

**SUPREME COURT OF NIGERIA**  
FRIDAY 1ST JULY, 2016. SC. 310/2012  
**CORAM:- O. RHODES-VIVOUR, N. S. NGWUTA, M. U.**  
**PETER-ODILI, M. D. MUHAMMAD, A. SANUSI, JJSC**

FABIAN IMOH ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

---

CRIMINAL PROCEDURE - Conviction - Confession - Where Court is satisfied that confession is direct and positive - It can convict on the confession alone (H1)

EVIDENCE - Confession - Retraction of - Weight - Confession does not become inadmissible - Merely because appellant resiled from it - As it is an issue of evaluation within primary function of trial Court (H2)

CRIMINAL PROCEDURE - Miscarriage - Ingredient - Penal Code s. 233 - The offence is complete where intention to cause the woman's miscarriage is shown - As knowledge that death may likely occur is immaterial (H3)

**FACTS**

Accused/appellant was arraigned before the Benue State High Court Makurdi for an offence contrary to section 233 of the Penal Code Cap 89 Laws of the Northern State (applicable to Benue State) which provides that whoever with intent to cause miscarriage of a woman whether or not with child, does any act which causes the death of such woman shall be punished. Appellant pleaded not guilty. To prove its case against appellant, prosecution/respondent relied on the evidence of its lone witness, the investigating police officer.

Respondent tendered in evidence Exhibit 2 i.e. appellant's confessional statement and Exhibit 5 i.e. the post mortem examination report conducted on the victim. The documents were admitted in evidence. At the end of respondent's case, appellant through his learned counsel made a no case submission. The Court overruled the submission. Consequently, appellant gave evidence in his own

defence and called two other witnesses. Appellant retracted from his confessional statement. At the end of the trial, the Court convicted appellant as charged. Dissatisfied with the decision of the Court, appellant appealed to the Court of Appeal. The appeal was dismissed. Hence, this is a further appeal to the Supreme Court by appellant.

### **ISSUES FOR DETERMINATION**

*“(1) Whether the Honourable Court of Appeal was right in law when it upheld the conviction and sentence of the Accused/Appellant by the Honourable Trial Court which was based on his extra judicial confessional statement - Exhibit 2.*

*(2) Whether from the totality of the evidence, the Honourable Court of Appeal was right in law when it upheld the conviction and sentence of the Accused/Appellant by the Honourable Trial Court, based on Exhibit 5 [the Nigeria Police Post Mortem Examination Report] to reach the conclusion that the death of the deceased was caused by the act of the appellant.*

*(3) Whether in view of the evidence before the trial court the prosecution proved its case against the appellant beyond reasonable doubt.*

**HELD** (Unanimously dismissing the appeal per

**MUHAMMAD JSC)**

*CRIMINAL PROCEDURE - Conviction - Confession*

**1. My lords, the law is trite that though it is desirable for a court to base its conviction on evidence outside an accused person’s confessional statement as well, it is not the principle that where the court is satisfied that the confessional statement is direct, positive and probable it cannot convict an accused on the confessional statement alone.** (p. 3345 H)

*EVIDENCE - Confession - Retraction of - Weight*

**2. I am in complete agreement with learned respondent’s counsel here that whether or not Exhibit 2, in the face of appellant’s denial, is the statement he made to the police remains an issue of fact evaluation in respect of which falls within the trial court’s primary function. Appellant’s denial that the statement is not his, on the authorities, does not affect the**

**admissibility of the statement. Once the two courts below are right in their concurrent findings that Exhibit 2 is a confession, the law is well settled that it does not become inadmissible merely because the appellant has resiled from it.**

**The appellant's further contention that he was not the maker of Exhibit 2 and/or that there was breach of the judges' rules by the person who recorded the statement remain equally unavailing. Whether or not he was the maker remains a question of fact and, in the case at hand, turns on the credibility of the appellant whom the trial court had the opportunity of seeing as he testified in denial of being the maker of the statement. Neither the lower court nor this Court has the advantage the trial court had and which forms the basis of its conclusion that Exhibit 2 was indeed made by the appellant. There is nothing in the record of this appeal remotely suggesting that the trial court's evaluation of evidence, which is its primary function, has not met the principles laid down by this Court. The lower court's affirmation of the trial court's finding is, therefore, unassailable. (pp. 3346 D/3349 H)**

*CRIMINAL PROCEDURE - Miscarriage - Ingredient*

**3. The explanatory note under the section states that it is not essential for an offence thereunder that the offender should know that his act is likely to cause death.**

**In Exhibit 2 which both courts below found to be confessional, it is glaring that the appellant had, with the consent of the deceased injected her with "Kalamide" otherwise known as "fortwine" with the intention of causing miscarriage. It has been argued by appellant's counsel that the prosecution did not prove the death of the deceased as being in consequence of the injection administered on her by the appellant. That certainly is not an ingredient of the offence under Section 233 of the penal code appellant has been convicted for. Once it has been established that the appellant had injected the deceased, intending to cause miscarriage thereby and death has ensued, the offence under Section 233 of the penal code is complete. Knowledge that the death of the deceased is even likely to result in such death is not an ingredient the prosecu-**

*tion is required to prove in order to secure conviction under the section. With the appellant's admission that on injecting the deceased with the sole intention of aborting the pregnancy he believed her to be carrying, the appellant is liable. In sum, by Exhibit 2 which, on the authorities, solely entitles the trial court to convict the appellant, all the ingredients of the offence under Section 233 of the penal code have been admitted by the appellant. The statement which has been established to be voluntarily given by the appellant is direct, positive and unequivocal in its suggestion that appellant has indeed committed the offence.* (p. 3349 A)

## NOTABLE POINT OF INTEREST

### **MUHAMMAD JSC**

#### **D 1. Confession – Meaning of**

Now, a statement is said to be confessional if it suggests the commission of the whole ingredients of the offence which the maker of the statement stands trial for. (p. 3347 E)

