary unsolicited confession of his crime to him. The witness was on a routine visit to suspects detained by his men in all police stations under him when he met the appellant at 2 a.m. with his eyes wide open. He asked him why he did not go to sleep. He replied that whenever he closed his eyes he was seeing the image of his father whom he killed. He solicited for prayers and then narrated in detail

how he and one other killed his father. He made a clean breast of the whole sordid story of how he put overdose of sleeping tablets in the father's food to make him sleep and then killed him in a vicious manner. **He made this confession to P.W.5 before his confessional statement in Exhibit 'D' which was expunged was ever recorded. This voluntary confession made to P.W.5 and given graphically before the trial court without any challenge by the appellant or his counsel was clearly admissible under Section 27 of the Evidence Act** which reads:

"(1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

(2) Confession, if voluntary, are deemed to be relevant facts as against the persons who make them only."

The submission of the learned counsel for the appellant that the evidence of P.W.5 is hearsay is totally misconceived. P.W.5 gave direct evidence of what the appellant told him confessing to a serious offence before the trial court in the presence of the appellant and his counsel who for reasons best known to them failed to challenge it. The confession is so graphic and vivid that its veracity is not In doubt.

Apart from the evidence of P.W.5 there was this circumstantial evidence pointing to the guilt of the appellant in that the appellant reported that his father was killed by armed robbers, but when the Police arrived at the scene it was discovered that the house was not broken into and only the appellant who led them into the father's bedroom to find him dead in his pool of blood could account for his father's death.

In the case of Akinmogu v. The State (2000) 6 NWLR (Pt. 662) 608 at page 629, Iguh JSC had this to say on circumstantial evidence:

"In the present case, there can be no doubt that the circumstantial evidence led against the appellant was clearly strong and irresistibly pointed at him as the perpetrator of the offence for which he was charged. His rooms were never broken into. He had always been in possession of the keys to them. He also never alleged that there was any other person than himself who had access to his bedroom and who could have removed the air-conditioners.

Where, as in the present case, the evidence conclusively points at the accused as the perpetrator of the crime for which he is charged, and the evidence is duly tested scrutinized and accepted by the court, the onus is on the accused to rebut the presumption of guilt or to cast a reasonable doubt on the case of the prosecution by preponderance of probabilities. See *Onakpoya V. The Queen* (1959) S.C.N.L.R. 384, *Kalu V The State* (1993) 6 N.W.L.R. (Pt 300) 385 at 396. In the present case, there was no attempt whatsoever on the part of the appellant to rebut the presumption of guilt against him or to cast a reasonable doubt on the case of the prosecution, albeit, by preponderance of probabilities.”

I adopt the words of my learned brother in holding that the appellant was properly convicted by the lower court based on the evidence of P.W.5 and circumstantial evidence which pointed irresistibly to his guilt and for which he made no attempt to counter the case of the prosecution. It is a heinous offence for a son to kill his father as in the circumstances of this case. Accordingly, I see no merit in this appeal and I hereby dismiss it and affirm the conviction and sentence of the appellant in line with the judgment of the Court of Appeal.

TOBI JSC

This is an appeal on a conviction of culpable homicide punishable with death under section 221 of the Penal Code. The appellant was arraigned on 19th April, 1990 at the Federal Capital Territory High Court, Abuja on one count charge of culpable homicide punishable with death. Kushake, J was the trial Judge.

In the course of the trial, an alleged confessional statement was tendered. The appellant raised an objection which resulted in a trial within trial. The trial within trial took some fourteen months. Kushake, J, convicted the appellant and passed a death sentence on him. His appeal to the Court of Appeal was dismissed. This is a further appeal to this court.

