

SUPREME COURT OF NIGERIA

23RD MARCH, 2012. SC. 72/2010

**CORAM:- W. S. N. ONNOGHEN, I. T. MUHAMMAD, O. O.
ADEKEYE, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

STEPHEN HARUNA APPELLANT
V
A-G OF THE FEDERATION RESPONDENT

APPEALS - Concurrent findings - Supreme Court does not interfere
- Save where findings are perverse (H1)

EVIDENCE - Admissibility - Basis - Exhibits M1-M3 - Once an evidence is relevant to fact in issue - It is considered admissible - And court is bound to admit same (H2)

CRIMINAL PROCEDURE - Confession - Retraction of - Admissibility
- Court can admit and convict on such confession - If satisfied that accused made same (H3)

CRIMINAL PROCEDURE - Conviction - Based on retracted confession - Validity - Prior to conviction - Extraneous evidence needs to be adduced - To make it probable that the confession is true (H4)

COURTS - Evidence - Evaluation - Ascription of probative value to witnesses - Is primary function of trial court - That heard and watched demeanour of the witnesses (H5)

COURTS - Evidence - Evaluation - Trial court is not bound to make findings - As to probative value of Exhibits A-N - Before a conviction is grounded (H6)

EVIDENCE - Weight - The fact that evidence is admissible - Does not mean that it has weight - Because same may be of no probative value (H7)

EVIDENCE - Appeals - Reevaluation - Justification - Where trial court fails to properly evaluate evidence before it - Appellate court can

interfere - Provided that credibility of witnesses is not involved (H8)

EVIDENCE - Proof - Onus - Appellant has duty to prove - That PW3 lacks capacity to remember events - Which makes his evidence unreliable (H9)

CRIMINAL PROCEDURE - Proof - Prosecution is not bound to call all listed witnesses - In order to prove its case beyond reasonable doubt (H10)

MURDER - Proof - Doctrine of last seen - Onus is on the person last seen with deceased - To offer minimum explanation - As to cause of the death (H11)

FACTS

Accused/appellant was attached as security guard for the deceased – Miss E.N. Igwe (an Assistant General Manager, Legal of Power Holding Company of Nigeria Plc). On that fateful day, the body of the deceased was found on the floor in her house. Appellant was the only person in the compound with her. The police subsequently arrested appellant. Appellant made three different statements to the police. He confessed in one of the statements that he removed the sum of N40, 500 from the deceased which he handed over to his girl friend one Mary Jimoh. The investigation police officer contacted Mary Jimoh and recovered the said sum of money. The police recovered other items at the scene of crime.

Accordingly, appellant was arraigned before the High Court of Federal Capital Territory, Abuja for the offence of culpable homicide contrary to section 221 of the Penal Code. At the trial, prosecution called six witnesses. Prosecution tendered several exhibits including the said statements of appellant marked as Exhibits M1-M3. At end of trial, the court relying on appellant's confessional statement (corroborated by other evidence) and the doctrine of last seen, convicted appellant of the offence as charged and thus sentenced him to death. Dissatisfied, appellant appealed to the Court of Appeal, Abuja contesting reliance placed on the confessional statement. The court dismissed the appeal and affirmed the judgment of trial court. Aggrieved further, appellant has appealed to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the court below is right to hold that it is now too late in the day for the Appellant/Accused to seek to impugn the value or weight to be placed on those exhibits when at the trial the defence opposed their admissibility and later withdrew its objection.

2. Whether the courts below are right to hold that what the Appellant counsel calls incongruous pieces of contradictions are really of no moment and did not affect the substance of what was intended to be conveyed in exhibit M3.

3. Whether the court below is right to hold that the trial Judge did not misdirect himself when he held that there were many questions which the accused/appellant threw open that needed his explanation and he failed to deliver as the Appellant is only required to offer a minimum explanation.

HELD (Unanimously dismissing the appeal per **GALADIMA JSC**)
APPEALS - Concurrent findings

1. I have observed that this appeal is against concurrent findings of facts of the two courts below. The firmly rooted principle of law is that this court does not make a practice of interfering with such concurrent findings of fact unless the findings are perverse or there are special circumstances to warrant same.

