

SUPREME COURT OF NIGERIA
FRIDAY 15TH FEBRUARY, 2013. SC. 373/2010
CORAM:- M. S. MUNTAKA-COOMASSIE, S. GALADIMA,
N. S. NGWUTA, K. B. AKA'AH, S. S. ALAGOA, JJSC

THE STATE APPELLANT
V.
AHMED RABIU RESPONDENT

EVIDENCE - Evaluation - Ascription of probative value to evidence
- Is primary function of trial court - And appellate court does not
substitute its own view - For that of trial court (H1)

EVIDENCE - Evaluation - Interference - Where trial court failed to
properly evaluate evidence - Appeal court can interfere - By making
proper findings justified by evidence (H2)

CRIMINAL PROCEDURE - Trial within trial - Purpose - The trial is
conducted to ascertain - Whether the statement made by accused
was voluntarily made (H3)

CRIMINAL PROCEDURE - Confession - Admissibility - For state-
ment of accused to be admissible in evidence - It must have been
made freely and without any inducement (H4)

EVIDENCE - Confession - Voluntariness - The test for voluntariness
is whether accused was properly guided - To write what he actually
wanted to write (H5)

FACTS

Before the High Court of Kogi State Okene, accused/respondent was charged with the offence of Culpable Homicide punishable with death under section 221(a) of the Penal Code. The charge against him was that on the 10th November, 2005 while armed with a gun, he had intentionally shot and killed one Nasiru Audu. In the course of trial 23rd January 2008, the statement of respondent was admitted in evidence and marked exhibit 'B' by the learned trial Judge. Subsequently counsel for respondent by a motion on notice brought

pursuant to section 6(6) of the Constitution of the Federal Republic of Nigeria and the inherent jurisdiction of the court sought for an order setting aside the entire proceedings of the 23rd January 2008 or in the alternative, an order setting aside the ruling admitting Exhibit ‘B’ in evidence and revisiting the issue of the admissibility of the said document.

The application was opposed by appellant. After hearing arguments from both counsel, the court set aside the earlier ruling of the court admitting the statement of respondent in evidence as Exhibit ‘B’ and adjourned the case for trial within trial. After the trial within trial, the court held that the statement of respondent was voluntarily made. Aggrieved, respondent appealed to the Court of Appeal Abuja Division. The court allowed the appeal. It is against this latest judgment that appellant filed appeal to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Justices of the Court of Appeal were right to set aside the findings of facts made by the trial court when the said findings were not perverse or said to be perverse.

2. Whether the Court of Appeal was right to hold that the confessional statement obtained as a result of question and answer cannot be said to be voluntary.

3. Whether the Justices of the Court of Appeal were right when they substituted their views for that of the trial court when there was no evidence to back up the views expressed by the Justices of the Court of Appeal.

HELD (Allowing the appeal per **ALAGOA JSC**, **MUNTAKA-COOMASSIE JSC** Dissenting)

EVIDENCE - Evaluation

1. The law is that the evaluation of evidence and ascription of probative value to such evidence are primarily the function of a trial court and when such functions are duly and correctly discharged by the trial court an appellate court has no business substituting its own view for that of the trial court.

(p. 571 D)

EVIDENCE - Evaluation - Interference

2. It is equally the law my Lords that where a trial court failed to properly evaluate the evidence before it or made the wrong inference from admitted facts, an appeal court can interfere by making the proper findings justified by the evidence.

(p. 571 E)

Trial within trial - Purpose

3. The sole purpose behind the conduct of a trial within trial is to ascertain whether the statement made by an accused person was voluntarily made and the learned trial Judge's finding of fact that it was voluntarily made should not have been upset by the lower court same not having been found by the Court below to be perverse or to have occasioned a miscarriage of justice. (p. 572 H)

CRIMINAL PROCEDURE - Confession - Admissibility

4. It is the law that for the Statement of an accused person to be admissible in evidence it must have been made voluntarily. What this means is that it must have been made freely and without any inducement or threat of harm to the accused.

(p. 573 B)

EVIDENCE - Confession - Voluntariness

5. I think the true test of voluntariness should be whether an accused person in the course of writing his statement was, if need be properly guided to write what he actually wanted to write and not what he certainly did not want to write and would not have written but for some form of threat of harm or inducement or whatever that would make his statement involuntary. (p. 575 E)

NOTABLE POINT OF INTEREST

MUNTAKA-COOMASSIE JSC – DISSENTING

1. Court must accept unchallenged evidence

The respondent gave evidence of how he was tortured right from Okene police station, to C.I.D Headquarters Lokoja. He specifically

mentioned how he was treated at the Commissioner of Police Office that led to serious bleeding and how he used his cloth to clean the blood after he agreed to sign the statement. Curiously the respondent was not cross-examined at all on any of these allegations. I think the law, my lords, is settled that where the adversary fails to cross-examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence. The evidence remained uncontroverted and unchallenged too, and the court will not have any option than to accept it as the truth. (p. 581 A)

C
REPRESENTATION

A. V. Etuvwewe, Esq., with A. Awala, (Miss), for the Appellant
A. M. Aliyu, Esq. with K. C. Wisdom Esq. and Rafatu O. Muhammad, Esq., for the Respondent

