

SUPREME COURT OF NIGERIA
FRIDAY 1ST MARCH, 2013. SC. 391/2010
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, S. GALADIMA, S. N. NGWUTA,
S. S. ALAGOA, JJSC**

1. LAWRENCE OGUNO
2. JOEL OGUNO APPELLANTS
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Confession - Proof - Onus to prove voluntariness of extra judicial statement made by accused - Is on prosecution (H1)

CRIMINAL PROCEDURE - Confession - Objection to - Accused who denies voluntariness of his extra judicial statement made to police - Must object when prosecution seeks to tender the statement in evidence (H2)

CRIMINAL PROCEDURE - Confession - Voluntariness - Test - Court conducts trial within trial on admissibility of such statement - And it is prosecution that begins first - As it will be wrong to call on accused to start calling witness first (H3)

APPEALS - Criminal procedure - Irregularity - Objection - Appellants were not prejudiced on the procedure they elected to adopt - And having failed to object at trial court - They cannot be allowed to do so on appeal (H4)

CRIMINAL PROCEDURE - Circumstantial evidence - Weight - Such evidence is good and sometimes better than other evidence - If it is positive and conclusive as to guilt of accused (H5)

MURDER - Proof - Apart from confessional statements of appellants - Evidence adduced by prosecution witnesses point to the only fact - That it was appellant that killed deceased (H6)

MURDER - Aiding & abetting - Proof - The charge was proved beyond reasonable doubt - For the fact that 2nd appellant was present at the scene without raising alarm - And assisted 1st appellant in carrying the corpse downstairs (H7)

EVIDENCE - Confession - Admissibility - Exhibit 4 was rightly admitted as it was tendered without objection - And PW4 through whom it was tendered - Was member of team of policemen that investigated the case (H8)

FACTS

Before the High Court of Plateau State Jos, accused/1st appellant was arraigned for the offence of culpable homicide punishable with death under section 221 of Penal Code, while 2nd appellant was arraigned for abetting the commission of culpable homicide punishable under section 85 of the Code. The case against 1st appellant was that he caused the death of the deceased (his biological father) by inflicting on him some grievous bodily injury. It was also in evidence that 1st appellant poured a corrosive substance on deceased's body. 2nd appellant who was at the crime scene, refused to raise an alarm, but assisted 1st appellant to carry the corpse to downstairs of their house. The corpse was later discovered by PW2. It was PW3 that reported the incident to Police. Appellants were thus arrested. They made extra-judicial statements (Exhibits 1, 2, 3 and 4) to Police.

At the trial, appellants pleaded not guilty to the charges. Exhibits 3 and 4 were tendered through PW4 (I.P.O. who investigated the case) without objection. However, objection was raised against the voluntary nature of Exhibits 1 and 2. A trial within trial was therefore ordered by the court to test the voluntariness or otherwise of the Exhibits 1 and 2. Appellants' counsel adopted the procedure at the mini trial. At the end, the court ruled that the Exhibits were admissible in evidence. In their respective testimonies, PW1 – 5 linked appellants with the death of deceased. Appellants testified in their defence and tendered no Exhibit. At the end of trial, the court convicted appellants and sentenced them to death by hanging. Appellants were dissatisfied and hence appealed to the Court of Appeal, Jos Division. The court dismissed the appeal and affirmed the trial court's judgment. Aggrieved again, appellants appealed to Supreme

Court.

ISSUES FOR DETERMINATION

1. Whether the honourable Court of Appeal was right in affirming the conviction and death sentence passed on the 2nd Appellant based principally on Exhibits 1 and 2, when the burden of establishing the alleged involuntariness was placed on the 2nd Appellant.

2. Whether the charges of culpable homicide punishable with death under Section 221 of the Penal Code and abetment under Section 85 of the Penal Code were established beyond reasonable doubt by the prosecution against the Appellants.

3. Whether the Honourable Court of Appeal was right when it held that the unusual and suspicious behaviour of the Appellants was conclusive of the commission of the offences with which they were charged.

4. Whether the Honourable Court of Appeal was right when it held that the PW2 and PW3 gave evidence that it was the appellants that saw the deceased last alive.

5. Whether the Honourable Court of Appeal was right in affirming the conviction and death sentence passed on the 1st Appellant when Exhibit 4 was tendered through another witness other than the maker.

HELD (Unanimously dismissing the appeal per **MUNTAKA-COOMASSIE JSC**)

CRIMINAL PROCEDURE - Confession - Proof

1. It is settled principle of law that the onus to prove the voluntariness of extra judicial statement made by the accused person is on the prosecution. (p. 4545 F)

CRIMINAL PROCEDURE - Confession - Objection to

2. The practice in trial Court for an accused person, who denies the voluntariness of his extrajudicial statement made to the police, is to object to the statement when the prosecution seeks to tender it in evidence. (p. 4545 G)

CRIMINAL PROCEDURE - Confession - Voluntariness - Test

3. When this is done at that stage the court proceeds to test

the voluntariness of such a statement by conducting a trial within trial on the admissibility of the statement. And it is the prosecution who should begin first. It will be wrong for the trial Court to call on the accused's person to start by calling his witness first. By so doing it has shifted the onus of proving that the statement was not made voluntarily on the accused person which of course would be prejudicial to the accused person and a denial of his right to fair hearing, the end result of statement admitted under this procedure is to set it aside.
 (p. 4545 G)

Criminal procedure - Irregularity - Objection
4. I have carefully perused the record of appeal and I am unable to find anywhere the trial Court directed the appellants to start first. It was the appellants; through their learned counsel that elected to start giving evidence first at the two trials within trial conducted in respect of exhibits 1 and 2.

