

**SUPREME COURT OF NIGERIA**  
FRIDAY 8<sup>TH</sup> MARCH, 2013. SC. 432/2011  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
M. D. MUHAMMAD, JJSC**

ALLI DOGO ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Confession - Conviction - In order to ground a conviction - Confession must be positive and direct - But reason for commission of the crime - Must not be stated (H1)

EVIDENCE - Inconsistency in - Effect - Appellant's evidence at trial is unreliable - And his previous statement does not constitute evidence upon which court can act - And both are no defence to the murder charge (H2)

CRIMINAL LAW - Defence of accident - Sustainability - 1999 Constitution s. 33(2) cannot avail appellant - Since his act in defence of property - Excludes shooting by accident (H3)

CRIMINAL PROCEDURE - Murder - Medical report - The report is not relevant - Since appellant attributed the cause of death of the deceased to himself (H4)

**FACTS**

Accused/appellant was alleged to have murdered one Engr. Isiaka Lawal at an Estate in Ibadan, Oyo State. Consequently, he was arraigned before the High Court of Oyo State, Ibadan Judicial Division, for murder contrary to and punishable under section 319 of the Criminal Code Cap. 30 Vol. II Laws of Oyo State of Nigeria 2000. Prosecution/respondent called two witnesses and closed its case. On the other hand, appellant testified as DW1 and closed his case.

In its judgment, the court held that from the totality of evidence adduced, appellant was guilty of the offence of murder of the deceased. Appellant was accordingly convicted and sentenced. Ap-

pellant being dissatisfied, appealed to the Court of Appeal, Ibadan Division. The court in its judgment dismissed the appeal and affirmed the judgment of the trial court. Aggrieved further, appellant filed appeal in Supreme Court.

**ISSUES FOR DETERMINATION:**

*"(1) Whether the Court below was right in holding that the confessional statement, Exhibit 'B' fits in squarely as a confession and as such basing its judgment on same without considering the totality of the evidence before the Court.*

*(2) Whether the Court below was right in holding that the defence of property under Section 33 (2) (a) of the 1999 Constitution of the Federal Republic of Nigeria and Section 282 of the Criminal Code Act does (sic) not avail the appellant.*

*(3) Whether the Court below was right in holding that the Medical report is a sufficient evidence to prove the death of the deceased without calling the said Doctor that carried out the post-mortem examination of the deceased for the purpose of cross-examination by the appellant."*

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

*CRIMINAL PROCEDURE - Confession - Conviction*

**1. I agree with learned Counsel for the appellant that for a confession to ground a conviction it must be positive and direct. However, I do not share learned counsel's view that for a confession to ground a conviction it must state reason for the commission of the crime. The reason for the commission of the crime to which the appellant confessed is not an element in the definition of a confession. (p. 1261 E)**

*EVIDENCE - Inconsistency in - Effect*

**2. The defence of accident put up by the appellant at his trial is at variance with the defence that he shot the deceased because he thought he was an armed robber. Inconsistency doctrine traces its origin to the English case of *Resina v. Golder* (1960) 1 WLR 1169 at 1179. Lord Parker, CJ in his judgment**

held as follows:

***“In the judgment of this Court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act.”***

**Appellant, though the accused person testified at his trial and was therefore a witness. His extra-judicial statement to the Police is that he shot the deceased in defence of lives and property because he thought he was an armed robber. This was his statement when the facts were fresh in his mind. On the witness stand, he set up a defence of accident. By the doctrine of inconsistency, his evidence at the trial should be regarded as unreliable and his previous statement does not constitute evidence upon which the Court can act. The two mutually exclusive versions of the incident leading to the shooting of the deceased cancel each other, leaving the appellant with no defence to the charge of murder laid against him. I find no merit in issue 1 and I resolve same against the appellant and in favour of the respondent. (p. 1263 A)**

*CRIMINAL LAW - Defence of accident - Sustainability*

**3. In issue 2, learned Counsel for the appellants seeks refuge for his client in s.33 (2) (a) of the Constitution and s.282 of the Criminal Code Act, i.e. the defence of property. The two Courts below rightly held that none of the sections cited availed the appellant. In my view, the defence of shooting an unarmed man in the back in defence of property excludes shooting him by accident. I resolve the issue against the appellant. Appellant was not defending anyone or any property when he shot the deceased at his back and killed him at the spot. (p. 1263 G)**

*Murder - Medical report*

**4. In issue 3, learned Counsel for the appellant generated some heat in the trial court's reliance on Exhibit C, the medical re-**