D
CASES REFERRED TO

- Odeh v. FRN (2008) 3-4 SC 147
Attah v. The State (2010) 10 NWLR (pt. 1201) 190
Akinloye v. Eyiola (1968) N.M.L.R. 92
E Ebba v. Ogodu (1984) 2 SCNLR 372
ACB Ltd v. Oba (1993) 7 NWLR (pt. 304) 173
Bamgboye v. Olarewaju (1991) 4 NWLR (pt. 184) 132
Woluchem v. Gudi (1981) 5 SC 291
Awote v. Owodunni (1986) 5 NWLR (pt. 46) 941
F Namsoh v. The State (1993) 5 NWLR (pt. 292) 129
Ihuebeka v. The State (2000) FWLR (pt. II) 1827
Bozin v. The State (1985) 2 NWLR (pt. 8) 465
George v. State (2009) 1 NMLR (pt. 1122) 325
G Amadi v. Nwosu (1992) 5 NWLR (pt. 241) 273
Offorlette v. State (2000) 12 NWLR (pt. 681) 415
Buba v. The State (1994) 7 NWLR (pt. 355) 195

STATUTES REFERRED TO

- H Penal Code, s. 221(a)
Constitution of the Federal Republic of Nigeria, s. 6(6)

LEAD JUDGMENT BY ALAGOA JSC

This is an appeal against the judgment of the Court of Appeal

Abuja Division delivered on the 15th April, 2010 which allowed the Appeal against the Ruling of the Kogi State High Court delivered on the 30th March, 2009 by Otu J. The facts leading up to this appeal are briefly set out hereunder:-

The Respondent who was the accused at the High Court Okene was charged with the offence of Culpable Homicide punishable with death under section 221(a) of the Penal Code. The charge against him was that on the 10th November, 2005 while armed with a gun, he had intentionally shot and killed one Nasiru Audu. B

In the course of trial on the 23/1/2008 the Statement of the Respondent taken on the 1st January, 2006 was admitted in evidence and marked exhibit 'B' by the learned trial Judge. Subsequently Counsel for the Respondent by motion on Notice dated 17th April, 2008 and brought pursuant to section 6(6) of the Constitution of the Federal Republic of Nigeria and the inherent jurisdiction of the Court D sought for:

1. An order setting aside the entire proceedings of the 23rd January, 2008.

OR IN THE ALTERNATIVE

2. An order setting aside the ruling admitting Exhibit 'B' in evidence and revisiting the issue of the admissibility of the said document. E

3. Such further or other orders as this Honourable Court may deem fit to make in the circumstance.

The application was opposed and arguments taken and in his ruling of the 10th July, 2008 at pages 28 - 31 of the Record the learned trial Judge set aside the earlier ruling of the court admitting the Statement of the Respondent in evidence as Exhibit 'B' and adjourned the case to the 25th September, 2008 for trial within trial. F G

Records however show that as a result of several adjournments, the trial within trial did not commence until the 5th February, 2009 when the evidence of PW1 Sesan Aransiola was taken and he was cross examined. The prosecution closed its case having fielded just that witness. On the 11th February, 2009 the defence in the trial within trial commenced with the Accused/Respondent giving evidence and being cross examined. Like the prosecution, the Accused/Respondent was the sole defence witness so to speak in the trial within trial. The case was then adjourned for address of counsel in the trial H

within trial and in his considered Ruling on the 30th March, 2009, the learned trial Judge, Otu J. held in the concluding part of his ruling at page 47 of the Record.

B *“From the totality of the evidence before me in this trial within trial, the evidence of the accused is in my view of little or no value at all, it is fable coming from the imagination of the accused. I find that the statement of the accused person to the police was freely and voluntarily made by the said accused person. The objection is over ruled and the statement is admitted in evidence and marked Exhibit ‘BB’.”*

C Aggrieved, the Accused/Respondent appealed to the Court of Appeal Abuja Division which in its judgment delivered on the 15th April, 2010 resolved the sole issue for determination before it which was whether the statement of the accused was voluntarily made in D favour of the accused. The lower court therefore set aside the ruling of the High Court delivered on the 30th March, 2009 which said ruling admitted the statement of the Accused - Exhibit ‘BB’ in evidence.

E Aggrieved, the State (now as Appellant) has appealed against the said judgment of the lower court delivered on the 15th April, 2010 by a Notice of Appeal contained at pages 101 - 105 of the Record of Appeal. The Grounds of Appeal are reproduced hereunder shorn of particulars:-

F *“1. The Learned Justices of the Court of Appeal, Abuja erred in law when they held that the prosecution did not discharge the burden of proving that Exhibit ‘BB’ was voluntarily made.*

G *2. The learned Justices of the Court of Appeal, Abuja erred in law when they held that Exhibit ‘BB’ was inadmissible on the ground that same was obtained by means of question and answer.*

3. The learned Justices of the Court of Appeal Abuja erred in law when they held that the material allegation of torture made out by the Appellant now Respondent was not controverted.

H *4. The learned Justices of the Court of Appeal Abuja erred in law when they held as follows: “The prosecution did not include the DPO at Okene as one of its witnesses to tell his side of the story and possibly discredit the testimony of the Appellant, neither did it cross examine the Appellant as to the veracity or otherwise of the claim he made against the D.P.O. at Okene as well as those at the State C.I.D.*

at Lokoja.”