In the face of overwhelming evidence against the Appellant, I cannot upturn the concurrent findings of the trial court and the court below (the court of Appeal) when the Appellant has failed to demonstrate that the said concurrent findings were perverse and could not be supported having regard to the evidence adduced by the Prosecutor. (p. 1317 B/1323 A)

EVIDENCE - Admissibility - Basis

2. All 3 statements of the Appellant obtained under words of caution, were admitted as Exhibits, 'M1 - M3'. These Exhibits were admitted without objection. The learned defense/Counsel repeatedly maintained that he was not objecting to the admissibility of the Exhibits. Generally admissibility is based on relevance. Once evidence is probative of the fact in issue, it is considered to be relevant and therefore admissible, because relevance determines admissibility. Therefore, once evidence is relevant for the proper determination of any fact in

issue, the court is bound to admit it. (p.1317 H)

CRIMINAL PROCEDURE - Confession - Retraction of

3. Considering the fact that the appellant retracted ever making the third confessional statement (Exhibit “M3”), it is relevant to address the issue on whether the court can convict on such evidence. It is settled law that the court can still admit and convict on a retracted confession, if satisfied that the accused person made the statement and as to the circumstances which give credibility to the contents of the confession. (p. 1318 C)

Conviction - Based on retracted confession - Validity

4. Yet it is desirable that, before conviction can be properly based on such a retracted confession there ought to be some corroborative evidence outside the confession which would make it probable that the confession was true. (p.1318 E)

Evidence - Evaluation

5. There was other issue requiring my emphasis. Whether there was evaluation of evidence by the trial court. It is instructive to note that evaluation of evidence and ascription of relevant probative value thereto is the primary duty of the trial court, who had the opportunity to see and hear the parties and assessed the witnesses. The trial Judge has the advantage of seeing the witnesses, watching their demeanour and hearing them give evidence. (p. 1318 H)

Evidence - Evaluation

6. It is instructive to note that the trial court is not bound, as a matter of law; to make a finding as to the probative value of all the Exhibits (A - N) before a conviction could be grounded in the circumstance of the present case. (p. 1319 G)

EVIDENCE - Weight

7. The fact that evidence, oral or documentary is admissible does not mean that it has weight. It may not have any probative value or any weight at all, though admissible. (p. 1319 G)

EVIDENCE - Appeals - Reevaluation - Justification

8. It is trite principle of law that an appellate court should loathe to interfere with or reverse findings of fact made by a court of trial unless such findings are perverse. It is only when the issue at stake is narrowed down to only the inference to be drawn from proved facts without going into the rigour of determine credibility that the appellate court could rightly intervene to re-evaluate evidence. The Appellants argument is that the court ought to have reevaluated the evidence without restricting itself to inference that could be drawn to already established facts. He also queried the credibility of witnesses called and evidence tendered. All these are clearly outside the allowed purview within which the court below could re-evaluate the evidence already evaluated by a trial court. (p. 1320 B)

EVIDENCE - Proof - Onus

9. In paragraphs 6.02 - 6.04, of the Appellants brief, he argues that the trial court ought not to have attached any weight to the testimony of PW3, one IMRAN ATIKU IBRAHIM who was a Principal Security Manager with PHCN, on the ground that his recollections must have been wiped out of memory because of effluxion of time (according to him a period of one and half years) at the time of his testimony, and also the fact that the two other so called witnesses did not corroborate the testimony of PW3 that the accused had blood stains on his body and with some wounds on his face and hand at the time PW3 saw him (the Appellant). The implication of the Appellant's argument is that a time frame must be set within which he must give his testimony. In other words any witness called within or after one year and six months cannot be relied upon because such witness will not be able to recollect what happened. This argument is not tenable. The onus lies on the Appellant to prove that the PW3 lacks the capacity to remember events and therefore his evidence cannot be relied on when he testified. (p. 1321 D)

CRIMINAL PROCEDURE - Proof - Duty on prosecution

10. Appellants' line of argument is that the testimony of PW3 was not corroborated by one MUBARAK EL-NAFATY and IKARA BASSEY. But they must not be called if the prosecution did not require their evidence. The prosecution is not bound to call all his listed

witnesses. He would call enough witnesses that could help him establish his case beyond reasonable doubt. He is not required to call a large team of witnesses whose evidence are not helpful in resolving the issue before the trial court.(p. 1321 H)

B MURDER - Proof - Doctrine of last seen

11. There is the last issue framed in Appellants' issue No.3. It is understood within the context of the doctrine of "*last seen*" and the primary duty of a trial court to evaluate evidence and ascribe probative value thereto in the determination of the phrase "*minimum explanation*" required of a person last seen with the deceased. This doctrine is captured at p.261 of the Record by the trial court. The law requires a person last seen with the deceased, whose cause and nature of death is in contention, to offer an explanation of what he D knows about the death of the deceased. Onus is on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased.(p. 1322 B)

NOTABLE POINT OF INTEREST

E ADEKEYE JSC

1. Culpable homicide – Ingredients

The ingredients of the offence of culpable homicide are -

1. That the death of a human being took place.
2. That such death was caused by the accused
- F 3. That the act of the accused that caused the death was done with the intention of causing death or that the accused knew that death would be the probable consequence of his act.

