

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY, 2013. SC. 399/2010
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, B. RHODES-VIVOUR, C. B. OGUNBIYI,
K. B. AKA'AH, JJSC**

AKINOLA OLATUNBOSUN APPELLANT
V.
THE STATE RESPONDENT

MURDER - Charge - Under CC s. 319 - Charge for murder in any Southern State in Nigeria would be correct - If brought under CC s. 319 (H1)

MURDER - Charge - Objection - Where the charge under CC s. 319(1) is wrong - It is the duty of counsel to take objection - Before appellant takes his plea (H2)

CRIMINAL PROCEDURE - Confession - Conviction - Validity - A voluntary confession of guilt is sufficient to warrant conviction - Provided that court is satisfied that it is true (H3)

CRIMINAL PROCEDURE - Confession - Corroboration - It is desirable to have some evidence outside the confession - Which would make it probable that the confession is true (H4)

CRIMINAL PROCEDURE - Confession - Relevancy - Confession is relevant when it establishes elements of the crime charged - And identifies the person who committed the offence (H5)

FACTS

Accused/appellant was arraigned before the High Court of Ekiti State on one count charge for Murder contrary to section 319(1) of the Criminal Code Cap 30 Vol. II Laws of Ondo State of Nigeria 1978 as applicable in Ekiti. Appellant, PW1 (mother of the deceased) and her two children along with several others attended a night vigil at a church in Ekiti. After the vigil and while several people were still sleeping, PW1 noticed that her three month old baby Joy Faith

Olubodun (deceased) and appellant were nowhere to be found. Appellant was also not found at his house. The matter was reported to the police. Appellant was eventually found and he confessed that he killed and buried the little girl. Appellant took the police to the site where he buried the child in a shallow grave after having removed the eyes and slashed the throat.

Appellant was therefore on these facts charged before the court. At the trial, appellant in his testimony on oath admitted committing the offence. In its judgment, the court found appellant guilty of murder under section 316 of the Criminal Code and sentenced him to death pursuant to section 319 of the same law. Dissatisfied, appellant appealed to the Court of Appeal, Ilorin Division. The court in a majority decision dismissed the appeal and affirmed the conviction and sentence of appellant. Denton-West JCA dissented on the charge as framed. Aggrieved further, appellant appealed to Supreme Court, contending inter alia that he was charged under a wrong law.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was not in error in holding that charging the appellant for the offence of murder under section 319(1) of the criminal code law instead of under section 316 of the same law is at sufficient to vitiate the trial and sentence of the appellant and to discharge and acquit the appellant accordingly.

2. Whether the Court of Appeal was right in affirming the conviction of the appellant on weak circumstantial and contradictory evidence adduced by the prosecution.

3. Whether the Court of Appeal was right in affirming the conviction of the appellant when his guilt was not proved beyond reasonable doubt.

HELD (Unanimously dismissing the appeal per

RHODES-VIVOUR JSC)

MURDER - Charge

1. A charge for murder in any of the Southern States in Nigeria would be correct if brought under section 319 of the Criminal Code. Such a charge shall be good and sufficient in law. Consequently the charge for murder against the appellant

which was brought under section 319(1) of the Criminal Code (the punishment section) was correct. (p. 3861 C)

Charge - Objection

2. If the charge under section 319(1) of the Criminal Code is wrong it is the duty of counsel to take objection to the charge before the appellant took his plea especially in Murder cases.

At trial the appellant was represented by counsel. He pleaded not guilty to the one count charge for murder. He never showed that he was misled. On the 20th of August 2007 he gave evidence on oath and admitted in evidence in chief that he killed Faith Olubodun, only to contest the charge during closing speeches. On a careful perusal of the evidence led and accepted by the trial court the offence was committed and there was no defence, rather the appellant admitted in testimony on oath that he committed the offence. In the circumstances there is no substance in this issue as the appellant had not suffered any embarrassment or prejudice at the trial. The appellant was never in jeopardy as there was no miscarriage of justice. The objection to the charge was taken too late. It ought to have been taken at the time the appellant was called upon to enter a plea to the one count charge, and in any case the charge was properly framed. Once the court is satisfied that no substantial miscarriage of justice has actually occurred an appeal on this or similar points ought to be dismissed. (p. 3861 D)

CRIMINAL PROCEDURE - Confession - Conviction - Validity

3. In his extra judicial statement the appellant confessed that he killed and buried Faith Joy Olubodun. The confessional statement was admitted without objection and admitted in evidence as Exhibit D. The long settled position of the law is that a free and voluntary confession of guilt made by an accused person is sufficient to warrant a conviction provided the court is satisfied that the confession is true.