5. *The Learned Justices of the Court of Appeal, Abuja erred in law when they held thus,*

“I am of the humble view that what happened at Okene Police Station and then at the State C.I.D. Lokoja must be regarded as one continuous transaction and not a separate and distinct incidents (sic). Not only did each incident immediately follow the other, but nothing was done at the State C.I.D. Lokoja by way of assuring the accused that he need no longer fear physical violence if he chose not to say anything.”

6. *The learned Justices of the Court of Appeal Abuja erred in law when they held as follows:*

“I fail to understand how the Appellant is expected to have been able to give details as to the number of policemen that beat him up or how he could have reported the incident at Okene to anyone considering the circumstances narrated by the Appellant regarding his arrest.”

7. *The learned Justices of the Court of Appeal Abuja erred in law when they set aside the findings of fact of the learned trial Judge of the Okene High Court.*

8. *The judgment of the Court of Appeal Abuja is unwarranted and unreasonable having regard to the evidence before the Court.”*

From these Grounds the Appellant in its Brief of Argument dated the 24th January, 2011, filed on the 26th January, 2011 but deemed properly filed and served on the respondent on the 23rd March, 2011 has distilled the following three issues for determination by this Court:-

1. Whether the Justices of the Court of Appeal were right to set aside the findings of facts made by the trial court when the said findings were not perverse or said to be perverse (Grounds 1, 3 and 7).

2. Whether the Court of Appeal was right to hold that the confessional statement obtained as a result of question and answer cannot be said to be voluntary (Ground 2).

3. Whether the Justices of the Court of Appeal were right when they substituted their views for that of the trial court when there was no evidence to back up the views expressed by the Justices of the Court of Appeal (4, 5, and 6).

These issues are contained in paragraph 1.0 at pages 2-3 of the Appellant's Brief of Argument.

The Respondent on his part formulated the following two issues from the grounds of Appeal for the determination of this Court:-

i. Whether the learned Justices of the Court of Appeal were right to hold that Exhibit "BB" was not obtained voluntarily by the police and is, therefore, inadmissible in evidence? (Grounds 1, 2, 3, 4, 5 and 6).

ii. Whether having found that the learned trial Judge did not make a proper use of his opportunity of seeing and hearing the witnesses at the Trial within trial, the learned Justices of the Court of Appeal were right to have set aside the findings made by the learned trial Judge (Ground 7).

These issues are contained in paragraph 3.01 at page 4 of the Respondent's Brief of Argument dated the 5th April, 2011 and filed on the 7th April, 2011.

These Briefs of Argument were on the 22nd November, 2012 when this appeal came up for hearing adopted and relied upon by the respective counsel for the parties. A. V. Etuvwewe who appeared with A. Awala, (Miss) for the Appellant urged this Court to allow the appeal and set aside the judgment of the lower court.

A. M. Aliyu appeared with K. C. Wisdom and Rafatu O., as Counsel for the Respondent and urged this Court to dismiss the appeal and affirm the decision of the lower court.

I have carefully considered the issues formulated by the Appellant and Respondent in their respective Briefs of Argument and I consider the issues as formulated by the Appellant as having covered all the grounds of appeal and intend to adopt same in the consideration and determination of this appeal.

Issue 1 is "Whether the Justices of the Court of Appeal were right to set aside the findings of fact made by the trial court when the said findings were not perverse or said to be perverse".

Learned Counsel for the Appellant has referred this Court to that part of the trial court's ruling which states as follows: *"From the totality of evidence before me in this trial, the evidence of the accused is in my view of little or no value to all, it is a fable coming from the imagination of the accused. I find that the statement of the accused person to the police was freely and voluntarily made by the*

said accused person.”He posits that this being a finding of fact by the trial court could not have been disturbed by the lower court as nowhere in the lower court’s judgment did that court say that this finding of fact is perverse or occasioned a miscarriage of justice. Counsel relied on HENRY ODEH v. FEDERAL REPUBLIC OF NIGERIA (2008) 3-4 SC 147 at 180-181. B

Counsel also submitted that it is only the trial court that has the duty of assessing the credibility of witnesses. Reliance was placed on SAMUEL ATTAH v. THE STATE (2010) 10 NWLR (PART 1201) 190 at 213. Learned Counsel for the Respondent appears to agree with the above submission when in paragraphs 5.01 and 5.02 at pages 13 and 14 of the Respondent’s Brief of Argument he had stated as follows: “The relationship between a court of trial and an appellate court as regards the evaluation of evidence and ascription of probative value to such evidence has long been settled by a long line of D authorities.

The law is that the evaluation of evidence and ascription of probative value to such evidence are primarily the function of a trial court and when such functions are duly and correctly discharged by the trial court an appellate court has no business substituting its own view for that of the trial court. See AKINLOYE & ANOR v. EYIYOLA & ORS (1968) N.M.L.R. 92, EBBA v. OGODO (1984) 2 SCNLR 372. E

It is equally the law my Lords that where a trial court failed to properly evaluate the evidence before it or made the wrong inference from admitted facts, an appeal court can interfere by making the proper findings justified by the evidence. I refer my Lords to HIGH GRADE MARITIME SERVICES LTD v. F.B.N. LTD (1991) 1 NWLR (PART 167) 290 at 310 and A.C.B. LTD v. OBA (1993) 7 NWLR (PART 304) 173 at 183.” I think it is appropriate for me to say here that these submissions of both learned counsel are correct and represent the law. There is indeed a plethora of case law on this subject matter. F

Respondent’s Counsel also agrees that the finding of the trial court which was disturbed by the court below is, as counsel for the Appellant had earlier said runs thus, H

“From the totality of evidence before me in this trial within trial, the evidence of the Respondent is in my view of little or no

value at all, it is a fable coming from the imagination of the Respondent. I find that the Statement of the Respondent person to the police was freely and voluntarily made by the said Respondent person."