All these ingredients must co-exist before a conviction could G be secured. It is indisputable that the prosecution must prove all these ingredients of the offence of culpable homicide against the appellant beyond reasonable doubt. (p. 1325 D)

REPRESENTATION

H Samuel Zibiri Esq., with Sonny Idasefiema Esq. and Chukuma Okwudiri Esq., for the Appellant
Chief Godwin Obla Esq. with John Alu Esq., for the Respondent

CASES REFERRED TO

Olusegun Otupale & Ors. v. The State (1968) NMLR 261	
Alarape v. State (2001) 14 WRN 1	
Said Jammal v. The State (1999) 12 NWLR (pt. 632) 582	
NAF v. Sqd. Leader Obiosa (2003) 4 NWLR (pt. 810) 233	
Igabele v. The State (2006) 6 NWLR (pt. 975) 100	B
Okoro & Anor. v. The State (1964) 1 ALL NLR 423	
Ubani v. State (2003) 18 NWLR (pt. 851) 24	
Uguru v. State (2002) 9 NWLR (pt. 771) 90	
Adara v. State (2006) 9 NWLR (pt. 984) 155	C
R v. Sykes (1913) CAR 113	
R v. Omokaro (1941) 7 WACA 146	
Achabua v. State (1976) NSCC 74	
Yusufu v. State (1976) 6 SC 167	
Solola v. State (2005) 11 NWLR (pt. 937) 460	D

STATUTES REFERRED TO

Penal Code, s. 221	
Evidence Act, ss. 6, 27(1)	E

LEAD JUDGMENT BY GALADIMA JSC

This is an appeal against the decision of the court of Appeal, Abuja dated 22nd January, 2010 affirming the decision dated 6th October, 2008 of the High Court of Abuja FCT, wherein the Appellant was convicted and sentenced to death for the offence of culpable homicide contrary to section 221 of the penal code. F

The background facts of this case have a remarkably very sad antecedent. The Appellant as has been stated was charged for the offence of culpable homicide contrary to section 221 of the Penal Code and punishable with death. The case against the Appellant was that on or about 31st of December, 2003, he caused the death of one Miss E. N. Igwe. The appellant was a security guard working with POWER HOLDING COMPANY OF NIGERIA PLC (PHCN) and was attached to the deceased who was at the material time Assistant General Manager, Legal. On the date the body of the deceased was found on the floor of her house, the appellant was the only person who was in the compound with her. The Appellant made 3 different statements. In two of the statements, especially, the 3rd statement, the G H

Appellant clearly, directly and unequivocally confessed to the killing of the deceased.

On 20th day of April, 2005, the prosecution counsel opened his case and called 6 witnesses. PW1 testified that a case of culpable homicide was referred from Garki Police Division, involving the appellant. PW1 testified that on getting to the scene of crime he recovered a number of Exhibits which incriminated the appellant. PW1 took Exhibits 'M1 - M3', all statements of the accused, under word of caution and Exhibit "N", statement of the Appellant's girlfriend (one Mary Jimoh) where he kept the money. The appellant testified before the trial court. After the prosecution and defence closed their case the trial court on 6th October, 2008 delivered its judgment wherein it convicted the appellant of the offence of culpable homicide punishable with death. Being dissatisfied with the decision of the court below, the appellant herein further appealed to this Court filing his Notice of Appeal on 9th March, 2010 containing 5 grounds. The Appellant, in his brief of argument dated 4th but filed on 5th May, 2010, formulated 4 issues for determination as follows:

1. Whether the court below is right to hold that it is now too late in the day for the Appellant/Accused to seek to impugn the value or weight to be placed on those exhibits when at the trial the defence opposed their admissibility and later withdrew its objection.

2. Whether the court below are right to hold that what the Appellant counsel calls incongruous pieces of contradictions ore reality of no moment and did not affect the substance of what was intended to be conveyed in exhibit M3.

3. Whether the court below is right to hold that the trial Judge did not misdirect himself when he held that there were many questions which the accused/appellant threw open that needed his explanation and he failed to deliver as the Appellant is only required to offer a minimum explanation.

4. Whether the court below is right to follow the decision of the Judge and rely on Exhibit M3 (3rd statement of accused) to the exclusion of M1 (1st statement of accused) and Exhibit M2 (2nd statement of accused).

It is instructive to note that Appellant's issue No. 1 flows from Ground 1 of the Notice of Appeal, issue No. 1 from Ground I issue No. 3 from Ground 3 and issue No. 4 from Ground 4 respectively.

The issues as formulated by the Appellant can be condensed into sole issue for the purpose of the appeal. The ultimate issue is the determination vel no of the guilt of the appellant. Clearly, the argument of the Respondent is that his guilt has been established beyond all reasonable doubt.

I have observed that this appeal is against concurrent findings of facts of the two courts below. The firmly rooted principle of law is that this court does not make a practice of interfering with such concurrent findings of fact unless the findings are perverse or there are special circumstances to warrant same.

