

SUPREME COURT OF NIGERIA
FRIDAY 27TH FEBRUARY, 2015. SC. 404/2010
CORAM:- I. T. MUHAMMAD, J. A. FABIYI,
M. D. MUHAMMAD, C. B. OGUNBIYI,
K. M. O. KEKERE-EKUN, JJSC

ADEKUNLE OLUWAFEMI ALO APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Confession - Relevancy - If confession is voluntary - It is deemed to be relevant fact as against the person who made it and no other - Unless the other adopts it (H1)

CRIMINAL PROCEDURE - Confession - Voluntariness - Confession is irrelevant if it is obtained involuntarily - And such confession calls for trial within trial - To determine the extent of authenticity (H2)

CRIMINAL PROCEDURE - Conviction - Confession - Court can convict accused on his confession - And such confession does not require corroboration - If it meets the requirements of the law (H3)

CRIMINAL PROCEDURE - Confession - Objection - Time - Proper time to raise objection to voluntariness of confession - Is at the point when it is to be tendered in evidence (H4)

COURTS - Evidence - Review of - Court reviews a part of evidence complained of through ground of appeal - Properly filed and challenging the evidence (H5)

MURDER - Proof - Evidence - Evidence reveal that appellant certainly knew so much about the death of deceased - And to these facts he did confess in his statement (H6)

EVIDENCE - Contradiction - Weight - It is not every discrepancy in evidence of PW that leads to rejection - For the contradiction must be so material - As to cast grave doubts on prosecution's case (H7)

MURDER - Conviction - Circumstantial evidence - Where there is no direct evidence - Court can draw inference from proved facts - Going by circumstances surrounding the cause of death (H8)

MURDER - Ingredients - Proof - Prosecution must prove that the deceased died - That the death was unlawful - That act of accused caused the death - And that accused intended to cause death (H9)

EVIDENCE - Criminal trial - Similar facts - Where accused is jointly tried with another - And their case is clearly interwoven - Conviction of one cannot stand where the other was discharged and acquitted (H10)

FACTS

Accused/appellant and two others were arraigned before the High Court of Ondo State sitting in Akure on a two count charge of conspiracy to commit murder and murder contrary to sections 324 and 316 of the Criminal Code Laws of Ogun State. They pleaded not guilty to the charge. Prosecution/respondent's case against appellant is that he conspired with the others to murder the deceased one Olanrewaju Disu. At the trial, respondent adduced evidence and called several witnesses in support of its case. Appellant gave evidence in his own defence but called no witness. The testimonies of PW 1 to 3 are basically similar. They testified that appellant was last seen with the deceased.

Appellant in his own testimony stated that he was in the police custody when the Investigating Police officer told him that the deceased had died. He denied being involved in the deceased's murder. He further stated that he was tortured to make the confessional statement - Exhibit 'E'. However, under cross-examination, appellant agreed that the information contained in the exhibit was true. The other two accused persons claimed innocence of the offence and raised the defence of alibi which was investigated and found to be the truth. In his judgment, the learned trial judge convicted and found appellant guilty of murder. He was therefore sentenced to death. The other two accused were discharged and acquitted. Dissatisfied, appellant appealed to the Court of Appeal Benin Division. The court heard and dismissed the appeal. Aggrieved further, appellant appealed

to Supreme Court.

ISSUES FOR DETERMINATION

1. *Were the Learned Justices of the court of Appeal right in affirming the conviction and sentence of death of the Appellant solely on the Appellant's confessional statement in spite of the manifest contradictions in the prosecution's evidence before the trial court?*

2. *Were the Learned Justices of the Court of Appeal right in holding that the prosecution proved its case beyond all reasonable doubts at the trial court?*

3. *Were the Learned Justices of the Court of Appeal right in upholding the conviction and sentence of the Appellant on the same and similar evidence on which the co-accused persons were discharged and acquitted?*

HELD (Unanimously dismissing the appeal per
OGUNBIYI JSC)

CRIMINAL PROCEDURE - Confession - Relevancy

1. Section 27(1) of the Evidence Act, defines confession as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime. A confession, if voluntary, is deemed to be relevant fact as against a person who made it only. In other words, the confessional statement of the 1st accused/appellant which implicated the 2nd accused is deemed to be a relevant fact as against the 1st accused person who made it and no other. See section 27(2) of the Evidence Act Cap. 112 Laws of the Federation 1990. The application of section 27(3) of the Evidence Act will therefore not permit the confessional statement of the 1st accused person (Exhibit E) to be taken into consideration as against any of such other persons in whose presence or against whose interest it was made unless he adopted the said statement by words or conduct.

On the authority of section 27(2) of the Evidence Act therefore, the confessional statement of the 1st accused/appellant which implicated the 2nd accused is deemed only as relevant facts against the 1st accused person who made it. Further-

more and by section 27(3) of the same Act, Exhibit ‘E’ could only be used against the 2nd accused’s interest if it was made in his presence and he adopted the said statement by words or conduct. Such adoption was not shown on the record.

As rightly submitted by the learned counsel for the respondent therefore, the Justices of the Court of Appeal correctly reviewed the records of the trial court before affirming that the 2nd and 3rd accused persons were not discharged and acquitted on similar evidence on which the appellant was convicted and sentenced. The appellant’s confessional statement Exhibit ‘E’ bind him alone and no other person.
(pp. 346 F/361 D)

CRIMINAL PROCEDURE - Confession - Voluntariness

2. Also by the provision of section 28 of the Evidence Act, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid an evil, of a temporal nature. There must be an indication or some reason in convincing the court that the purported confession was not made voluntary out of volition but by some reason of inducement, threat or promise. Such a confession must call for a conduct of a mini trial otherwise known as trial within trial for purpose of determining the extent of authenticity. (p. 347 A)

Conviction - Confession

3. The premium laid on confessional statement is very weighty. The justification is not far fetched because, it is long settled that an accused person can be convicted solely on his confessional statement, if made voluntarily and it is fully consistent and probable; this requirement, although conclusive, it is however desirable to have outside the confession some evidence, be it slight, of circumstances which make it probable that the

confession was true. The general application of the law as firmly established is that the court can convict an accused based on his confessional statement and that such confession does not need to be corroborated if it meets the requirements of the law. (p. 347 D)

B

CRIMINAL PROCEDURE - Confession - Objection - Time

4. This court has ruled that when an accused person alleges that a confessional statement credited to him was made under duress or was not made voluntarily by him, an objection must be raised as to the admission of the statement when it is sought to be tendered in evidence and not after it had been admitted.

C

It has been stated earlier in the course of this judgment that when the prosecution sought to tender Exhibit 'E' on the 15th March, 2005, neither the Appellant nor his counsel raised any objection as to the voluntariness of the statement. The objection was raised only in the appellant's evidence-in-chief wherein he alleged that he was beaten by five policemen and was forced to make and sign Exhibit 'E'. It has been long settled that the proper time to raise an objection to the voluntariness of a confessional statement is at the point when it is to be tendered in evidence. (p. 347 H)

E

Evidence - Review of

F

5. The law is settled that the only time the court can review a part of evidence complained of must be through a ground of appeal, properly filed and challenging same. (p. 350 A)

G

MURDER - Proof - Evidence

6. On a careful and communal reading of the evidence of the witnesses particularly P.W.6 and the statement of the 1st accused/appellant, there is an irresistible conclusion which would leave no one in doubt that the facts stated in Exhibit 'E' are true.

H

For instance, overwhelming evidence avails on the record that the accused/appellant was the last person who

was seen with the deceased alive. The evidence of P.W.6 was well stated in the course of this judgment, that it was the accused/appellant who took him to the place where the corpse of the deceased was found. The detailed facts of the evidence had been restated earlier as to how P.W.6 had to seek for the assistance of the Fire Brigade men to remove the corpse from the well. The witness P.W.6 was not discredited on his evidence under cross examination relating the vital exposition and revelations. The pieces of evidence clearly reveal that the accused/appellant certainly knew so much about the death of the deceased and to these facts he (the accused) did confess in his confessional statement. The appellant took advantage of his friendship with the deceased and did not only brutally and callously murdered him but he went further and mercilessly also cruelly excised the deceased's private parts. No doubt, the evidence of discovery of the deceased's vehicle and body when the appellant led P.W.6 and the other officers to the scene of crime have clearly corroborated and supported the confirmation of the confessional statement. (p. 350 G)

EVIDENCE - Contradiction - Weight

7. The principle of law is well settled as laid down in plethora of case laws that where there are material contradictions in the testimonies of the prosecution witnesses, it will be wrong for a court to act on such testimonies.

As rightly submitted by the learned counsel for the respondent, there is no manifest contradiction revealed in the evidence of the prosecution witnesses. For instance the evidence of P.W.6 the star witness is very vivid and clear that the appellant led him and others to the well where the deceased's corpse was dumped and the body was in fact discovered just as it was told the witness by the appellant. I will not hesitate to repeat again that the witness P.W.6 was not contradicted on his evidence especially the aspect that the accused/appellant led him and others to the scene of crime. The question sought to raise by appellant's counsel as to who found the body of the deceased is not an issue therefore. It is obvious that the body

was found on the information given by the appellant himself: that is to say he led P.W.6 and others to the well, the place of crime. The appellant's statement Exhibit 'E' and also his evidence before the trial court are the confirmation. The thrust of the evidence of the witnesses P.W.1, P.W.2 and P.W.3 all relate to the discovery of the deceased's body and the burnt car. B

It is not every discrepancy or contradiction in the evidence of the prosecution witnesses that would lead to the rejection of such evidence. It must be shown that the allegation is so material that grave doubts are cast on the case of the prosecution. (pp. 352 G/353 G) C

MURDER - Conviction - Circumstantial evidence

8. The law is also settled that where there is no direct evidence of eye witnesses to a crime, the court can draw inference from proved facts going by circumstances surrounding the cause of death. The trial Judge in the case at hand placed reliance on evidence before the court and the voluntary confessional statement of the appellant (Exhibit 'E') to convict the appellant based on his (Judge's) conviction that the confessional statement was voluntary, true and possible as established by a plethora of judicial authorities. (p. 355 H) D E

MURDER - Ingredients - Proof

9. The law is firmly settled further that there are essential ingredients which the prosecution must of necessity prove in a charge of the offence of murder and are as follows:- F

- 1) that the deceased did die;
 - 2) that the death was unlawful and prohibited;
 - 3) that it was the act of the accused person that caused the death; and
 - 4) that the accused intended to cause the death of the deceased.
- G

Contrary to the submission by the appellant's counsel therefore, the totality of the evidence before the trial court leaves no one in doubt that all the ingredients of the offence of murder were ably proved beyond reasonable doubt against the appellant; particularly when the circumstantial evidence is H

viewed in the light of the confessional statement made by the accused/appellant. (pp. 358 D/359 D)