**port. As argued by learned counsel for the respondent, the trial court has discretion to call or not to call the medical doctor whose report he admitted without objection. If learned counsel needed to cross-examine the doctor on Exhibit C, he had a duty to ask the trial Court to summon him. He cannot**  
**B blame his dereliction on either the trial court or the court below. The issue of fair hearing is a red herring. It is not relevant. The appellant said he shot the deceased and he fell down and died. Appellant could have been convicted without the medical report. From the appellant himself the deceased died of**  
**C the bullet wound and the shot was fired by the appellant. Thus the cause of death and the manner of death were attributed by the appellant to himself. He did not say that the deceased inflicted the wound on himself. The issue is resolved against the**  
**D appellant. (p. 1264 A)**

## NOTABLE POINTS OF INTEREST

### **NGWUTA JSC**

#### ***1. When to file reply brief***

**E** A reply brief is filed when an issue raised in the respondent's brief calls for a reply.

It is not meant to give the appellant a second chance to improve on his argument in the appellant's brief as appears to be the case herein.

**F** (p. 1260 E)

### **ARIWOOLA JSC**

#### ***2. Proof of Murder – Ingredients***

**G** It is however equally trite law that to obtain a conviction for murder, the prosecution must prove beyond reasonable doubt -

(i) that the deceased has died.

(ii) that the death of the deceased resulted from the act of the accused and

**H** (iii) That the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence.

(p. 1266 H)

## **REPRESENTATION**

Dr. Akin Onigbinde with Richard Baiyeshea Stewart David and Adedeji Adeyemi, for the Appellant

M. O. Adebayo, A-G Oyo State with D. O. A. Adebayo (SLO Oyo State), for the Respondent

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## **CASES REFERRED TO**

Abu v. The State (2008) All FWLR (pt. 447) 1126

Alarape v. The State (2001) 5 NWLR (Pt. 705) 79

Salihu v. The State (1994) 3 NWLR (pt. 332) 352

Takida v. The State (1969) 6 NSCC 270

Akpabio v. The State (1994) 7 NWLR (pt. 359) 671

Ekpenyong v. The State (1991) 6 NWLR (Pt. 200) 682

Shekete v. NAF (2000) 15 WRN 56

Okonkwo v. The State (1988) 4 NWLR (pt. 544) 142

The Queen v. Eyo (1962) 1 All NLR 516 SC

Nwosu v. The State (1986) 4 NWLR (pt. 35) 348

Lambert v. Nigerian Navy (2006) 7 NWLR (pt. 980) 512

Nwachukwu v. State (2002) FWLR (Pt. 123) 312

Eliot v. State (1993) 4 NWLR (pt. 290) 644 SC

ANPP v. Usman (2009) All FWLR (pt. 463) 1292

FMBN Ltd. V. Adu (200) 11 NWLR (pt. 678) 309

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## **STATUTES REFERRED TO**

Criminal Code Cap. 30 Vol. II Laws of Oyo State 2000, s. 319

Constitution of Federal Republic of Nigeria 1999, s. 33(2)(a)

Criminal Procedure Act, ss. 179, 249, 282

Evidence Act, s. 28

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## **LEAD JUDGMENT BY NGWUTA JSC**

Before the Ibadan Judicial Division of the High Court of Justice of Oyo State the appellant was charged with murder contrary to and punishable under S. 319 of the Criminal Code Cap. 30 Vol. II Laws of Oyo State of Nigeria 2000. The particulars of the offence read thus:

*“Alli Dogo ‘M’ on or about the 8th day of May 2003 at Adejojo Estate, Old Ife Road, Ibadan in the Ibadan Judicial Division, unlawfully killed one Engineer Isiaka Lawal.”*

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The prosecution opened its case on 20th July 2005, called two witnesses and rested. The defence opened its case on 13th February 2006, called the accused (now appellant) as DW1 and closed its case. Learned Counsel for the parties addressed the Court. In its judgment delivered on 22nd June 2006 the trial Court reviewed all the relevant materials before it and concluded thus:

*"In the circumstances, from the totality of the evidence before me, I am satisfied that the accused person shot Engineer Isiaka Abiodun Lawal at the right middle part of the back on the 18th of May 2003 at Adejo Estate Old Ife Road, Ibadan. I therefore find the accused person guilty of the offence of murder and I convict him accordingly."* See p.49 of the record.