The Respondent's Counsel's grouse with the trial court's findings of fact is that the learned trial Judge did not go on to state which aspect of the Respondent's story he considered a fable. Respondent's Counsel then went on to give quite a long list of what he considered vital factors which the learned trial Judge would have taken into consideration in arriving at his finding of fact. One must at this stage stop and ask the question again whether the court below made a pronouncement that the finding of fact of the learned trial Judge was perverse or occasioned a miscarriage of justice? The answer is in the negative. On the proper attitude of an appellate court to findings of fact by the trial court, this Court per Belgore JSC (as he then was) in *AMOS BAMGBOYE & ORS. v. RAIMI OLAREWAJU* (1991) 4 NWLR (PART 184) 132 held as follows:

"Once a Court of trial has made a finding of fact, it is no more within the competence of the Appellate Court to interfere with those findings except in certain circumstances. The real reason behind this attitude of Appellate Courts is that the court hearing the appeal is at a disadvantage as to the demeanour of the witnesses in the lower court as they are not seen and heard by the Appellate Court. It is not right for the Appellate Court to substitute its own eyes and ears for those of the trial court which physically saw the witnesses and heard them and thus able to form opinion as to what weight to place on their evidence." See also *CHIEF VICTOR WOLUCHEM v. CHIEF NELSON GUDI & ORS.* (1981) 5 SC 291 at 295; *AWOTE v. OWODUNNI* (1986) 5 NWLR (PART 46) 941.

What appeared to have weighed very heavily on the mind of the lower court were the gory details of violence and torture which the Respondent said he suffered. The evidence on this was placed before the trial court which soberly considered same and made its findings of fact.

The sole purpose behind the conduct of a trial within trial is to ascertain whether the statement made by an accused person was voluntarily made and the learned trial Judge's finding of fact that it was voluntarily made should not have been upset by the lower court same not having been found by the

Court below to be perverse or to have occasioned a miscarriage of justice.

The lower court was clearly in error to have substituted its own findings for the findings of the trial court. This issue must be and is hereby resolved in favour of the Appellant against the Respondent.

Issue No.2 is “Whether the Court of Appeal was right to hold that a confessional statement obtained as a result of question and answer cannot be said to be voluntary.”

It is the law that for the Statement of an accused person to be admissible in evidence it must have been made voluntarily. What this means is that it must have been made freely and without any inducement or threat of harm to the accused. In MANSHEP NAMSOH v. THE STATE (1993) 5 NWLR (PART 292) 129 at 124, Kutigi, JSC, (as he then was) had this to say;

“However before I conclude I would like to make some observations on the statement exhibit H. This statement unlike the other statement exhibit F which was recorded or written by the Appellant himself was recorded by one policeman Sgt. Titus Kwakiya (PW7). Both PW7 and the Appellant in their testimonies made it abundantly clear that exhibit H was the product of a “question and answer” session between the two of them. The police recorder (PW7) was putting questions already prepared by his superiors on a sheet of paper to the Appellant while he (PW7) also recorded the answers. This procedure is clearly wrong. Once a police officer decides to make a complaint against an accused person, he must first of all caution the accused person in a prescribed form. If the accused person decides to volunteer a statement, he may write it himself or the police officer may write it for him. I cannot see how a Statement such as exhibit H herein would be regarded as free and voluntary when it is evident that the so called statement was a result of questions selected by and put to the accused by the police officer himself...”

Could that be said to be what happened in the present case now being considered on further appeal? The learned trial Judge had, at page 46 of the Record of Appeal made this finding of fact;

“PW1 said he cautioned the accused in English language informing the accused inter alia, that “you are not obliged to say anything unless you wish to do so...” PW1 said he cautioned the accused in English language and having understood the caution signed it.

The statement has the signature of the accused person under the words of caution. Throughout his evidence the accused never said he was not cautioned or that the signature therein is not his own. I also cannot see how a police officer can properly record the statement of the accused person if he cannot ask the accused certain information that will take the form of question and answer.”

It can thus be seen that the learned trial Judge in his summation of the evidence of PW1 knew the importance to be attached to the caution to be administered to the Respondent before he would be called upon to make his statement. The learned trial Judge also knew the importance of the Respondent’s signature on the statement made by him. The learned trial Judge had said as follows;

“Throughout his evidence the accused never said he was not cautioned or that the signature therein is not his own.”

The learned trial Judge’s reference to “question and answer” must therefore be understood in its proper context. In *NAMSOH v. THE STATE* (supra) the police recorder (PW7) was putting questions already prepared by his superiors on a sheet of paper to the accused/Appellant while the answers were recorded. This was clearly a question and answer session and a statement obtained that way could not have been expected to be voluntary.