#### **E REPRESENTATION**

John Okoriko, for the Appellant

P. H. Ogbole with Boniface Bassey, A. A. Malik, and P. C. Ashuikaka, for the Respondent

#### **F CASES REFERRED TO**

Olayinka v. State (2007) All FWLR (pt. 373) 163

Bassey v. State (2012) NWLR (pt. 1314) 209

Kareem v. FRN (2002) FWLR (pt. 104) 555

G Ogudo v. State (2011) 18 NWLR (pt. 1278) 1

Ubierho v. State (2005) 5 NWLR (pt. 919) 644

Ogbe v. Asade (2010) FWLR (pt. 510) 612

Idowu v. State (2000) FWLR (pt. 16) 2672

Ihuebeka v. State (2000) FWLR (pt. 11) 1827

H Suberu v. State (2010) FWLR (pt. 520) 1263

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

Alarapa v. State (2001) FWLR (pt. 41) 1872

Akpa v. State (2008) 14 NWLR (pt. 1106) 72

Lambert v. Nigerian Navy (2006) 7 NWLR (pt. 980) 514

UBN v. Ishola (2001) 15 NWLR (pt. 735) 47

Awuse v. Odili (2005) 16 NWLR (pt. 952) 416

### **STATUTES REFERRED TO**

Penal Code, s. 233

Evidence Act Cap. E14 LFN 2004, s. 138(1)

B

### **LEAD JUDGMENT BY MUHAMMAD JSC**

This is an appeal against the judgment of the Court of Appeal, Makurdi Judicial Division, hereinafter referred to as the court below, affirming the conviction and sentence of the appellant under Section 233 of the penal code for causing miscarriage to a woman. The judgment appealed against was delivered on the 10<sup>th</sup> of July 2012.

C

The facts of the case that brought about the appeal are very brief. To prove its case against the appellant after he had pleaded not guilty to the charge, the prosecution relied on the evidence of its lone witness, the investigating police officer. Through the lone witness, Exhibit 2, appellant's confessional statement and Exhibit 5, the post mortem examination report, on the basis of which the trial court convicted the appellant, were admitted.

E

After a no case submission that was overruled by the trial court, the appellant gave evidence in his own defence and also called two others, DW2 and DW4. At the end of trial, appellant was convicted by the trial court as charged. The dismissal of his appeal by the court below explains the instant appeal.

F

At the hearing of the instant appeal, parties identified their respective briefs earlier filed and exchanged, and adopted same as their arguments for and against the appeal. The three issues distilled in the appellant's brief as having arisen for the determination of the appeal read:-

G

*“(1) Whether the Honourable Court of Appeal was right in law when it upheld the conviction and sentence of the Accused/Appellant by the Honourable Trial Court which was based on his extra judicial confessional statement - Exhibit 2. [Distilled from Ground I]”*

H

*“(2) Whether from the totality of the evidence, the Honourable Court of Appeal was right in law when it upheld the conviction and sentence of the Accused/Appellant by the Honourable Trial Court, based on Exhibit 5 [the Nigeria Police Post Mortem Examination*

*Report]* to reach the conclusion that the death of the deceased was caused by the act of the appellant. *[Distilled from Ground2]*

(3) *Whether in view of the evidence before the trial court the prosecution proved its case against the appellant beyond reasonable doubt.*

B The respondent, see page 2 of its brief of argument, adopted appellant's foregoing issues as calling for determination in the appeal.

On his first issue, the appellant contends that Exhibit 2 is a purported confessional statement as same was extorted from him after he had been thoroughly beaten at the police station. He had objected at the trial court against the admission of the very statement to no avail. Besides not being voluntarily given, the statement is in excess of the one page narration recorded from him. Neither him-  
 C self nor the police officer who recorded the statement, it is further submitted, signed the statement. In the circumstances, learned ap-  
 D pellant counsel argues, Exhibit 2 remains inadmissible and, where same had been wrongly admitted, both courts are duty bound to expunge it. Learned counsel relies on the decisions, among others,  
 E in *Fatai Olayinka V. The State* (2007) ALL FWLR (Pt 373) 163 at 175 - 176, *Edet Asuquo Bassey V. State* (2012) IN NWLR (Pt 1314) 209 at 234, *Alhaji Prince Kareem V. FRN* (2002) FWLR (Pt 104) 555 at 569 - 570, *Chukwuka Ogudo V. State* (2011) 18 NWLR (Pt 1278) 1 at 26 *Ozana Ubierho V. State* (2005) 5 NWLR (Pt 919) 644  
 F at 656 and urges that the perverse decisions of the two courts below convicting the appellant on Exhibit 2 and in absence of any corroborating evidence thereto to be set aside and the appeal allowed.

Responding on appellant's first issue, it is argued, that he never  
 G objected to the admissibility of his statement, which is confessional, on the grounds that it was not voluntarily given. He only resiled from making the statement and/or that the recorder did not fulfill certain conditions.

Appellant's denial of the confessional statement, it is submit-  
 H ted, does not render it inadmissible. Once proved, conviction may be secured on the confessional statement. Appellant's complaints not based on the fact that the statement is not voluntary and confes- sional, it is urged, be ignored. Learned counsel relies on the decisions of this Court inter-alia in *Ogbe v. Asade* (2010) FWLR (Pt 510) 612

at 638, Idowu V. State (2000) FWLR (Pt 16) 2672 at 2703, Ihuebeka V. State (2000) FWLR (Pt 11) 1827 at 1847 and Suberu V. State (2010) FWLR (Pt 520) 1263 at 1276-1277 in support of his submission. Learned respondent counsel further submits that appellant's grouse on Exhibit 2 falls into the realm of the Judges Rules breach of which is not necessarily fatal. In the case at hand, it is submitted, the rules having been complied with makes the case of Fatai Olayinka V. The State (supra) the appellant relies on inapplicable. B

Further relying on Nwachukwu V. State (2002) FWLR (Pt 123) 312 at 335, Alarapa V. The State (2001) FWLR (Pt 41) 1872 at 1893 and Basil Akpa V. State (2008) 14 NWLR (Pt 1106) 72 at 98 C learned counsel concludes that a trial-within-trial being unnecessary in the instant case, the concurrent findings of the two lower courts that Exhibit 2 is confessional and reliable cannot be revisited. The evidence of PW1, learned counsel submits, renders appellant's admissible confessional statement probable and reliance on it by the two courts below in convicting the appellant beyond reproach. He D urges the resolution of the issue against the appellant.