Briefs were filed and exchanged. The appellant formulated the following issue for determination:

“Whether in the absence of the confessional statement expunged

by the Court of Appeal, the court was right to have confirmed the conviction and sentencing of the appellant on the evidence of P.W.5 or any other evidence circumstantial or otherwise”

The respondent formulated the following issue for determination:

B *“Whether from the totality of the facts and circumstances of the case the court below was right when it affirmed the decision, conviction and sentence of the trial court on the ground of circumstantial evidence”*

C The pith of the submission of learned counsel for the appellant is that while the Court of Appeal was right in expunging the statement admitted by the learned trial Judge as confessional statement, it was wrong in confirming the conviction on the evidence of P.W.5 The pith of the submission of learned counsel for the respondent is that D the Court of Appeal was right in affirming the decision, conviction and sentence of the trial court on the ground that the respondent proved the case against the appellant beyond all reasonable doubt.

What did the Court of Appeal say in affirming the conviction and sentence of the appellant? The Court of Appeal, per Peter Odili, E JCA, said in the penultimate paragraph at page 103 of the Record and I quote the learned Justice in some detail:

“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/appellants committed the offence F for which they were convicted and sentenced. The clever posturing of the learned defence counsel would not cure the situation of the defence who in spite 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 G by relying only on shooting down the confessional statements and no more. Well they successfully shot down the extrajudicial statements based on procedural irregularity which was fundamental but H 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/appellants. See The State v. Ogubunjo (supra).”

What was the evidence of P.W.5 the Court of Appeal relied on in the conviction of the appellant? The evidence is at pages 25 to 27 of the Record. I reproduce it here in part:

“As a routine I went to visit suspects detained by my men in all the police stations. I met him (the appellant) sitting down with his eyes wide open around 2.00a.m. I asked him to know why he was still awake. He told me that he was not able to sleep and that I should help to pray because whenever he closed his eyes, he was seeing the image of the father whom he killed... He said he was the one who killed him... He said they went to a chemist shop to buy sleeping pills, He gave me the name as magada... After making sure that the deceased was fast asleep, 2nd accused asked the 1st accused to soak a towel in water., 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... He told me that they used the rope to strangle the deceased who did not die in time”

Learned counsel for the appellant argued that the evidence of P.W.5 is a re-play or a report of the purported confessional statement made by the appellant. It was based on the expunged confessional statement and that relying on the evidence of P.W.5 amounts to bringing through the back door the confessional statement which was rightly thrown away by the court. He cited Judicial Service Committee v Omo (1990) 6 NWLR (Pt.57) 47 at 468 and Achora v. Attorney General Bendel (1990) 7 NWLR (Pt. 160) 92 at 98,

A confessional statement is different from evidence given by a witness in court. While a confessional statement is a pre-trial matter, made by an accused person mostly in pre-trial custody, evidence given by a witness in court is before the face of the trial court. One cannot be substituted for the other. The mere fact that the contents by way of facts of both are similar or the same, do not in law make them the same as the legal incidents of acceptability or otherwise of the two are quite different. In confessional statements, the test is its voluntary nature. In evidence in court, the test is relevance, veracity or authenticity. I therefore entirely agree with the Court of Appeal in rejecting the confessional statement and accepting the evidence of P.W.5 in court. I also agree with the Court of Appeal that the evidence of P.W.5 clearly justifies conviction of the appellant for murder. Here is a man who said that he and one other person killed the

father. They drugged him to sleep, blocked his natural passage to shout, tied him with a rope and finally killed him. Can the law acquit such a person? No. He must face the gallow.

Like my learned brother, Ogebe, JSC, I too dismiss the appeal.

B

MOHAMMED JSC

I have had the opportunity before today of reading the judgment just delivered by my learned brother Ogebe J.S.C. I entirely agree with him that there is no merit in this appeal. The law is indeed well settled that where the evidence adduced by the prosecution is cogent and positive that it leaves no room whatsoever for any other conclusion other than that it was the accused that committed the offence, the court can safely convict on such evidence. See *KIM V THE STATE* (1991) 2 NWLR (Pt.175) 622 at 625. In the present case where the Appellant was charged with the offence of culpable homicide punishable with death under section 221 of the Penal Code for having caused the death of his own father and in spite of cogent and positive evidence on record that leaves no room whatsoever for any other conclusion other than that it was the Appellant who committed the offence, he decided to rest his case on the same evidence adduced by the prosecution, his appeal is bound to fail.