EVIDENCE - Criminal trial - Similar facts

10. Contrary to the contention held out by the appellant's counsel also, the case against his client is highly distinguishable from a situation where the evidence connecting two or more accused persons to the commission of a crime is joined together. In such a situation, all the accused persons must either fall or stand together. The instant case is however different from the one under reference. In other words, where an accused is jointly tried with another or other accused persons and their case is clearly interwoven and inseparable from one another, the conviction of one cannot stand where the other accused person was discharged and acquitted.
(p. 361 H)

NOTABLE POINTS OF INTEREST

OGUNBIYI JSC

1. Confessional statement – Test of

It is also pertinent to state that in as much as the law enjoins a court to act upon a confessional statement for the conviction of an accused person, the veracity of the confession ought to be tested. In other words, the test of determining veracity thereof has been judicially decided in a plethora of authorities. For instance in the case of Ekure v. The State (1991) 13 NWLR (Pt. 635) p. 456 at 470-471 it was held that a confession of an accused should be tested as to its truth by examining it in the light of the other evidence, to determine:-

- a. whether the facts stated in it are true so far as can be tested.
- b. whether the accused had the opportunity of committing the offence.
- c. whether the accused's confession was consistent with the facts which have been ascertained and proved.
- d. whether the accused's confession was possible.
- e. whether there is anything outside it to show that it is true.
- f. whether it is corroborated. (p. 350 D)

2. Criminal trial – Burden of proof

Our constitutional provision vide Section 36(5) 1999 provides also that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. In principle, the effect is firmly established that a duty lies on the prosecution to prove its case beyond reasonable doubt; and a general burden to rebut the presumption of innocence as constitutionally guaranteed to an accused. (p. 358 A) B

3. Trial court – Evaluation of evidence

The trial court has the duty of evaluating, appraising and ascribing of probative value to oral evidence adduced before it. This privilege is solely within its ambit and the appellate court is enjoined not to interfere with the findings of fact of a trial court unless such findings are shown to be perverse having been based on improper evaluation of facts and wrong conclusions. (p. 362 C) C D

REPRESENTATION

Seni Adio, Esq. , for the Appellant

A. A. Adegbonmire Esq., for the Respondent E

CASES REFERRED TO

Awopejo v. State (2002) FWLR (pt. 87) 772

Hassan v. State (2001) 6 NWLR (pt. 709) 286

Kim v. State (1992) 4 NWLR (pt. 233) 25 F

Amusa v. State (2002) 2 NWLR (pt. 50) 90

Ntaha v. State (1972) 4 SC 1

Ikemson v. State (1989) 3 NWLR (pt. 110) 455

Saidu v. State (1982) 3 SC 41 G

Akpan v. State (1992) 6 NWLR (pt. 248) 139

Mohammed v. State (1991) 5 NWLR (pt. 192) 438

Okoroh v. State (1988) 5 NWLR (pt. 81) 214

Queen v. Eguabor (1962) 1 SCNLR 409

Odeh v. FRN (2008) 13 NWLR (pt. 1103) 1 H

Kotoye v. Saraki (1990) 6 SC 1

Sanusi v. Ayoola (1992) 9 NWLR (pt. 265) 275

Owoh v. Asuk (2008) 16 NWLR (pt. 1112) 113

STATUTES REFERRED

Criminal Procedure Act 2004, ss. 100(2), 210, 223

Police Act Cap. p.19 (Special Provisions) Act 2006, s. 24(1)(a)

Constitution of the Federal Republic of Nigeria 1999, s. 35(7)

Evidence Act Cap. 112 LFN 1990, ss. 27(1), 28

B

LEAD JUDGMENT BY OGUNBIYI JSC

The appeal is against the judgment of the court of Appeal Benin Division delivered on the 4th June, 2010. The lower court dismissed the appellant's appeal against his conviction and sentence by the Ondo State High Court sitting in Akure.

The background briefly is that on 30th March, 2004, the appellant and two other accused persons were arraigned before an Ondo State High Court sitting in Akure on a two count charge of conspiracy to commit murder and murder contrary to sections 324 and 316 of the criminal code, Cap 30, Vol. II Laws of Ondo State, 1978 respectively. The accused each pleaded not guilty to the two counts charge. The case against the accused persons was that on or about the 8th of March, 2001, the appellant together with one Segun Oluwole and one Adeoyo Idowu conspired to murder and murdered one Olanrewaju Disu (deceased).

In proof of the accused' guilt, the prosecution called 7 witnesses while the 1st accused (now the appellant), and the 2nd accused person each gave evidence in his own defence, but did not call any other witness. The 3rd accused did not testify and called no witness. The testimonies of P.W.1, P.W.2 and P.W.3 were substantially similar. They all testified that the appellant and the deceased went out together in the deceased's parents' vehicle on the 8th day of March, 2001 along with P.W.1 which vehicle was driven by the deceased. They testified to the fact that the deceased and the 1st accused person (appellant) were friends.

They also agreed that P.W.1 alighted from the vehicle at a spot while the deceased and the appellant alone headed for a certain destination on the fateful day.

It is also the witnesses' evidence that at about 2.00 p.m. on the day in question, the deceased's whereabouts was not known; that the appellant who was last seen with the deceased stated in his statement (Exhibit 'D') that he parted ways with the deceased at about

9.00 am on this fateful day upon alighting from his vehicle; that the appellant, however later stated in his confessional statement (Exhibit 'E') that he master-minded and executed the murder of the deceased in connivance with the 2nd accused person.

On the part of the 1st accused/appellant, his oral testimony was that he was in the police custody when the Investigating Police officer (I.P.O.) told him that the deceased had died. He denied being involved in the deceased's murder. He stated that he was tortured to confess. However, under cross-examination, he agreed that the information contained in (Exhibit 'E') was correct.

The 2nd accused person who also testified on his behalf said he was arrested and locked up in the cell. It was while he was in the cell that P.W.4 told him that he was one of the people who allegedly murdered the deceased. He denied the allegation profusely. In his testimony, he said he was severely tortured to make a confession but maintained his innocence. He denied knowing about the death of the deceased or having anything to do with it. He also stated that he was elsewhere on that particular day the deceased was last seen.

In answering questions whether he knew the 3rd accused, the witness said that he knew him for the first time in the year 2000 when they consulted him for 'Ifa' divination as to the person who stole a sum of N5,000.00 belonging to the mother of the deceased; that ever since then he had no cause to see or meet the 3rd accused until this case.

The 3rd accused in his statement raised the defence of alibi which was investigated and found to be true. His counsel therefore rested their case on the evidence adduced by the prosecution and the 1st and 2nd accused persons.

At the close of evidence from both sides and addresses by counsel, the learned trial judge in a considered judgment delivered on the 18th day of July, 2005 found the appellant guilty of conspiracy to commit murder and murder and proceeded to convict him accordingly. The 2nd and 3rd accused were however discharged and acquitted.

The appellant was dissatisfied with the conviction and sentence. Hence, he filed an amended Notice of Appeal before the lower court which unanimously dismissed the appeal and affirmed the judgment of the trial court. The appellant was again dissatisfied with that

decision and has now further appealed to this court by a Notice of Appeal filed 23rd August, 2010 and raised five grounds of appeal.

In accordance with the rules of court, briefs of arguments were filed on the 21st December, 2010 and 15th December, 2011 on behalf of the appellant and respondent respectively. At the hearing of the appeal on the 11th December, 2014, both counsel adopted and relied on their respective briefs of arguments. While the counsel Mr. Seni Adio urged that the appeal be allowed and the appellant be discharged and acquitted, Mr. A. A. Adegbonmire, represented the respondent and urged that the conviction and sentence should be affirmed and the appeal be dismissed.

From the five grounds of appeal raised, three issues were formulated on behalf of the appellant. The issues are substantially the same in material particular with those of the respondent. I will therefore reproduce the following formulation by the appellant as adequate:-

“1. Were the Learned Justices of the court of Appeal right in affirming the conviction and sentence of death of the Appellant solely on the Appellant’s confessional statement in spite of the manifest contradictions in the prosecution’s evidence before the trial court? (Grounds 1 and 3 of the Appellant’s Notice of Appeal).

2. Were the Learned Justices of the Court of Appeal right in holding that the prosecution proved its case beyond all reasonable doubts at the trial court? (Grounds 2 and 5 of the Appellant’s Notice of Appeal).

3. Were the Learned Justices of the Court of Appeal right in upholding the conviction and sentence of the Appellant on the same and similar evidence on which the co-accused persons were discharged and acquitted? (Ground 4 of the Appellant’s Notice of Appeal).”

ISSUE ONE poses a question challenging the propriety of the lower court in affirming the conviction and sentence of death on the appellant solely on his confessional statement in the circumstance of this case.

The bone of appellant’s complaint in this issue is centered on the document Exhibit ‘E’, the confessional statement. In other words, that Exhibit ‘E’ was made under duress and therefore does not represent the true state of what transpired; as such the court should not act upon it; that although the objection to the admissibility of Exhibit

‘E’ was not raised at the time when the prosecution sought to tender it in evidence, it is the counsel’s submission that the power to raise objection to the admissibility of a confessional statement on the ground that it Was made under duress can be raised by both the accused and the accused person’s counsel. The counsel sought to relate convincingly to the record of appeal especially the proceedings conducted on 15th March, 2005, the day Exhibit ‘E’ was tendered, which he submits will reveal that the appellant was absent from court when the document was admitted in evidence; thus, he could not have objected to the admissibility of same or inform his counsel of the circumstances leading to the making of Exhibit ‘E’; that the only opportunity the appellant had to attack the authenticity of Exhibit ‘E’ was when he opened his evidence. It is the submission of counsel therefore that both the trial court and the Court of Appeal erred when they held that Exhibit ‘E’ was admissible and that the appellant had waived his right to object to the admissibility thereof. Counsel cited in reference the trite nature of law relating erroneous admission of inadmissible evidence, which a court can still refuse to act thereon, on the ground that it ought not to have been admitted in the first instance; that the proceedings of the High Court of Ondo State, Akure in this case on 15th March, 2005 were tainted with illegality, following the absence of the appellant in court on that day. Counsel sought support and succor in the provision of section 210 of the Criminal Procedure Act (CPA), 2004, applicable to Ondo State; that the use of the word shall in Section 210 of CPA implies its mandatory requirement except where Section 100 and subsection (2) of Section 223 CPA apply but which do not in this case; that it is the appellant only, who knew the circumstances under which Exhibit ‘E’ was made, that could have objected to its admissibility and not the legal practitioner who, although present in court on the date of trial, was not present at the scene where Exhibit ‘E’ was made. Furthermore, that the legal practitioner being one recruited from the Legal Aid Council may not have had the opportunity of an extensive pre-trial conference or interview with the appellant so as to afford him the opportunity of knowing what transpired during investigation and the time the appellant made Exhibit ‘E’.