On appellant's second issue, his counsel contends that the reliance placed on Exhibit 5, the police post mortem report, by the two lower courts is wrong. The appellant, it is submitted, is charged under E Section 233 of the penal code for knowingly causing the death of his pregnant victim when, with the intention of inducing a miscarriage, he injected her. The two, submits learned appellant's counsel further, requires the prosecution to prove the fact that the deceased was pregnant, that appellant had administered the injection on the deceased F with the intention of causing a miscarriage and that the death was occasioned solely by the act of the appellant. Evidence abound from the 1st accused clearly showing that the deceased was seriously ill G before the event that led to appellant's conviction. The prosecution having failed to exclude other possible causes of her death, it is argued, disentitled them from securing a conviction.

Outside appellant's confessional statement, learned appellant counsel further contends there is completely no evidence establishing H that the deceased was pregnant. Neither Exhibit 4, the medical report affirming the fact of death of the deceased, nor Exhibit 5, the police post mortem report, is forth-coming with the fact that the deceased was pregnant. Furthermore, by Sections 68 and (I)(b) of the

Evidence Act, it is submitted, it was necessary to call the makers of Exhibits 4 and 5 to testify. Failure of the prosecution to do so in the present case, on the authority of *Lambert V. Nigerian Navy* (2006) 7 NWLR (Pt 980) 514 at 547, *UBN V. Ishola* (2001) 15 NWLR (Pt 735) 47 and *Awuse V. Odili* (2005) 16 NWLR {Pt 952} 416, learned B appellant's counsel submits, renders the two documents inadmissible. Once the two documents are expunged, it is contended, the prosecution's case becomes unsustainable.

On the 2nd issue, learned respondent's counsel contends that the reliance placed by the two lower courts on Exhibits 4 and 5 is unassailable. In any event, Exhibit 2, the appellant's confessional statement, suggests the existence of all the ingredients of the offence for which appellant is convicted. Exhibits 4 and 5, the medical report and the post mortem examination report, merely corroborate Exhibit 2. Corroboration of appellant's confessional statement though desired, argues learned counsel, is not a necessity. The fact that the appellant and DW1 in their respective statements to the police have admitted not only the fact that the deceased was pregnant but that appellant had injected her with the view to expelling the pregnancy E she was carrying, it is submitted, obviates the need for the prosecution to further prove the fact and cause of death of appellant's victim. Appellant's further resort to Sections 68 and 83 of the Evidence Act which makes it incumbent for both courts below to reject Exhibits 4 and 5 for having been tendered without their makers before the F courts, respondent counsel submits, is misconceived. Appellant's conviction remains sustainable even on the basis of Exhibit 2 alone which admits all the ingredients of the offence for which the appellant is convicted. Learned counsel relies on *Azu V. State* (1993) 6 NWLR G (Pt 299) 303 at 313-314, *Akpa V. State* (supra) and *Uguru V. State* (supra). Further relying on *Afolabi V. State* (supra) and *Ebeinwe V. State* (2011) FWLR (Pt 566) 413 at 425-426 learned counsel contends that the prosecution has discharged the burden the law placed on it. The appellant cannot, learned respondent counsel concludes, H insist that the prosecution should prove its case beyond any shadow of doubt.

On the 3rd issue, learned appellant counsel refers to the trial courts findings at page 95 lines 29 - 35 of the record of appeal that appellant's act of injecting the deceased with fortwine, without any



scientific evidence thereon, as an error that has occasioned miscarriage of justice. The lower court's affirmation of the perverse finding, learned appellant counsel contends, cannot be otherwise. The decisions of this Court in *Grace Akinfe V. The State* (1988) NSCC (Vol. 19) (Pt 11) 313 and *Oforlete V. The State* (2000) 12 NWLR (Pt 681) 415 contends learned counsel, entitle this Court to set aside the perverse crucial finding of both courts below. Learned appellant's counsel urges that the appeal be allowed. B

Learned respondent's counsel relies on his submissions under the 1st and 2nd issues in meeting appellant's arguments on the latter's 3rd issue. He submits that the appeal be dismissed. C

This appeal raises two principal issues. Firstly, it has asked the question, yet again, whether the conviction of an accused person is sustainable on the basis of the convict's confessional statement alone. Whereas the appellant has answered the question in the negative, D the respondent's answer on the same question is in the positive. The appellant insists that conviction of an accused endures only if the confessional statement on which it is founded is corroborated. The respondent, on the other hand, maintains that a court can convict solely on accused person's confessional statement that is direct and E positive.

Secondly, the appellant has further contended that breach of the judges' rules by the recorder of an accused person's purported confessional statement makes the statement unreliable and disentitle a court from basing its conviction of an accused person on the said F confessional statement. Again, and not surprisingly, learned respondent's counsel holds a contrary view. He argues that breach of the judges' rules by the recorder of the confessional statement does not render the statement inadmissible. The court may rely on the G statement to find a conviction. I think learned respondent's counsel is right.

Resolving these two issues in my considered view will adequately determine the appeal.