My lords, the appellant made a voluntary confessional statement and the courts below were satisfied that the confession was not beaten out of him. Such a confession alone is good

enough for a conviction. After making the extra judicial confession, the appellant came to court to confirm the confessional statement by admitting that he killed Faith Joy Olubodun, a rare occurrence seen in our courts. It would amount to inverse reasoning for appellant's counsel to complain about weak circumstantial or/and contradictory evidence from the prosecution. With the oral testimony of the appellant confessing to be the one who killed the deceased the prosecution's case is no longer relevant. On the evidence of the appellant alone, admitting to the murder is in itself proof beyond reasonable doubt that he committed the murder and the onus required by section 138 of the Evidence Act is comfortably attained. (pp. 3865 E/3866 F)

D CRIMINAL PROCEDURE - Confession - Corroboration

4. The courts have also decided that it is desirable to have some evidence outside the confession which would make it probable that the confession is true. The fact that Exhibit D, the appellant's confessional statement was tendered without objection is conclusive evidence that his confession to the murder of Faith Joy Olubodun was a free and voluntary confession. The confession of murder was free and voluntary, consistent and probable and exhibit D was corroborated by several facts testified to by credible witnesses for the prosecution e.g. Postmortem Report, Machete used in dismembering the deceased, slab on which the deceased was placed to make decapitation easy. Shallow grave where deceased was buried and mutilated corpse recovered with slit throat and eyes removed. These evidence outside the confession showed that the confession was true. (p. 3865 G)

CRIMINAL PROCEDURE - Confession - Relevancy

5. A confession becomes relevant when it establishes one or all the elements of the crime charged, and identifies the Person who committed the offence. Exhibit D, the appellant's confessional statement establishes beyond reasonable doubt that Faith Joy Olunbodun was killed and the appellant was responsible. The appellant's oral testimony on oath is also a

confession to the murder of Faith Joy Olubodun. (p. 3866 D)

NOTABLE POINTS OF INTEREST

RHODES-VIVOUR JSC

1. Charges - Purpose of

I must observe that the main purpose of a charge is to give the accused person good notice of the case against him, and so once the charge discloses an offence with the necessary particulars that should be brought to the notice of the accused person to avoid him being prejudiced or embarrassed such a charge would be good in law. The charge for murder under section 319(1) of the Criminal Code satisfies the above. (p. 3864 A) B

2. Conviction not to be quashed merely on technicality

An appeal court judge should not quash a conviction on a mere technicality which had caused no embarrassment or prejudice. They should bear in mind that justice must be done even if the decision is wrong. They must not interfere once satisfied that there had been no substantial miscarriage of justice. That is to say the substance of the case must at all times be carefully examined bearing in mind that reliance on technicalities ends up in injustice. This is the principle on which appeals should be decided. (p. 3864 G) D

REPRESENTATION

O. Ajayi with him A. A. Usman, for Appellant F
O. Olanipekun with him D. Aalumum, for Respondent

CASES REFERRED TO

Ibori v. Agbi (2004) 6 NWLR (pt. 868) 78 G
Amayo v. State (2001) 18 NWLR (pt. 745) 257
Okaroh v. State (1990) 1 NWLR (pt. 125) 128
Agbo v. State (2006) 6 NWLR (pt. 977) 545
Rex v. Thompson (1914) 2 KB 99
Ozo v. State (1971) NSCC Vol.7 101 H
Akang v. State (1971) NSCC Vol. 7 55
Obi v. State (1972) NSCC Vol.7 76
Achimi v. State (1972) NSCC Vol.7 595

Onyema v. State (1975) NSCC Vol.9 438

Onyekwe v. State (1988) NSCC Vol. 19 (pt. 1) 369

Njoku v. State (1993) 6 NWLR (pt. 299) 272

Yusufu v. State (1976) 6 SC 167

Obosi v. State (1965) NMLR 119

B Kopa v. State (1971) 1 ALL NLR 150

STATUTES & RULES REFERRED TO

Criminal Code Cap 30 Vol. II Laws of Ondo State 1978, ss. 316, 319(1)

C Criminal Procedure Act, s. 463

Evidence Act, s. 138

Supreme Court Rules, O. 6 r. 5(1)(a)(2)

D **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

The appellant, as accused person was charged before an Omuo Ekiti High Court on one count for Murder. The charge read:

STATEMENT OF OFFENCE

E Murder contrary to section 319(1) of the Criminal Code Cap 30 Vol. II Laws of Ondo State of Nigeria 1978 as applicable in Ekiti.

PARTICULARS OF OFFENCE

F Akinola Olatunbosun (M) on or about the 28th day of June, 2003 at All Christian Fellowship Ministry Church, Ode-Ekiti, in the Omuo Judicial Division murdered one Joy Faith Olubodun.

Jegede J presided. Trial commenced on the 29th day of June, 2006 and ended on the 21st day of August 2007 with closing speeches from counsel. Four witnesses testified for the state while the appellant in his testimony on oath admitted committing the offence. The following were admitted in evidence as exhibits:

1. Exhibit A-Cutlass.
2. Exhibit B - Piece of Wood.
3. Exhibit C - Postmortem Report.
4. Exhibit D - Statement of appellant.
- H 5. Exhibits A1-A8 - Photographs of corpse.

In a considered judgment delivered on the 27th day of September, 2007 the learned trial judge found the appellant guilty of the offence of murder under section 316 of the Criminal Code and sentenced him to death by hanging pursuant to section 319 of the Crimi-

nal code.