E

Accordingly, I also dismiss this appeal and affirm the conviction and sentence passed on the appellant and affirmed by the court below.

F

ONNOGHEN JSC

The issue that calls for determination in the appeal is as formulated by the learned counsel for the appellant, Chukwuma Machukwu Ume Esq. in the appellant's brief of argument filed on the 2nd day of August, 2007 as follows:-

"Whether in the absence of the confessional statement expunged by the Court of Appeal, the court was right to have confirmed the conviction and sentencing of the appellant on the evidence of P.W.5 or any other evidence circumstantial or otherwise (Ground 1)."

H

The appellant together with one Dotun Fatilewa were charged

before the High Court of the Federal Capital Territory, Abuja with the following offence:

“That you Suleiman Olawale Arogundare male, 19 years, of block 335 Zone 6, Wuse District, Abuja and Dotun Fatilewa male 27 years, of block 380 Zone 4, Wuse on or about the 30th day of November, 1989, at Wuse District within the jurisdiction of the High Court of Justice, Federal Capital Territory Judicial Division, Abuja committed culpable homicide punishable with death to wit, you caused the death of one Noshudi Atanda Arogundare by giving him drug to induce him to sleep, biting (sic) his body with wooden handle of a hoe several times, covered his mouth with towel soaked in water and tied his neck with twine, all this act were done by both of you with the intention of causing his death and you thereby committed an offence punishable under section 221 of the Penal Code.”

The prosecution, in attempt at proving the charge called six witnesses and tendered inter alia, exhibits D and E which were extra judicial confessional statements of the accused persons. At the end of the prosecution’s case, the defence called no witness but rested their case on that of the prosecution.

It is the case of the prosecution that on the 30th day of November, 1989 at about 10pm the police intercepted a wireless signal that armed robbers were attacking a home at block 334, flat 2, Zone 6, Wuse and consequently proceeded thereto. At the scene, the police saw the appellant who is the son of the deceased on the ground screaming. The appellant confirmed the story of the alleged armed robbery attack which allegedly resulted in the death of his father. The police noticed that the house was not broken into and therefore arrested the appellant and later the 2nd accused person who made confessional statements to the police which statements though admitted at the trial were expunged from the record by the lower court. The appellant and the 2nd accused were however convicted and sentenced to death on the strength of the confessional statements, exhibits D and E. Apart from the confessional statements, there is also the testimony of P.W.5 which is an oral confession of the appellant of the offence charged to P.W.5

Upon appeal to the lower court, the court expunged exhibits D and E from the record but affirmed the conviction and sentence of the appellant and the 2nd accused person based on the evidence of

P.W.5 The instant appeal is a further appeal by the appellant against the judgment of the lower court delivered on the 12th day of April, 2006, the sole issue for the determination of which I had earlier re-produced in this judgment.

In arguing the issue, the learned counsel for the appellant referred to the evidence of P.W.5 and submitted that the testimony of the said witness is nothing but a narration of the confessional statement of the appellant earlier expunged by the lower court and that the reliance of the lower court on the evidence of the P.W.5 amounts to bringing through the backdoor, the confessional statement earlier thrown out by the court. It is also the submission of learned counsel for the appellant that the evidence of P.W.5 amounts to hearsay and the lower court ought not to have relied on it, relying on the case of Judicial Service Committee vs Omo (1990) 6 NWLR (Pt. 157) 407 at 468; Achara vs A- G Bendel (1990) 7 NWLR (Pt. 160) 92 at 98; Awuse vs Odili (2005) 16 NWLR (Pt. 952) 447; Okhwarobo vs Aigbe (2002) 9 NWLR (Pt. 771) 30.