In the light of the foregoing, counsel urged that this is a special case where the admissibility of confessional statement of the ap-

pellant could be set aside on appeal, its admission he argued having been wrongly done by the trial court in the absence of the appellant. Counsel also submits that assuming but not conceding that Exhibit 'E' is admissible, that the lower court and indeed the trial court cannot use the said Exhibit 'E' to convict the appellant.

B The learned counsel submitted at great extent and also cited a number of authorities in substantiation of his arguments and concluded in summary that the lower court placed so much reliance on Exhibit 'E' without looking at Exhibits 'C' and 'D' also the testimony of D.W.2 which he argues is in clear contradiction to Exhibit 'E', which
C document did not in any way reveal that the appellant murdered the deceased but somebody else. In final submission, counsel contends that in the absence of other evidence corroborating Exhibit 'E', it would be unsafe for the court to convict the appellant based on Exhibit 'E'; that the lower court greatly erred therefore in affirming the
D judgment of the trial court and hence the issue should be resolved in favour of the appellant by allowing the appeal.

In response to the foregoing 1st issue, the Senior Counsel Eytayo Jegede, SAN submitted in the affirmative the propriety of
E the Justices of the lower court in affirming the conviction and sentence of the appellant as there was no material contradictions in the prosecution's evidence before the trial court. The counsel related copiously to certain excerpts of the witnesses P.W.1, P.W.2, P.W.3 where
F the common denominator characterizing their evidence is their insistence that the deceased was last seen with the 1st accused (appellant) person; that there is no material contradiction, whatsoever in their pieces of evidence either with Exhibit 'E' or P.W.6's evidence that the appellant took him to the locus criminis where the deceased's corpse
G was dumped by the murderer; that the trial court never convicted the appellant upon reasonable suspicion and neither did the Court of Appeal affirm the appellant's conviction upon reasonable suspicion of his having committed a crime; that P.W.4 who was a chief superintendent of police ordered the appellant's arrest and detention as it is adequately provided for by Section 24(1)(a) of the Police
H Act, Cap. p.19, Special Provisions Act 2006. Further reference was made to Section 35(7) of the 1999 Constitution of the Federal Republic of Nigeria in lending weight to the arrest and detention of any person upon reasonable suspicion of having committed a capital of-

fence.

Counsel urged that Exhibit 'C', which is the autopsy report, does not contradict Exhibit 'E', the appellant's confessional statement; that a critical analysis of the evidence of all the prosecution witnesses does not reveal any manifest contradiction. Relying on the case of *Awopejo v. State* (2002) FWLR (Pt. 87) 772 S.C. at pp.781-782, the learned senior counsel urged the court to hold in the absence of any material contradiction in the evidence of the prosecution witnesses in this case; that the concurrent findings of the trial court and the court of Appeal should be endorsed and affirmed.

The 1st issue poses a question whether the learned Justices of the Court of Appeal acted correctly when they affirmed the conviction and sentence of the appellant.

The lower court in its judgment while affirming the conviction and sentence of the appellant held and said thus:-

"The learned trial judge meticulously applied the correct law and properly founded that the statement of the appellant, exhibit 'E'; which is confessional can be acted upon by the trial court... I cannot find any justifiable reason to tamper with the findings of the trial judge on this matter..."

The implication of the judgment is that the conviction of the appellant was solely predicated on his confessional statement Exhibit 'E', which now forms the central point of contention by the appellant. In other words, whether or not Exhibit 'E' was made under duress as alleged by the appellant, a critical examination of the entire circumstance surrounding the making of the document, as well as its admission, must be considered in the light of the evidence made before the trial court by the prosecution witnesses and also the accused/appellant himself. Put differently, Exhibit 'E' cannot be taken in isolation for purpose of determining its veracity and hence legal effect. It is pertinent to state that Exhibit 'E' was recorded by P.W.6, one P. C. Okunfolarin Orimisan attached to the Nigeria police station 'A' Division Akure. He was detailed to investigate the absence of a missing person reported at the station and in his evidence on 15/3/2005 as P.W.6, he said:

"Based on the information that the 1st accused left home with the deceased... I arrested the 1st accused and brought him to the police station. He was cautioned in English language and he made

a statement to me. He wrote the statement himself. Thereafter I signed it as a witness. The statement the accused made was confessional as a result I took him before a senior police officer for endorsement which was read to the hearing of the 1st accused by P.W.4 and it was endorsed by her. After this the 1st accused took me and the other police officers to Irese road. When we got to Irese road the 1st accused took us to the place where he showed us the vehicle which the deceased and himself drove out that day. The vehicle was already burnt. He thereafter took us to a well where the corpse of the deceased was kept. Three pieces of planks were used to cover the well...

The Fire Brigade men then brought out the corpse of the deceased from this well the corpse was taken to the specialist hospital Akure for post mortem... When the corpse was brought from the well 1st accused said it was the corpse of the person whom he killed."

The statement was sought to be tendered and in the absence of any objection from Mr. Ibikunle, counsel representing 1st and 2nd accuseds also Mr. Agbede on behalf of 3rd accused person, the 1st accused/appellant's statement made 12/3/2001 was admitted in evidence and marked Exhibit 'E'. It is pertinent to add also that the said witness P.W.6 was cross examined by the appellant's counsel and the witness was emphatic in confirming his evidence in chief to the effect that the 1st accused/appellant led him to the scene of crime where the corpse of the deceased was discovered. He was not however, cross examined on the alleged confessional statement.

Section 27(1) of the Evidence Act, defines confession as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime. A confession, if voluntary, is deemed to be relevant fact as against a person who made it only. In other words, the confessional statement of the 1st accused/appellant which implicated the 2nd accused is deemed to be a relevant fact as against the 1st accused person who made it and no other. See section 27(2) of the Evidence Act Cap. 112 Laws of the Federation 1990. The application of section 27(3) of the Evidence Act will therefore not permit the confessional statement of the 1st accused person (Exhibit E) to be taken into consideration as against any of such other persons in whose presence or against whose interest it was made unless he adopted the

said statement by words or conduct.

Also by the provision of section 28 of the Evidence Act, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid an evil, of a temporal nature. There must be an indication or some reason in convincing the court that the purported confession was not made voluntary out of volition but by some reason of inducement, threat or promise. Such a confession must call for a conduct of a mini trial otherwise known as trial within trial for purpose of determining the extent of authenticity. The premium laid on confessional statement is very weighty. The justification is not far fetched because, it is long settled that an accused person can be convicted solely on his confessional statement, if made voluntarily and it is fully consistent and probable; this requirement, although conclusive, it is however desirable to have outside the confession some evidence, be it slight, of circumstances which make it probable that the confession was true. The general application of the law as firmly established is that the court can convict an accused based on his confessional statement and that such confession does not need to be corroborated if it meets the requirements of the law. Section 27(1) of the Evidence Act (supra) is in point and also the judicial authorities in Hassan v. The State (2001) 6 NWLR (Pt. 709) 286; Kim v. The State (1992) 4 NWLR (Pt. 233) at 25 and Amusa v. The State (2002) 2 NWLR (Pt. 50) 90-93. See also Ntaha v. State (1972) 4 SC p.1; Ikemson v. State (1989) 3 NWLR (Pt. 110) p. 455 and Saidu v. State (1982) 3 S.C. P.41.

It is pertinent to state also that the whole concept of trial within trial is for the purpose of safe guarding the interest of the accused and which strengthens further the Constitutional Provision of accused's presumption of innocence until proved otherwise.

This court has ruled that when an accused person al-

leges that a confessional statement credited to him was made under duress or was not made voluntarily by him, an objection must be raised as to the admission of the statement when it is sought to be tendered in evidence and not after it had been admitted. See Akpan v. The State (1992) 6 NWLR (Pt. 248) 139
 B and Mohammed v. The State (1991) 5 NWLR (pt. 192) 438.

It has been stated earlier in the course of this judgment that when the prosecution sought to tender Exhibit ‘E’ on the 15th March, 2005, neither the Appellant nor his counsel raised any objection as to the voluntariness of the statement. The objection was raised only in the appellant’s evidence-in-chief wherein he alleged that he was beaten by five policemen and was forced to make and sign Exhibit ‘E’. It has been long settled that the proper time to raise an objection to the voluntariness of a confessional statement is at the point when it is to be tendered in evidence. In the case of Nwachukwu v. State (2004) 17 NWLR (Pt. 902) p.262 at 273-290 it was held that:-
 D

“A trial within trial is necessary only where a confessional statement is effectively challenged and not where all the opportunities at trial for such denial were never utilized. Thus, only where an issue arises as to whether a confession was made voluntarily should the exceptional procedure of holding a trial within trial be adopted by the court...”
 E

The foregoing decision implies that objection to the voluntariness of a confessional statement must be raised timeously and not belated for purpose of conducting a possible trial within trial. See also the case of:- Okoroh v. State (1988) 5 NWLR (Pt. 81) p. 214 and Queen v. Eguabor (1962) 1 SCNLR 409.
 F

The appellant in this case had an ample opportunity and time to have challenged the voluntariness of Exhibit ‘E’ when it was sought to be tendered but he chose not to object. He, the appellant was equally represented by counsel throughout the trial and he did not deem it fit to raise such objection; what is more, even, under
 H cross examination, the accused/appellant confirmed the authenticity of the information contained in exhibit ‘E’. Authorities have shown that once an accused fails to object at an early stage, he will be estopped from contesting the voluntariness at a later stage of the proceeding and also on appeal. See Akpan v. State (2008) 14 NWLR

(Pt. 1106) p.72 and Mohammed v. State (1991) 5 NWLR (Pt. 192) 438 at 457.

It is also the submission of the appellant's counsel that the proceedings of the trial court on 15th March, 2005 were tainted with illegality, following the absence of the appellant in court on that day; that the use of the word shall in Section 210 of the Criminal Procedure Act makes it mandatory that the accused must be present in court at his trials. Counsel also cited a number of decided authorities to buttress his submission. B

Without having to belabour the point as to whether the accused/appellant was in court when exhibit 'E' was admitted in court, reference can be made to his evidence under cross-examination before the trial court, wherein he said thus at page 23 of the record:- C

"I was in Court when the statement I made in the police station i.e. Exhibit 'E' was tendered in court... The information in the statement is correct." D

It is pertinent to restate further that the appellant in his evidence in chief testified that he was a student of OAU Ife. It is a matter of common knowledge that the said institution is very renowned as a centre of learning in Nigeria. Therefore the appellant could not have feigned his inability in understanding the nature or implication of the questions put to him under cross examination. It is also evident that the allegation of the accused/appellant's absence from court, at the time Exhibit 'E' was admitted, was not made an issue before the court below and this has further lent credence to the position of the respondent. Exhibit 'E' was put in evidence by P.W.6 without any objection by counsel to the 1st accused/appellant. The evidence of the same witness P.W.6 was also unchallenged under cross examination on the discovery of the corpse of the deceased. It was the witnesses evidence for instance that the accused/appellant led him (the witness) in company of the prosecution witnesses and some other policemen to the locus criminis. These are all borne on the record of appeal. E F G

Again and as rightly submitted by the learned counsel representing the respondent, the complaint by the 1st accused/appellant of his absence from court was neither made a ground of appeal at the lower court nor was it made a ground in this court. Therefore, it is obvious that the introduction of this alleged error is clearly an after H

thought given the very clear admission of the appellant supra, that he was in fact and indeed in court when Exhibit 'E' was tendered.