The appellant filed an appeal. It came before the Ilorin Division of the Court of Appeal. There was a split decision, Agube, Nweze, JJCA delivered the majority judgment while Denton-West JCA dissented.

Affirming the decision of the trial High Court the majority decision of the Court of Appeal ran as follows:

“...Surely, the circumstances of the contemporaneous disappearance of the accused person and the child; the child’s subsequent mutilation and burial in a shallow grave etc were matters which called for explanation. The accused person supplied the explanations that inculpated him. The lower court rightly convicted him. I, hereby affirm the conviction and sentence of the appellant. This appeal has no merit. It is hereby dismissed.”

This appeal is against that judgment. In accordance with Order 6 Rule 5(1)(a)(2) briefs were filed and exchanged. The appellants brief was filed on the 9th day of November, 2010, while the respondents brief was deemed filed on the 18th day of April, 2012.

Learned counsel for the appellant formulated three issues for determination. They are:

1. Whether the Court of Appeal was not in error in holding that charging the appellant for the offence of murder under section 319(1) of the criminal code law instead of under section 316 of the same law is at sufficient to vitiate the trial and sentence of the appellant and to discharge and acquit the appellant accordingly.

2. Whether the Court of Appeal was right in affirming the conviction of the appellant on weak circumstantial and contradictory evidence adduced by the prosecution.

3. Whether the Court of Appeal was right in affirming the conviction of the appellant when his guilt was not proved beyond reasonable doubt.

Learned counsel for the respondent formulated two issues for determination of this appeal. They are:

1. Whether the prosecution did not prove the offence of murder against the appellant beyond reasonable doubt;

2. Whether charging the appellant for the offence of murder under section 319(1) of the Criminal Code Law, Cap 30, Vol. II, Laws of Ondo State, 1978 (as applicable in Ekiti State) instead of

under Section 316 of the same Law is not sufficient to vitiate the trial and sentence of the appellant.

I have examined the issues formulated by both sides, and found them to be the same. I am satisfied that the issues formulated by learned counsel for the appellant properly addresses the appellants
B grievance in this appeal. At the hearing of the appeal on the 18th day of April, 2013 learned counsel for the appellant, Mr. O. Ajayi adopted his brief filed on the 9th day of November, 2010. He urged us to allow the appeal and examine the dissenting judgment.

C Mr. O. Olanipekun, for the respondent adopted the respondents brief deemed filed on the 18th of April, 2013. He urged this court to dismiss the appeal since the appellant confessed to murder of a 3 month old baby.

THE FACTS ARE THESE.

D On the 28th day of June, 2003 a night vigil was held at the All Christian Fellowship Church, Ode Ekiti. In attendance were several people including PW1, two of her children and the appellant. At the end of the vigil at about 3 a.m. some of the congregation went home while others slept in the church. PW1 and her two children, the ap-
E pellant and several other people slept in the church. A few hours after everyone went to sleep PW1 woke up to find that her three month old baby (Joy Faith Olubodun, Deceased) and the appellant were nowhere to be found. A search party went to the appellant's
F house and found it locked up. A report was made at a nearby Police Station. The appellant was eventually found and he confessed to PW2 (PW1's husband, and father of the deceased) that he killed and buried Joy Faith Olubodun. He took the Police and PW2 to where he killed and buried the child in a shallow grave. The body was ex-
G humed and it was found that the child's eyes were removed and the throat slashed. On the night of the 28th of June 2003 a ritualist was on the prowl at the night vigil and the ritualist was the appellant. I shall now consider the issues seriatim.

ISSUE 1

H Whether the Court of Appeal was not in error in holding that charging the appellant for the offence of murder under section 319(1) of the Criminal Code Law instead of under section 316 of the same Law is not sufficient to vitiate the trial and sentence of the appellant and to discharge and acquit the appellant accordingly.

Learned counsel argued that it was wrong to charge the appellant under section 319(1) of the Criminal Code, the punishment section instead of section 316 of the Criminal Code. He further argued that the learned trial judge was wrong to suo motu amend the charge at judgment stage without giving counsel the opportunity to address him on it. Reference was made to *Ibori v. Agbi* 2004 6 NWLR pt.868 p.78, *Amayo v. State* 2001 18 NWLR Pt.745 P.257. He urged this court to resolve this issue in the appellant's favour. B

Learned counsel for the respondent observed that it was wrong for the appellant to be charged under section 319, the punishment section, contending that the charge ought to have been brought under section 316 of the Criminal Code (the section that created the offence). He submitted that notwithstanding the error the appellant knew he was standing trial for murder, entered his plea, was represented by counsel from the beginning to the end, and at no time did he raise objection to the charge. He observed that - *Amayo v. State* 2001 18 NWLR pt.745 p.257 relied on by learned counsel for the appellant is not of any help to him. Concluding he submitted that the error or irregularity pales to insignificance since the killing was intentional and unlawful, the appellant was never misled and the objection was raised too late, contending that it cannot violate the judgment of the trial court. C D E