In my view where a party elected and/or consented to an irregular procedure he cannot, on appeal, challenge the said irregularity whichever way the appellants argue it is clear that they were heard by the trial Court on the procedure they elected to adopt, hence the decisions of Z 'DEEIT V. RSCSC supra, cited by the appellants, is in applicable to this case. It would have been a case of prejudice if it was the Court ordered that the appellant to start first. I am of the firm view that the appellants were not prejudiced on the procedure they elected to adopt at the trial within trial. The alleged irregularity complained of was not objected to immediately or timeously at the trial Court, and being of the view that no miscarriage of justice was occasioned thereby. I therefore find no justification for allowing the appellants to raise it on appeal.
 (p. 4546 B)

CRIMINAL PROCEDURE - Circumstantial evidence - Weight
5. The argument of the appellant that there was no eye witness to the commission of the crime hence the circumstantial evidence adduced in this case is not sufficient to convict and sentence the appellants, is of no moment in this case, circum-

stantial evidence, particularly evidence that was not challenged under cross-examination as in this case, is as good and sometimes better than any other evidence if it is cogent, positive and conclusive. It is no derogation of evidence to say that it is circumstantial, it may also be noted that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered against an accused person charged with the offence available for which the circumstantial evidence is the only one available. Each case depends on its own facts but the one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree of possibility or chance that other person could have been responsible for the commission of the offence. (p. 4547 F)

MURDER - Proof

6. In the instant case apart from Exhibits 1, 2, 3 and 4 of the confessional statements of the appellants, the evidence adduced by the prosecution witnesses point to the only fact that it was the appellant that killed the deceased particularly if the following facts were considered:-

1. The appellants were not comfortable with the presence of the PW1 in the house, hence they have to look for a way to send her out into the cold weather to go and open the shop at 7.30am.

2. Why were they uncomfortable when PW3 entered the house and they were following him to everywhere he went?

3. After the PW3 left and they have accomplished their aim, they left the house came to the shop, discussed briefly and dispersed.

4. Why did the 2nd appellant not challenge the PW2 why she alleged that Joel 'so this is what you are up to and he did not protest?'

5. The Appellants were the last persons who were with the deceased and who saw him last.

All of these and coupled with Exhibits 1, 2, 3 and 4 point conclusively that it was the appellants who committed the crime. (p. 4548 B)

MURDER - Aiding & abetting - Proof

7. The 2nd appellant was present at the scene, he saw PW1 attacking the deceased he did not raise alarm, when the deceased died he joined the 1st appellant to carry the corpse to downstairs when a substance suspected to be acid was poured on him. Then can the 2nd appellant be said not to have aided, encouraged or instigated the 1st appellant to commit the offence of murder in this case, the answer is in the negative. I hold that the charge of aiding and abetting made against the 2nd appellant has been proved beyond reasonable doubt.
(p. 4549 F)

EVIDENCE - Confession - Admissibility

8. The appellants challenged the admissibility of Exhibit 4, the 1st appellant’s statement to the police on the ground that it was not the PW4 that made it or recorded it, while the maker was the Inspector Danladi Daniel, and Exhibit 4 having been tendered through PW4 who was not in a position to answer any question on it, the learned trial judge as well as the lower court ought not to have placed any probative value on it. In my view the submission of the learned counsel to the appellants is a complete misconception of the facts of this case. In the first place Exhibit 4 was tendered without any objection from the defence and secondly it is clear from the record that Pw4 is a member of the team of Policemen headed by Inspector Danladi Daniel who investigated this case, and he was part of the team that took the statement of the appellants.
(p. 4550 C)

REPRESENTATION

Elisha Y. Kurah Esq., for the Appellants
Sheni Ibiwoye Esq., for the Respondent

CASES REFERRED TO

Auta v. State (1975) All NLR 163
Effiong v. State (1998) 5 SC 136
Gbadamosi v. State (1992) 11 - 12 SCNJ 269

Kaza v. State (2008) 7 NWLR (pt. 105) 125

Njovens v. State (1973) 5 SC 12

Ozaki v. State (1990) All NLR 94

Idrisu v. State (1963) NMLR 88

Isah v. State (2007) NWLR (pt. 1049) 582

Sade v. State (2006) 12 MJSC 78

B

Omega Bank (Nig.) Plc v. O.B.C Ltd (2005) All FWLR (pt. 249) 1964

Fixed Odds Ltd v. Akatugba (2001) FWLR (pt. 767) 708

Buhari v. INEC (2008) 19 NWLR (pt. 1120) 246

Durwode v. State (2000) 15 NWLR (pt. 691) 467

C

Omoh v. State (1985) 3 NWLR (pt. 12) 236

Ebenelu v. State (2009) 6 NWLR (pt. 1138) 434

STATUTES REFERRED TO

Penal Code, ss. 85, 221

D

Evidence Act, ss. 91(1)(a)(b), 138(1)

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

This is an appeal against the judgment of the Court of Appeal Jos Division, hereinafter called the lower court delivered on 2/6/2010 affirming the conviction and death sentence passed on the two Appellants by the trial court. E

The two accused persons, Lawrence Oguno and Joel Oguno, were arraigned before the High Court of Justice Plateau State for the offences of culpable homicide punishable with death under Section 221 of the penal Code and abetting the commission of culpable homicide punishable under Section 85 of the penal Code respectively. F

The charges read thus:-

1. That you LAWRENCE OGUNO on or about the 31st day of August 1998 at No. 53B Murtala Mohammed Way, Jos committed culpable homicide punishable with death in causing the death of Chief Patrick Oguno by causing him such bodily injury. To wit, stabbing him several times on different parts of his body with knife and pouring a corrosive substance on his body, suspected to be acid, knowing that his death was the probable consequence of your act and thereby committed an offence punishable under Section 221 of the penal Code. G H

2. That you JOEL OGUNO on or about 31st day of August,

1998 at No. 53.B Murtala Mohammed way, Jos committed the offence of culpable homicide punishable with death in that you abetted the said Lawrence Oguno in the Commission of the said offence of culpable homicide punishable with death by doing an act, to wit; abetting Lawrence Oguno to dispose of the corpse of Chief Patrick Oguno and failing to report the incident and that you have thereby committed an offence punishable under Sections 85 and 221 of the Penal Code.

Both accused persons each pleaded not guilty to the charge and thereafter hearing in the case commenced in earnest. It will be interesting to note that the two accused persons are brothers while the deceased Patrick Oguno was their biological father.

At the trial, the prosecution called five (5) prosecution witnesses and tendered five (5) Exhibits. The accused persons testified in their defence and tendered no exhibit. Both declined to call other witness or witnesses.