The law is settled that the only time the court can review a part of evidence complained of must be through a ground of appeal, properly filed and challenging same. See the case of

B Odeh v. Federal Republic of Nigeria (2008) 13 NWLR (Pt. 1103) 1 at 19-20 where this court reinstated the principles of law as follows:-

C *"Every issue for determination must be formulated from and related to or distilled from a competent ground of appeal. In other words, an issue not distilled from any ground of appeal is incompetent and must be discountenanced with the argument or arguments advanced there under."*

D See also the case of Kotoye v. Saraki (1990) 6 SC 1, Sanusi v. Ayoola (1992) 9 NWLR (Pt. 265) 275 and Owoh v. Asuk (2008) 16 NWLR (Pt. 1112) 113.

E It is also pertinent to state that in as much as the law enjoins a court to act upon a confessional statement for the conviction of an accused person, the veracity of the confession ought to be tested. In other words, the test of determining veracity thereof has been judicially decided in a plethora of authorities. For instance in the case of Ekure v. The State (1991) 13 NWLR (Pt. 635) p. 456 at 470-471 it was held that a confession of an accused should be tested as to its truth by examining it in the light of the other evidence, to determine:-

- F
- a. whether the facts stated in it are true so far as can be tested.
 - b. whether the accused had the opportunity of committing the offence.
 - c. whether the accused's confession was consistent with the
- G facts which have been ascertained and proved.
- d. whether the accused's confession was possible.
 - e. whether there is anything outside it to show that it is true.
 - f. whether it is corroborated.

H ***On a careful and communal reading of the evidence of the witnesses particularly P.W.6 and the statement of the 1st accused/appellant, there is an irresistible conclusion which would leave no one in doubt that the facts stated in Exhibit 'E' are true.***

For instance, overwhelming evidence avails on the record

that the accused/appellant was the last person who was seen with the deceased alive. The evidence of P.W.6 was well stated in the course of this judgment, that it was the accused/appellant who took him to the place where the corpse of the deceased was found. The detailed facts of the evidence had been restated earlier as to how P.W.6 had to seek for the assistance of the Fire Brigade men to remove the corpse from the well. The witness P.W.6 was not discredited on his evidence under cross examination relating the vital exposition and revelations. The pieces of evidence clearly reveal that the accused/appellant certainly knew so much about the death of the deceased and to these facts he (the accused) did confess in his confessional statement. The appellant took advantage of his friendship with the deceased and did not only brutally and callously murdered him but he went further and mercilessly also cruelly excised the deceased's private parts. No doubt, the evidence of discovery of the deceased's vehicle and body when the appellant led P.W.6 and the other officers to the scene of crime have clearly corroborated and supported the confirmation of the confessional statement. In his evidence, the accused/appellant stated further that he parted company with the deceased at 9 a.m. and that in the afternoon around 2 p.m. he went to the shop of P.W.2 the father of the deceased. The accused/appellant however, failed to explain where he was between 9.30 a.m. and 2 p.m. Although he said that he was with the sister of the deceased throughout the day on 8/3/2001 after the deceased had dropped him; however, this piece of evidence could not be substantiated.

I must say with all sense of responsibility and without mincing my words that the appellant is a very wicked individual who had betrayed all forms of decency in a civilized human existence and society. This I say because the appellant was embraced as a friend of the deceased whose members of his entire family also accepted him (the appellant) without any negative reservation. It is unfortunate therefore that the same appellant should exhibit such a vicious and animalistic behaviour by betraying in dehumanizing and taking due advantage of the deceased and his family members.

For all intent and purpose, it is the result of the heinous act committed by the appellant that haunted him to the marrow and

hence his confessional statement in Exhibit ‘E’. In other words, his guilt is akin to that of Macbeth in William Shakespeare’s write up wherein by murdering King Duncan, Macbeth was said to have murdered sleep and therefore he could also sleep no more!

It is the submission of counsel for the appellant that aside
 B Exhibit ‘E’, there is no other corroborative evidence linking the accused to the crime. Again Counsel cited the case of Nwachukwu v. State (2007) 17 NWLR (Pt. 1062) p. 31. With due respect to the learned counsel, the submission in that regard is totally against his
 C case especially when regard is had to the overwhelming evidence by P.W.6 which strongly confirms the testimony by the accused/appellant and also exhibit ‘E’. In the said authority under reference for instance, this court had this to say at page 65-66 of the report:-

“...Even without those corroborative acts, the appellant could
 D perfectly be convicted solely on his voluntary confessional statement. I am of the opinion that a positive, direct and voluntary confession by an accused person is the best evidence a criminal court can conveniently admit to convict its maker. The admission of a confessional statement which has satisfied all the requirements of the law to be
 E “confessional,” properly so called, can satisfy the burden of proof required of the prosecution to discharge in order to secure a conviction.”

A further issue raised by the appellant’s counsel is where he
 F alleges contradiction in the evidence by P.W.6, P.W.3 and P.W.2 as to who found the dead body of the deceased. In other words it is the counsel’s submission that, while the evidence of P.W.6 suggests that the appellant has something to do with the death of the deceased, P.W.3 and P.W.2 suggest otherwise.

G ***The principle of law is well settled as laid down in plethora of case laws that where there are material contradictions in the testimonies of the prosecution witnesses, it will be wrong for a court to act on such testimonies.*** See Amala v. The State (2004) 12 NWLR (Pt. 888) p. 520. In the case under consideration
 H at pages 119-120 of the record of appeal the lower court held and said:-

“I have perused the testimonies of P.W.1, P.W.2 and P.W.3...I cannot find an iota of contradiction in those pieces of evidence whether examined singly or collectively. ...P.W.2 did not state that it

was the Appellant that found or discovered the corpse of the deceased.”

It has been held times without number and as arrived at supra, that the court can convict on the confessional statement of an accused person alone, if it is free and voluntary and it is fully consistent and probable; it is however desirable to have outside the confession some evidence, be it slight, of circumstances which make it probable that the confession is true. See the case of Nwachukwu v. State (2002) 12 NWLR (pt. 782) p. 543 at 572 a decision of this court also Ubierho v. State (2005) 20 WRN III (2005) 5 NWLR (Pt. 919) p.644.

In the case of Ubierho v. State (supra) for instance, it was held and said:-

“A man may be convicted solely on his confession. There is no law against it. If a man makes a free and voluntary confession which is direct and positive and is properly proved, the court may if it thinks fit convict him of any crime upon it. It is however desirable to have some evidence of circumstances which make it probable that the confession was true.”

From the foregoing authority, it is implied that corroboration is desirable but not a necessity. The purpose of corroboration is merely to confirm and support the confessional statement which evidence is in itself sufficient, satisfactory and credible. Corroboration in this instance is required as a matter of practice but not law.

In the case at hand, the confession by the appellant to the murder of the deceased was positive, credible and direct. There are also other material evidence outside the confession which makes Exhibit ‘E’ probable that it is true. I have stated earlier that the test of veracity is very necessary for purpose of testing the truth of the confession. The cases of Ikemson v. State and Edemine v. State (supra) are in reference. The confessional statement Exhibit ‘E’ is true because, it is consistent with the surrounding circumstance of the death of the deceased and other facts that have been ascertained.

As rightly submitted by the learned counsel for the respondent, there is no manifest contradiction revealed in the evidence of the prosecution witnesses. For instance the evidence of P.W.6 the star witness is very vivid and clear that the appellant led him and others to the well where the deceased’s corpse was dumped and the body was in fact discovered just

as it was told the witness by the appellant. I will not hesitate to repeat again that the witness P.W.6 was not contradicted on his evidence especially the aspect that the accused/appellant led him and others to the scene of crime. The question sought to raise by appellant's counsel as to who found the body of the deceased is not an issue therefore. It is obvious that the body was found on the information given by the appellant himself: that is to say he led P.W.6 and others to the well, the place of crime. The appellant's statement Exhibit 'E' and also his evidence before the trial court are the confirmation. The thrust of the evidence of the witnesses P.W.1, P.W.2 and P.W.3 all relate to the discovery of the deceased's body and the burnt car.

It is not every discrepancy or contradiction in the evidence of the prosecution witnesses that would lead to the rejection of such evidence. It must be shown that the allegation is so material that grave doubts are cast on the case of the prosecution. See the following decided cases which will illustrate the situation. *Awopejo v. State* (2002) FWLR (87) 772 SC p. 781-782, *Effia v. The State* (1999) 8 NWLR (Pt. 613) 1 at 9-10. See also *Onubogu v. The State* (1974) 1 All NLR (Pt. II) 5, *Nasamu v. The State* (1968) NMLR 86, *Ibe v. The State* (1992) 5 NWLR (Pt. 244) 642 at 649 and *Nanisol v. The State* (1993) 5 NWLR (Pt. 292) 129. The fact that the accused/appellant made a confessional statement, Exhibit "E" that is consistent with the case against him, cements the charge against him.

The appellant's counsel also submitted a heavy weather of contradiction between Exhibits 'E' and 'C' (the medical report.) In other words that while Exhibit 'E' states that the deceased was hit with a stick on the head by the appellant, Exhibit 'C' said the deceased was hit by machete on the head. The consistency in this regard lies in the fact that both Exhibits 'E' and 'C' refer to the deceased's head as the object of attack. It is a matter of common knowledge that a hard hit with a sharp-edge stick on a human head can have the same effect as a machete wound on the head. With the appellant and his cohorts hitting the deceased with a stick in the head, as against a less sensitive and vital part of the body, it will not be out of place to presume that the act was intentional with the knowledge that death

or grievous bodily harm would be the probable consequence. As rightly submitted by the counsel representing the respondent, the seeming contradiction is not material enough to have warranted the trial court declining reliance on Exhibit 'E'. The main issue here is that the deceased died and the appellant admitted being responsible for his death in Exhibit 'E' and which was also confirmed during cross examination of the appellant when he stated thus. "...I was in court when the statement I made in the police station i.e. Exhibit 'E' was tendered in court... The information in the statement is correct."

I have said somewhere in this judgment that the appellant was a University student of OAU and he cannot claim ignorance of the implication of his statement and evidence.