This issue asks the court to set aside the conviction and sentence on the ground that the information was preferred under the penalty provision of section 319(1) instead of under section 316 of the Criminal Code which defines the offence of murder. F

This is what the Court of Appeal had to say on this issue:

"...In the first place he must show that he was misled in two respects, namely, that he was either misled by the description of the offence and the ingredients thereof as stated on the information or that he was misled in the preparation of his defence. S. Adekunle v. State 2006 14 NWLR Pt.1000 p.717" G

The Court of Appeal continued:

"He is, also, under obligation to demonstrate the prejudice he suffered in that trial as a result of the misstatement of the section of the Code, Ogbodu v. State 1987 2 NWLR pt.54 p.20. Above all, where he is unable to point to the miscarriage of justice which that irregularity occasioned in respect of his trial and conviction, an appel- H

late court would not upturn such a trial and conviction on the sole ground of the said misstatement of the section of the Code..."

Concluding the Court of Appeal said:

"...the lower court made specific findings of facts on four crucial matters, namely, that the objection was not raised in time, the accused person did not show that he was misled; there was no miscarriage of justice, the accused person knew the offence he was alleged to have committed. These findings were not challenged as being perverse. As such this court cannot interfere with, or disturb them. The law has long been settled that unless findings can be shown to be perverse an appellate court would not interfere with them..."

And with the above conclusion the Court of Appeal resolved the issue against the appellant. The Criminal Law and Procedure of the Southern States of Nigeria, Third Edition by T. A. Aguda states on p. 751 how an information for Murder should be drawn up. It reads:

STATEMENT OF OFFENCE

Murder contrary to section 319 of the Criminal Code.

PARTICULARS OF OFFENCE

A B, on the ...day of ...at ... in the... Judicial Division murdered J.S.

The learned author went on to say that:

"The count is correctly laid under this section by virtue of Form 3 in the Third Schedule to the Criminal Procedure Act and section 463 of that Act."

Section 463 of the Criminal Procedure Act states that:

"463(i) Subject to the express provisions, if any, of the rules, the forms and Precedents contained in the First, Second and Third Schedules may, in accordance with any instructions contained in the said Forms, and with such variations as the circumstances of the particular case may require, be used in the cases to which they apply and, when so used, shall be good and sufficient in law."

(2) The Forms in the said schedules may be added to, revoked, replaced or varied by the rules in all respects as if they had originally been so made."

Again Form 3 in the Third Schedule states how a charge for Murder should be framed. See p. 279 of the Third Schedule of Criminal Law and Procedure of the Southern States of Nigeria. It reads:

STATEMENT OF OFFENCE

Murder, contrary to section 319 of the Criminal Code.

PARTICULARS OF OFFENCE

A. B. on the day of 19....., in the
Judicial Division, Murdered J.S.

The charge to which the appellant entered NOT guilty plea to
on the 29th day of June 2006 runs as follows: B

STATEMENT OF OFFENCE

Murder contrary to section 319(1) Of the Criminal Code Cap
30 Vol. II, Laws of Ondo State of Nigeria 1978 as applicable in Ekiti.

PARTICULARS OF OFFENCE

Akinola Olatunbosun (M) on or about the 28th day of June 2003 at
All Christian Fellowship Ministry Church, Ode-Ekiti in the Omuo Ju-
dicial Division murdered one Joy Faith Olubodun. C

***A charge for murder in any of the Southern States in
Nigeria would be correct if brought under section 319 of the
Criminal Code. Such a charge shall be good and sufficient in
law. Consequently the charge for murder against the appel-
lant which was brought under section 319(1) of the Criminal
Code (the punishment section) was correct. If the charge un-
der section 319(1) of the Criminal Code is wrong it is the duty
of counsel to take objection to the charge before the appel-
lant took his plea especially in Murder cases.*** See Okaroh v.
State 1990 1 NWLR pt.125 p.128, Agbo v. State 2006 6 NWLR
Pt.977 p. 545. D E

***At trial the appellant was represented by counsel. He
pleaded not guilty to the one count charge for murder. He
never showed that he was misled. On the 20th of August 2007
he gave evidence on oath and admitted in evidence in chief
that he killed Faith Olubodun, only to contest the charge dur-
ing closing speeches. On a careful perusal of the evidence led
and accepted by the trial court the offence was committed
and there was no defence, rather the appellant admitted in
testimony on oath that he committed the offence. In the cir-
cumstances there is no substance in this issue as the appel-
lant had not suffered any embarrassment or prejudice at the
trial. The appellant was never in jeopardy as there was no
miscarriage of justice. The objection to the charge was taken
too late. It ought to have been taken at the time the appellant*** F G H

was called upon to enter a plea to the one count charge, and in any case the charge was properly framed. Once the court is satisfied that no substantial miscarriage of justice has actually occurred an appeal on this or similar points ought to be dismissed. See *Rex v. Thompson* 1914 2 KB p.99, *R. v. Aseigbu* 3

^B WACA p.142, *R. v. Osita Chukwigbo Agwuna* 12 WACA p. 456.