Appellant took exception to the judgment against him and appealed same to the Court of Appeal Ibadan on three grounds. Subsequently, with leave of Court, two additional grounds of appeal were filed; bringing the number of grounds of appeal to five from which three issues were distilled for determination by the Court below.

The court below resolved all the three issues against the appellant and concluded thus:

*"Finally, the appeal lacks merit and it is accordingly dismissed. The judgment of the lower Court in Suit No. 1/47/04 delivered on the 22nd of June 2006 is hereby affirmed."* See page 140 of the record.

On further appeal to this Court, appellant challenged the judgment of the court below on five grounds, hereunder reproduced, shorn of particulars:

#### GROUNDS OF APPEAL

*"1. The learned trial justices of the Court of Appeal erred in law when their Lordships held that: 'In my humble opinion, the statement Exhibit 'B' fits in squarely as a confession and it is admissible against the appellant without considering the totality of the evidence before the court."*

*2. The learned trial justices of the Court of Appeal misdirected themselves in holding that the right to defence of property under section 33(2) (a) of the 1999 Constitution as well as section 282 of the Criminal Procedure Act is not available to the appellant."*

*3. The learned trial justices of the Court of Appeal erred in law*

*in holding that the medical report is admissible in evidence to prove the cause of death of the deceased.*

4. *The learned trial justices of the Court of Appeal erred in law when their Lordships held as follows: ‘In the instant case, the deceased and his group were not armed, they did not pose threat to the life of the appellant and the inhabitants of Adejo Estate’ whereas such a fact or state of things could not have been known to the appellant at the material time and in the circumstances of the case.* <sup>B</sup>

5. *The learned justices of the Court of Appeal erred in law when their Lordships held that the decision of the learned trial judge was not perverse.*” See pages 145 to 148 of the record. <sup>C</sup>

Consistent with the rules and practice of this Court, learned Counsel for the parties filed and exchanged briefs of argument. In his brief of argument filed on 22/11/2011 learned Counsel for the appellant distilled the following three issues from his five grounds of appeal for the Court to resolve: <sup>D</sup>

**ISSUES FOR DETERMINATION:**

*“(1) Whether the Court below was right in holding that the confessional statement, Exhibit ‘B’ fits in squarely as a confession and as such basing its judgment on same without considering the totality of the evidence before the Court.* <sup>E</sup>

*(2) Whether the Court below was right in holding that the defence of property under Section 33 (2) (a) of the 1999 Constitution of the Federal Republic of Nigeria and Section 282 of the Criminal Code Act does (sic) not avail the appellant.* <sup>F</sup>

*(3) Whether the Court below was right in holding that the Medical report is a sufficient evidence to prove the death of the deceased without calling the said Doctor that carried out the post-mortem examination of the deceased for the purpose of cross-examination by the appellant.”* <sup>G</sup>

Issues 1-3 relate to Grounds 1, Grounds 2, 4 and 5 and Ground 3, respectively. In his brief of argument filed on 14/3/2012 out of time and deemed properly filed and served on 17/1/2013, learned Counsel for the respondent isolated the following three issues from the appellant’s grounds of appeal: <sup>H</sup>

**“Issues for Determination:**

*(i) Whether or not the Court below rightly relied on the appellant’s confessional statement, i.e. Exhibit B, tendered before*

*the learned trial judge and thereby based its judgment on same.*

(ii) *Whether or not the Court below was right in holding that the defence of property under Section 33 (2) (a) of the 1999 Constitution of the Federal Republic of Nigeria and Section 282 of the Criminal Code does (sic) not avail the appellant in the circumstances of this case.*

(iii) *Whether or not the Court below rightly relied on medical report of post-mortem examination (i.e. Exhibit C) conducted on the corpse of the deceased as sufficient proof of his death without calling the maker."*

Appellant's reply brief earlier filed on 13/4/2012 was deemed properly filed and served on 17/1/2013. The argument of learned Counsel for the appellant on his issue one centres on his complaint that the conviction of the appellant by the trial Court and its subsequent endorsement by the Court below was based primarily and exclusively on the confessional statement, Exhibit B. Learned Counsel argued that the trial court ought to have considered the circumstances surrounding the shooting, such as the time the shooting took place, the fact that the deceased was in company of others in the car; the fact that the deceased and his group refused to identify themselves and their attempt to snatch the appellant's gun. He relied on *Abu v. The State* (2008) All FWLR (pt. 447) 1126 CA in his contention that the trial court had no sufficient materials upon which to convict the appellant.