At the end of the trial proper the learned trial Judge Dusu J in a reserved judgment convicted the two Appellants as charged and sentenced them to death by hanging. See pages 230 - 260 of the record of appeal.

Both accused persons were dissatisfied with the judgment of the trial court unsuccessfully appealed to the Court of Appeal Jos Division hereinafter called the lower court.

In a unanimous decision the Court of Appeal on pages 319-342 held thus:-

Particularly pages 341-342 the lower court held thus:-

“From Exhibit 1, 2, 3 and 4 both Appellants were ad idem that 1st Appellant killed the deceased. The 2nd Appellant only aided in carrying the corpse downstairs to hide under the staircase.

From Exhibit 1, 2, 3 and 4, the 2nd Appellant helped in hiding the corpse and also failed to report the crime to the police.

The trial Judge agreed that the drafting of the second count was inelegant but did not think that there was any doubt that the 2nd Appellant is charged with abetting the 1st Appellant in the commission of culpable homicide. The 2nd Appellant was not misled in any way. He understood what he was charged with.

The 2nd Appellant reported that their father was missing but failed to tell them the truth. Was their father really missing when he

helped the 1st appellant to hide his body under the staircase?

All the ingredients of the 2nd count were proved from Exhibits 1, 2, 3, 4 and 5 from the testimonies of PW1, PW2 and PW3. The second issue for the 2nd Appellant is resolved against the 2nd Appellant.

Learned counsel for the 2nd Appellant submitted that there was no iota of evidence against the 2nd Appellant. I dare say that the prosecution fixed the 2nd Appellant to the scene of crime from the evidence of PW1, PW2, and PW3. Exhibits 1, 2, 3, 4 and 5 were also part of the evidence against the Appellants.

The prosecution proved that it was the intentional act of the 1st Appellant that killed the deceased. Also that the 2nd Appellant had knowledge of the crime and helped the 1st Appellant in hiding the body of the deceased. Prosecution witness 5 also gave evidence as to the primary cause of death of the deceased. All these evidence pieced together read to no other conclusion other than that, the Appellants killed their father and hid his body under the staircase.

The 3rd issue articulated for the 2nd Appellant also fails.

The 3 issues articulated by learned SAN for the 2nd Appellant are all resolved against him. This appeal lacks merit and it is hereby dismissed. I affirm the judgment of the lower court and the sentencing thereof in respect of the 2nd Appellant.

The appeals of both Appellants are unmeritorious and therefore dismissed. I affirm the judgment of the trial court. I also affirm the sentence of death by hanging of the 1st Appellant Lawrence Oguno and 2nd Appellant Joel Oguno”.

Dissatisfied with the judgment of the lower court the appellants again appealed to this court on a Notice of Appeal containing five (5) grounds of appeal. They are hereunder reproduced without their particulars:-

1. The Honourable Court of Appeal erred in law when it held that ‘the trial Judge elicited from the evidence of PW1, PW2 and PW3 that both Appellants were in the house with their deceased father when prosecution witness 2 went downstairs to open the shop. It was the Appellants that saw the deceased last alive from the evidence of PW2 and PW3.

2. The Honourable Court of Appeal erred in law when it held that ‘the behaviour of the Appellants on that day was unusual and

suspicious and points to no other conclusion that they were indeed the ones that committed the crime’ when suspicion no matter how strong cannot dispense with the need to prove the allegation against the Appellants beyond reasonable doubt.

3. The Honourable court of Appeal erred in law in affirming the conviction and death sentence passed on the 1st Appellant based on Exhibit 4 when same was tendered through a witness that had no connection with the recording of the said exhibit.

4. The Honourable Court of Appeal erred in law in affirming the conviction and death sentence passed on the 1st Appellant based on Exhibits 3 and 4 when the contents of the aforesaid exhibits were in direct conflict with the evidence adduced by the 1st Appellant.

5. The judgment of the Honourable Court of Appeal affirming the conviction and death sentence passed on the 1st Appellant by the trial court is against the evidence before it.

In compliance with the rules of this court both parties filed and exchanged their respective briefs of argument. The appellants in their joint brief of argument formulated five issues for determination as follows:-

1. Whether the honourable Court of Appeal was right in affirming the conviction and death sentence passed on the 2nd Appellant based principally on Exhibits 1 and 2, when the burden of establishing the alleged involuntariness was placed on the 2nd Appellant. (Ground 1 of 2nd Appellant’s Notice of Appeal)

2. Whether the charges of culpable homicide punishable with death under Section 221 of the Penal Code and abetment under Section 85 of the Penal Code were established beyond reasonable doubt by the prosecution against the Appellants. (Ground 5 of the 1st Appellant’s grounds of appeal and 2 & 6 of the 2nd Appellant’s Notice of Appeal)

3. Whether the Honourable Court of Appeal was right when it held that the unusual and suspicious behaviour of the Appellants was conclusive of the commission of the offences with which they were charged. (Ground 3 of the 2nd Appellant’s Notice of Appeal and ground 2 of the 1st Appellant’s Notice of appeal)

4. Whether the Honourable Court of Appeal was right when it held that the PW2 and PW3 gave evidence that it was the appellants that saw the deceased last alive. (Ground 1 of the 1st Appellant’s

grounds of appeal and ground 4 of the 2nd Appellant's ground of appeal)

5. Whether the Honourable Court of Appeal was right in affirming the conviction and death sentence passed on the 1st Appellant when Exhibit 4 was tendered through another witness other than the maker. (Ground 3 of the 1st Appellant's ground of appeal) B

The respondent in its brief of argument distilled three issues for determination thus:-

"1. Whether the lower court solely relied on Exhibits 1 and 2 in affirming the conviction and sentences passed on the 2nd appellant. If the answer is in negative, whether from the totality of the evidence available at the lower court, the lower court wrongly affirmed the conviction and sentence of the 2nd appellant." C

2. Whether the respondent failed to prove its case against the appellants beyond reasonable doubt as required of them by law. D

3. Whether the lower court wrongly evaluated the evidence before it in affirming the conviction and sentence of the appellants".