The arguments canvassed by the appellant in his brief could be summarised thus. That the Exhibits tendered by the prosecution leading to the conviction of the appellant were not from proper custody and as such the trial court ought not to have admitted them in evidence; and that the court below ought to have reversed the decision of the trial court. I have carefully gone through the records of proceedings at the trial court pertaining to how the various exhibits namely - Exhibits 'A'- G4 were admitted. These are:

- (a) A grey NEPA Uniform - Exhibit 'A' E
- (b) A black Pair of trousers - Exhibit 'B'
- (c) A broken ceramic Plate - Exhibit 'C'
- (d) A black baton - Exhibit 'D'
- (e) A multi coloured boxer pant - Exhibit 'E'
- (f) A flake (sic) - Exhibit 'F' F
- (g) A bundle of N200 notes (N22, 000) - Exhibit 'G1'
- (h) A bundle of N100 note (N10, 000) - Exhibit 'G2'
- (i) 'bd a bundle of N100 note '97 Exhibit '91G3'91
- (j) Four Pieces of N500 notes (N2, 000) - Exhibit 'G4' G
- (k) Head tie - Exhibit 'H'
- (l) A white pant recovered from the scene of crime - Exhibit 'I'
- (m) 11 printed copies of the deceased's picture that were taken at the scene of crime - Exhibits 'J1-J11' etc-

All 3 statements of the Appellant obtained under words of caution, were admitted as Exhibits, 'M1 - M3'. These Exhibits were admitted without objection. The learned defense/Counsel repeatedly maintained that he was not objecting to the admissibility of the Exhibits. Generally admissibility is based

on relevance. Once evidence is probative of the fact in issue, it is considered to be relevant and therefore admissible, because relevance determines admissibility. Therefore, once evidence is relevant for the proper determination of any fact in issue, the court is bound to admit it.

B The fact that the PW1, through whom the Exhibits were tendered was an IPO, one of the members of the team that first visited the scene of the crime, and thereon collected the exhibits in question, it is not contestable that the Exhibits, collected are irrelevant in proving the offence of murder. The record of appeal also shows that proper foundations were laid by the prosecution counsel, through C the questions put to PW1 and the answers he supplied.

Considering the fact that the appellant retracted ever making the third confessional statement (Exhibit "M3"), it is relevant to address the issue on whether the court can convict on such evidence. It is settled law that the court can still admit and convict on a retracted confession, if satisfied that the accused person made the statement and as to the circumstances which give credibility to the contents of the confession. Yet it is desirable that, before conviction can be properly based on such a retracted confession there ought to be some corroborative evidence outside the confession which would make it probable that the confession was true. See OLUSEGUN OTUPALE & ORS V. THE STATE (1968) NMLR 261 at 265-266. F ANTHONY EJINIMA V. THE STATE (1991) 6 NWLR (pt.200) 627 at 555. The situation that has arisen in this case is that the Appellant's confessional statement was corroborated by the discovery of stolen money he took to his girlfriend at Kubwa, suburb of Abuja city to keep for him. It was on the strength of the confessional statement G that the police went to Kubwa where he discovered the money. Also the testimonies of the driver, the PHCN'S Senior Security Officers and the forensic reports corroborated the Appellant's confessional statement.

H ***There was other issue requiring my emphasis. Whether there was evaluation of evidence by the trial court. It is instructive to note that evaluation of evidence and ascription of relevant probative value thereto is the primary duty of the trial court, who had the opportunity to see and hear the parties***

and assessed the witnesses. The trial Judge has the advantage of seeing the witnesses, watching their demeanour and hearing them give evidence. The portion of the appellant's Brief of argument in the court below relating to the evaluation of evidence is issue No. 3. It reads as follows:-

"Whether the conclusion of the trial judge would have been different if the trial judge had not improperly evaluated the evidence adduced before the trial and made findings of fact not supported by evidence."

This issue raised by the Appellant at the Court below complained of the evaluation of evidence generally without specific reference to Exhibit A - N.

In reply to the above issue the Respondent stated:

"The prosecution through the evidence of PW1, PW2, PW3, PW4, PW5 and PW6 have proved beyond reasonable doubt all the ingredients of the offence of culpable homicide punishable with death which evidence was cogent and had linked the accused with the death of the deceased. The prosecution has proved positive act of the accused causing serious injuries to the deceased. In the instance case, the facts proved in evidence by the prosecution leads to the irresistible conclusion that it is the accused and no other person had the same opportunity to murder the deceased and that he was infact the person who murdered her."

Further, the Appellant has argued at paragraph 5.14 p.16 of his Brief of argument before this court that:

"It is further submitted that the trial court did not make any finding as to whether Exhibit A - N have probative value throughout its judgment."

It is instructive to note that the trial court is not bound, as a matter of law; to make a finding as to the probative value of all the Exhibits (A - N) before a conviction could be grounded in the circumstance of the present case. The fact that evidence, oral or documentary is admissible does not mean that it has weight. It may not have any probative value or any weight at all, though admissible.