***My lords, the law is trite that though it is desirable for a court to base its conviction on evidence outside an accused person's confessional statement as well, it is not the principle that where the court is satisfied that the confessional statement is direct, positive and probable it cannot convict an ac*** H

**cused on the confessional statement alone.**

In the case at hand, the appellant's contention is that he never made Exhibit 2, the statement recorded from him, which both courts adjudged confessional. In his evidence before the trial court at page 54 line 34 to lines 1 - 8 of page 55 of the record of appeal he explains thus:-

*"I gave statement to the police on 6/9/99. It was a one page statement. I signed after the words of caution and after my statement. I was not taken before any police officer after I made the statement [shown Exhibit 2]. The signature at the end of the statement is also not mine. Exhibit 2 is not my statement. My name is not on it and the signature thereon is also not mine. "*

Learned appellant's counsel contends that the gaps manifest in the respondent's case not having been resolved, as to who made Exhibit 2, disentitle the trial court, in the absence of any corroboration to the confessional statement to convict the appellant. Lower court's affirmation of the trial court's wrong finding, appellant asserts, should not be allowed to endure.

***I am in complete agreement with learned respondent's counsel here that whether or not Exhibit 2, in the face of appellant's denial, is the statement he made to the police remains an issue of fact evaluation in respect of which falls within the trial court's primary function. Appellant's denial that the statement is not his, on the authorities, does not affect the admissibility of the statement. Once the two courts below are right in their concurrent findings that Exhibit 2 is a confession, the law is well settled that it does not become inadmissible merely because the appellant has resiled from it.*** Learned respondent's reliance on inter-alia Sule V. State (supra) Ihuebeka V. State (supra) and Suberu V. State (supra) in this regard is very apposite. In Idowu V. State (supra), a case learned respondent's counsel also alluded to, this Court restates the principle at page 2703 of the law report thus:-

*"...Mere retraction of a voluntary confessional statement by - an accused person does not render it inadmissible or worthless and untrue in considering his guilt.*

*...If the confessional statement is satisfactorily proved, a conviction founded on it without more, will be sustained by an appellate*

court.” See also Nwachukwu V. State (supra) and Alarapa V. State (supra) and Effiong V. State {1998} 8 NWLR {Pt 562} 364 at 371-372.

The trial court at page 86 of the record of appeal in evaluating the evidence led, including Exhibit 2, found the evidence of PW1 it had the privilege of seeing and observing in the course of his testimony unshaken and reliable; that Exhibit 2 is appellant’s statement and was signed by him, the appellant himself having revealed that much under cross examination. At page 87 of the record of appeal, the trial court inferred as follows:-

*“Having held that Exhibits 2 and 7 were signed by the 2nd accused person and having there being no allegation that they were not voluntarily made or he was coerced into making them, I hold that he voluntarily made these statements. It is now trite law that a man can be convicted on his free and voluntarily confession which is direct and positive and is properly proved. See R v. Sykes (1913) 18 CAR 233, Obi V. State (1976) 12 SC63 at 68 amongst several other cases.”*

The 2nd accused referred to in the foregoing is the appellant herein.

Now, a statement is said to be confessional if it suggests the commission of the whole ingredients of the offence which the maker of the statement stands trial for. In Exhibit 2, the appellant inter-alia states thus:-

*“On the 27/09/99 at about 1200hrs I was in my Dispensary when one Benjamin and his wife came to me and stated that they want a pregnancy of two months to be terminated... On that very day I told them I don’t do it. They went on pleading. I still refused and they left to their home... When the pleading was so much I heeded to it... I then went out to look for the drug that I can use in terminating the pregnancy. It was at the Wurukum/Gboko roundabout that I met one drug deliverance van and inquired to know whether they had Kalamide injection which is also know to be fortwine. I bought two of the injection at the cost of one thousand Naira. When I reached my office, they were waiting for me and I called on the deceased and I gave or inject the drug through her I. V. vein. After injecting the drug she being the deceased sat on a chair for about thirteen to fourteen minutes, the deceased started vomit-*

ing. It was then I administered phenegan tablets to her in order to stop the vomiting. When the vomiting stopped, the deceased became unrest and I gave her Hydrocortisone injection in order to subside the power of the fortwine injection. After giving the Hydrocortisone to subside the fortwine injection, and there was no improvement I let the husband Benjamin to know that we should transfer to a specialist hospital and I suggest Madonna hospital, Makurdi. The husband of deceased accepted... I and her husband Benjamin carried her on our hands and put her into the vehicle... when we left on the way to the Madonna hospital she then gave up (that is she died). But we still proceeded to Madonna hospital in order to confirm her death,... when the doctor came to examine her, he confirmed her deceased (sic) was to stop pains such as surgery operation, tooth ache, painful menstruations. That I have no intention to abort the pregnancy... the vitocine written in my statement from 'B' Division is never a drug I mention to the police and the drug itself never exist since I am in practice."

From the foregoing, the trial judge deduces in part as follows:-

"It is crystal clear from the above account that the 2nd accused person-

I) Was informed that the deceased was pregnant.

II) He was also informed that they needed an abortion of the pregnancy and he was given reasons why they wanted it terminated.

III) Initially he refused to do the abortion but later agreed to do it after much pleading.

IV) He charged a fee for his work and he was fully paid.

V) He went out to buy the drug to abort the pregnancy and requested for a specific one which he purchased.

VI) He administered the drug so purchased on the deceased."

The appellant was tried and convicted for an offence contrary to Section 233 of the Penal Code CAP 89 laws of the Northern State applicable to Benue State which provides:- "Whoever with intent to cause miscarriage of a woman whether with child or not does any act which causes the death of such woman shall be punished.