At the hearing of the appeal before us on 13th day of December 2012 both counsel on behalf of their respective client adopted their respective briefs of argument. E

The learned counsel for the appellant also adopted his reply brief. He then urged this court to allow this appeal.

On issue 1, learned counsel for the Appellant submitted that the procedure adopted at the trial within trial had deprived the appellant's fair hearing. In that the appellants were saddled with the burden to prove that the statements made were made involuntarily. He contended that the burden was on the prosecution to prove that the statements were made voluntarily and not otherwise. F

In the instant case the accused persons were said to have been called to prove that the statement was not made voluntarily as they were called first to start giving evidence in the trial within trial instead of calling on the prosecution to start first. Learned counsel cites the following cases to support his submissions:- G

a. Ishaku L. Auta v. The State (1975) All NLR 163 at 169; H

b. Effiong V. The State (1998) 5 SC 136/142 particularly the case of:

c. Gbadamosi & 1 other v. The State (1992) 11 - 12 SCNJ 269 at 277 -278.

Learned counsel continued to submit that since Exhibits 1 and 2 were admitted under an irregular procedure the end result is that they were wrongfully admitted and must be set aside. It was further argued that if these exhibits were set aside, there would be nothing left before the court upon which the conviction and sentence of the 2nd appellant could be based upon.

On his issue No II, learned counsel submitted that the 2nd appellant could not be said to have abetted the commission of the crime when he did not instigate the 1st appellant or engages with him to cause the death of the deceased as provided in Section 85 of the penal Code. He referred to the case of *Kaza v. The State* (2008) 7 NWLR (Pt.105) 125 at 127. Learned counsel faulted the argument of the prosecution to the effect that the 2nd appellant helped the 1st appellant to carry the deceased corpse downstairs and hid it, this is so because there was no eye witness to corroborate the position as stated by the prosecution. However he posited that even if the 2nd appellant helped the 1st appellant to carry the deceased corpse downstairs, it is an act that took place after the commission of the crime and it cannot amount to the castigation or encouragement of the 1st appellant to commit this offence. Cites the case of *Njovens v. The State* (1973) 5 SC 12; learned counsel referred to Exhibit 3, the 1st appellant statement, and contended that it was not a confessional statement in that he did not admit killing the deceased, he only struggled with the deceased but it was the 2nd appellant that killed him. Even at that, the learned counsel contended that this statement could not be used against the 2nd appellant being a co-accused, he cited *Ozaki v. The State* (1990) All NLR 94 at 110. It was the further contention of the learned counsel that even if Exhibit 3 is said to be a confessional statement it would be unsafe for the court to convict the 1st appellant without any evidence to corroborate, and in this case there was no such evidence. Learned counsel also challenged the admissibility of Exhibit 5 on the ground that it was not shown to the accused persons whether they agreed with the contents or not. That by the provisions of Section 243(1)(c) the exhibit is admissible as the appellants were not given an opportunity to make the request that the maker be called as a witness; he referred to the case of *Yahaya Idrisu V. The State* (1963) NMLR 88 at 91.

On issue III it was the contention of the learned counsel to the

appellants that the conviction of the appellants were based on suspicion, as the lower court found that the behaviour of the appellants on the date of the incident was unusual and suspicious, he therefore submitted that suspicion no matter how strong cannot be a ground to convict an accused person, he referred to the case of *Isah v. The State* (2007) - NWLR (pt. 1049) 582 at 605; *Akinbi Sade v. The State* (2006) 12 MJSC 78 at 101. B

On issue IV, the learned counsel to the appellant challenged the findings of the lower court that the accused persons being the last persons who were with the deceased on the date of the incident was perverse as it was not based on the evidence before the court. He referred to the evidence of PW1, PW2 and PW3 and submitted that the evidence did not specify which of PW2 brothers were with the deceased at the time of incident. C

On issue No. V, learned counsel challenged the admissibility of Exhibit 4, one of the confessional statements made by the 1st appellant on the ground that sergeant Abdulkadir Mahmud, through whom it was tendered was not the maker of the statement, and as such the exhibit was inadmissible by virtue of the provisions of Section 91(1)(a)(b) of the Evidence Act, he also referred to the case of *Omega Bank (Nig.) Plc V. O.B.C Ltd* (2005) All FWLR (Pt.249) 1964 at 1994; *Fixed Odds Ltd V. Akatugba* (2001) FWLR (Pt.767) 708 at 731. D E

Learned counsel to the respondent also adopted his brief of argument and urged this court to dismiss the appeal. On his issue No. 1, it was submitted by him that the procedure adopted during the trial-within-trial was not wrong and did not work any injustice on the appellants. F

Alternatively, it was submitted that if this court holds otherwise, then the effect of the wrong procedure cannot nullify the proceeding before the court. That this irregularity, if at all, attaches to only an aspect of the trial designed for a specific purpose, and in this case, the admissibility of Exhibits 1 and 2, he cites the case of *Gbadamosi v. The State* (1992) 9 NWLR (Pt. 266) 465 at 480. G

Learned counsel proceeded to submit that the appellants and their counsel were in court, and they did not object to the procedure in fact it was the appellants' counsel that put the appellant as the first witness in trial-within-trial, therefore having consented to the procedure adopted he cannot come to this court and challenge the same H

procedure on appeal, he cites the case of Buhari V. INEC (2008) 19 NWLR (Pt.1120) 246 at 346 - 347; Nasco Nig. Serv. Ltd v. A.N. Amaku Transport (1999) 1 NWLR (Pt. 576) 576 at 588.

Furthermore, it was submitted that the appropriate time of which a party to proceedings should raise objection based on procedural irregularity is at the commencement of the proceedings or at the time when the irregularity arises, he cited Duke v. Akabuyo L. G. (2005) 19 NMLR (Pt. 959) 130 at 153 - 154; Durwode v. The State (2000) 15 NWLR (Pt.691) 467 at 488. It was also the submission of the learned counsel to the respondent that the lower court did not rely solely on Exhibits 1 and 2 in affirming the judgment of the trial court. Other evidence were available before the trial court which the court considered before convicting and sentencing the 2nd appellant. Learned counsel referred to the evidence of PW1, PW2, PW3, PW4 and PW5, which show that it was only the appellants that were with the deceased and in fact the last persons with at the time incident happened. The PW2 who was then in the house was cajoled by the PW1 to go to the shop down stair. When eventually the deceased corpse was found, the PW2 challenged the 2nd appellant “that so this is what you want to do” and the PW2 and the 2nd appellant could not reply.