On his part, the learned counsel for the respondent, S. Aliyu Esq., DPP of the Federation submitted that the prosecution proved the charge against the appellant and as such the lower court was right in affirming the conviction and sentence of the appellant; that the learned counsel for the appellant has not stated reasons why this court should interfere with the concurrent findings of facts by the lower courts and urged the court not to interfere, relying on Ogunbayo vs The State (2007) 29 NSCQR 806 at 834; Adara vs The State (2006) 25 NSCQR 604 at 612; Ndidi vs The State (2007) 30 NSCQR 395 at 408.

It is the further submission of learned counsel for the respondent that the evidence of P.W.5 is not hearsay and that the lower court was right in relying on same and urged the court to resolve the issue against the appellant and dismiss the appeal.

The primary issue before this court is whether the evidence of P.W.5 which forms the basis of the affirmation of the conviction and sentence of the appellant is hearsay evidence and consequently inadmissible. While learned counsel for the appellant contends that it is, the learned counsel for the respondent maintains that it is not.

In the case of Subramaniam vs Public Prosecutor, (1956) 1 WLR 965 at 969, hearsay evidence was described in the following

terms:-

“Evidence of a statement made to a witness called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.” B

From the above, it is clear that the purpose for which a statement made by a person to the witness is tendered in court determines its admissibility since if the intention of introducing the evidence is to establish the truth of the statement/evidence it would be hearsay and inadmissible but would be admissible if the purpose or intention is to establish the fact that the statement was made by the person concerned. C

In the instant case, is the evidence of P.W.5 hearsay evidence? D I think it is not particularly as it was to confirm the fact that the appellant made the statements credited to him to P.W.5 The truth of the appellant making the statements is enhanced by the fact that the appellant did not testify at the trial though he had the opportunity to deny what P.W.5 said that he said neither did his counsel cross examine P.W.5 at all. E

The second and very important aspect of the evidence of P.W.5 is that it constitutes an oral or verbal confession of the appellant as to the commission of the offence of murder - the confession as narrated by P.W.5 was made voluntarily by the appellant to P.W.5 a superior police officer. Again, the appellant did not challenge P.W.5 either by cross examination or by adducing evidence in rebuttal - He did not deny what P.W.5 said at all. F

Section 27 of the Evidence Act defines confession as follows:- G

“27 (1) A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

(2) Confession, if voluntary, are deemed to be relevant facts as against the persons who make them only.” H

The testimony of P.W.5 as to what the appellant told him is positive and direct - it is a direct evidence of what the appellant said or confessed to P.W.5 which was narrated to the court in the presence of the appellant who failed to challenge it as to either the making of

the statement attributable to him or the truth of its contents.

The learned counsel for the appellant is under the erroneous impression that the original written confessional statement of the appellant having been expunged from the record on whatever grounds, the oral confession made by the appellant to PW5 is thereby rendered inadmissible without the appellant raising a separate objection to its admissibility. A confession may be either oral or in writing. In the instant case, it was both oral and in writing. *Does the expunging of the written confession render inadmissible the oral version of the confession of the appellant to PW5 - who was not the person before whom the written confession was made?*

I do not think so. It was the duty of learned counsel for the appellant to have challenged the testimony of PW5 but he did not. It is at the moment too late in the day to make the attempt.

In conclusion, I agree with the reasoning and conclusion of my learned brother, OGEBE, JSC that the appeal is without merit and should be dismissed. I therefore order accordingly and affirm the judgment of the lower court as to the conviction and sentence of the appellant.

Appeal dismissed.

ADEREMI JSC

I have had the privilege of reading, in draft, the judgment of my learned brother, Ogebe JSC. I agree in totality with his reasoning and conclusion. As I have nothing more to add, I would also dismiss the appeal; affirm the conviction and sentence of the appellant as per the judgment of the Court of Appeal.

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H