As a matter of information, I would state that the evidence of PW.1 - PW.3 apart from being very consistent, are also devoid of malice in that they all testified to the good behaviour of the appellant throughout the known period of his friendship with the deceased. It is also on record that P.W.2 and P.W.3 even insisted that the appellant should not be arrested by the police by reason of his being a close friend of the deceased, their son. Alas, the appellant callously did betray the family trust and I have resounded his brutal and wicked behaviour earlier in the course of this judgment. I will therefore say no more.

A further contention submitted by the appellant's counsel relates to Exhibit 'D', a statement made by the appellant in which he denied committing the alleged offence and raised a defence of alibi; that the respondent failed to raise any evidence to disprove Exhibit 'D' and it was therefore detrimental to their case; that the lower court erred by failing to look at the said evidence.

The two statements Exhibits 'D' and 'E' were made on 10/03/2001 and 12/03/2001 respectively. The courts below considered the latter more credible than the former. In the case of *Sule v. The State* (2009) 8 SCM, 177 the law was well propounded that where an accused person makes two statements, a trial judge will be right to take the one less favourable to him.

The law is also settled that where there is no direct evidence of eye witnesses to a crime, the court can draw inference from proved facts going by circumstances surrounding the cause of death. See *Omotola & Ors v. The State* (2009) 3

SCM, 127. ***The trial Judge in the case at hand placed reliance on evidence before the court and the voluntary confessional statement of the appellant (Exhibit ‘E’) to convict the appellant based on his (Judge’s) conviction that the confessional statement was voluntary, true and possible as established by a***

plethora of judicial authorities. See the case of Ikemson v. State (1989) 65 CNP 54; also Olabode v. The State (2008) 7 SCM 96. The lower court in affirming the trial court’s judgment said:-

“I am quite satisfied that the trial court properly directed itself as to the approach to be followed in assessing the confessional statement of the appellant. The confessional statement is true because it is consistent with the surrounding circumstance of the death of the deceased and other facts that have been ascertained...

Therefore, a denial by the appellant herein that Exhibit ‘E’ was voluntarily made came too late in the day.”

The conclusion arrived thereat is very apt, well considered and thought out. I cannot therefore agree more but endorse same. The lower court I hold cannot be faulted in affirming the judgment of the trial High Court. In other words, the courts were right in imposing the conviction and sentence of death on the appellant solely on his confessional statement in the light of the evidence adduced before the trial court. Issue no. 1 is hereby resolved against the appellant and I so hold.

The 2nd Issue is, whether the learned Justices of the Court of Appeal were right in holding that the prosecution proved its case beyond all reasonable doubts at the trial court.

It is the submission of the appellant’s counsel that his client should not have been sentenced for murder having regard to the evidence available to the court; that this submission stems from the fact that Exhibit ‘E’ did not state that it was the appellant who killed the deceased; that the prosecution must prove the appellant guilty beyond reasonable doubt to secure his conviction for murder. Counsel cites the case of Adekunle v. The State (2006) 14 NWLR (Pt. 1000) page 717. It is the counsel’s submission further that the court ought not have convicted the appellant based on Exhibit ‘E’ and glossing over Exhibit ‘C’ which is more authoritative as to the cause of death of the deceased. In other words, that Exhibit ‘E’ did not in any way reveal that the appellant murdered the deceased but somebody else;

that one person cannot be found guilty of the offence of conspiracy. Finally that in the absence of any other evidence corroborating Exhibit 'E', it would not be safe for the court to convict the appellant based on the Exhibit only. Counsel therefore urged in favour of allowing the appeal and as a consequence discharge and acquit the appellant of the charge against him. B

In response to the foregoing submission, the counsel Mr. Jegede, SAN on behalf of the respondent cited the case of Idok v. State (2008) 13 NWLR (Pt. 1104) 225, wherein this court related copiously to the ingredients of the offence of murder, which the prosecution must need to prove. Counsel submits the presumption of mental capacity as provided in section 27 of the criminal code, Volume II cap 30, Laws of Ondo State, 1978 which is sufficient to establish the mens rea of the appellant; that this is especially where he failed to set up any legal defence supported by credible evidence in justification of the commission of the heinous crime; that this court would not endorse the interference with concurrent findings of the two lower courts. In summary, the learned counsel submits that the placement of reliance on Exhibit 'E' by the courts below in view of the overwhelming surrounding circumstances, which pointed to a direct and irresistible conclusion, that it is only the 1st accused now appellant who could be responsible for the death of the deceased, ought not to be disturbed. The counsel urged on the court to affirm the concurrent findings of the two lower courts in dismissing this appeal. C D E F

For purpose of recapitulation, the appellant was charged alongside two other persons who were 2nd and 3rd accused persons respectively for the offence of conspiracy to commit murder and murder. The trial court discharged and acquitted the 2nd accused on the defence of alibi and 3rd accused on the ground that there was no prima facie case made out against him. The appellant was however convicted and sentenced as charged by both the two lower courts. G

It is the submission by the appellant's counsel that the prosecution failed to prove its case against the appellant beyond reasonable doubt. Section 138(1) of the Evidence Act CAP E14 Laws of the Federation of Nigeria 2004 provides that H

"If the commission of a crime by a party to any proceedings is directly in issue in any proceedings, civil or criminal, it must be

proved beyond reasonable doubt.”

Our constitutional provision vide Section 36(5) 1999 provides also that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. In principle, the effect is firmly established that a duty lies on the prosecution to prove its case beyond reasonable doubt; and a general burden to rebut the presumption of innocence as constitutionally guaranteed to an accused. See the case of *Alabi v. State* (1993) 7 NWLR (Pt. 507) p. 511 at 551. Also in the case of *Bolanle v. The State* (2010) vol. 179 LRCN p. 25 at pages 32-33 it was held by this court amongst others that:-

“the commission of a crime by a person must be proved beyond reasonable doubt. ...it is also the law that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt. If on the entire evidence, the trial court is left with no doubt that the offence was committed by the accused person, that doubt is discharged and the conviction of the accused person will be upheld even on the credible evidence of a single witness.”

The law is firmly settled further that there are essential ingredients which the prosecution must of necessity prove in a charge of the offence of murder and are as follows:-

- 1) that the deceased did die;**
- 2) that the death was unlawful and prohibited;**
- 3) that it was the act of the accused person that caused the death; and**
- 4) that the accused intended to cause the death of the deceased.**

The foregoing propositions of law are well entrenched in the case of *Idok v. State* (2008) 13 NWLR (Pt. 1104) 225 at 237-238.

I hasten to say at this point that there was no discrepancy found on the record as to the identification of the deceased’s corpse; Exhibit ‘C’, the autopsy report, has sufficiently established the death of the deceased.

I wish to state pointedly also that the bulk of this issue is substantially fused in the 1st issue. For instance, it has been effectively proved by circumstantial evidence that the appellant was responsible for the death of the deceased that is apart from his confession in Exhibit ‘E’ that he killed the deceased. For instance it was in evidence by PW.3 that the appellant invited the deceased (her son) on the

fateful day to help in conveying his appellants' mother's Kolanuts from Irese to Akure. The deceased and appellant rode together in the same vehicle when the two of them were last seen together. Appellant's claim that he dropped off from the deceased's vehicle at around 9.30 am has not been established by him. Also his claim at the trial court that he did not even ride with the deceased on the fateful day was shown to be false by the testimonies of P.W.1 - P.W.3, who all testified that the appellant and the deceased went out together. The appellant's alibi that he was with the deceased's sister throughout the day in question was discredited when it was shown that he did go out in the same vehicle with the deceased. When these pieces of circumstantial evidence are viewed and put together with the fact that appellant led the police to the scene of crime unaided and showed the well into which the deceased's corpse was dumped and that the appellant identified the deceased's corpse, the one and only conclusion that could be drawn is obvious that the deceased was murdered by the appellant.

Contrary to the submission by the appellant's counsel therefore, the totality of the evidence before the trial court leaves no one in doubt that all the ingredients of the offence of murder were ably proved beyond reasonable doubt against the appellant; particularly when the circumstantial evidence is viewed in the light of the confessional statement made by the accused/appellant.

Put differently, Exhibit 'E' is very expressive of the appellant's confession of his active involvement in the death of the deceased, by the use of a stick in heating the victim on the head which is a vital part of the body and resulting his instant death. It is also a further narration by the appellant that the deceased's body was finally dumped into a well and was covered with 3 planks. This statement was very consistent with the evidence given by the witness P.W.6 who was led by the appellant himself to the well where the deceased's body was discovered.

Contrary to the submission by the Counsel for the appellant, the learned Justices of the lower court had no other alternative but the conclusion arrived at in holding that the prosecution proved its case beyond reasonable doubt at the trial court. I also commend and uphold the conclusion arrived thereat by the two lower courts and I

so hold.

The 3rd issue is whether the learned Justices of the Court of Appeal were right in upholding the conviction and sentence of the appellant on the same and similar evidence on which the co-accused persons were discharged and acquitted?

B It is the appellant's submission in summary that the 2nd and 3rd accused persons having been discharged on the same offence and evidence for which appellant was charged and convicted; appellant ought also to have been similarly discharged and acquitted; that C one person cannot be found guilty of the offence of conspiracy.

In response to the foregoing issue, the respondent's counsel re-iterates that the appellant was neither convicted nor sentenced by the trial court on the same evidence on which co-accused persons were exonerated; that the 2nd accused person set up an alibi which D was investigated and confirmed by P.W.6, a police officer; that the confessional statement of the 1st accused (appellant) which implicated the 2nd accused is deemed to be relevant facts only as against the 1st accused person who made it. See section 27(2) of the Evidence Act.

E It is the counsel's further submission that the appellant was convicted on the strength of Exhibit 'E' (his voluntary confessional statement) and the circumstances surrounding the disappearance of the deceased who was last seen with the appellant; that the case of F the 1st accused (appellant) is neither interwoven nor inseparable from the case of the 2nd and 3rd accused persons. Notwithstanding the contention held by the appellant, the respondent's counsel submits further that the records of this appeal showed clearly and significantly that the case against the three accused persons were not inseparable. G Learned Counsel urged that the conviction and sentence of the appellant be affirmed.

H It is shown on record that the 2nd accused person was implicated only by the confessional statement of the appellant as a co-accused. The 2nd accused also consistently asserted his innocence and reference to his statement at page 25 of the record of appeal is very explicit wherein he said:-

"On the fourth day the I.P.O. came to inform the parents of the deceased that the 1st accused (the appellant) had confessed to the murder of the deceased. On the fifth day, I was arrested and

locked up in the cell. Mrs. Agbede, one of the police officers told me that I was one of the people who killed the deceased. I denied knowing anything about the murder... I was tortured in the cell to make a confession but maintained my innocence."

The above extract is a total denial of any involvement in the commission of the crime by the 2nd accused person. There cannot be a conviction of the accused in the absence of any implication linking him with the offence. This is more so especially where the 2nd accused set up an alibi which was investigated and confirmed by PW.6, a police officer as evidenced at page 21 of the record.