Placing reliance on *Ashimiyu Alarape & Ors v. The State* (2001 5 NWLR (Pt. 705) 79, learned counsel listed the following conditions for determining the veracity or otherwise of confessional statement:

*"(a) Whether there is anything outside the confession to show that it is true.*

*(b) Whether the statement is corroborated, no matter how slightly.*

*(c) Whether the fact contained thereon so far as can be tested are true.*

*(d) Whether the accused person had the opportunity of committing the offence.*

*(e) Whether the confession of the accused was possible.*

*(f) Whether the confession was consistent with other facts which have been ascertained and proved in the matter."*

Learned Counsel contended that the appellant could not have been convicted had the reason he gave for the shooting been considered. He submitted that at best, the appellant should have been convicted of manslaughter under Section 179 (1) of the Criminal Procedure Act. He cited and relied on *Adebayo Adeyemi v. The State* (1999) 6 NWLR (Pt. 195) (Incomplete citation). He relied on *Salihu v. The State* (1994) 3 NWLR (pt. 332) 352 at 362; *Takida v. The State* (1969) 6 NSCC 270 at 273; *Akpabio v. The State* (1994) 7 NWLR (pt. 359) 671; *Ekpenyong v. The State* (1991) 6 NWLR (Pt. 200) 682 at 698 and impugned the conviction of the appellant for failure of the Court below to consider all defences open to the appellant on the facts established at the trial. He urged the Court to resolve issue one in favour of the appellant. B  
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In issue 2, learned Counsel reproduced Section 33 (2) of the 1999 constitution of the Federal Republic of Nigeria and section 282 of the Criminal Code Act in pari material with the Criminal Code Law of Oyo State and argued that in shooting the deceased, the appellant acted on defence of his life as well as the lives of the residents of the estate and their properties. He stressed that the appellant acted under the reasonable belief that the deceased and those with him were armed robbers. D  
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He relied on *Shekete v. NAF* (2000) 15 WRN 56 at 69; *Okonkwo v. The State* (1988) 4 NWLR (pt. 544) 142 at 167; *The Queen v. Eyo & ors* (1962) 1 All NLR 516 SC; *Nwosu v. The State* (1986) 4 NWLR (pt. 35) 348 and argued that conviction of the appellant was not founded upon logical thinking based on the admissible evidence before the trial court. He urged the Court to invoke S.33 (2) of the 1999 Constitution of Nigeria and S.282 of the Criminal Code Act to resolve issue 2 in favour of the appellant. F  
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In issue 3 learned Counsel for the appellant was emphatic that the medical report was admitted in grave error to prove the cause of death of the deceased. He conceded that generally in murder cases, the court can dispense with the medical report in determining the cause of death. He however argued that when the manner of death is in issue as in this case the prosecution must call the medical doctor who performed the post-mortem examination on the body of the deceased. H

He relied on *Lambert v. The Nigerian Navy & ors* (2006) 7

NWLR (pt. 980) 512 at 547. He referred to S.42 (2) of the Evidence Act and S.249 of the Criminal Procedure Act and *Nwachukwu v. State* (2002) FWLR (Pt. 123) 312 at 328; *Eliot v. State* (1993) 4 NWLR (pt. 290) 644 SC and argued that the trial court should have called the maker of the medical report to testify and be cross-examined. He relied also on S.250 (1) and (2) of the Criminal Procedure Act. He referred to *All Nigerian Peoples Party v. Usman* (2009) All FWLR (pt. 463) p.1292 at 1344 paras. B-E for the attitude of Court to report prepared by expert witness.

With reliance on *Shell Petroleum Development Company v. Isaiah* (1997) 6 NWLR (pt. 508) 236 he characterized the medical report as inadmissible hearsay for the failure of the prosecution to call the medical doctor who prepared it. He contended that the trial Court erred to have relied on Exhibit C to determine the manner of death. He submitted that reliance on the medical report Exhibit C without calling the author to the stand is a violation of the appellant's right to a fair hearing enshrined in s.36 (6)(b) of the 1999 Constitution. He relied on *Maliki v. Michael Imodu Institute for Labour Studies* (2009) All FWLR (Pt. 491) p.979 para B; *FMBN Ltd. V. Adu* (200) 11 NWLR (pt. 678) 309 and urged the court to declare the entire proceedings in the trial court and ipso facto that of the court of Appeal a nullity. He urged the court to resolve issue 3 in favour of the appellant.