I do not agree with the learned counsel that no probative value was ascribed to the Exhibits admitted in evidence. Indeed, apart from reliance on the Appellant's confessional statement, nonetheless pp.143

- 177 of the record of Appeal show that the trial court did rightly and effectively examine and evaluate the relevant evidence relating to the murder of the deceased. The trial court considered in details the testimonies of the witnesses the exhibits tendered and -all the supporting circumstantial evidence validating the confessional statements of the Appellant to the crime of murder. Particularly, the court used Exhibit M3 (the third confessional statement of the appellant) as an anchor to link and evaluate the other relevant and corroborative evidence in establishing the guilt of the appeal.

It is trite principle of law that an appellate court should loathe to interfere with or reverse findings of fact made by a court of trial unless such findings are perverse. It is only when the issue at stake is narrowed down to only the inference to be drawn from proved facts without going into the rigour of determine credibility that the appellate court could rightly intervene to re-evaluate evidence. The Appellants argument is that the court ought to have reevaluated the evidence without restricting itself to inference that could be drawn to already established facts. He also queried the credibility of witnesses called and evidence tendered. All these are clearly outside the allowed purview within which the court below could re-evaluate the evidence already evaluated by a trial court

It must be therefore pointed out that the court below rightly held that the trial court correctly admitted the Exhibits which are considered relevant to the crime of murder and also gave them due probative value. Apart from the fact that the trial court rightly admitted the exhibits, the appellant withdrew his objection to the admissibility of the exhibits. He cannot now be expected to question the weight or probative value ascribed to the exhibits admitted in evidence.

For Appellant to suggest that the evidence given at the trial court and in particular Exhibit M3 (the confessional statement of the appellant) are incongruous-pieces is to hold the established legal principles upon which the decisions of the two courts below are predicted with levity, disdain and lack of appreciation of the issue involved. The learned counsel is doubtful about the established legal propositions. Exhibit M3 is the core evidence supported or strengthened by other corroborative evidence. I have said that a court can convict on con-

fessional statement even when retracted, provided it is corroborated by other circumstantial evidence. In answer to the so called contradictions listed by the Appellant before the lower court, the court of Appeal stated at page 259 of the Record thus:

"From all one can glean from the findings and conclusions of the learned trial judge, there was enough upon which we could reach the same conclusion he mode even though there were a few areas the learned trial judge went off, course that did not affect the substance of what was before him, and his conclusion was without fault."

The court below pointed out that though the trial court went off the course in few instances, these were minor slips which did not affect the substance of the decision rendered because the same conclusion would have been reached by the Court of Appeal based on evidence available.

In paragraphs 6.02 - 6.04, of the Appellants brief, he argues that the trial court ought not to have attached any weight to the testimony of PW3, one IMRAN ATIKU IBRAHIM who was a Principal Security Manager with PHCN, on the ground that his recollections must have been wiped out of memory because of effluxion of time (according to him a period of one and half years) at the time of his testimony, and also the fact that the two other so called witnesses did not corroborate the testimony of PW3 that the accused had blood stains on his body and with some wounds on his face and hand at the time PW3 saw him (the Appellant). The implication of the Appellant's argument is that a time frame must be set within which he must give his testimony. In other words any witness called within or after one year and six months cannot be relied upon because such witness will not be able to recollect what happened. This argument is not tenable. The onus lies on the Appellant to prove that the PW3 lacks the capacity to remember events and therefore his evidence cannot be relied on when he testified.

Appellants' line of argument is that the testimony of PW3 was not corroborated by one MUBARAK EL-NAFATY and IKARA BASSEY. But they must not be called if the prosecution did not require their evidence. The prosecution is not bound to call all his listed witnesses. He would call enough

witnesses that could help him establish his case beyond reasonable doubt. He is not required to call a large team of witnesses whose evidence are not helpful in resolving the issue before the trial court. See SAID JAMMAL V. THE STATE (1999) 12 NWLR (pt.632) 582 at 597, R v. KUREE 7 WACA 175 AT 177, R V. THOMPSON UDO 4 WACA 112. See NAF v. SQD. LEADER OBIOISA, (2003) 4 NWLR (pt.810) 233 of 277.

There is the last issue framed in Appellants' issue No.3. It is understood within the context of the doctrine of "last seen" and the primary duty of a trial court to evaluate evidence and ascribe probative value thereto in the determination of the phrase "minimum explanation" required of a person last seen with the deceased. This doctrine is captured at p.261 of the Record by the trial court. The law requires a person last seen with the deceased, whose cause and nature of death is in contention, to offer an explanation of what he knows about the death of the deceased. Onus is on the person last seen with the deceased to offer a minimum explanation of what he knows about the death of the deceased. See IGABELE v. THE STATE (2006) 6 NWLR (pt.975) 100 at 127 -128. See also OKORO & ANOR v. THE STATE (1964) 1 ALL NLR 423.