On the part of the 3rd accused, the alibi raised in his statement was equally investigated and found to be true. It is significant to state that the only reference made to the 3rd accused was by the 2nd accused in his own defence and the reference was alien to this case but in connection with an incident which occurred sometime before the case at hand. At page 31 of the record also, the prosecution stood in favour of the 3rd accused where it concedes that there was nothing that connects the 3rd accused person with the crime, based on the facts of this case. **On the authority of section 27(2) of the Evidence Act therefore, the confessional statement of the 1st accused/appellant which implicated the 2nd accused is deemed only as relevant facts against the 1st accused person who made it. Furthermore and by section 27(3) of the same Act, Exhibit 'E' could only be used against the 2nd accused's interest if it was made in his presence and he adopted the said statement by words or conduct. Such adoption was not shown on the record.**

As rightly submitted by the learned counsel for the respondent therefore, the Justices of the Court of Appeal correctly reviewed the records of the trial court before affirming that the 2nd and 3rd accused persons were not discharged and acquitted on similar evidence on which the appellant was convicted and sentenced. The appellant's confessional statement Exhibit 'E' bind him alone and no other person.

Contrary to the contention held out by the appellant's counsel also, the case against his client is highly distinguishable from a situation where the evidence connecting two or more accused persons to the commission of a crime is joined

together. In such a situation, all the accused persons must either fall or stand together. See Emmanuel Ebiri v. The State (2004) FWLR (Pt. 216) p.420 at 433. **The instant case is however different from the one under reference. In other words, where an accused is jointly tried with another or other accused persons and their case is clearly interwoven and inseparable from one another, the conviction of one cannot stand where the other accused person was discharged and acquitted.** The decision of this court in Akpan v. State (supra) is in point and well taken. In the case at hand, the case of the 1st accused (appellant) is neither interwoven nor inseparable from that of the 2nd and 3rd accused persons.

The trial court has the duty of evaluating, appraising and ascribing of probative value to oral evidence adduced before it. This privilege is solely within its ambit and the appellate court is enjoined not to interfere with the findings of fact of a trial court unless such findings are shown to be perverse having been based on improper evaluation of facts and wrong conclusions. See the cases of Woluchem & Ors. v. Gudi & Ors. (1986) 4 SC p. 291; Awoyale v. Ogunbiyi (1986) 4 SC p. 98, Sha (Jnr.) v. Kwan (2002) 8 NWLR (pt. 670) p. 685.

The appellant has not shown any reason warranting this court to upset the findings of the two lower courts and I so hold. In the result, issue three is also resolved against the appellant.

On the totality of this appeal and with all the three issues having been resolved against the appellant, the appeal is devoid of any merit and I endorse the decision of the lower court in affirming the judgment of the trial High Court Akure. The appeal is hereby dismissed while the conviction and sentence of the appellant is affirmed. The appellant is condemned to die by hanging.

I. T. MUHAMMAD JSC

I had a preview of the judgment just delivered by my learned brother, Ogunbiyi, JSC. I am in agreement with the reasoning and conclusion reached by my learned brother Ogunbiyi, JSC.

Now, as it is clear from the facts of this case, the appellant was found guilty of the offences of conspiracy and murder. He was con-

victed and sentenced by the trial court to death by hanging. The conviction and sentence were affirmed by the court below upon which the appellant appealed to this court.

My lords, I think it is interesting to state that before the actual date for hearing of this appeal, there were attempts by the appellant to withdraw this appeal. To that effect, a Notice of withdrawal of the appeal was dated and filed in this court on the 12th of August, 2014. B

On the date scheduled initially for hearing the appeal, i.e. 9th day of October, 2014, learned counsel for the appellant Mr. Julius Okosun drew this court's attention that a Notice of withdrawal of the appeal was filed by the appellant himself. Learned counsel however applied for an adjournment to enable him consult his principal partner on the matter. The appeal was, without objection from Mr. Olubodun for the respondent, adjourned to the 11th day of December, 2014 for hearing. On the said date, Mr. Seni Adio appeared for the appellant while Mr. A. A. Adegbonmire appeared for the respondent. Mr. Adio reported that as a result of pursuing the letter of withdrawal filed by the appellant, the appellant now reconsidered his stand and that his Notice of withdrawal of the appeal should be disregarded and the appeal should proceed. Mr. Adegbonmire for the respondent did not object and the appeal was heard and reserved for judgment today. C D E

My lords, the question put forward by the learned counsel for the appellant in his issue No. 1 i.e. whether the justices of the court below were right in affirming the conviction and sentence of the appellant by the trial court solely on the appellant's confessional statement in spite of the manifest contradictions in the evidence led by the prosecution, can only be answered in the positive if one takes the totality of what transpired in this case. I need not repeat all that happened in the case but it is in evidence that the 1st accused's (appellant) statements to the police were tendered and admitted in evidence through PW6, Police Constable Okanfolarin Orimisan Force No. 175522, pages 20-21 of the record of Appeal bears testimony to that: F G H

"The accused made a voluntary statement which I counter signed. Statement is bought (sic) to be tendered.

Mr. Ibikunle: No objection

Mr. Agbede: No objection

Court: The statement of the 1st accused made on 10/3/2001 is admitted and marked Exhibit "D"

Witness continues. The 1st accused also made another statement is sought to be tendered.

Mr. Ibikunle: No objection.

B *Mr. Agbede: No objection*

The statement of the accused dated 12/3/2001 as admitted and marked Exhibit "E".

C There is a finding by the trial court that the only evidence against the 1st accused is his statement made on 12/3/2001 marked exhibit E in which he confessed to the killing of the deceased. (p.51 of the record). An issue on the voluntariness of Exhibit E was raised at the trial court. Below is trial court's findings on Exhibit E:

D *"In his evidence in court the statement after PW6 and four other policemen had thoroughly beaten him. In other words the accused is now challenging the voluntariness of the confession. It is to be noted that on 15/3/2005, PW6 gave evidence where he sought to tender the confessional statement of the 1st accused. No objection was raised to its admissibility by the defence hence the court admitted and marked it as Exhibit E.*

E *The contention of the 1st accused that he made exhibit E after he had been severely beaten by PW6 and four other policemen is nothing but an after thought and for this reason I shall discountenance it.*

F *Having found that the statement of the 1st accused which is confessional can be acted upon. I am now left to determine the veracity of the confession. (p.52 of the record)."*

G The principle of law governing the admissibility of a confessional statement alleged to have been made by an accused person are well provided by our Evidence Act and the case law. Section 28 of the Evidence Act, 2011 (former section 27 of the Evidence Act, Cap E14 Laws of the Federation, 2004) defines a confession to be an admission made at any time by a person charged with a crime H stating or suggesting the inference that he committed that crime. Once such a confessional statement meets the test of admissibility, it alone without more, is sufficient to ground a conviction for the offence which was admitted by the accused and the requirement of proof beyond reasonable doubt in criminal cases would have been com-

pletely and fully satisfied by the prosecution see: *Ntaha v. State* (1972) 4 SC 1; *Ikemson v. State* (1989) 3 NWLR (Pt. 110) 455; *Saidu v. State* (1982) 3 SC 41. There is a finding by the trial court which was affirmed by the court below that when the prosecution sought to tender exhibit “E” in evidence, neither the appellant, nor his counsel raised any objection as to the voluntariness of the statement. The appellant only raised the issue of the involuntariness of the confessional statement in his evidence in chief that he was beaten by five policemen and was forced to make and sign the statement. This was rather too late. The proper time to raise an objection to the voluntary nature of a confessional statement or otherwise, is at the point when the prosecution tenders it in evidence so that the voluntariness or otherwise of the confessional statement would be determined before it is either admitted or rejected. *Akpan v. State* (1992) 6 NWLR (Pt. 248) 139. That of course, would have necessitated for a trial-within-trial. A trial-within-trial, certainly, is resorted to where an issue arises as to whether a confession was made voluntarily or otherwise, where same is tendered by the prosecution to be admitted in evidence. In this appeal, it is shown beyond doubt that exhibit “E” was purported to be retracted after it had been admitted in evidence and marked as an exhibit which could no longer be made the subject of any trial-within-trial. See: *Okaroh v. State* (1988) 3 NWLR (Pt. 81) 341; *Queen v. Eguabor* (1962) 1 SC NLR 409. It is to be noted also that all the opportunities of the world were offered by the trial court to the appellant to challenge or object to the admissibility of the confessional statement when the prosecution applied to tender it in evidence. Such opportunities were never utilized by the defence when it indicated that it had no objection. Thus, the defence/appellant has no reason to shift blame upon anyone else apart from its own self for such a monumental failure.

The next issue by the appellant I would want to comment on is issue No.3 i.e. on same and similar evidence. Learned counsel for the appellant summarized the fact that three persons were charged with the offence of murder contrary to section 316(1) of the Criminal Code of Ondo State (Cap 30 Vol. II, Laws of Ondo State of Nigeria, 1979), punishable under section 319 of the said law. At the conclusion of trial, the 3rd accused was discharged and acquitted for want of evidence linking him to the commission of the offence charged,

The 2nd accused who was implicated on the basis of the appellant's confessional statement (Exh. E) was also discharged and acquitted by the lower court.

Learned counsel for the appellant submitted that the basis for the discharge of the co-accused charged with the appellant, particularly the 2nd accused was the lack of further corroborative evidence in respect of Exh. E. Ironically, he submitted further, the same Exh. E which led to the discharge of the 2nd accused was the same evidence used in convicting the appellant. Learned counsel submitted further, that where two or more accused persons are charged together with the commission of an offence, and the evidence against all the accused persons is same and similar, the discharge of one, must as a matter of law, affect the discharge of the others. This, the learned counsel added, is because, if one or more of the accused persons is discharged for want of convincing evidence, that must automatically affect all the others in the light of the fact that the evidence against all the accused persons is tied together. Learned counsel cited several cases among which are: *Umani v. State* (1988) 1 NWLR (Pt. 70) 274; *Kalu v. State* (1988) 4 NWLR (Pt. 90) 503; *Adele v. State* (1995) 2 NWLR (Pt. 377) 269 at 293 E-H.

Learned counsel for the respondent submitted that the appellant was neither convicted nor sentenced by the trial court on the same evidence on which co-accused persons were exonerated.

I think I should re-iterate the position of the law my lords, that in a case where evidence before the trial court is same or similar which is relied upon by the trial judge to convict and sentence or discharge and acquit some co-accused persons same application of the law must apply to all other accused persons (if any) in that same case. But where an accused person is charged with other co-accused persons with the commission of a crime and the other co-accused persons are discharged and acquitted on different grounds, as in this appeal, there must be on record, additional and or different set of evidence which incriminates the appellant for criminal responsibility. See: *Umani v. State* (1988) 1 NWLR (Pt. 70) 274 (1988) 1 NSCC 137; *Akpan v. State* (2002) FWLR (110) 1845. In other words, where an accused is jointly tried with another/others and their case is clearly interwoven and inseparable from one another, the conviction of one cannot stand where the other accused(s) person(s) was/were dis-

charged and acquitted.