In conclusion learned Counsel urged the Court to allow the appeal, set aside the judgment of the Court of Appeal and discharge and acquit the appellant.

In issue 1 on reliance placed on appellant's confessional statement Exhibit C by the court below, learned counsel for the respondent reproduced portions of the statement based on which he contended that the appellant was rightly convicted of the killing of the deceased. He reproduced S.28 of the Evidence Act on the definition of a confession. He impugned the argument of learned counsel for the appellant that the confessional statement alone was not sufficient to convict the appellant for the offence of murder.

He argued that the evidence on record that the appellant killed the deceased is corroborated in Exhibit C, the medical report of the post-mortem examination conducted on the corpse of the deceased. He cited *Ubierho v. State* (2004) All FWLR (pt. 219) p.1028 at 1045

para. F-G; *Edhigere v. State* (1996) 42 LRCN 1082 at 1812 and *Igbinova v. State* (1981) 2 SC 5 at 17-18 in his argument that the appellant was rightly convicted on his confessional statement. He contended that, contrary to the submission of learned Counsel for the appellant, the trial Court critically examined the circumstances of the case before convicting the appellant. He returned to the case of *Edihigene v. State* (supra) and submitted that Exhibit B was corroborated by the testimony of PW1 to the effect that it was the appellant who killed the deceased. He urged the court to resolve issue one against the appellant in favour of the respondent.

In issue 2 on whether or not S.33 (2) (a) of the 1999 Constitution and S.282 of the criminal code avail the appellant he submitted that the appellant did not establish a reasonable cause for killing the deceased, adding that there was no reason for the appellant to believe violent attack on any person or property. He pointed out that the medical report admitted in evidence and marked Exhibit C reveal that appellant shut the deceased on the back.

He submitted that the appellant killed the deceased with vengeful motive and was rightly convicted of murder. He argued that none of Sections 33 (2) (a) of the Criminal Code avails the appellant. He returned to *Queen v. Udo Akpakpan* (1956) JSC P.1 and argued that since there is no evidence that the deceased was armed, the killing was not justified and the appellant's conviction for murder cannot be faulted. He urged the court to resolve issue 2 against the appellant and in favour of the respondent.

Issue 3 is on the admission of the Medical Report Exhibit C. Learned counsel said that Exhibit C was admitted in evidence without objection. He argued that the appellant is not permitted to approbate and reprobate at the same time. He relied on *SPDC Nig. Ltd v. Edamkhue* (2009) All FWLR (Pt. 489) p.407 at 429 para. F-4.

On the failure of trial Court to exercise its powers under s.42 (2) of the Evidence Act and s.249 (2) of the Criminal procedure Act, learned counsel said the exercise of the powers is discretionary and that failure to exercise the power in this case did not occasion a miscarriage of justice. He relied on *Nwachukwu v. State* (2002) 12 SCM 143 at 155 in his argument that it is not imperative to call the Medical Doctor who issued Exhibit C. He relied on *Olabode v. The State* (2009) 5 NMLR 315 at 323 ratio 21. He argued that the appellant

who did not apply to summon the author of Exhibit C cannot complain that the trial court did not call the maker of the medical report suo motu. He relied on *Idirisu v. State* (1968) NMLR 88.

On the alleged denial of fair hearing, learned counsel said that Exhibit C was tendered through PW2 and same was admitted without objection. He urged the court to reject the argument that the appellant was denied fair hearing in the admission of Exhibit C without calling the maker by the court on its own motion. He relied on *Mohammed V. Oluwunmi* (1990) 2 NWLR (pt. 133) 458 para. B-C. He said that the appeal is against the concurrent findings of fact by the two lower courts and the appellant has not shown that the judgment is perverse or that it cannot be supported having regard to the evidence before the trial court. He relied on *Olaiya v. State* (2010) 2 SCM 163 at 175. Learned counsel for the respondent summarised his argument and urged the Court to dismiss the appeal.

Appellant's reply brief was deemed filed on 17/1/2013. On the said reply brief learned Counsel devoted time and space to Exhibit B in particular as well as section 33 (2) (a) of the 1999 Constitution and S.282 of the Criminal Code Cap. 38 Vol. II Laws of Oyo State, 2000 which he exhaustively dealt with in the main brief. The function of a reply brief is to deal with issues raised in the respondent's brief other than a reply to argument in the appellant's brief.

A reply brief is filed when an issue raised in the respondent's brief calls for a reply. See *Nworie Nwali v. State* (1991) 5 SCNJ 14 at 19. It is not meant to give the appellant a second chance to improve on his argument in the appellant's brief as appears to be the case herein.