At page 155 of the Record the trial court stated that it was established that the appellant was the only person in the house of the deceased at the time of her death. It stated:

"From the evidence of PW3, and PW5 and the testimony of the accused during the cross-examination it is clearly established that the deceased was alone in the house on to faithful (sic) day she met her death. And that the accused was with her in the house as the security man. There is no evidence of any forceful entry or breakage to gain entry into the deceased and the accused were the only person in the compound and nobody else."

After the trial court reproduced the testimonies of the Appellant when examined in chief, the court went to evaluate the said testimony and in the process, and in the face of other circumstantial evidence he was found to have lied and therefore failed to meet the "minimum explanation" required. In this regard this court in IGABELE v. THE STATE (supra) held.

"We can find no other reasonable inference from the circum-

stances of the case. The facts which were accepted by the learned trial Judge, amply supported by evidence before him, called for an explanation and beyond untrue denials of the Appellant...”

In the face of overwhelming evidence against the Appellant, I cannot upturn the concurrent findings of the trial court and the court below (the court of Appeal) when the Appellant has failed to demonstrate that the said concurrent findings were perverse and could not be supported having regard to the evidence adduced by the Prosecutor.

In sum, this appeal fails, it is dismissed. The decision of the court below is affirmed.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother GALADIMA, JSC just delivered.

I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

I accordingly dismiss the appeal and abide by all the consequential orders made in the lead judgment including the order as to costs. Appeal dismissed.

MUHAMMAD JSC

I read in advance the judgment just delivered by my learned brother, Galadima, JSC.

I agree with my lord that the appeal lacks merit. It is hereby dismissed. I abide by all consequential orders therein.

ADEKEYE JSC

I was opportune to read in draft the judgment just delivered by my learned brother S. Galadima JSC. This appeal now in hand emanated from the decision of the Court of Appeal in the judgment delivered on the 22nd of January 2010. In that judgment, the Court of Appeal affirmed the decision of the Federal Capital Territory High Court which convicted and sentenced the appellant to death by hanging for the offence of culpable homicide contrary to Section 221 of

the Penal Code.

The facts of the case in a nutshell were that prior to the murder, the appellant Stephen Haruna was employed as a security guard by Power Holding Company of Nigeria Plc. He was attached to the quarters of late Barrister (Miss) E.N. Igwe also employed as Assistant
 B General Manager Legal at the Power Holding Company of Nigeria Headquarters Abuja. The appellant was on duty at the residence of late Barrister E.N. Igwe on the 31st of December, 2003 when her dead body was found on the floor of her sitting-room. The appellant
 C was the only person with her in the entire premises on that day. The appellant made three statements to the police about the incident. The appellant confessed in one of the statements that he removed a sum of N40, 500 from the deceased which he handed over to his girl friend one Mary Jimoh. The investigation police officer contacted
 D Mary Jimoh and recovered the said sum of money. The police recovered other items at the scene of crime like a PHCN uniform gray in colour; one black trouser; a broken ceramic; black batten, a milk colour boxer pant; a flask; one head tie and one white pant. These items including the money were tendered in court during the trial as
 E Exhibits A-1. The three statements of the appellant were tendered as Exhibits M1-M3 and the statement of Mary Jimoh as Exhibit N. The autopsy report and forensic laboratory report were tendered as Exhibits O and "5".

F At the hearing of this appeal four issues were formulated in the appellant's brief filed on 10th of June 2010. The issues are as follows

1) Whether the court below is right to hold that it is now too late in the day for the appellant/accused to seek to impugn the value
 G or weight to be placed on those exhibits when at the trial the defence opposed their admissibility and later withdrew its objection.

2) Whether the court below are right to hold that what the appellant counsel calls incongruous (sic) pieces or contradictions are really of no moment and did not affect the substance of what was
 H intended to be conveyed in Exhibit M3.

3) Whether the court below is right to hold that the trial judge did not misdirect himself when he held that there were many questions which the accused/appellant threw open that needed his explanation and he failed to deliver as the appellant is only required to

offer a minimum of explanation.

4) Whether the court below is right to follow the decision of the trial judge and rely on Exhibit M3 (3rd statement of accused) to the exclusion of M1 (1st statement of accused) and Exh. M2 (2nd statement of accused).

The respondent adopted the foregoing issues formulated by the appellant. My learned brother had exhaustively dealt with all the four issues raised for determination by the appellant. I shall only add a few words here and there.

On the day of the murder of Miss E.M. Igwe, it was the testimony before the trial court that she was all alone with her security guard; the appellant in her house, a wing of a duplex building at Area 11 Garki, Abuja. There was virtually no eye-witness account of the incident except that garnered from the confessional statement of the appellant. The appellant was charged to court for the offence of culpable homicide contrary to Section 221 of the Penal Code.