Learned counsel further submitted that a court can convict on circumstantial evidence provided same is compelling, accurate, reliable, cogent and creates no room for doubt or speculation, he cites Durwode v. The State (supra) P 485 - 486; Omoh V. The State (1985) 3 NWLR (Pt.12) 236; Ebenelu v. The State (2009) 6 NWLR (Pt. 1138) 434 at 443, and contended that the totality of the circumstantial evidence before the court showed conclusively, without any doubt, that the deceased was killed by the appellants.

On issue II, it was the contention of the learned counsel to the respondent that by virtue of Section 138(1) of the Evidence Act the onus is on the prosecution to prove the ingredients of the charges against the appellants beyond reasonable doubt. They include:

- i) The death of human being occurred.
- ii) That such death was caused by the accused; and
- iii) That the act was done with the intention of causing such bodily injury and death was the probable consequence of the act. He also cites the case of Ochemaje v. The State (2008) 15 NWLR

(Pt.1109) 57 at 85 - 86.

On the charge of aiding and abetting, the prosecution must also show:-

- a. That the accused person instigated another to do that thing.
- b. That the accused engaged with one or more other person or persons in any conspiracy for the doing of that thing; and
- c. That the accused intentionally aided or facilitated that illegal act or mission to do that thing; he also cites *Kaza v. State* (2008) 7 NWLR (Pt.1068) 125 at 174 - 177. He then contended that the totality of the evidence of PW1, PW2, PW3 Pw4 and PW5, with the confessional statements of the Appellants have proved all the ingredients of the offences charged. That it was not in dispute that Chief Patrick Oguno was killed and his corpse was discovered about 12 midnight on 3/8/08, which is supported by the evidence of PW5, the medical doctor who performed an autopsy on the deceased's corpse. He also referred to PW2 evidence which shows that she was in the house with the appellants and the deceased until when she was cajoled to go downstairs and open the shop, and when later the deceased corpse was discovered she confronted the 2nd appellant who did not utter a word. It was the contention of the learned counsel that these important pieces of evidence were not challenged under cross-examination.

He further submitted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. That the evidence in this case is strong enough to secure the conviction of the appellants, and this case has been proved beyond reasonable doubt, cites the case of *Michael v. The State* (2008) 13 NWLR (Pt.1104) 361 at 384.

On issue No. III, it was the learned counsel submission that the evaluation and ascription of weight to ascribe to it is the primary duty of the trial court, an appellate court could only re-evaluate and appraise the evidence available at the trial where -

- i. The trial court wrongly exercised its judicial discretion; and
- ii. Drew wrong inferences from the totality of the evidence; he cites the case of: *Oyewole v. Akande* (2009) 15 NWLR (Pt.1163) 119 at 148 - 149; *Mogaji V. Odofin* (1978) 4 SC 9. It was his further submission that the conviction and sentence passed by the trial court which was affirmed by the lower court was based on the right exercise of judicial discretion of the trial court. The trial court did not draw

any wrong inference from the totality of the evidence adduced before it, it carried out proper assessment and evaluation of the evidence in respect of the 1st appellant the trial identified the nature of the offence with which he was charged, the necessary components that the respondent must prove in order to prove its case beyond
B reasonable doubt.

In reply to the contention of the appellants' solicitor that exhibit 5 is not admissible, he contended that it is settled law that where the doctor who performed the autopsy gives evidence the report is
C no longer necessary to be tendered. It was further contended that this court would not normally interfere with the concurrent findings of facts of the High Court and the Court of Appeal unless there is miscarriage of justice or a violation of some principle of law of procedure. In the case at hand, it was submitted that no miscarriage of
D justice has occurred or been shown to have occurred counsel relies on *Princent v. The State* (2002) 18 NWLR (Pt.1103) 1 at 38.

As I stated earlier, the Appellants filed a reply brief of argument, it was his submission that by virtue of Section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria as amended,
E the Appellants are deemed to be innocent until found guilty. Equally section 138(1) of the Evidence Act places the burden on the prosecution to prove beyond reasonable doubt the guilt of the appellants. By these enactments they place the burden on the prosecution
F to prove that the statements made by the appellants were made voluntarily, he referred to the case of *Onuoha V. The State* (1987) NWLR (Pt.65) 331 at 345.

It was the learned counsel submissions that the provision and enactments, which provide the framework for statutory, public or
G constitutional policy, the observance of which is incumbent on all Courts cannot be waived, he cites *MENAKAYA VS. MENAKAYA* (2001) FWLR (Pt. 76) 742 at 796, and *ZIDEEH V. RSC SC* (2007) All FWLR (354) 243 at 256.

The 1st issue to decide in this case is whether the procedure
H leading to the admission of exhibits 1 and 2 in evidence is regular if not what is its effect on the proceeding.

The appellant's counsel has forcefully argued that the two exhibits be set aside (or expunged) and if this is done there is no any evidence before the Court that could link the appellants to the alle-

gation leveled against them.

On the other hand, the respondent's counsel submitted that even if, the two exhibits were set aside, the effect is only an admission of the document and does not affect the whole proceedings, at any rate the procedure was consented to by the appellants and they cannot therefore complain before this Court, they cannot approbate and reprobate, hence the procedure was legal and valid. The appellants' counsel then retorted that the procedure being statutory and constitutional in nature cannot be waived. B

At this juncture it is important to know what exactly happened at the commencement of the trial within trial. On 6/11/2000 PW4 sought to tender the 2nd accused statement made on 2/9/1988 in evidence. The 2nd accused counsel Dr. Ameh, SAN objected on the ground that the statement was not made voluntarily; the Court then ordered that a trial within trial be conducted. C D

Then defence counsel Dr. Ameh, SAN said "*the only witness is the 2nd accused*".