(a) With imprisonment for a term which may extend to fourteen years and shall also be liable to fine; and

(b) If the act or done without the consent of the woman, with imprisonment for life or for any less term and shall also be liable to

*fine.”*

***The explanatory note under the section states that it is not essential for an offence thereunder that the offender should know that his act is likely to cause death.***

***In Exhibit 2 which both courts below found to be confessional, it is glaring that the appellant had, with the consent of the deceased injected her with “Kalamide” otherwise known as “fortwine” with the intention of causing miscarriage. It has been argued by appellant’s counsel that the prosecution did not prove the death of the deceased as being in consequence of the injection administered on her by the appellant. That certainly is not an ingredient of the offence under Section 233 of the penal code appellant has been convicted for. Once it has been established that the appellant had injected the deceased, intending to cause miscarriage thereby and death has ensued, the offence under Section 233 of the penal code is complete. Knowledge that the death of the deceased is even likely to result in such death is not an ingredient the prosecution is required to prove in order to secure conviction under the section. With the appellant’s admission that on injecting the deceased with the sole intention of aborting the pregnancy he believed her to be carrying, the appellant is liable. In sum, by Exhibit 2 which, on the authorities, solely entitles the trial court to convict the appellant, all the ingredients of the offence under Section 233 of the penal code have been admitted by the appellant. The statement which has been established to be voluntarily given by the appellant is direct, positive and unequivocal in its suggestion that appellant has indeed committed the offence.*** The concurrent findings of the two courts having drawn from the evidence on record and not in breach of any known principle cannot, therefore, be set aside. See *Nkebisi v. State* (2010) FWLR (Pt 521) 1407 at 1419 and *Afolabi v. State* (2010) FWLR (538) 812 at 839.

***The appellant’s further contention that he was not the maker of Exhibit 2 and/or that there was breach of the judges’ rules by the person who recorded the statement remain equally unavailing. Whether or not he was the maker remains a question of fact and, in the case at hand, turns on the credibility of***

**the appellant whom the trial court had the opportunity of seeing as he testified in denial of being the maker of the statement. Neither the lower court nor this Court has the advantage the trial court had and which forms the basis of its conclusion that Exhibit 2 was indeed made by the appellant. There is nothing in the record of this appeal remotely suggesting that the trial court's evaluation of evidence, which is its primary function, has not met the principles laid down by this Court. The lower court's affirmation of the trial court's finding is, therefore, unassailable.** See Okunzua V. Amosu (1992) NWLR {Pt 248} 416 and Iri V. Erhurhoboro {1991} 3 SC 1.

Finally, I agree with learned counsel to the respondent that the recorder's non-compliance with the Judges Rules in the course of recording Exhibit 2 from the appellant does not make the statement inadmissible. Neither will appellant's denial that he was not the maker of the statement. The overriding requirement of the law to justify a conviction on the basis of a statement such as Exhibit 2 remains its voluntariness. See David Obue V The State (1976) 2 SC, Queen V. Chukwuiyi Obiasa (1962) 1 ALL NLR 651 and Ojegele V. The State (1988) 1 NSCC 276. In the latter case this Court at page 281 of the report has stated as follows:-

*"The Judges Rules are rules made by English Judges for the guidance of English Police Officers. Nobody, however, disputes the wisdom behind those Rules. But having said that, it is necessary to add that the Rules are not Rules of law but merely Rules of administrative practice. They are rules made for the more efficient and effective administration of justice and therefore should never be used to defeat justice. Even in England the Court of Appeal felt bound to observe that the Court must take care not to deprive themselves by new artificial rules of practice of the best chances of learning the truth - R. v. Richardson (1971) 2 Q.B. 484 at p.490: (1971) 2 All E.R. 777.*

*Here in Nigeria there is a consensus of judicial opinion that the practice set out in the Judges Rules accords with prudence and that where it is practicable, especially in serious cases of felony, where the only material evidence against an accused person is his confession contained in his Statement made to a junior police Officer that practice should be followed". But the Federal Supreme Court in Nwagboko*

& Ors. *V The Queen (1959) 4 F. S. C. 101 at p.102* resolutely held:

*'We do not, however, agree with the judge that the practice is not followed, the statement should necessary be viewed with suspicion... We are not prepared to go to the length of laying down as a general rule that where it (the practice) is not observed the statement should be viewed with suspicion.'*

B

*The aim of the Judges Rules is to ensure that confessions are voluntary. That practice should never be stretched too far, for the protection of guilt."*

In the instant case beyond Exhibit 2, the trial court relied on Exhibit 4 and 5 which further conveyed the fact of the death of the deceased. These clearly show that the lower court which affirmed the trial court's conviction of the appellant had good cause to as well.

C

In the result, I hereby resolve the pertinent issues raised by the appeal against the appellant and dismiss his unmeritorious appeal. The judgment of the lower court, given this conclusion, is hereby affirmed.

D

---

### **RHODES-VIVOUR JSC**

E

I read in draft the leading judgment delivered by my learned brother, Muhammad, JSC and I am in complete agreement with his lordship that there is no merit in this appeal. Appeal dismissed.

F

---

### **NGWUTA JSC**

I had the privilege of reading in its draft form the lead judgment just delivered by my learned brother, M. D. Muhammad, JSC and I entirely agree with the reasons leading to the conclusion that the appeal is bereft of merit and ought to be dismissed.

G

I will add a few words to express my agreement with the lead judgment.

In his issue one, learned Counsel for the appellant argued that the confessional statement of the appellant, Exhibit 2, was extorted from him, the appellant, after he had been thoroughly beaten at the Police Station. If the learned Counsel believed in his own argument, he would have raised the issue of voluntariness *vel non* of Exhibit 2 at the proper time, that is, at the time it was offered in evidence at the

H

trial. See *Oseni v. State* (2012) 2 SC (Pt. 11) 51 at 80-84.

At the time learned Counsel raised the issue that the statement was beaten out of his client it was an afterthought. Had it been raised at the appropriate time, the trial Court would have been obliged to conduct a trial within trial to determine whether or not Exhibit 2 was voluntarily made by the appellant. See *R v. Francis & Murphy* (1959) 43 CR APP R 174, *R v. Omokaro* 7 WACA 146; *Auta v. State* (1975) 4 SC 125.