I am satisfied that there was no error in the way the charge was framed. My lords, I am of the view that the charge for murder under section 319 of the Criminal Code was correct (see the Criminal Law and Procedure of the Southern States of Nigeria, third edition by T. Akinola Aguda page 751). If I am wrong, which I doubt, it must be noted that the appellant was defended by counsel at trial and could not have been embarrassed by the way this one count for murder was drafted. The Record of Appeal is abundantly clear that he knew
^C D precisely what was alleged against him by the prosecution/respondent and he admitted the allegations in his testimony on oath in court. The offence of murder was very clearly proved. There has been no miscarriage of justice.

^E Before I bring the curtains down on this issue I must comment on *Amayo v. State* supra heavily relied on by learned counsel for the appellant to support his argument that a charge for murder should be brought under section 316 of the Criminal Code and not Section 319(1) of the Criminal Code.

^F The opening paragraph of the leading judgment written by Uwaifo JSC reads:

“...The appellant, a police constable was charged with the murder of one Julius Duru under section 316 of the Criminal Code, Cap 30 Law of Eastern Nigeria, 1963, erroneously stated as Section 319(1).”
^G

The issues in the appeal were:

1. Whether the appellant was exculpated from criminal responsibility for the death of the deceased by virtue of the provisions of section 24 of the Criminal Code.
- ^H 2. Whether the guilt of the appellant was established beyond reasonable doubt as laid down by law before he was convicted for murder and sentenced to death.

After examining the issues above, the death sentence passed on the appellant was reduced to manslaughter by this court and a

sentence of 10 years I.H.L. was imposed. Nowhere in the leading judgment was it decided that a charge for murder must be brought under section 316 of the Criminal Code and not Section 319(1) of the Criminal Code. It was Ogundare, JSC who in his concurring judgment observed that:

“...The appellant was charged for the offence of murder contrary to section 319(1) of the Criminal Code” Subsection (1) of section 319 does not create the offence of murder, rather it provides for the punishment for murder..

The proper section is 316 of the Criminal Code of Eastern Nigeria. Clearly the error here has been as a result of gross carelessness on the part of the prosecution counsel. Defence counsel ought to have raised objection at the trial but did not. And as the point has not been raised in this appeal, I say no more on it.”

Whether the correct section to charge for murder is under section 316 or 319(1) of the Criminal Code is of no assistance in resolving any of the two issues. Consequently the observations of Ogundare, JSC in his concurring judgment are not an answer to any of the two issues considered by this court. His lordships views are obiter. They are not binding. Once again a charge for murder in Southern Nigeria should be brought under section 319(1) of the Criminal Code and not under section 316 of the Criminal Code. There are a plethora of authorities where the appellant was charged and tried for murder contrary to section 319(1) of the Criminal Code, and in all these cases no objection was raised. I shall refer to only a few of them. See *Ozo v. State* 1971 NSCC Vol.7 p.101, *Akang v. State* 1971 NSCC Vol. 7 P:55, *Obi & Ors v. State* 1972 NSCC Vol.7 p.76, *Achimi v. State* 1972 NSCC Vol.7 p.595, *Onyema v. State* 1975 NSCC Vol.9 p.438, *Onyekwe v. State* 1988 NSCC Vol 19 pt. 1 p.369, *Njoku v. State* 1993 6 NWLR pt.299 p. 272.

There can be no doubt that in view of the Forms and Precedents contained in the third schedule of the Criminal Procedure Act a charge for murder must be brought under section 319 of the Criminal Code and not under section 316 of the Criminal Code. A charge for Murder under section 319(1) of the Criminal Code is in the circumstances good in law. Both courts below made heavy weather on an issue, oblivious of the fact that the charge as framed at inception of the trial was correct. Their foray into the consideration of the cor-

rect position does not in anyway affect the judgment of the trial court which was affirmed by the Court of Appeal.

I must observe that the main purpose of a charge is to give the accused person good notice of the case against him, and so once the charge discloses an offence with the necessary particulars that should be brought to the notice of the accused person to avoid him being prejudiced or embarrassed such a charge would be good in law. The charge for murder under section 319(1) of the Criminal Code satisfies the above.

Once particulars on who, when, where, and what are given in a charge, an accused person would be well aware of the charge against him, and an objection to such a charge would not be sustained.

The appellant was charged for murder under section 319(1) of the Criminal Code. In the charge particulars are given as follows:

(a) Who is charged? Answer - The appellant
(b) When was the offence committed: Answer- On the 28th day of June, 2003.

(c) Where was the offence committed? Answer-At-All Christian Fellowship Ministry Church Ode Ekiti, in the Omuo Judicial Division.

(d) What did the appellant do? Answer- he killed one joy Faith Olubodun

The Charge was detailed on who, when, where, and what. The appellant was very well aware of the contents of the charge against him. He was in the circumstances not prejudiced or embarrassed by the way the one count charge was framed. The fact that he was represented by counsel right through trial and no objection was taken to the charge confirms that no miscarriage of justice resulted. The charge for murder under section 319(1) of the Criminal Code was very much in order. There was no basis for an objection to the charge as framed.