Going by the record, it was not the trial Court that ordered the appellant to start giving evidence first (See P102).

"*Dr. Ameh: The only witness is the 2nd accused*" (Italics mine). E

Also on the 17/11/2003, PW4 sought to tender the 2nd appellant's statement made on 7/9/98. The defence objected the ground of involuntariness, and the trial Court ordered a trial within trial. As it was done on 6/11/2000 the learned senior counsel proceeded to call his witness first without any prodding from the Court. F
See page 140 of the Record.

It is settled principle of law that the onus to prove the voluntariness of extra judicial statement made by the accused person is on the prosecution. The practice in trial Court for an accused person, who denies the voluntariness of his extra-judicial statement made to the police, is to object to the statement when the prosecution seeks to tender it in evidence. When this is done at that stage the court proceeds to test the voluntariness of such a statement by conducting a trial within trial on the admissibility of the statement. And it is the prosecution who should begin first. It will be wrong for the trial Court to call on the accused's person to start by calling his witness first. By so doing it has shifted the onus of proving G H

that the statement was not made voluntarily on the accused person which of course would be prejudicial to the accused person and a denial of his right to fair hearing, the end result of statement admitted under this procedure is to set it aside.

See Effiong v. The State (1998) 5 SC 136 at 142, Gbadamosi & Ors.

B v. The State (1992) 11-12 SCNJ 269 at 277 - 288.

In the instant case, was it the trial Court that called the appellant to start giving evidence first in the trial within trial?

C ***I have carefully perused the record of appeal and I am unable to find anywhere the trial Court directed the appellants to start first. It was the appellants; through their learned counsel that elected to start giving evidence first at the two trials within trial conducted in respect of exhibits 1 and 2.***

D ***In my view where a party elected and/or consented to an irregular procedure he cannot, on appeal, challenge the said irregularity whichever way the appellants argue it is clear that they were heard by the trial Court on the procedure they elected to adopt, hence the decisions of Z ‘DEEIT V. RSCSC supra, cited by the appellants, is in applicable to this case. It would have been a case of prejudice if it was the Court ordered that the appellant to start first. I am of the firm view that the appellants were not prejudiced on the procedure they elected to adopt at the trial within trial. The alleged irregularity complained of was not objected to immediately or timeously at the trial Court, and being of the view that no miscarriage of justice was occasioned thereby. I therefore find no justification for allowing the appellants to raise it on appeal.***

E See Durwode v. The State (2000) 15 NWLR (Pt.691) 467 at 488, Nasco **F** MGT Service Limited V. A.M. Amaku Transport Ltd supra.

It is to be noted that apart from the exhibit 1 and 2, there was oral evidence adduced by the prosecution witnesses that corroborated the contents of the Exhibits.

H PW1, the mother of the appellants gave evidence on how the deceased corpse was discovered and how Adaobi (PW2) and the appellants sister was beating the appellant’s telling ‘so this is what you people did’.

The PW2 also gave evidence of how she was in the house with the appellants and the deceased. Her presence was uncomfortable

to the appellants and they told her to go and open the shop, she refused because it was too early around 7.30 am, but the 2nd accused persisted and she has to go. The appellants were left together with the deceased and at about 10.30 am they came to the shop discussed briefly and left. At about 10pm while she was looking for blanket she discovered the deceased corpse, the 2nd appellant was there, she held him and said “so this is what they did”, she fought him and he did not retaliate. B

PW3 also, a brother to the appellant stated how he came home at about 9.00am he knocked at the door; it took the 1st appellant time to open the door and when he entered he met the 2nd appellant. Wherever he went the appellants followed him until he left the house. When the corpse was found by PW2 he confirmed her story that she told the 2nd appellant that so this is what you are up to, they then held the 2nd appellant so that he would not escape. He then lodged a complaint at the police station. He identified the bruises on the deceased body. On his way back from the police station he saw the 1st appellant and told him to accompany him to the police station to report that their father was missing. Initially he refused but his friend convinced him, he entered the car and when they got to the police station he handed him over to the police. C D E

PW4 is the I.P.O who investigated the case through whom the statements made by the appellants were tendered. Exhibits 3 and 4 which were the statements made by the 1st appellant were tendered without objection. It is instructive to note that none of these witnesses were cross-examined on the area of their evidence that is germane to this case and I have no reason to disbelieve them. ***The argument of the appellant that there was no eye witness to the commission of the crime hence the circumstantial evidence adduced in this case is not sufficient to convict and sentence the appellants, is of no moment in this case, circumstantial evidence, particularly evidence that was not challenged under cross-examination as in this case, is as good and sometimes better than any other evidence if it is cogent, positive and conclusive. It is no derogation of evidence to say that it is circumstantial, it may also be noted that there is no yardstick by which any circumstantial evidence can be measured before a conviction can be entered against an accused person charged with*** F G H

the offence available for which the circumstantial evidence is the only one available. Each case depends on its own facts but the one test which such evidence must satisfy is that it should lead to the guilt of the accused person and leave no degree of possibility or chance that other person could have been responsible for the commission of the offence. See Ebenelu v. The State (2009) 6 NWLR (Pt. 1138) 431 at 443, Ona v. The State (1985) 3 NWLR (Pt. 12) 236.

In the instant case apart from Exhibits 1, 2, 3 and 4 of the confessional statements of the appellants, the evidence adduced by the prosecution witnesses point to the only fact that it was the appellant that killed the deceased particularly if the following facts were considered:-

1. The appellants were not comfortable with the presence of the PW1 in the house, hence they have to look for a way to send her out into the cold weather to go and open the shop at 7.30am.

2. Why were they uncomfortable when PW3 entered the house and they were following him to everywhere he went?

3. After the PW3 left and they have accomplished their aim, they left the house came to the shop, discussed briefly and dispersed.

4. Why did the 2nd appellant not challenge the PW2 why she alleged that Joel 'so this is what you are up to and he did not protest?'

5. The Appellants were the last persons who were with the deceased and who saw him last.

All of these and coupled with Exhibits 1, 2, 3 and 4 point conclusively that it was the appellants who committed the crime.