The issues raised in the briefs are similar. I will determine the appeal on the appellant's issues. Of the five grounds of appeal learned Counsel for the appellant referred to their Lordships of the court of Appeal as "*the learned Trial Justices of the Court of Appeal*" in his grounds 1-3. The Court of Appeal is the penultimate court in the hierarchy of courts in this country. It is an appellate court. It does not try cases except when its original jurisdiction is ignited and this case does not fall within the exception. The clear distinction between trial and hearing of cases should be known to every legal practitioner.

The reference to the Honourable Justice of Appeal as "*the learned trial Justices...*" is most inappropriate. Appellant was charged

and tried under Cap. 30 Vol. II Laws of Oyo State of Nigeria, 2000. The reference by the learned counsel to the criminal procedure Act in place of the Criminal Procedure Law of Oyo State is not appropriate. Criminal Law and Procedure are not included in the Exclusive Legislative List. See the second schedule to the constitution of the Federal Republic of Nigeria 1999 (as amended). B

On his own part, learned counsel for the respondent did not paginate his brief for ease of reference. Appellant's issue 1 is double edged. It questions whether-

*"the confessional statement Exhibit B is a 'confession' and whether the court below was right to base its judgment on it 'without considering the totality of the evidence before the Court'".* C

In framing his issue 1, learned Counsel for the appellant conceded that Exhibit B is a confessional statement. It is an idle play on words for learned counsel to turn round to question whether a confessional statement is a confession. Section 28 of the Evidence Act 2011 defines a confession as:

*"... an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."* See *Suberu v. State* (2010) 1 NWLR (pt. 1176) 494. E

***I agree with learned Counsel for the appellant that for a confession to ground a conviction it must be positive and direct. However, I do not share learned counsel's view that for a confession to ground a conviction it must state reason for the commission of the crime. The reason for the commission of the crime to which the appellant confessed is not an element in the definition of a confession.*** F

The confessional statement of the appellant was admitted without objection. See page 19 of the record wherein the trial court states: G

*"Counsel seeks to tender the statement of the deceased IPO and the confessional statement of the accused person. No objection.*

*Court: The statement of the deceased IPO and the statement of the accused made to the witnesses are admitted and marked Exhibits A and B respectively."* H

The voluntariness of the confessional statement was not an issue before the trial court nor was it raised in the court below. In my humble view, the argument and authorities on *"the test for determining the veracity or otherwise of a confessional statement"* are ac-

usually directed at the voluntariness or otherwise of the confessional statement. They do not relate to any live issue in the case as the voluntariness of Exhibit B was never in issue. Contrary to issue 1 as framed and argument advanced, the trial court did not base *“its judgment on same without considering the totality of the evidence before the court.”* In the first place, an accused person can be convicted solely on his confession if the same is found to be cogent and direct with reference to the crime charged. In *Mustapha Mohammed v. The State* cited in Supreme Court cases *Through the Eyes and Lips of Niki Tobi*, 918 at 921 the learned Jurist said:

*“Once there exists a confessional statement which is direct, cogent and unequivocal to the fact that the appellant murdered the deceased, the prosecution need not prove any of the three elements or all the three elements.”*

Secondly, the trial Court did not base its judgment exclusively on Exhibit B. There is also the Medical report Exhibit C which was admitted without objection. It showed that the deceased was shot at his back. Learned counsel for the appellant elicited from the PW2 in cross-examination the damaging testimony that *“the deceased drove inside the main gate after it was opened for him.”* See page 20 of the record.

Learned counsel for the appellant referred to the claim by the appellant that *“He shot the deceased because he thought he was an armed robber”* and argued that the appellant should have been convicted of the lesser offence of manslaughter. The deceased was not armed and was not even facing the appellant when he was shot in the back. In firing the fatal shot at the deceased, the appellant may be said to have exhibited the wisdom of the serpent based on what he claimed happened in the past for which security suffered but his action was bereft of the harmlessness of the Biblical dove.

In any case, the appellant stated in Exhibit B, inter alia, that: *“... but when the one that came out of the vehicle for second time was about to near me I fired and the bullet hit him and he died on the spot...”* See page 13 of the record.