I propose to add a few observations, which I venture to hope will be of assistance to judges who sit to hear appeals. An appeal court judge should not quash a conviction on a mere technicality which had caused no embarrassment or prejudice. They should bear in mind that justice must be done even if the decision is wrong. They must not interfere once satisfied that there had been no substantial miscarriage of justice. That is to say the substance of the case must at all times be carefully examined bearing in mind that reliance on tech-

nicalities ends up in injustice. This is the principle on which appeals should be decided.

Issues 2 and 3 would be taken together. They question the conviction of the appellant on weak circumstantial and contradictory evidence, and whether the guilt of the appellant was proved beyond reasonable doubt. B

I have carefully read the submissions of counsel on both issues and diligently examined proceedings in the trial court. I intend to reproduce the appellant's testimony in full to justify my reasoning on these issues. C

On the 20th day of August 2007, Mr. Ogunmoroti, learned counsel for the appellant informed the court that he was ready to open defence. This is what transpired.

DW1. Akinola Olatunbosun (the accused) sworn on the Holy Bible in Yoruba by Mr. M.A. Akintoye. The accused elects to give his evidence in Yoruba to be interpreted by Mr. Akintoye the clerk and who has been our sworn interpreter.

"My names are Akinola Olatunbosun. I was living at Oloye Street, Ode Ekiti before my arrest. I was an apprentice mechanic. I know one Faith Joy Olubodun. She was the daughter of our Pastor, Mr. Mathew Olubodun. It is true that I killed the child Faith Olubodun in June, 2003. It is just as the prosecution alleged. I made statement to the Police." E

In his extra judicial statement the appellant confessed that he killed and buried Faith Joy Olubodun. The confessional statement was admitted without objection and admitted in evidence as Exhibit D. The long settled position of the law is that a free and voluntary confession of guilt made by an accused person is sufficient to warrant a conviction provided the court is satisfied that the confession is true. See Yusufu v. State (1976) 6 SC p.167, E. Obosi v. State (1965) NMLR p.119 ***The courts have also decided that it is desirable to have some evidence outside the confession which would make it probable that the confession is true.*** See Onuoha v. State 1987 4 NWLR H Pt.65 P.331, Kopa v. State 1971 1 ALL NLR p.150, E. Obosi v. State 1965 NMLR p. 119.

The fact that Exhibit D, the appellant's confessional statement was tendered without objection is conclusive evidence

that his confession to the murder of Faith Joy Olubodun was a free and voluntary confession. The confession of murder was free and voluntary, consistent and probable and exhibit D was corroborated by several facts testified to by credible witnesses for the prosecution e.g. Postmortem Report, Machete used in
B **dismembering the deceased, slab on which the deceased was placed to make decapitation easy. Shallow grave where deceased was buried and mutilated corpse recovered with slit throat and eyes removed. These evidence outside the confession showed that the confession was true.**
C

In testimony on oath in the trial court the appellant said:

"I know one Faith Joy Olubodun. She was the daughter of our Pastor, Mr. Mathew Olubodun. It is true that I killed the child Faith Joy Olubodun in June, 2003. It is just as the prosecution alleged..."

D Section 27(1) of the Evidence Act States that:

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

A confession becomes relevant when it establishes one
E **or all the elements of the crime charged, and identifies the Person who committed the offence. Exhibit D, the appellant's confessional statement establishes beyond reasonable doubt that Faith Joy Olunbodun was killed and the appellant was responsible. The appellant's oral testimony on oath is also a**
F **confession to the murder of Faith Joy Olubodun.**

My lords, the appellant made a voluntary confessional statement and the courts below were satisfied that the confession was not beaten out of him. Such a confession alone is
G **good enough for a conviction. After making the extra judicial confession, the appellant came to court to confirm the confessional statement by admitting that he killed Faith Joy Olubodun, a rare occurrence seen in our courts. It would amount to inverse reasoning for appellant's counsel to complain about weak circumstantial or/and contradictory evidence**
H **from the prosecution. With the oral testimony of the appellant confessing to be the one who killed the deceased the prosecution's case is no longer relevant. On the evidence of the appellant alone, admitting to the murder is in itself proof**

beyond reasonable doubt that he committed the murder and the onus required by section 138 of the Evidence Act is comfortably attained.

The appellant killed because he is a ritualist. He dismembered the body of Faith Joy Olubodun, a three month old baby. He gouged out her eyes, slit the neck and disemboweled the child in the most harrowing way. The evidence against the appellant is one way, and he agrees with it. It justifies the death sentence passed on him by Jegede J of an Ekiti High Court, affirmed by the Court of Appeal, and finally affirmed now by this court.

The main thrust of the dissenting judgment is on the charge as framed. This has been adequately dealt with under issue one.

An Appeal Court would only interfere when there is substantial miscarriage of justice. In this case there was no miscarriage of justice.

If ever there was a criminal appeal completely devoid of any merit whatsoever this one scores very high marks. This appeal is dismissed.