Appellant in his oral testimony said he did not make Exhibit 2. This denial or retraction of the confessional statement does not affect its admissibility. Rather the retraction is a determinant of the weight to be attached to the statement. See *Dibie v. State* (2007) 3 SC (Pt. 1) 176; *Ukpong v. Queen* (No.1) (1961) 1 SC NLR 53; *Adekoya v. State* (2012) 3 SC (Part III) 36.

The confessional statement of the appellant, Exhibit 2, made at the time the facts were fresh in his memory, is anything but forced or beaten out of him as alleged. It has a ring of truth. There is nothing to indicate it was contrived or forced out of the appellant.

Exhibit 2 is a graphic account of the incident leading to the death of the pregnant woman. Appellant initially would not help the woman get an abortion. However, due to pressure from the man, of course accompanied by financial reward, he agreed to procure abortion. He went out to purchase what he considered appropriate drug for the occasion. The injection of the drug called “Kalamide” led to the victim vomiting and this in turn led to administration of other drugs; and the eventual demise of the victim.

In making Exhibit 2, which was found to have been voluntarily made by the trial Court and affirmed by the Court below, the appellant spoke from his heart and by his own mouth rightly condemned himself.

The appellant had an uphill takes in urging this Court to interfere with the concurrent findings of the trial Court and the Court below. He failed to demonstrate a perversity in the judgment, or a substantial error in substantive or procedural law which needs to be corrected to avoid a miscarriage of justice. See *Lokoyi & Anor v. Olojo* (1983) 8 SC 61 at 68; *Bankole v. Pelu* (1991) 8 NWLR (Pt. 211) 23; *Enang v. Adu* (1981) 11-12 SC 25 at 42.

This Court, therefore, has no valid grounds to interfere with



the judgment of the Court below.

For the above and the fuller reasons in the lead judgment I also dismiss the appeal and affirm the judgment of the Court below which affirmed the judgment of the trial Court. Appeal dismissed.

B

### **PETER-ODILI JSC**

I am in total agreement with the judgment just delivered by my learned brother, Musa Dattijo Muhammad JSC and to underscore my support of the reasoning I shall make some remarks.

C

This is an appeal against the decision of the Court of Appeal wherein the conviction of the appellant by the High Court of Justice, Makurdi was affirmed.

The facts of the case leading up to this appeal are well adumbrated in the lead judgment and it will serve no useful purpose repeating them here except for some excerpts thereof that would of necessity be brought out herein.

D

Mr. John Okoriko of counsel for the appellant on the 14/4/16 date of hearing adopted his Brief of Argument settled by Peter Mrakpor Esq. and filed on the 11/10/2012.

E

In it were distilled three issues for determination, viz:

1. Whether the Honourable Court of Appeal was right in law when it up held the conviction and sentence of the accused/ appellant by the honourable Trial Court, which was based only on his extra judicial confessional statement (Exhibit 2)

F

2. Whether from the totality of evidence before the court, the Honourable Court of Appeal was right in law when it upheld the conviction and sentence of the accused/ appellant by the Honourable Trial Court, based on Exhibit 5 (the Post Mortem Examination Report) to reach the conclusion that the death of the deceased was caused by the act of the appellant.

G

3. Whether in view of the evidence before the trial court, the prosecution proved its case beyond reasonable doubt.

Learned counsel for the respondent adopted their Brief of Argument filed on 12/2/2012 and equally adopted the issues as crafted by the appellant. These issues are good enough for the determination of the appeal and I shall utilise them.

H

ISSUE ONE

-Whether the Honourable Court of Appeal was right in law, when it upheld the conviction and sentence of the accused/appellant by the Honourable Trial Court which was based on his extra judicial confessional statement Exhibit 2 (Distilled from Ground 1).

It was submitted for the appellant along the line of his testimony in court of trial that he gave a statement to the police on 6/9/99, a one page statement which he signed after the words of caution and the statement but was not taken before any police officer after he made the statement. As for Exhibit 2 the appellant said the signature both after the words of caution and statement was not his own. Learned counsel contended that whether or not the Signature on Exhibit 2 was actually that of the appellant was left unresolved throughout the trial and so the court of trial was wrong to base the conviction on the said Exhibit 2 which was erroneously admitted in evidence. He cited *Fatai Olayinka v The State* (2007) ALL FWLR (Pt. 373) 163 at 175 -176.

That the said confession of the appellant, Exhibit 2 was not consistent with other ascertained facts of the case. Mr. Okoriko of counsel stated that there was clear contradiction between the oral testimony of the 1st accused, the appellant and DW2 and the Exhibit 2 which cast a doubt on the reliability of Exhibit 2 which doubt should be resolved in favour of the appellant. He referred to *Edet Asuquo Bassey v State* (2012) 12 NWLR (Pt. 1314) 209 at 234; *Kareem v F. R. N.* FWLR (Pt. 104) 555 at 569 - 570 etc.

Learned counsel for the appellant further submitted that a trial within a trial ought to have been conducted when the appellant contested the voluntariness of Exhibit 2. He cited *Basil Akpa v State* (2008) 14 NWLR (Pt. 1106) 72 at 98.

For the respondent, H.P Ogbale Esq. submitted that when an accused person as the appellant did, denied making a statement that does not render the statement inadmissible. He cited *Sule v State* (2009) FWLR (Pt. 481) 809 at 831; *Ogbe v Asade* (2010) FWLR (Pt. 510) 612 at 638; *Suberu v State* (2010) FWLR (Pt. 520) 1263 at 1276 - 1277, etc.