In the present case under consideration, the position would appear to be different in the sense that only questions that would make the Respondent’s Statement coherent were put to him. This would appear to me permissible if not overdone. That this would appear to have been the case can be seen in the learned trial Judge’s further summation of the evidence of PW1 at page 46 of the Records thus,

“Under cross-examination PW1 stated: “The accused was asked to tell his own version of the story. In the statement, I asked him of the schools he attended and the years he attended it and also to tell me what happened on the 10th November, 2005”.

This line of questioning can hardly be described as a “question and answer session” as in *NAMSOH v. STATE* (supra). That an admission may be obtained from a person by questions fairly and properly put to him by a police officer has been judicially pronounced upon by this court in the case of *SUNDAY* pages 1854 - 1855 per Kalgo, JSC.

“What then is a confessional statement in law: It is simply a statement of an accused person charged with a criminal offence which is a confession. What amount to a proper confessional in this context? In Osborne’s Concise Law Dictionary Sixth Edition page 87 Confession is defined thus:-

“An admission of guilt made to another by a person charged with a crime. It is admissible only if free and voluntary i.e. if it is not forthcoming because of inducement or threat held out by a person in authority. It must not be made under hope of reward (other than spiritual) or fear of punishment in relation to the proceedings. The onus of proof that a confession was voluntary is on the crown (D.P.P. v. PINLIN (1915) 3 W.L.R. 419) admission may be obtained from a person by questions fairly and properly put to him by a police officer.”

Evidence of PW1 on record which was never debunked is that he asked the Respondent which schools he attended and when and to say what happened on the 10th November, 2005. These were fair questions properly put to the Respondent in the course of writing his statement. It does happen and not too infrequently that an accused person left alone to write his statement without any form of guidance goes on a merry go round of sorts leaving behind the crucial issues.

I think the true test of voluntariness should be whether an accused person in the course of writing his statement was, if need be properly guided to write what he actually wanted to write and not what he certainly did not want to write and would not have written but for some form of threat of harm or inducement or whatever that would make his statement involuntary.

Going by the Records Respondent’s counsel cannot be right when he stated in paragraph 4.08 at page 11 of the Respondent’s Brief of Argument that, *“the Police had even before the Appellant (sic) opened his mouth decided to obtain a statement from him.”*

The learned trial Judge at page 46 of the Records said as follows-

“It is my own view that having cautioned the accused person and had fully understood the caution, the accused had the choice whether to answer questions put to him or not or whether he was prepared to give his own version of the story or not. Indeed the

accused person not only gave his entire bio data in the said statement but gave a graphic detail of the fight that took place between the two factions of the PDP on that day giving names of the participants and also their sponsors."

These are details which the police itself could not have known and which certainty could not have been obtained from the accused/ Respondent in a question and answer session. The proper conclusion to draw from this is that after the necessary caution, Respondent had been given a free hand to say what was contained in his statement which he then signed. The Respondent's Counsel freely credited PW1 with having said what he did not say. PW1 never admitted in evidence that the Respondent was the object of torture or brutality from the police to obtain a statement from him neither did he admit that the DPO shot the Respondent on the leg. At page 37 of the Records PW1 said under cross examination as follows-

"The accused was asked to tell his own version of the story... From the facts of this case there was a dispute between two factions of the PDP. In the Okene IPO's report, the accused was arrested upon efforts of members of the public. I will not be surprised that those people who got the accused person arrested were members of the opposing faction of the PDP they are the ones who have been assisting the police in the investigations. It will not surprise me to hear that those members of the public gave the accused a thorough beating before handing him over to the police..."

I do not know how he came about the injury but he had the injury when he was brought to us. I will be surprised to hear that the DPO in Okene shot the accused person".

PW1's statement can thus be described at best as speculative and not categorical. This issue is resolved in favour of the Appellant against the Respondent.

Issue No.3 is, "Whether the Justices of the Court of Appeal were right when they substituted their views for that of the trial Court when there was no evidence to back up the views expressed by the Justices of the Court of Appeal (4, 5 and 6)"

This issue has already been substantially dealt with while treating the other two issues and may have been properly treated along with them. The bottom line is that a trial court on findings of fact has the kind of advantage which an Appellate court lacks and an appel-

late court cannot substitute its views for those of the trial court that saw and heard the witnesses and was therefore in a position to appreciate and properly evaluate the evidence of the witnesses. This issue must be and is hereby resolved in favour of the Appellant.

The appeal succeeds and is allowed and the Judgment of the Court of Appeal, Abuja Division delivered on the 15th April, 2010 which allowed the appeal against the ruling of the Kogi State High Court delivered on the 30th March, 2009 by Otu J., is hereby set aside. It is further ordered that this case be remitted back to the Kogi State High Court for continuation of hearing.

MUNTAKA-COOMASSIE JSC (DISSENTING)

I was privileged to have read in draft the lead judgment of my learned brother Stanley Alagoa JSC Just delivered. However I wish to chip in some points of mine. I think and hold regrettably that the appeal lacks merit same should have been dismissed. I dismiss the appeal.

This is an appeal against the judgment of the Court of Appeal Abuja Division, herein after called the lower court. The lower court had on 15/4/2010 allowed the appeal to that court by setting aside the ruling of the Kogi State High Court sitting at Okene presided by Otu J. See pages 35 - 105 of the record.