The ingredients of the offence of culpable homicide are -

1. That the death of a human being took place.
2. That such death was caused by the accused
3. That the act of the accused that caused the death was done with the intention of causing death or that the accused knew that death would be the probable consequence of his act.

All these ingredients must co-exist before a conviction could be secured. It is indisputable that the prosecution must prove all these ingredients of the offence of culpable homicide against the appellant beyond reasonable doubt.] *Ubani v. State* (2003) 18 NWLR pt.851 pg.24, *Uguru v. State* (2002) 9 NWLR pt.771 pg.90, *Igabele v. State* (2006) 6 NWLR pt.975 pg.100, *Adara v. State* (2006) 9 NWLR pt.984 pg.155.

Generally speaking the guilt of an accused can be proved by: -

- a. The confessional statement of the accused person.
- b. Circumstantial evidence.
- c. Evidence of eye witness account of the crime *Igabele v. State* (2006) 6 NWLR pt.975 pg.100.

The appellant made three confessional statements which were tendered as Exhibits M1-M3. The court relied heavily on Exhibit M3 the third confessional statement. By virtue of Section 27 (1) of the Evidence Act, a confession is an admission made at any time by a

person charged with a crime stating or suggesting by inference that he committed a crime. A confession cannot be used against an accused unless the court is satisfied that it is voluntary. There is however a duty on the court to test the truth of a confession by examining it in the light of the other credible evidence before the court. R v. Sykes B (1913) CAR pg. 113, R v. Omokaro (1941) 7 WACA 146, Achabua v. State (1976) NSCC pg.74, Yusufu v. State (1976) 6 SC 167, Solola v. State (2005) 11 NWLR pt.937 pg.460, Idowu v. State (2000) 7 SC pt.11 pg.50, Alarape v. State (2001) 14 WRN Pg.1.

C A confessional statement must be direct, positive, true and unequivocal of facts that satisfy the ingredients of the offence the accused person confesses to have committed. In the confessional statement Exhibit M3, the accused person confessed to how he murdered the deceased. During the trial of the case he virtually denied D making the statement. The court admitted the retracted statement in evidence, as a confessional statement does not become inadmissible because the appellant retracted the confession. The confessional statement cannot be regarded as unreliable by mere denial or retraction. The admissibility was based on relevance. The retraction is however E a matter to be taken into consideration to decide what weight could be attached to it. Dibia v. State (2007) 9 NWLR pt.1038 pg.30, Otufale v. State (1968) NMLR pt.261, Ukpogong v. Queen (1961) 1 SCNLR 53, R. v. John Agariga Itule (1961) 2 SCNLR 183. A court F can convict on the retracted confessional statement of an accused person but before this is properly done, the trial judge should evaluate the confession and the testimony of the accused person and all the evidence available. This entails the trial judge examining the new version of events presented by the accused person which is different G from his retracted confession and the judge asking himself the following questions -

- Is there anything outside the confession to show that it is true?
- a. Is it corroborated?
- b. Are the relevant statements made in it of facts true as far as H they can be tested?
- c. Did the accused Person have the opportunity of committing the offence charged?
- d. Is the confession Possible?
- e. Is the confession consistent with other facts which have been

ascertained and have been proved?

R. v. Sykes (1913) CAR pg.113, R. v. Omokaro (1941) 7 WACA pg.146, Achabua v. State (1976) NSCC pg.74, Yusufu v. State (1976) 6 SC 167.

The appellant raised objection to the admissibility of all the Exhibits A-M as they were not from proper custody and that the court failed to make any specific findings on whether the Exhibits A-N have probative values. Ordinarily admissibility of evidence is governed by Section 6 of the Evidence Act. Once a piece of evidence is relevant, it is admissible in evidence irrespective of how it was obtained. Fawehinmi v. NBA (No.2) (1989) 2 NWLR pt.105 pg.558.

Where a piece of evidence is wrongly received in evidence by the trial court, an appellate court has the inherent jurisdiction to exclude it or expunge it from the records notwithstanding that counsel at the trial court did not object to the admissibility of the piece of evidence as any finding made on inadmissible evidence is perverse. However the proper time to object to the admissibility of a document, particularly Exhibits M1-M3 the confessional statements of the appellant where necessary was when they were tendered in evidence. Olayinka v. State (2007) 9 NWLR pt.1040 pg.561, Ogudo v. State (2011) Vol. 202 LRCN pg.1.

The trial court evaluated the evidence whereupon it considered the probative value of the exhibits particularly Exhibits M1, M2 and M3 the confessional statements of the appellant. The other exhibits; "Exhibit A the PHCN grey uniform, the black trousers Exhibit B, a white pant Exhibit 1 all which were recovered in the sitting-room of the deceased belonged to the appellant and the sum of N40, 500 recovered from the girl friend of the appellant served as corroborative evidence to the contents of the confessional statement Exhibit M3.