In reviewing the evidence before them the learned trial judge made the following findings, among others:

“In this case seven witnesses gave evidence for the prosecution while the 1st and 2nd accused persons gave evidence in their own defence and called no witness. The 3rd accused did not testify or call any witness. It is noteworthy that none of the prosecution witnesses gave evidence that either directly or remotely connects or incriminates him. It was the 2nd accused who in his testimony stated that sometime in the past they had occasion to consult the 3rd accused, a herbalist, for ‘Ifa’ divination in tracing the thief who stole the money of PW3. In his statement to the police which is exhibit G, the 3rd accused claimed to be in Ore at the time when the crime was committed. In his address Mr. Daniel Agbede the learned Senior Legal Officer conceded and rightly in my respective (sic) view that there is no nexus between the 3rd accused and the crime. That being so, the 3rd accused therefore rightly deserves his freedom as he is innocent of the charge. In the circumstance he is entitled to be discharged and acquitted.

Now coming to the 2nd accused the investigation of the police did not incriminate or link him with the crime of conspiracy to murder and murder. It was the 1st accused who in his statement at the police station that mentioned his name as a co-participant in the crime. Even in his oral testimony in court, the 1st accused, this time, did not mention or connect the 2nd accused with the crime. What then is the evidential value of a statement made by an accused person which incriminates another co-accused when they are charged together? In this regard I have to refer to the Evidence Act for assistance. Section 27(3) provides:

‘where more persons than one are charged jointly with a criminal offence and a confession made by one of such persons in the presence or more of the other persons so charged is given in evidence the court or a jury where the trial is one with a jury shall not take such statement into consideration as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct.’

Before the confession of the 1st accused can be admitted against the 2nd accused as provided in the foregoing section of the Evidence

Act, the confessional statement must have been made in the presence of the 2nd accused person. Not only that, the 2nd accused must have adopted the confession either by words or conduct. The statement i.e. exhibit E was made on 12/3/2001 not in the presence of the 2nd accused. When the 1st accused was testifying in court, he
 B admitted that he was the one who made it albeit under duress but failed to mention the 2nd accused person in whatever way at all. The 2nd accused on his part denied any knowledge of the crime and neither did he either by words or conducts admit or adopt the contents of exhibit E. In interpreting the afore-stated section 27(3) of the
 C Evidence Act, the Court of Appeal in *Onyeukwu v. The State* (2000) 12 NWLR (Pt. 681) 256 at pages 268-270 held that a man can only confess to his own act. He cannot confess for another. Moreso when the statement was not made in the presence of the other and the
 D other did not adopt the said statement as his own. In *Shekete v. The Nigerian Air Force* (2000) 15 NWLR (Pt. 692) 868 at 874 the Court of Appeal held that as it was not shown that the statement was made in the presence of the appellant who was implicated by the statement and the appellant was not shown to have adopted or admitted it, the
 E statement cannot therefore be relied upon in convicting the appellant.

Guided by the Evidence Act and the decided authorities above, it is my considered view that exhibit E cannot be used to
 F consider the guilt of the 2nd accused in so far as the said exhibit was not made in his presence and he has not adopted it as his own.

In the course of investigation, the 2nd accused stated that on the day of the incident, shortly after the deceased and the 1st accused had driven off, he went to meet his aunt in the State Hospital
 G Akure. The aunt gave him a sum of N10,000 and thereafter he returned to the shop of PW2. The alibi was found to be true. All these points considered either individually or collectively show that the 2nd accused is not connected or involved in the killing of Lanre Disu. He is accordingly entitled to be discharged and acquitted."

H The court below, in affirming the above findings of the trial court, stated that as the trial court upheld the defence of ALIBI pleaded by the 2nd accused and as a prima facie case was not made against the 3rd accused, who were charged along with the appellant, the trial court was right in discharging and acquitting them. The court below

went on to hold as follows:

“Having carefully gone through the record of appeal with an eagle’s eyes, I have no hesitation in coming to the conclusion that the trial of the appellant along with the others was properly in law conducted. It was elaborate and the appellant had all the opportunities to defend himself. The learned trial judge meticulously evaluated and appraised the evidence adduced by all the parties and properly ascribed probative value to same. His findings from the evidence adduced before him and his conclusions were proper in accordance to all applicable laws. The learned trial judge meticulously applied the correct law and property founded that the statement of the appellant exhibit E, which is confessional can be acted upon by the trial court.”

Thus, the discharge and acquittal of accused persons 2 and 3 (co-accused to the appellant) had nothing to do with the evidence with which the appellant was tried, found guilty of, convicted and sentenced. I agree with the learned counsel for the respondent that the discharge and acquittal of the 2nd and 3rd accused persons by the trial court and affirmed by the court below were legally justifiable since the arraignment of the 2nd accused person was wrongly based on the appellant’s confessional statement which should ordinarily be held only against the maker in the light of Section 27(2) of the Evidence Act. I need to draw attention further that the issue of same or similar evidence which the appellant in hammering upon is one where the evidence connecting two or more persons accused of committing a crime is knitty joined together like Siamese twins. In such a situation all the accused persons must either fall or stand together. *Ebiri v. State* (2004) FWLR (Pt. 216) 420 at 433 G-H. The accused persons normally, are tried jointly as their case is clearly interwoven and inseparable. In that situation, the conviction of one cannot stand where the other accused persons were discharged and acquitted.

This court laid the principle in several cases such as in *Akpan v. State* (supra) where Katsina-Alu, JSC (as he then was) stated:

“Now, the law on this point is clear. It is thus, when the evidence against two or more accused persons in a criminal case is in all material respect the same and no doubt is resolved by the trial judge in favour of one of the accused persons, the same doubt should be resolved in favour of the other or others. Consequently, if one is acquitted and discharged, the other or others should also be acquitted

ted and discharged. Differently put, where an accused is jointly tried with another or other accused persons and their case is clearly interwoven and inseparable from one another, the conviction of one cannot stand where the other accused person was acquitted and discharged. See further: Abudu v. State (1955); Kalu v. State (supra) 1 B NWLR (Pt. 1) 55."

From the facts and evidence before the trial court, this appeal is quite dissimilar from such cases where the facts and evidence are same or similar.

C For this and the detailed reasons given by my learned brother Ogunbiyi, JSC, I too, find no merit in the appeal which is hereby dismissed.

D **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother - Ogunbiyi, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

E The appellant and two other accused persons were arraigned before Fagbe, J. sitting at the Ondo State High Court, Akure (the trial court) on a two-count charge of conspiracy to commit murder and murder contrary to sections 324 and 316 of the Criminal Code, Cap 30, vol. 11 Laws of Ondo State, 1978. The appellant and the two F other accused persons pleaded not guilty to the offences charged.

The learned trial judge garnered evidence from both sides of the divide. He was duly addressed by learned counsel to the parties. In a judgment delivered on 18th July, 2005, he found the appellant G guilty on the two stated counts. He consequently convicted and sentenced him accordingly.

The appellant felt dissatisfied with his conviction and sentence and appealed to the Court of Appeal (the court below). On 4th June, 2010, the Justices of the court below unanimously dismissed the appeal H and affirmed the decision of the trial court.

The appellant felt dissatisfied with the decision of the court below and decided to further appeal to this court. On December 11, 2014 when this appeal was heard, learned counsel for the appellant adopted and relied on his brief of argument and urged that the ap-

peal be allowed. As well, learned counsel for the respondent equally adopted and relied on brief of argument filed on behalf of the respondent and urged that the appeal be dismissed.

I wish to confine my own remarks to appellant's issue 2 which reads as follows:-

"Whether the learned justices of the Court of Appeal were right in holding that the prosecution proved its case beyond all reasonable doubts at the trial court."

It is apt to re-state the ingredients of the offences of murder here below as follows:-

- (1) that the deceased had died;
- (2) that the death was caused by the accused and;
- (3) that the act or omission which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was the probable outcome of the action.

For the above, the case of Ibikunle v. The State (2007) 2 NWLR (Pt. 1019) 546 at 570 and Idok v. The State (2008) 13 NWLR (Pt. 1104) 225 at 237-238 are clearly in point.

On behalf of the appellant, it was contended that there were contradictions in the evidence adduced by the prosecution witnesses. It must be stated at this point that contradiction in the evidence of prosecution that will be fatal must be substantial. Minor or miniature contradiction which did not affect the credibility of witnesses may not be fatal. Contradiction must relate to substance of the matter. Trivial contradictions should not vitiate a trial. See Ankwa v. The State (1969) 1 All NLR 133, Queen v. Iyanda (1960) SCNLR 595, Omisade v. Queen (1964) 1 All NLR 233 and Sele v. The State (1993) 1 SCNJ 15 at 22-23, (1993) 1 NWLR (Pt. 269) 276; Musa v. The State (2009) 9 SCM 63.

It must be pointed out clearly that the evidence of P.W.1, P.W.2 and P.W.3 which established that the appellant was the last person seen with the deceased alive have not been shown to be contradictory. The appellant was caught up in the web of 'the Last Seen Doctrine.' He had the duty to explain what happened to the deceased. But he failed to extricate himself. The two courts below were left in no doubt as to the fact that the deceased was last seen with the appellant.

Exhibit E is appellant's cautioned statement. Therein, he

made a clean breadth admission as to how the deceased was hit with a stick on the fore-head and he died. The records of the courts below clearly linked the deceased's death with head injury and chopped-off genitals. The trial court was right in placing reliance on the appellant's confessional statement to convict him as it was convinced that same was voluntary, true and possible. The court below was in order when it sustained the stance of the trial court. See *Olabode v. The State* (2009) 7 SCM 96.

The above is not the end of the matter. The appellant, as found by the two courts below, led P.W.6 (the I.P.O.) and others to where the deceased's burnt vehicle was found and also to the well where the deceased's body was traced. This clearly corroborated admissions in his cautioned statement - Exhibit 'E'.

The two courts below made concurrent findings of fact on crucial issues canvassed in this appeal. They have not been demonstrated to be perverse or against the current of plausible evidence on record. I shall not interfere as it is not in the character of this court to so do. See *Shorumo v. The State* (2010) 12 SC (Pt. 1) 73 at 96, 102; (2010) 19 NWLR (Pt. 1226) 73; *Igwe v. The State* (1982) 9 SC 174; *Victor v. The State* (2013) 12 NWLR (Pt. 1369) 465 at 485.