The learned counsel submitted that it was wrong for the lower court to have affirmed the judgment of the trial court as it relates to the appellants, according to him the act of helping the 1st appellant to bring the deceased corpse downstairs cannot amount to aiding and abetting. That the act of castigation, encouragement and incitement must have taken place before the commission of the crime, he cites the case of Njovens v. The State (supra).

Apparently the learned counsel overlooked the contents of

Exhibit 3, the 2nd appellant's statement, where he gave graphic account of how he met the 1st appellant and the deceased fighting, and how the deceased became unconscious and how he joined the 1st appellant in bringing the corpse downstairs. After dropping the body they went out. This court in the case of Kaza v. The State (2008) 7 NWLR (Pt. 1068) 123 at 176 held as follows:-

"For an accused person to be convicted of abetment under Section 85 of the Penal Code the prosecution must prove the following ingredients:-

1. That there was an encouragement, incitement, setting on, instigation, promotion or procurement of offence.

2. Any of the above act must be positive and unequivocal specially addressed to the commission of offence.

3. The act abetted must be committed in consequence of abetment.

4. An accused person could be convicted of the offence of abetment on proof by prosecution of any of the acts mentioned in (1) above. In other words the acts mentioned in (1) above are in the alternative and not cumulative. An encouragement here means an act of making someone to feel brave or confident enough to do something by giving active approval in support of the crime, incitement also has the element of encouragement. By incitement the person is provoked by a strong passion or feeling to commit an offence. The word "set" is a word of quite a num of synonyms. The two words "set on" connote the semblance of causing to attack or close like one may say the fisherman prepared the bait to set on the fish".

The 2nd appellant was present at the scene, he saw PW1 attacking the deceased he did not raise alarm, when the deceased died he joined the 1st appellant to carry the corpse to downstairs when a substance suspected to be acid was poured on him. Then can the 2nd appellant be said not to have aided, encouraged or instigated the 1st appellant to commit the offence of murder in this case, the answer is in the negative. I hold that the charge of aiding and abetting made against the 2nd appellant has been proved beyond reasonable doubt.

On the issue of suspicion, I am at a loss on how the appellant came about the suspicion. There is no where the lower court held that the appellants were suspected to have committed the offence,

rather the lower court held-

“The prosecution proved that it was the intentional act of the 1st appellant that killed the deceased. Also that the 2nd appellant had knowledge of the crime and helped the 1st appellant in hiding the body of the deceased. Prosecution witness also gave evidence as
 B *to the primary cause of death of the deceased.*

All these evidence pieced together lead to no other conclusion other than that the appellants killed their father and hid his body under the staircase”

C I have no reason to tamper with this finding of the lower court. The issue of convicting the appellant based on suspicion does not arise at all from the evidence before the court.

The appellants challenged the admissibility of Exhibit 4, the 1st appellant’s statement to the police on the ground that
 D ***it was not the PW4 that made it or recorded it, while the maker was the Inspector Danladi Daniel, and Exhibit 4 having been tendered through PW4 who was not in a position to answer any question on it, the learned trial judge as well as the lower court ought not to have placed any probative value on it. In***
 E ***my view the submission of the learned counsel to the appellants is a complete misconception of the facts of this case. In the first place Exhibit 4 was tendered without any objection from the defence and secondly it is clear from the record that***
 F ***Pw4 is a member of the team of Policemen headed by Inspector Danladi Daniel who investigated this case, and he was part of the team that took the statement of the appellants.***

Finally my lords, I must say that this particular appeal is an appeal against the concurrent findings of the trial court and lower
 G court. These findings, in my view, are reasonably justified by the evidence and no error in law, substantive or procedural, that leads to miscarriage of justice has been made by the appellants. As such I cannot interfere with the findings of those two courts below. I am, fortified by the case of Odeh V. F.R.N. (2008) 13 NWLR (Pt.1103) 1
 H at 35; Princet v. The State (supra at 76).

As a result of all what I have been labouring all along to state above is that I resolve all the issues formulated by the appellants against them. The appeal in a nutshell is devoid of any merit same is accordingly dismissed. The conviction and sentence passed by the

trial court which was affirmed by the lower court are hereby restored and affirmed.

MOHAMMED JSC

The appeal is against the judgment of the Court of Appeal Jos of 2nd February, 2010 dismissing the Appellants' appeal against their conviction by the trial High Court of Plateau State Jos for the offences Culpable Homicide punishable with death for 1st Appellant and Abetment of the offence by the 2nd Appellant also punishable with death for causing the death of their father on 31st August, 1998 at Jos.

The Appellants who were left with their father in their house, confessed to the fact that the 1st Appellant killed the deceased by inflicting injuries found on him resulting in his death. The 2nd Appellant confessed to assisting the 1st Appellant to hide the corpse of the deceased at the stair case of their house. The 1st Appellant left the house after the act while the 2nd Appellant remained behind to report to the Police that their father was missing. The following day PW2, the sister of the Appellants discovered the corpse of their deceased father under the stair case and reported to the Police leading to the arrest of the Appellants who were charged with the offences of causing the death of the deceased and abetting the causing of the death of deceased under Sections 221 and 85 of the Penal Code.

The circumstantial evidence on record point to no other persons other than the Appellants as those who caused the death of their deceased father. The offences under Sections 221 and 85 with 221, have been established against the Appellants. All the 4 issues in the Appellants brief must be resolved against the Appellants. Consequently, I entirely agree with my learned brother Muntaka-Coomassie, JSC in his lead judgment that this appeal must fail. Accordingly I also dismiss the appeal and further affirm the conviction and sentence as passed on the Appellants by the trial court and affirmed by the Court below.

GALADIMA JSC

I have had the opportunity of reading in draft the lead judg-

ment of my learned brother MUNTAKA-COOMASSIE JSC. I agree with his reasoning leading to the conclusion that this appeal lacks merit and it should be dismissed.

The learned trial judge having found the Appellants guilty of the offences of culpable homicide and abatement of the offence under sections 221, and 85 and 221 of the penal Code convicted and sentenced them accordingly. Their appeal to the Court of Appeal, Jos was dismissed which has resulted in the appeal brought before this court.