Also that it is not correct that Exhibit 2 was rendered inadmissible because the appellant was not taken before a superior police officer. *Olayinka v The State* (2007) FWLR (Pt. 373) 163 at 175 - 176 was cited in aid. That the trial court can if satisfied of the

voluntariness of the confessional statement convict on it without seeking for corroboration even though the accused resiled from it. Learned counsel cited *Nwachukwu v The State* (2002) FWLR (Pt. 123) 312 at 335; *Alarapa v The State* (2001) FWLR (Pt. 41) 1872 at 1893 etc.

That it is not the law that a trial within trial ought to be conducted where an accused merely denies making his statement and a challenge to the voluntariness of the statement should be raised timely for the convocation of a trial within trial and not as in this instance where it was raised during the cross-examination of the appellant while testifying in his own defence .

It was also canvassed for the respondent that the conviction of the appellant stemmed from concurrent findings of the two courts below and there is no basis for the interference of this court. *Nkebisi v State* (2010) FWLR (Pt. 521) 1407 at 1319; *Amadi v FRN* (2009) FWLR (Pt. 462) 1103; *Afolalu v State* (2010) FWLR (Pt. 538) 812 at 839.

The stance of the appellant is that the court below grievously erred in law when it upheld the conviction of the appellant which was based on Exhibit 2, his purported extrajudicial confessional statement only, without any corroborative evidence. The opposing position of the respondent being that the said confessional statement being direct, positive and voluntarily made was sufficient of itself alone upon which a conviction of the appellant can be based without more.

The appellant anchored stand on the denial of making the said statement and that the statement did not carry his signature and he was not taken before a senior Police Officer. In this regard, it is to be reiterated since it has become trite that the resiling from a statement by an accused at the trial does not make that extra-judicial statement inadmissible. Admissibility of evidence and particularly documents depends on the purpose for which it is being tendered and so in the case of a confessional statement such as the one in issue, mere retraction of it by the accused/appellant does not render it inadmissible or worthless and untrue in considering the guilt of the accused. If the confessional statement is satisfactorily proved, a conviction founded on it without anything else is sustainable on appeal. See *Ogbe v Asade* (2010) FWLR (Pt. 510) 612 at 638; *Ihuebeka v State* (2000) FWLR (Pt. II) 1827 at 1847; *Idowu v State* (2000) FWLR (Pt. 16) 2672 at 2703.

On this same note I cannot resist the dictum of this court in the case of *Sule v State* (2009) FWLR (Pt. 481) 809 at 831, paras F-H, this Honourable Court in dismissing the appeal held that:

“.... a confession, it is settled, does not become inadmissible merely because an accused person denies having made it and in his respect, a confession contained in a statement made to the police by a person under arrest, is not to be treated differently from any other confession. In other words, all the usual tests put forward in the case of *R v Kanu* (1952) 14 WACA 30 in the principles in *R v Sykes* (1913) 8 CAR 233 were adopted, would have to be considered: *Ejinima v State* (sic) *Aiguoreghian & Anor. v State* (2004) FWLR (Pt. 195) 716 ..... For purposes of emphasis, the denial of a statement made by the accused person to the police, is not only an issue of fact to be decided in the judgment, but an issue, which does not affect admissibility of the statement”.

The case of *Sule v State* (supra) quoted above offers the proper guide when a court is faced with a situation of an accused retracting from a statement which prosecution has proffered that he made before his arraignment in court.

Again to be tackled is the appellant’s posture that since he was not taken before a superior police officer to attest to the statement, that statement is rendered inadmissible. That stance does not in my humble view represent the law as the taking of an accused before a senior police officer to attest or endorse the extra-judicial statement is an administrative practice to assist in making it easier when the occasion calls for it in future to prove the voluntariness of the statement. That does not give it the status of a condition precedent to the validity or admissibility of the said statement. I place reliance on *R v Voisin* (1918) 1 KB 531; *R v Ajani & Ors.* (1936) 3 WACA 3; *R v Sapele* (1957) 2 FSC 24; *Fatai Olayinka v The State* (2007) ALL FWLR (Pt. 373) 163 at 175 - 176.

Getting back to the question whether the trial court was right to hold that the confessional statement of the appellant alone was enough to ground the conviction. From the record the trial court and as affirmed by the Court of Appeal found that the appellant voluntarily made the confessional statement, Exhibit. 2 and the later retraction a mere afterthought to wriggle out and so finding it voluntary, direct and positive was on firm ground to use it alone to effect

the conviction of the appellant. This situation is premised even without the senior police officer being on the scene as what an accused says against his own interest without any police influence is most likely to be true. Again even acceptable is such a statement made without caution being administered. See *Arogundade v State* (2009) FWLR (Pt. 469) 409 at 417; *Shurumo v State* (2011) FWLR (Pt. 568) 864 B at 892.

A reference to the Record pages 86 and 87 on what the trial court did in coming to its finding and conclusion about the statement would make the situation clear.

*"There is no denial from the 2nd accused person that a statement was recorded from him at the State C. I. D. There is also no denial from the 2nd accused person that PW1 recorded a statement from him. His only denial is the signature alleged as his on Exhibit 2. I have no cause to disbelieve the testimony of 'PW1 that the signature at the end of the words of caution and the statement on exhibit 2 belongs to that of the 2nd accused person. I reject his denial and hold as of a fact that he signed exhibit 2 after it was recorded and read over to him by PW1."*

At page 87 of the Record the trial court stated thus:

*"Having held that exhibits 2 and 7 were signed by the 2nd accused person, and having there being no allegation that they were not voluntarily made or he was coerced into making them, I hold that he voluntarily made these statements. It is now trite law that a man can be convicted on his free and voluntary confession which is direct and positive and is properly proved. See *R v Sykes* (1913) 8 CAR233, *Obi v The State* (1976) 12 SC at 68 amongst several other cases."*

From the details shown in the said exhibit 2, the confessional statement, are seen intimate facts which could only have come from the personal knowledge of the accused/appellant including his background, family, place of birth, school and place of work etc thereby offering the trial court and later accepted on appeal that indeed the statement was voluntarily made and the facts therein positive and direct thereby needing no corroboration from anything outside of that statement. Therefore in keeping with the laid down principles of this court and other appellate courts, this is one of those instances where those findings are to be left well alone, untampered with and

undisturbed. *See* Amadi v FRN (2009) FWLR (Pt. 462) 1103 at 1120; Afolalu v State (2010) FWLR (Pt. 538) 812 at 839.