The respondent, Ahmed Rabi, was arrested and charged with the offence of culpable Homicide punishable with death contrary to Section 221(a) of the penal Code. At the hearing before trial court the prosecution called only one witness, the investigating police officer (IPO), who conducted investigation into the case. The witness sought to tender the respondent's statement in evidence; and upon his objection, the trial Judge Ordered a trial-within-trial.

During the trial-within-trial the prosecution called only the police officer who stated that on 1/1/2006 at about 1210 hour, he was in the interrogation room at the state C.I.D when he sent one P. C. Moshood to bring the Respondent out of the cell for his statement to be taken. He cautioned the Respondent in English Language in which he recorded the Respondent's statement, the Respondent thereafter volunteered a statement in English language which he recorded and after recording he read it over to the Respondent which he signed

and the witness counter-signed and all these happened in the presence of P. C. Moshood and other policemen in the Interrogation room. The accused person gave his statement voluntarily. Under cross-examination he stated that interrogation room is where I. P. O makes compilation of case files after taking statement. He further stated that
B the accused person was arrested in Okene town and one P. C. Anthony investigated the case in Okene, the said Anthony brought the accused person with the case diary from Okene. This case diary contained the statement made by the accused person at Okene. He admitted that the accused person's statement made in Okene contained
C the same information in the statement being sought to be tendered.

During his interview with the accused person he told the accused that the allegation against him is that he killed a person and he did this before his superior officer who was in-charge of conducting
D interview. He stated that when the accused was brought he had an injury on his leg and he was the one who helped to take him for treatment. He would not know if the injury came about as a result of gunshot. He stated that he will be surprised to hear that the D.P.O Okene shot the accused.

E The accused person also testified in trial-within-trial. He stated that he was arrested on 31/12/2005 at about 11:00 am when some boys stormed the place and started beating him that he killed somebody and he was taken to the police station in Okene. He denied
F killing anybody and he was asked to make statement which he did and he denied killing anybody. His statement was taken by the D.P.O. and after reading the statement the D.P.O insisted that he killed somebody and when he denied the D.P.O. took out his pistol and shot his leg.

G After being shot a statement was brought that he should sign which he did. He was then taken to Lokoja C.I.D Headquarters and before the C.O.P he denied killing anybody and that he was arrested at a wedding ceremony. The police started beating him that he was lying and blood started coming out from his body. From the injury
H sustained as a result of gunshot the police then threatened him that if he did not confess he would not be taken for treatment and because of the severity or the beating he now admitted to whatever he was asked to do. They then gave him a statement and asked him to sign which he did. He was then asked to remove his shirt to clean the

blood after which he was taken to police clinic. He spent up to one month in the state C.I.D cell.

Under cross-examination, he stated that it was the I.P.O who took him to clinic for treatment and he was the same person who recorded his statement.

Learned counsel to both parties addressed the trial court after which the judge delivered his ruling and admitted the statement as Exhibit B. B. In its conclusion the trial court held as follows:-

"I think the objections raised by the learned counsel to the accused person in terms of the inducement, non-compliance with police officers rules and torture can be answered by reference to the Supreme Court's decision in the case of Patrick Njovens and 3 Ors. v. The State (1973) 5 SC 17 at 55/64. From the totality of evidence before me in this trial-within-trial the evidence of the accused is, in my view, of little or no value at all, it is fable coming from the imagination of the accused. I find that the statement of the accused person to the police was freely and voluntarily made by the accused person. The objection is over-ruled and the statement is admitted in evidence and marked Exhibit BB"

The accused person was dissatisfied with the above ruling and has, as a result, appealed to the Court of Appeal, Abuja Division, hereinafter called the lower court. The lower court in its conclusion held as follows:-

"Furthermore PW1 stated that:-

"I tasked P. C. Adeyemi to bring the accused person to enable me obtain his statement." See page 36 of the records.

In R. v. Kwagbo (1962) NNLR 4 at 4 - 5 the Supreme Court held:-

"... when a policeman speaks of obtaining a statement from a suspect there is a suggestion that he has been trying to get statement out of the suspect or to make it.... if a policeman sets out to "obtained" a statement it will very likely appear that he has led the suspect know that he wants him to make the statement. That is something that evidence Act does not in any way infer that a confessional statement made by an accused person as a result of question and answer is involuntary, he cites the case of Ihuebeka v. The State (2000) FWLR (pt.11) 1827 at 1851.

It was further contended that the lower court did not apply the

test of a confessional statement before setting aside the ruling admitting the confessional statement made by the respondent. The case of *Udo v. The State* (1972) 8 - 9 SC. 334 was cited. Thus applying the test as stated in the above case the evidence before the court lend credence to the fact that the statement made by the respondent was indeed a confessional statement.

On issue No.3 learned counsel submitted that the decisions of the court are based on the materials placed before it. The trial court which had the opportunity of assessing the credibility of the witness and making pronouncement thereon found that the statement of the accused was voluntarily made. It is therefore wrong for the lower court to substitute its view for that of the trial court when there is no shred of evidence to back up or support the views expressed by the lower court. Counsel cited in support the case of *Bozin v. The State* (1985) 2 NWLR (pt.8) 465.