ONNOGHEN JSC

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

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

My learned brother has dealt exhaustively with the relevant issues in the appeal which leaves me with nothing useful to add.

Consequently I order that the appeal be and is hereby dismissed.

CHUKWUMA-ENEH JSC

I read the lead judgment of my learned brother Rhodes-Vivour JSC in this matter with which I entirely agree. All the issues raised for determination have been rightly resolved against the Appellant. The appeal has no merit whatsoever and should be dismissed. I endorse all the consequential orders contained therein.

Appeal dismissed.

OGUNBIYI JSC

This is an appeal against the judgment of the Court of Appeal, Ilorin Division delivered on 11th day of December 2009 wherein the lower court in a split judgment affirmed the conviction and sentence
 B of the appellant.

The appellant was charged before the trial court with the offence of murder punishable under section 319(1) of the Criminal Code Law, Cap 30 Vol. II, Laws of Ondo State of Nigeria, 1978 as
 C applicable in Ekiti State.

The appellant pleaded not guilty to the charge; the prosecution called four witnesses inclusive of the mother and father, of the victim as P.W.1 and P.W. 2 respectively. Also in the course of the trial, a number of exhibits were tendered and admitted. In his own defence,
 D the appellant also gave evidence as D.W.1.

The facts of the case have been explicitly stated in the lead judgment of my lead judgment of my learned brother Bode Rhodes-Vivour (JSC).

It is a fact on the record that the appellant was at the High
 E Court charged for murder under section 319(1) as against section 316(1) of the Criminal Code. It was on this account that he seeks for his conviction and sentence by the trial court to be vitiated and hence his discharge and acquittal.

Section 319 of the Criminal Code under reference states as
 F follows:-

“S.319 subject to the provisions of the section any person who commits the offence of murder shall be sentenced to death.”

The appellant’s point of contention is that without the commission of a crime and trial for the offence which in this instance is under section 316 of the Criminal Code, there cannot be punishment. At page 73 of the record of appeal, the trial court held and said:-
 G

“Accordingly, I hereby find the accused guilty as charged under section 316 of the Criminal Code.”
 H

On behalf of the appellant, his learned counsel maintained that it was wrongful in law for the trial court to have suo motu amended the charge without any application to that effect and without inviting parties to address on the need for such an amendment.

The Court of Appeal in its judgment did not reason along side the contention held by the appellant's counsel and at page 129 of the record had this to say:-

"...the appellant prayed this court to set aside his conviction and sentence on the ground that the information was preferred under the penalty provision of section 319(1) and not under section 316(1)... which defines the offence of murder. Unfortunately, he was unable to discharge the four fold burden cast on him. Surely he cannot discharge the said burden by the mere submission of his counsel that the information was laid under the penalty provision of the code; he can only do so by instantiating those vitiating factors from the printed records, Adekunle v. State (supra) 734 with respect, therefore, to heed to his plea would amount to technical justice..."

It is on record that the appellant was arraigned and he pleaded not guilty to the one count charge of murder with the particulars of the offence clearly read out to him. As rightly submitted by the learned respondent's counsel therefore the appellant, no doubt knew that he was facing the charge of murder which was also very well known to his counsel.

It is significant to further restate that the appellant was, throughout the duration of the trial, represented by a counsel. Neither himself nor his counsel raised any objection that he could not be charged under section 319(1) of the Criminal Code. For purpose of confirming that the appellant precisely knew the nature of the charge against him, reference can be made to his evidence in court as D.W.1 at page 46 of the record of appeal wherein he said:-

"It was true that I kill the child faith Olubodun in June, 2003. It is just as the prosecution alleged. I made statement to the police."

The accused/appellant's extra judicial statement was recorded by P.W.3 one Sgt. Nelson Okidu who attested to same in his evidence before the court at pages 33 - 34 of the record. The statement taken on 28th June, 2003 was admitted and marked Exhibit 'D' and it serves as a confirmation of the appellant's evidence given in court and reproduced supra. This is what the appellant said in his extra judicial statement:-

"I am presently a member of All Christian Fellowship Ministry Church Ode-Ekiti. I joined the church since 1998 December and since then I have been a member up till the time of this incident. I

could remember the (sic) sometime ago I had wanted to become rich but the source was not decided until yesterday 27th June, 2003 when I made up my mind to kidnap a child from church... At about 03.30 hours of 28/6/2003 while still in the church, I saw a small child a female covered with a mosquito net. I then decided to kidnap the child without anybody's knowledge. I took the child to the almost a mile to church. When I got to the bush I first of all dug a shallow grave before I finally killed the child. I killed the child with a cutlass which I used on her several times before the child finally died I then buried the child without the eyes in the shallow grave."

It is informative that the appellant did not deny making the foregoing statement to the police; rather in his evidence before the court at page 46 of the record he testified that the made a statement to the police. The appellant did not also challenge the extra judicial statement.