Indeed the Court of Appeal was right in holding that the findings of the trial court were correctly made that of itself alone, the confessional statement was enough to sustain the conviction of the appellant and so I answer the question in the affirmative.

### ISSUE TWO AND THREE

Whether from the totality of evidence before the court, the Honourable Court of Appeal was right in law when it upheld the conviction and sentence of the accused/appellant by the Honourable Trial Court, based on Exhibit 5 (the Post Mortem Examination Report) to reach the conclusion that the death of the deceased was caused by the act of the appellant.

Whether the prosecution proved its case against the appellant beyond reasonable doubt.

Learned counsel for the appellant contended that the reliance placed on Exhibit 5 (the Police Post Mortem Report) in finding the appellant guilty as charged was wrong as the appellant was charged with deliberately doing an act that caused the death of the deceased. That what the prosecution had set out to prove and which the courts below accepted was that the provision of S.233 of the Penal Code Law was in operation which means that the appellant with full knowledge that the deceased was pregnant, deliberately and willfully injected her to induce a miscarriage as a result of which administration of the said injection, she died. That it is clear that the prosecution has to prove that the deceased was pregnant and the appellant administered the injection for the sole purpose of inducing a miscarriage, that the death of the deceased was caused solely by the alleged direct act of the appellant and that the death cannot be traced to any other intervening or supervening circumstance whether before or after the appellant had done the act for which he stood trial. That these essential ingredients were not established. He cited sections 68 and 83 of the Evidence Act 2011. That the doctor who carried out the post mortem examination so as to have the accused person cross-examine him on the report should have been called. He cited section 83(1) (b) of the Evidence Act 2011, Lambert v Nigerian Navy (2006) 7 NWLR (Pt. 980) 514 at 547 (CA).

For the appellant it was submitted that with the loose ends

prevailing, the prosecution cannot be said to have proved the case against the appellant beyond reasonable doubt. The cases of Oforlete v State (2000) 12 NWLR (Pt. 681) 415 at 436; Gaji v Pary (2003) FWLR (Pt. 163) 1 at 17 - 18 etc.

Countering the stance of the appellant, learned counsel for the respondent stated that there was no intervening event between the administration of the injection by the appellant intended to abort the pregnancy of the deceased and the death of the deceased. That Exhibit 5 corroborating the appellant's confessional statement that the deceased died as a result of nothing other than the injections administered by the appellant. That Exhibit 5 being "*expert documentary evidence*" did not need the maker tendering it to enable the accused person cross examine to make the document admissible. He relied on Azu v State (1993) 6 NWLR (Pt. 299) 303 at 313 - 314; Akpa v State (supra) 662, 663; section 57 Evidence Act Cap. E14 LFN 2004; Section 42 (1) (a) of the Evidence Act LFN 2004.

That the ingredients of the offence were proved beyond reasonable doubt by the prosecution as required by the law. He cited Ebeinwe v State (2011) FWLR (Pt. 566) 413 at 425 - 426; Akinyemi v State (1999) 6 NWLR (Pt. 607) 449 at 463 - 464.

The appellant is of the mind set that with Exhibit 5, the report of the Post Mortem examination, it being an opinion of an expert the expert should have testified for Exhibit 5 to be taken seriously as without the cross-examination of that doctor the document lacks any probative value and cannot be utilized to convict the accused/appellant. I find it difficult to accept the view put forward by the appellant, rather it is that of the respondent's counsel that I am going along with as the said Exhibit 5 simply corroborates Exhibit 2, the confessional statement wherein the appellant detailed his role in the tragic saga, leaving no room for speculation that the deceased had been pregnant when he administered the injection to abort the pregnancy and the result was the fatality. All that made an expert's evidence not necessary as it falls within the exception where medical evidence is not required as the cause of death is clear and there was no intervening event between the act of the appellant and the death of the deceased. That is to say the prosecution did not need to prove or attempt to prove an admitted or established fact. See Akpa v State (2008) FWLR (Pt. 420) 644; Azu v State (1993) 6 NWLR (Pt. 299)

As to whether the offence under section 233 Penal Code Law on which the appellant was charged had been proved beyond reasonable doubt, the essential elements of the offence are thus:

- (i) That the woman was with child,
  - B (ii) That the accused did an act to cause a miscarriage
  - (iii) That he did so with that intention,
  - (iv) That such act caused the death of the woman; and
  - (v) If the cause comes under .paragraph (ii) that such act was
- done by the accused without the consent of the woman.

C From the record the trial court made very thorough evaluation supported by the evidence before him from which he made his findings and conclusion which left the Court of Appeal without any option but to affirm those findings, also coming to the conclusion  
D that the prosecution clearly proved the ingredients of the offence beyond reasonable doubt and so the extraordinary standard that the appellant is asking for which is akin to proof beyond the shadow of doubt is outside the realm of our adjudicatory system and law with particular reference to section 138(1) of the Evidence Act Cap. E14  
E LFN 2004, the same in content with the present section 135 Evidence Act, 2011. See *Afolabi v State* (supra) 831 -832; *Ebeinwe v State* (2011) FWLR (Pt. 566) 413 at 425 - 426; *Akinyemi v State* (1999) 6 NWLR (Pt. 607) 499 at 463 - 464.

F In the end, I see nothing' persuading me to go against what the two courts did in their concurrent findings and conclusions and so there being no basis to disturb them, and in line with the better and fuller reasoning in the lead judgment I find no merit in this appeal and so dismiss it.

G I abide by the consequential orders made.

H