In his defence at page 30 of the record he set up a different defence, that of accident. He states, inter alia:

*“My partner’s gun was loaded. I did not know that it was loaded before it went off.”*

***The defence of accident put up by the appellant at his trial is at variance with the defence that he shot the deceased because he thought he was an armed robber. Inconsistency doctrine traces its origin to the English case of Resina v. Golder (1960) 1 WLR 1169 at 1179. Lord Parker, CJ in his judgment held as follows:***

***“In the judgment of this Court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act.”*** See Gabriel Shofolahan Joshua v. The Queen (1964) 1 All NLR 1 at pp 3-4; The State v. Dominic Okolo & 3 ors (1974) 2 SC 73 at 80-81.

***Appellant, though the accused person testified at his trial and was therefore a witness. His extra-judicial statement to the Police is that he shot the deceased in defence of lives and property because he thought he was an armed robber. This was his statement when the facts were fresh in his mind. On the witness stand, he set up a defence of accident. By the doctrine of inconsistency, his evidence at the trial should be regarded as unreliable and his previous statement does not constitute evidence upon which the Court can act. The two mutually exclusive versions of the incident leading to the shooting of the deceased cancel each other, leaving the appellant with no defence to the charge of murder laid against him. I find no merit in issue 1 and I resolve same against the appellant and in favour of the respondent.***

***In issue 2, learned Counsel for the appellants seeks refuge for his client in s.33 (2) (a) of the Constitution and s.282 of the Criminal Code Act, i.e. the defence of property. The two Courts below rightly held that none of the sections cited availed the appellant. In my view, the defence of shooting an unarmed man in the back in defence of property excludes shooting him by accident. I resolve the issue against the appellant. Appellant was not defending anyone or any property when he shot the deceased at his back and killed him at the***

spot.

***In issue 3, learned Counsel for the appellant generated some heat in the trial court's reliance on Exhibit C, the medical report. As argued by learned counsel for the respondent, the trial court has discretion to call or not to call the medical doctor whose report he admitted without objection. If learned counsel needed to cross-examine the doctor on Exhibit C, he had a duty to ask the trial Court to summon him. He cannot blame his dereliction on either the trial court or the court below. The issue of fair hearing is a red herring. It is not relevant. The appellant said he shot the deceased and he fell down and died. Appellant could have been convicted without the medical report. From the appellant himself the deceased died of the bullet wound and the shot was fired by the appellant. Thus the cause of death and the manner of death were attributed by the appellant to himself. He did not say that the deceased inflicted the wound on himself. The issue is resolved against the appellant.***

Having resolved the three issues in the appeal against the appellant, I hold that the appeal has no merit. I agree with learned Counsel for the respondent that the appellant has not shown that the concurrent findings of fact of the two Courts below are perverse or not based on admissible evidence. See *Njoku & ors v. Eme & ors* (1973) 5 SC 293 at 306; *Kale v. Coker* (1982) 12 SC 252 at 221.

I dismiss the appeal as without merit and I affirm the decision of the Court below endorsing the conviction of the appellant and the sentence passed on him by the trial Court. Appeal dismissed.

G

### **ONNOGHEN JSC**

I have had the benefit of reading in draft, the lead judgment of my learned brother, NGWUTA, JSC just delivered. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

The submission of learned Counsel for appellant to the effect that the trial court ought not to have convicted appellant on exhibit 'B', the confessional statement of appellant and that the lower court was in error in affirming the said conviction is very much miscon-

ceived. A confession is simply an admission made at any time by a person charged with the commission of a crime, either stating or suggesting the inference that he committed that crime. The confession however, must be directed, positive, as to the offence charged.

In exhibit 'B' appellant stated inter alia, at page 12:

*"I was at the gate at Ade-Ojo Estate about 9.30pm to 10p.m B when I move to them ask where are you going to, there two of them came down dragging gun with me later they move inside with car and I used my single barrel gun loaded with cartridge and shot him and later died..."*

*When I shot him... I thought that he was an Armed Robber. I C did not see weapon or suspected any stolen thing with him. I got to know at the police station that the man shot is an Engineer Abiodun Isiaka Lawal working at Mobil Oil Company Port Harcourt that is not armed robbery and he is not a thief. I made a mistake to shot him I D know that is an offence to kill an innocent person. I beg for forgiveness."*

Again at page 13, appellant stated, inter alia as follows:

*"When the one that came out of the vehicle for second time E was about to near me I fired and the bullet hit him and he died on a spot..."*

*They did not fire at me at all, what they did is that they wanted to collect my gun from me after they might have damage the first one when we were struggling with ourselves. Hence, I fired one of F them. That was all".*

The above extracts from exhibit 'B' clearly showed that the said exhibit is a confessional statement within the context of section 28 of the Evidence Act, 2011.