The killing by the appellant of his victim was intentional and unlawful for ritual purpose. He was a brutal beast who was carried away in his quest to get rich by hook or crook. It was a demonic desire which must be condemned. As rightly maintained by the learned respondent's counsel, the appellant was never misled by the charge having been brought under the wrong section; he very well knew the offence for which he was standing trial and was never in doubt. The address of the appellant's counsel at the close of the case on the error or irregularity cannot be regarded as an objection to the prosecution of the case. The objection raised at the address stage was far too late in the day as it did not in anyway affect or change the validity of the proceedings. In the case of Solomon Adekunle V. The State (2006) 14 NWLR (pt.1000) 717 at 742-743 this court held and said:-

"It is the duty of counsel especially in murder cases, to promptly take objection to any every perceived irregularity relating at least to procedure or charge."

On the totality of the case predicated this appeal the extra judicial statement made by the appellant is greatly corroborative of the prosecution's case. By the admission and confession of the accused, the requirement securing his conviction had been met without more. The prosecution had sufficiently proved the appellant guilty of the offence charged and his conviction and sentence was well ap-

portioned by the lower court in affirming the judgment meted out by the trial court. See *Achahua V. State* (1976) 12 SC 63 at 65.

With the few words of mine and more particularly on the comprehensive reasoning and conclusions by my learned brother Bode Rhodes-Vivour on his lead judgment, I also dismiss the entire appeal as lacking in merit. The judgment of the lower court in affirming that of the trial court is also endorsed by me.

AKA'AH'S JSC

I have had a preview of the lucid and well articulated judgment of my learned brother, RHODES-VIVOUR, JSC. I am in complete agreement with his reasoning and conclusion that the appeal is unmeritorious and should be dismissed. I however feel obliged to comment on the charge which led to the dissenting judgment by Denton West JCA. The charge sheet read as follows:

STATE (SIC) OF OFFENCE

MURDER contrary to section 319(1) of the Criminal Code Cap 30 Vol.II Laws of Ondo State of Nigeria 1978 as applicable in Ekiti.

PARTICULARS OF OFFENCE

Akinola Olatunbosun (m) on or about 28th day of June, 2003 at All Christian Fellowship Ministry Church, Ode - Ekiti in the Omuo Judicial Division murdered one Joy Faith Olubodun.

The bone of contention in the dissenting judgment by Denton West JCA is anchored on the view that the appellant was charged under the punishment section and not the section that created the offence. That argument will hold water only if the offence for which the appellant was convicted is not known to law. If the facts on which an appellant was convicted are known to law the fact that the accused was charged under a wrong law or section of the law, will not lead to his acquittal. See: *Alhaji Mujahid Dokubo - Asari v. Federal Republic of Nigeria* (2007) 5-6 SC 150; *Aminu Mohammed v. State* (2007) 7 NWLR (part 1032) 152. Although there is a slip in the dissenting judgment, I do not think Denton West JCA is quarrelling with the facts as stated in the majority judgments which have been well articulated in the leading judgment of my learned brother, RHODES - VIVOUR JSC. I believe it is the insatiable greed for mate-

rial wealth and power that led the appellant to contemplate this heinous crime. The blood of this three month old innocent baby certainly cried to heaven for vengeance just like the blood of Abel who was killed by Cain (Genesis 4:10).

Although there is a divergence of opinion as to whether a charge
 B for murder should be laid under Section 316 of the CPA as advocated by Uwaifo and Ogundare JJSC in *Amayo vs State* (2001) 18
 NWLR (part 745) 257 or under Section 319 as captured in the Forms
 to the Third Schedule of the Criminal Law and Procedure of the
 C Southern States of Nigeria, Third Edition by T. A. Aguda, and the
 plethora of cases which have been listed in the leading Judgment
 namely; *Ozo vs State* (1971) NSCC Vol. 7 page 101; *Akang vs State*
 (1971) NSCC Vol. 7 page 55; *Obi & Ors vs State* (1972) NSCC Vol.
 7 Page 76; *Achimi vs State* (1972) NSCC Vol. 7 page 595; *Onyema*
 D *vs State* (1975) NSCC Vol. 9 Page 438; *Onyekwe v. State* (1988)
 NSCC Vol. 19 (part 1) Page 369 and; *Njoku v. State* (1993) 6 NWLR
 (part 299) page 272 what is of relevance is that the main purpose of
 a charge is to give the accused good notice of the case against him,
 and once the charge discloses an offence with the necessary particu-
 E lars and the accused is not prejudiced or embarrassed, he should not
 be let off the hook simply on account that he was not tried under the
 correct section of the law.

From the evidence adduced both by the prosecution and the
 F accused/appellant an unmitigated injustice would have resulted if a
 verdict other than that the accused/appellant is found guilty of the
 offence of murder had been returned. The learned trial Judge acquitted himself creditably well and returned the correct verdict. The
 majority decision affirmed the conviction of the appellant for murder.
 G I too find that the appeal is completely bereft of any merit and I
 accordingly dismiss it. I further affirm the conviction and sentence
 passed on the appellant by Jegede J. who found him guilty of the
 offence of murder under Section 316 of the Criminal Code and sentenced him to death by hanging pursuant to section 319 of the same
 H Criminal Code.