The respondent's counsel also adopted his brief of argument and urged the court to dismiss the appeal. On his issue I it was the learned counsel's submission that the lower court was right in its decision in view of the evidence before the court. Learned counsel referred to the evidence of the respondent as to how he was arrested, and beaten up by the mob, and how the D.P.O. Okene police station shot his leg which resulted in the injury on his leg. The appellant's sole witness admitted that the respondent was brought with injury on his leg particularly learned counsel pointed out that the respondent's evidence was neither challenged nor denied by the appellant. The appellant did not cross-examine the respondent on any of the allegations made by him in his testimony. It is therefore presumed in law that the appellant admitted the allegations made by the respondent in this appeal. Learned counsel cited in support the following cases:-

- a) *George v. State* (2009) 1 NMLR (pt.1122) 325 at 352.
- b) *Amadi v. Nwosu* (1992) 5 NWLR (pt.241) 273 at 284; and
- c) *Offorlette v. State* (2000) 12 NWLR (pt.681) 415 at 436.

Again learned counsel submitted that the trial court was wrong to have admitted the statement because the respondent had signed the words of caution written at the top of the statement. He opined that by asking the respondent to tell all that happened immediately after cautioning him, the constable wholly dissipated the effect that the statement was obtained in the presence of P. C. Moshood and

other policemen in the interrogation room. None of these policemen was called to give evidence of what actually transpired. Under cross-examination he admitted that the respondent was injured and severely beaten, and he in fact took him for treatment.

The respondent gave evidence of how he was tortured right from Okene police station, to C.I.D Headquarters Lokoja. He specifically mentioned how he was treated at the Commissioner of Police Office that led to serious bleeding and how he used his cloth to clean the blood after he agreed to sign the statement. Curiously the respondent was not cross-examined at all on any of these allegations. I think the law, my lords, is settled that where the adversary fails to cross-examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence. The evidence remained uncontroverted and unchallenged too, and the court will not have any option than to accept it as the truth. I refer to *George v. The State* (2009) 1 NWLR (1122) 325 at 362; *Offorlette v. The State* (supra) at page 436.

Applying the above principles of law to the case at hand, it is quite clear or apparent that the trial court did not make use of the unchallenged and uncontroverted evidence placed before it by the respondent. I am even more surprised how such evidence could be described as fable and imagination of respondent by the trial court.

Therefore for failing to properly evaluate the evidence before it, the lower court was right to interfere and make its own findings as done in this case. See *ACB Ltd. v. Oba* (1993) 7 NWLR (pt.304) 173 at 183; *Nwosu v. The State* (1986) 4 NWLR (pt.35) 348; *Buba v. The State* (1994) 7 NWLR (pt.355) 195 at 202.

For the reasons stated above, I with respect, resolve the sole issue formulated by me, in favour of the respondent. I hold that the appellant has not proved beyond reasonable doubt that the statement in issue was made voluntarily. I therefore hold that this appeal lacks merit and is hereby dismissed. The judgment of the lower court is accordingly affirmed.

H

GALADIMA JSC

I have read in draft the lead judgment of my learned brother ALAGOA JSC. He has most assiduously and analytically examined

all the ramifications of this unfortunate case. The facts are simple. The Respondent herein was the accused at the Okene trial High Court, Kogi State who was charged with offence of Culpable Homicide punishable with death under S.221 (a) of the Penal Code. The charge against him was that on 10/11/2005 while armed with a gun the Respondent had intentionally shot and killed one Nasiru Audu.

In the course of trial the statement of the Respondent was admitted in evidence as Exhibit 'B' by the learned trial Judge. Subsequently counsel by a motion sought to set aside the whole proceedings of 23/1/2008 or in the alternative set aside the Ruling admitting Exhibit 'B'.

Although this application was opposed, the learned trial judge over indulged the Respondent and set aside his earlier Ruling admitting Exhibit 'B', the Respondent's statement and adjourned the case for a trial within trial. The trial was eventually held and thence, in his ruling the learned trial Judge held that from the evidence before him, the Statement of the Respondent to the police was freely and voluntarily made by him. Having overruled the objection he admitted the statement as Exhibit 'BB'.

Respondent was aggrieved and he appealed to the court of Appeal Abuja Division which in its Judgment delivered on 15/4/2010 set aside the Ruling of the trial court admitting the statement of the Respondent, Exhibit 'BB'. The further appeal to this Court is against the judgment of the said lower Court. Briefs of argument were filed and exchanged by learned counsel for the parties. Issues were formulated accordingly. Issues formulated by the Appellant were preferred by my learned brother and he adopted and meticulously dealt with them.

The first issue was whether the lower court rightly set aside the findings of fact made by the trial court when such findings were not perverse. The findings of the trial court in its ruling, complained of by the Appellant is that which states as follows:

"From the totality of evidence before me in this trial, the evidence of the accused is in my view of little or no value at all, it is a fable coming from the imagination of the accused. I find out that the statement of the accused person to the Police was freely and voluntarily made by the said accused person."