It is settled law that an accused person, such as appellant in this G case, can be tried and convicted solely on his confessional statement in which he admits the commission of the crime/offence charged. See Edhigere v. State (1996) 42 LRCN 1082 AT 1812; R. v. Obiasa (1962) All NLR 651; Yusuf v. State (1976) SC 176; Dawa v. State (1980) 8 - 11 S.C 236; Igbino v. State (1981) 2 S.C 5 at 17 - 18. H

Having resolved the above issue against appellant, it follows that the other two issues are of no moment as same have become hypothetical and academic.

It is for the above reasons and the more detailed reasons con-

tained in the said lead judgment of my learned brother NGWUTA, JSC that I too find no merit whatsoever in the appeal and consequently dismiss same. Appeal dismissed and the judgments of the lower courts affirmed by me.

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### **ARIWOOLA JSC**

I had the opportunity of reading in draft the lead judgment of my learned brother, NGWUTA, JSC just delivered. I agree with the reasoning therein and the conclusion arrived thereat.

C The appellant herein had been charged with the offence of murder contrary to and punishable under Section 319 of the Criminal Code, Cap 30 Vol. 11, Laws of Oyo State of Nigeria, 2000.

D It is instructive to note that the prosecution predicated its case primarily on the confessional statement of the appellant to secure conviction and sentence of the appellant. The confessional statement had been tendered and admitted as Exhibit B by the trial court. The court below in its judgment appealed against had affirmed the conviction and sentence of the appellant by the trial court given earlier  
E on 22/06/2006. On a further appeal to this court, one of the issues raised before us by the appellant for determination of his appeal reads thus:

F *“Whether the court below was right in holding that the confessional statement; Exhibit B fits in squarely as a confession and as such basing its judgment on same without considering the totality of the evidence before the court.”*

G What then is a confession? A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. See Section 28 of the Evidence Act. Akpan v. State (2001) 7 SC (pt 1) 124, Nwachukwu v. State (2002) 7 SC (pt 1) 124 (2002) 12 SCM 143; Patrick Ikemson & Ors. v. The State (1989) 1 CLRN 1 at 22; (1989) 3 NWLR (Pt.110) 455 at 476.

H It is trite that an accused person can be convicted on his own confessional statement alone without more. It is however equally trite law that to obtain a conviction for murder, the prosecution must prove beyond reasonable doubt -

(i) that the deceased has died.

(ii) that the death of the deceased resulted from the act of the accused and

(iii) That the act of the accused was intentional with knowledge that death or grievous bodily harm was its probable consequence. See *Nwachukwu v. State* (supra) at p. 159 of SCM.

In the instant case, the appellant in Exhibit B which is said to be a confessional statement credited to him stated, inter alia, as follows:

*"I was at the gate at Ade-Ojo Estate about 9.30pm to 10.00pm when I move to them ask where are you going to, there two of them came down dragging gun with me later they move inside with car and I used my single barrel gum loaded with cartridge and shot him and later died... When I shot him. I thought that he was an Armed Robber... I did not see weapon or suspected any stolen thing with him... When the one that came out of the vehicle for second time was about to near me I fired and the bullet hit him and he died on a spot... They did not fire at me at all, what they did is that they wanted to collect my gun from me after they might have damage the first one when we were struggling with ourselves. Hence, I fired one of them."*

There is no doubt that the above is a confession by which the appellant admitted that he shot and killed the deceased. It is therefore clear that the elements of the charge preferred against the appellant were proved by the prosecution without any doubt. Confession of an accused person to the commission of a crime has been held to play a major and important part in the determination of guilt of the accused person and a Court of law is entitled to convict on the confession once it comes to the conclusion that the confession is voluntary. The reason being that confession itself puts an end to the rough and speculative edges of criminal responsibility in terms of the twin requirements of mens rea and actus reus. See *Gozie Okeke v. The State* (2003) 5 SCM 131 at 189.

I am not in the slightest doubt that the trial court properly found that the confessional statement of the appellant was direct, cogent and unequivocal to the effect that the appellant killed the deceased. He was therefore properly convicted and sentenced by the trial court which sentence was equally properly affirmed by the Court of Appeal.

For the above brief comment and the fuller reasons in the lead judgment of my learned brother, I too hold that the appeal is unmeritorious and deserves to be dismissed. Accordingly, I dismiss same and affirm the judgments of the two Courts below.

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