Without any shred of doubt, the prosecution proved all the essential ingredients of the offences charged beyond reasonable doubt as postulated by Lord Sankey, L. C. in *Woolmington v. DPP* (1935) A.C. 462. Proof beyond reasonable doubt is not proof to the guilt; however. See *Miller v. Minister of Pension* (1947) 2 All ER. 372. As all the essential ingredients of the offence charged were clearly established, it was idle to have argued to the contrary. See: *Alabi v. The State* (1993) 7 NWLR (Pt. 307) 511 at 523; *Abogede v. The State* (1996) 5 NWLR (Pt. 448) 220 at 276.

Perhaps, it is still apt to state it that this court in *Princewill v. The State* (1994) 2 LRCN 303 at 318, per Iguh, JSC vehemently held -

"That where the court is satisfied that the prosecution has proved beyond reasonable doubt that the death of the deceased was caused directly or indirectly by the act of the accused to the exclusion of all other possibilities, the court is bound to convict."

The two courts below rightly, in my view, found that the charge against the appellant was proved beyond reasonable doubt. I

agree and pitch my tent with them without any reservation.

For the above remarks and the detailed reasons adumbrated in the lead judgment, I too feel that the appeal is devoid of merit. It is hereby dismissed by me; as well.

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M. D. MUHAMMAD JSC

Having had a preview of the lead judgment of my learned brother Ogunbiyi JSC, I imbibe the reasoning and the conclusion therein that the appeal lacks merit and that it be dismissed.

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It is my privilege to rely on the facts of the case that brought about the appeal as fully captured in the lead judgment in stressing the position of the law on the principal issues raised by the appeal which read:-

(I) Were the learned Justices of the Court of Appeal right D affirming the conviction of the appellant solely upon the appellant's confessional statements in spite of the manifest contradictions in the prosecution's evidence before the trial court?

(II) Were the learned Justices of the Court of Appeal right in holding that the prosecution proved its case beyond all reasonable E doubt at the trial court?

It is my considered view that appellant's third issue for the determination of the appeal as reproduced in the lead judgment is subsumed in his 2nd issue as reflected above.

F

Exhibit E is appellant's extra judicial statement which his counsel contends have been wrongly relied upon by the two courts below to convict and sentence the appellant.

Firstly, learned counsel contends that the appellant who was not represented by counsel on the 15/3/2005 when Exhibit E was G tendered could not, for that reason, object to the admissibility of the statement. My examination of the record of appeal does not fully bear out learned counsel's assertion.

Certainly, Exhibit E which vividly contains how his victim met his death equally states the role played by the appellant in that re- H gard. And there is the equally devastating admission of the appellant under cross-examination at page 23 of the record that Exhibit E is the correct statement recorded from him.

The record of appeal further shows that on the very date Ex-

hibit E was tendered and admitted the appellant was represented by counsel who was equally in attendance at the day's proceedings of the court. It is not unreasonable, therefore, to reject appellants' summations that being not represented by counsel he was not in the position to object to the admissibility of Exhibit E on its being tendered. The truth is that being the correct statement that was recorded from him the appellant had no reason to justifiably distance himself from it. Exhibit E is manifestly confessional as it contains all the ingredients of the offences appellant has been convicted for.

The two courts below have, in their concurrent decisions, found the appellant guilty as charged. Both Courts have inter-alia relied on Exhibit E to arrive at their decisions. I have not found their reliance on the statement perverse to warrant tempering with their decisions. See *Shorumo v. State* (2010) 19 NWLR (Pt. 1226) 73 and *Victor v. State* (2013) 12 NWLR (Pt. 1369) 465.

The law does not say the appellant cannot be convicted on his confessional statement alone. It is not appellant's position that Exhibit E is not confessional. Indeed he owns up all the content of the document as being correct. On scrutiny, Exhibit E has turned out to be appellant's direct, positive and unequivocal confession of the offence he was tried and convicted for. Beyond Exhibit E, there is the testimony of PW6 the investigating police officer the appellant led, three days after the disappearance of the deceased, to the well where the latter's corpse was retrieved. The lower court's affirmation of appellant's conviction and sentence on the basis of these facts remains impeccable. See *Ikemson v. State* (1989) 3 NWLR (Pt. 110) 455, and *Kalu v. State* (1988) 4 NWLR (Pt. 90) 503 and *Adele v. State* (1995) 2 NWLR (Pt. 377) 269 at 293.

The appellant insists that he should have been discharged along with his co-accused as nothing outside the very evidence that entitled the co-accused to their freedom had been led by the respondent to justify his conviction. The evidence on record does show that is not in whereas the 3rd accused any way connected with the offence the three were charged and for that reason entitled to his "freedom", both courts are again right that by virtue of Section 27(3) of the Evidence Act, the 2nd accused cannot be convicted on the basis of Exhibit E which he neither made nor made in his presence and he owned up to. The evidence on the basis of which the appellant has

been convicted which does not similarly rope in the 2nd accused cannot legally warrant his conviction as well. Appellant's case is clearly not interwoven with and inseparable from the case of his co-accused to justify his discharge and acquitted. See *Ebiri v. State* (2004) FWLR (Pt. 216) 420 and *Akpan v. State* (1992) 6 NWLR (Pt. 248) 139.

For the foregoing and more so the fuller reasons contained in the lead judgment I also find no merit in the appeal and dismiss it. I abide by the consequential orders made in the lead judgment.

KEKERE-EKUN JSC

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

This is an appeal against the judgment of the Court of Appeal, Benin Division delivered on 4/6/2010 upholding the judgment of the Ondo State High Court sitting at Akure delivered on 18/7/2005 convicting the appellant of murder and sentencing him to death by hanging. The facts leading to the appeal have been well summarized in the read judgment. The three issues for determination in this appeal are:

1. Were the learned Justices of the Court of Appeal right in affirming the conviction and sentence of the appellant solely upon the Appellant's confessional statement in spite of the manifest contradictions in the prosecution's evidence before the trial court?

2. Were the learned Justices of the Court of Appeal right in holding that the prosecution proved its case beyond all reasonable doubt at the trial court?

3. Were the learned Justices of the Court of Appeal right in upholding the conviction and sentence of the appellant on the same or similar evidence on which the co-accused were discharged and acquitted?

The law is well settled that a free and voluntary confession is sufficient proof of guilt if it direct, positive and unequivocal with reference to the offence charged. See: *Adio v. The State* (1986) 2 NWLR (Pt. 24) 581; (1986) 4 SC 194; *Mohammed v. The State* (2007) 11 NWLR (Pt. 1045) 303; *Osung v. The State* (2012) 18 NWLR (Pt.

1332) 256 @ 276-277 D-E; The State v. Jimoh Salawu (2011) 18 NWLR (Pt. 1279) 883 @ 920-921 G; Okoh v. The State (2014) 2-3 SC 184 @ 205 lines 15-23.

One of the serious contentions of the appellant herein is that his confessional statement, Exhibit E, was obtained under duress even though no objection was raised when it was tendered at the trial. It is the appellant's further contention that learned counsel who represented him at the trial was from the Legal Aid Council and *"may not have had the opportunity of meeting with the appellant to extensively discuss the making of Exhibit E"*. He also contends that he could not have objected to the statement at the time it was tendered because he was absent from court that day. Learned counsel for the appellant referred us to the record of proceedings for 15/3/2005.

The first issue to resolve is whether in fact Exhibit E is a confessional statement. Having carefully perused the said statement one is not left in any doubt that it is confessional. From the evidence before the court, the appellant was the last person seen alive with the deceased. Exhibit E provides a vivid account of all that transpired on the day the deceased was killed and the part the appellant played in it.

Now, the proper stage at which to challenge the admissibility of a confessional statement is at the time it is tendered in evidence. Depending on the grounds for the objection, the court would either conduct a trial within the trial, the appellant contends that it was obtained under duress, See: Nsofor v. The State (2004) 18 NWLR (Pt. 905) 92; Jimoh v. The State (2014) LPELR-22464 (SC) 1 @ 30-31; Akpa v. The State (2008) 14 NWLR (Pt. 1106) 22; or it would admit the statement and decide on its probative value at the end of the trial in the course of delivering its judgment where the appellant contends that he did not make the statement at all. See Madjemu v. The State (2001) 9 NWLR (Pt. 718) 349; Ikpasa v. The State (1981) 9 SC @ 89.

I shall take the more serious of the appellant's contentions first i.e. his alleged absence on the day the statement was tendered and admitted in evidence. Having perused the record of proceedings for 15/3/2005, it seems to me rather strange that if indeed the accused persons were absent, neither the court nor counsel on either side commented on it, bearing in mind the provision of Section 100

of the Criminal Procedure Law, Cap. 31 vol. II, Laws of Ondo State 1978, which makes it mandatory for an accused person to be physically present throughout his trial unless his presence is expressly excluded by the court where he is violent or under the conditions provided for in the law. It is significant to note that while the appellant and the 2nd accused were represented by Mr. E. O. Ibikunle from the Legal Aid Council, the 3rd accused person was represented by a separate counsel, Mr. Dapo Agbede. Mr. Ibikunle cross-examined the witness but did not put any questions to her to suggest that the statement was made involuntarily. A second opportunity to challenge the statement was when it was sought to be tendered through the I.P.O. (PW.6). It was admitted without objection from either counsel. Once again, Mr. Ibikunle cross-examined the witness but did not raise the issue of duress, Indeed it was under cross-examination by Mr. Ibikunle that PW6 stated that it was the appellant who led him to the well where the corpse of the deceased, who had been missing for about three days, was found. B
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Even weightier is the admission by the appellant under cross-examination by learned counsel for the 3rd accused that he was in court on the day that Exhibit E was tendered. Page 23 of the record reads thus: E

“Cross-examined by Dapo Agbede: When the case was fresh, I made a statement at A Division, I also made a statement at S.I.B. I was in court when the statement I made in the police station i.e. Exhibit E was tendered in court. ...The information in the statement is correct.” F

This is an admission straight from the horse’s mouth! He was not re-examined on this crucial issue. It is also noteworthy that the alleged accused was not made a ground of appeal against the judgment of the trial court. It is clearly an afterthought. The insinuation that learned counsel who represented the appellant at the trial was incompetent is most unfortunate and clearly unfounded. G

Relying on the authority *Mohammed v. The State* (supra) this court in: *Osung v. The State* (supra) at 276-277 D-D held that a voluntary confessional statement made by an accused person and tendered without objection does not need any further corroboration. See also: *Obosi v. The State* (1965) 1 NMLR 129; *Atanyi v. The Queen* 15 WACA 34; *Adio v. The State* (1986) 2 NWLR (Pt. 24) H

581. This position notwithstanding, there was ample credible evidence before the court outside of Exhibit E that confirmed the contents thereof.

In light of the above and for the more detailed reasoning contained in the lead judgment I hold that the lower court was right in affirming the conviction and sentence of the appellant based on his confessional statement. Accordingly I also dismiss the appeal and affirm the judgment of the lower court upholding the appellant's conviction and sentence.

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