I agree with the learned counsel for the Appellant that this

being a finding of fact by the trial court, the lower court could not have disturbed it, as nowhere in the judgment of the lower court did it say that the finding of fact by the trial court was perverse or it occasioned a miscarriage of justice. See HENRY ODEH v. FEDERAL REPUBLIC OF NIGERIA (2008) 3 - 4 SC. 147 at 180 - 81. It is trite law that it is only the trial court that has the duty of appraising evidence at a trial. It is pre-eminently placed in that position that it saw and heard the witnesses, Appellate Courts should exercise restraint in disturbing findings of fact made by trial court. See NOR v. TARKAA (1998) 4 NWLR (pt.544) 130, EBOADE v. ATOMESIN (1997) 5 NWLR (pt.506) 490 at 507 and ATTAH v. THE STATE (2010) 16 NWLR (pt. 1201) 190 at 213.

The Respondent's complaint with the trial court's findings of fact is that the learned trial Judge did not go on to state which part of the Respondent's story he considered "fable". The gory details of violence and torture which the Respondent alleged he suffered weighed heavily on the mind of the lower court. But the trial court soberly considered this evidence and made its findings of fact. The main object behind the conduct of a trial within trial is to ascertain whether the statement made by the accused person was made voluntarily. The learned trial judge found that it was made voluntarily. These findings have not been upset by the lower court for being perverse or to have occasioned a miscarriage of justice. The lower court was therefore wrong to have substituted its own findings for that of the trial court.

As for the second issue regarding the Respondent's confessional statement obtained as a result of "question and answer," I shall examine the law on this aspect. It has been said that for the statement of an accused to be admissible in evidence, it must be made voluntarily without any inducement or threat of harm to him. In MANSHEP NAMSOH v. THE STATE (1993) 5 NWLR (pt.292) 129 this court held as follows:

"However before I conclude I would like to make some observations on the statement Exhibit 'H'. This statement unlike the other statement Exhibit 'F' which was recorded or written by the Appellant himself was recorded by one police Sgt, Titus Kwakiya (PW7). Both PW7 and the Appellant in their testimonies made it abundantly clear that Exhibit 'H' was the product of a "question and answer" session

between the two of them. The Police recorder (PW7) was putting questions already prepared by his superiors on a sheet of paper to the Appellant while he (PW7) also recorded the answers. This procedure is clearly wrong. Once a police officer decides to make a complaint against an accused person, he must first of all caution the accused person in a prescribed form. If the accused person decides to volunteer a statement, he may write it for him. I cannot see how a Statement such as Exhibit 'H' herein would be regarded that the so called statement was a result of questions selected by and put to the accused by the police officer himself ..."

The circumstances leading to the above passage cannot be said to be on all fours with the instant case. The learned trial judge had at page 46 of the Record made the following findings of facts:

"PW1 said he cautioned the accused in English Language in forming the accused inter alia, that "you are not obliged to say anything unless you wish to do so... PW1 said he cautioned the accused in English language and having understood the caution signed it. The statement has the signature of the accused person under the words of caution. Throughout his evidence the accused never said he was not cautioned or that the signature therein is not his own. I also cannot see how a police officer can properly record the statement of the accused person if he cannot ask the accused certain information that will take the form of question and answer."

The learned trial Judge in the above summary of PW1's evidence found that the Respondent was duly cautioned before he volunteered his statement which he agreed to carry his signature. This is unlike the situation in the case of *NAMSOH v. THE STATE* (Supra) in which the police was putting questions already prepared by his superiors on a sheet of paper to the accused, while the answers were recorded. This is a clear statement obtained as a result of questions prepared and answer obtained from the accused. The position is not, the same with the instant case. In his summation of evidence of PW1, at p. 46 of the Records the following was recorded:

"Under Cross-examination PW1 states: "the accused was asked to tell his own version of the story. In the statement, I asked him of the schools he attended and the years he attended it and also to tell me what happened on the 10th November, 2005."

This line of questioning can hardly be regarded as "question

and answer session,” as in *NAMSOH v. STATE* (supra) In *SUNDAY IHUBEKA v. THE STATE* (2000) FWLR (pt. II) 1827 at 1854 -1855 this court held that

“Admission may be obtained from a person by questions fairly and properly put to him by a police officer.”

Going by that Regard, I do not agree with the learned Counsel of the Respondent that “the police had even before the Respondent opened his mouth decided to obtain a statement from him.” This statement cannot be true in view of the observation expressed by the learned trial judge at page 46 of the Records thus:

“It is my view that having cautioned the accused person and he had fully understood the caution, the accused had the choice whether to answer the questions put to him or not or whether he was prepared to give his own version of the story or not indeed the accused person not only gave his entire bio data in the said statement but gave graphic detail of the fight that took place between the two factions of the PDP on that day giving names of the participants and also their sponsors.”

These details could not have been known to the police and which were not obtained from the Respondent in a question and answer session.

In the light of what I have said above and for the fuller reasons in the Lead Judgment, I also allow this appeal. The judgment of the court below delivered on 15/4/2010 which allowed the appeal against the Ruling of the trial High Court delivered on 30/3/2009 is hereby set aside. I too order that this case be remitted back to the High Court of Kogi State for continuation of hearing expeditiously.

AKA’AHS JSC

I had a preview of the judgment of my learned brother, Alagoa JSC. I agree with his reasoning and conclusion that the appeal has merit and is accordingly allowed. I endorse the order remitting the case to the Kogi State High Court for continuation of trial before Otu J.