The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate

court will be justified in drawing the inference that the accused person killed the deceased. *Igabele v. State* (2006) 6 NWLR pt.975 pg.100. This doctrine of “last seen” was rightly and properly invoked by the trial court in the peculiar circumstance of this case. In homicide cases where the cause of death is obvious, medical evidence ceases to be of practical necessity where for instance in this case the deceased died immediately from the voluntary act of the appellant. However the medical report tendered as Exhibit O confirmed the cause of death of the deceased as narrated in Exhibit M3. *Ben v. State* (2006) 16 NWLR pt.1006 pg.582, *Aighuorogh v. State* (2004) 1 NWLR pt.888 pg.515, *Uguru v. State* (2002) 9 NWLR pt.771 pg.90, *Alarape v. The State* (2001) LRCN pg.634, *Baguda v. State* (1996) 7 NWLR pt.450 pg.279.

Evaluation of relevant and material evidence before the trial court and ascription of probative value to such evidence are the primary functions of the trial court which saw, heard and watched the demeanour of witnesses while they testified. Where the trial court unquestionably evaluated the evidence and exhaustively appraised the facts, it is not the business of the appellate court to substitute its own views for that of the trial court. It is only where and when it fails to evaluate such evidence properly or at all that an appellate court can intervene and re-evaluate such evidence. *State v. Ajie* (2000) 7SC pt.1 pg.24.

The learned trial judge went into great length in evaluating the overwhelming evidence before him against the appellant and ascribed probative value to them before convicting the appellant of the offence of culpable homicide. The court of appeal relying on the evidence on record affirmed the decision of the trial court and dismissed the appeal. The appeal before this court is against the concurrent findings of facts of the two lower courts. The appellant had not established that the decisions of the two lower courts were perverse or cannot be sustained having regard to the evidence adduced by the prosecution. In the absence of any such exceptional circumstance, this court sees no reason to disturb the findings of the trial court which were affirmed by the lower court that the appellant was guilty of murder and liable to be convicted and sentenced to death. *Bakare v. State* (1987) 1 NWLR pt.52 pg.579, *Onyejekwe v. State* (1992) 3 NWLR pt.230 pg.444.

With fuller reasons given by my learned brother S. Galadima JSC in his lead judgment, I too find no merit in the appeal and I accordingly dismiss it. I adopt the consequential order made in the lead judgment as mine.

B

RHODES-VIVOUR JSC

I have had the privilege of reading in draft the leading judgment of my learned brother Galadima, JSC; I am in full agreement with it. I would though add a few paragraphs of my own. The appellant was convicted on his confessional statement and on the doctrine of last seen.

C

It is long settled that the court can convict on the appellants confessional statement, even though retracted. The underlining consideration is that such a statement must be voluntary and true. See *R v. Kanu* 1952 14 W.A.C.A p.30, *Aremu v. State* 1991 7 NWLR pt.201 p.1, *Akpan v. State* 1992 6 NWLR pt.248 p.439, *Queen v. Obiasa* 1962 25 SCNLR p.402.

D

It has always been the practice of the courts to look for some evidence outside the confession which would make it probable that the confession is true. See *Onuoha v. State* 1987 4 NWLR pt. 65 p. 331. The appellants confessional statement was corroborated by the fact that he took the sum of N40, 500 which he stole from the deceased to his girlfriend of kubwa to keep for him. There was other evidence outside the confession.

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My lords, the confession of murder by the appellant was free and voluntary, consistent and probable and the statement was corroborated by several facts most especially the fact that he gave the sum of N40, 500 to his girlfriend for safe keeping. These several facts showed that the confession was true. The appellant was the security guard for the premises occupied by Miss E.M. Igwe (deceased); Unassailable evidence is that he was the last person with her when she was killed. The doctrine of last seen is one of the occasions in our criminal jurisprudence when the accused person is not expected to remain silent. He is expected to explain the circumstances of the death of the person he was last seen with. See *Okoko anor v. State* 1964 1 ALL NLR p. 423. The appellant was unable to show that he was not responsible for the death of the deceased. The evidence against the

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appellant was very compelling.

The courts below found that it was the appellant who killed Miss Igwe, and left her in a pool of her own blood. These are concurrent findings of fact. This court would only disturb concurrent findings of fact if, they are found to be unsound. The reason is obvious.

B The trial court saw and heard the witnesses. It formed impression about them and evaluated their evidence. Surely on appeal court should attach great weight to the opinion of the trial judge. After all an Appeal Court judge never saw the witnesses.

C Concurrent findings of fact in this case are sound and the appellant was unable to show or establish the contrary. See *Ogbu v. State* 1992 8 NWLR pt.259 P. 255, *Ogba v. State* 1992 2 NWLR 2 pt. 222 p.164, *Igago v. State* 1999 14 NWLR pt. 637 p.1.

For this, and the more detailed reasoning in the leading judgment I would dismiss the appeal.

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