The Law is settled that the guilt of an accused person may be proved by confessional statement circumstantial evidence; and/or direct evidence from eye witness to the commission of the offence. In this case the Appellants who were with their father in their house confessed that the 1st Appellant killed the deceased by inflicting various injuries on him, which resulted in his death. The 2nd Appellant confessed that he assisted the 1st Appellant to hide the corpse of the deceased under the stair case of their family house.

Circumstantial evidence on record that points to no other persons other than the Appellants as those who caused the death of their father are that: The 1st Appellant left the house after the dastardly and cruel act, while the 2nd Appellant remained behind to pretentiously report to the police that their father was missing. Unfortunately for the Appellants, their sister discovered their father's corpse under the stair case and reported the matter to the Police leading to the arrest of the Appellants.

The above facts and circumstances are sufficient evidence credible enough linking the Appellants as those who caused the death of their deceased father. I cannot fault the concurrent findings of the two courts below that the Appellants caused the death of their deceased father. The conviction of the Appellants and sentence passed upon them by the trial court which was affirmed by the court below are also hereby further affirmed by me.

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NGWUTA JSC

I read in draft the lead judgment delivered by My Lord, Coomassie, JSC just now. I agree with the reasoning and conclusion reached.

This is a pathetic case. The circumstances of the family of the deceased make one wonder what could be the motive for the appellants to kill their own father. Only the appellants could provide an answer to the poser. Since they denied the charge, the reason for the devilish act may never be made known.

In a trial-within-trial, the onus is on the prosecutor to satisfy the Court that the accused made the confessional statement voluntarily. It is therefore the prosecutor who will start by leading evidence and not the accused person. However, though the order was reversed, the appellants were not misled. It is not shown that the procedure, though irregular, resulted in a miscarriage of justice.

For the above and the fuller reasons in the lead judgment, I also dismiss the appeal as devoid of merit and affirm the concurrent judgments of the two Courts below.

ALAGOA JSC

This is an appeal against the judgment of the Court of Appeal Jos Division affirming the conviction and sentence of the Appellants to death” The Appellants are blood brothers of the same parents and the deceased was their father. The charge against them reads as follows:-

1. THAT YOU LAWRENCE OGUNO on or about the 31st day of August, 1998 at No. 538 Murtala Mohammed Way, Jos, committed culpable homicide punishable with death in causing the death of Chief Patrick Oguno by causing him such bodily injury to wit stabbing him several times on different parts of his body with knife and pouring a corrosive substance on his body suspected to be acid knowing that his death was the probable consequence of your act and thereby committed an offence punishable under Section 221 of the penal Code.

2. THAT YOU JOEL OGUNO on or about the 31st day of August, 1998 at No. 53B Murtala Mohammed Way, Jos, committed the offence of culpable homicide punishable with death in that you abetted the said Lawrence Oguno in the said offence of culpable homicide punishable with death by doing an act to wit abetting Lawrence Oguno to dispose of the corpse of Chief Patrick Oguno and failing to report the incident and that you have thereby commit-

ted an offence punishable under Sections 85 and 221 of the Penal Code.

They pleaded not guilty and the case went on to be tried at the High Court with the prosecution calling five witnesses and tendering five exhibits while the Appellants testified for themselves as DW1 and DW2. At the end of the trial and in a considered judgment the learned trial Judge convicted and sentenced the Appellants to death which sentence and conviction were confirmed by the Court of Appeal hence this further appeal to the Supreme Court. At the trial Court the Appellants made confessional statements - Exhibits 3 and 4 for the 1st Appellant and Exhibits 1 and 2 for the 2nd Appellant.

One of the tests in ascertainment of the voluntariness of a confessional statement is whether there is anything outside it to show that it was true. This Court in *SILAS IKPO & ANOR. V. THE STATE* (1995) 9 NWLR (PART 421) 540 considered the following as aids towards such determination:-

- i. Whether there is anything outside the confession to show that it is true?
 - ii. Whether the Statement is corroborated?
 - iii. Whether the statement of facts made in the confessional statement so far as can be tested is true?
 - iv. Whether the accused person had the opportunity of committing the offence charged?
 - v. Whether the confession of the accused person was possible?
- See also *IKPASA v. A-G BENDEL STATE* (1981) 9 SC 7

There are numerous authorities on the subject matter. From the evidence in this case the following appear not to be in doubt-

1. The Evidence of PW1 and PW2 show that the deceased was last seen by the Appellants.
2. The chemical burns in the medical report tally with the statement of the 2nd Appellant that acid was poured on the body of the deceased.
3. PW1 - PW5 in their respective evidence linked the Appellants with the death of the deceased.
4. There were facts in the confession of the Appellants which the police could not have known on their own.
5. There was evidence that the Appellants acted curiously on the day of the incident.

6. When PW3 came to knock on the door of the deceased, it took a long time for the door to be opened and the Appellants gave PW3 a close marking until he left the house.

There is a plethora of case law to the effect that the Supreme Court will not disturb the concurrent findings of fact of two lower courts. In *ADAKU AMADI v. EDWARD NWOSU* (1992) NWLR (PART 241) 273; (1992) 6 SCNJ 59, this Court per Karibi Whyte, JSC stated thus:

“It is now well settled that this Court will not disturb the findings of facts of two courts below unless there is manifest error which leads to some miscarriage of justice or a violation of some principle of law or procedure.” See also *ONWUJUBA V. OBIENU* (1991) 4 NWLR (PART 188) 16; *ODOFIN V. AYOOLA* (1984) 11 SC 72; *OGUNDIPE v. AWE* (1988) 1 NWLR (PART 88) 188; *OSHO V. FOREIGN FINANCE CORPORATION OF NIGERIA* (1991) 4 NWLR (PART 184) D 157; *OJOMU V. AJAO* (1983) 9 SC 22 at 53; (1983) 2 SCNLR 156.

I find no reason to hold that these principles have been breached. It is for these reasons and the fuller reasons contained in the lead judgment of my learned brother Muntaka-Coomassie, JSC which I had the privilege of reading in draft before now and which I fully endorse, that I too dismiss the appeal and uphold the conviction and sentence of death passed on the Appellants by the Court below.

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