

**AYOOLA ADEKUNLE**

**v.**

**THE STATE**  
**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**SC/319/2017**

FRIDAY, 4<sup>TH</sup> JULY, 2025

*Criminal Law: Murder - ingredients thereof - the principle in Okere vs. IGP (2021) LPELR - 53079(SC)*

*Criminal Law: Ingredients of murder - proof of the death of the deceased - whether the death of the deceased can be proved by evidence of identification - the principle in Princewill vs. The State (1994) 6 NWLR (pt. 353)@715*

*Criminal Law: Murder - proof of guilt - whether confessional statement where direct and positive can establish guilt of the accused*

*Criminal Law and Procedure: Murder - proof of guilt - where the Appellant made a confessional statement, walked into the police station with a blood stained matchet and evidence of eye witnesses who saw him matchet the deceased - whether prosecution has proved the offence of murder beyond all reasonable doubt - the principle in Asimi vs. State (2016) LPELR -40436(SC)*

*Criminal Law: Murder - Proof of cause of death - whether can be proved by both direct and circumstantial evidence - the principle in Sansani vs. State (2022) LPELR -57954(SC)*

*Criminal Law: Murder - intention to kill or cause grievous bodily harm - where it is shown that the Appellant hit the deceased with a machet - whether the prosecution has proved intention to kill or cause grievous harm*

*Criminal Law and Procedure: Cause of death - proof thereof - where there are sufficient evidence suggesting cause of death - whether medical evidence although essential is not desirable*

*Criminal Law and Procedure: Retracted confessional statement - where Appellant retracted his confessional statement during trial - whether court can convict based on the said retracted confessional statement where satisfied that it was made voluntarily - the principle in Mohammed vs. State (2014) LPELR -22916(SC)*

- 1. Whether the Prosecution proved the guilt of the Appellant beyond reasonable doubt?**
- 2. Whether the contradictions in the testimonies of the Respondent witnesses were material enough to have this Court discredit them?**

The accused appellant was charged and arraigned before the High Court of Ogun State on a one count charge of murder contrary to section 319(1) of the Criminal Code Laws of Ogun State of Nigeria, 2006.

The accused appellant was alleged to have on or about 4th day of March, 2009 at Isale Owoade Egba, in the Abeokuta Judicial Division murdered Sola Folorunsh.

At the trial, the prosecution called three witnesses while the appellant testified on his behalf and called no additional witness.

At the close of hearing the trial court delivered judgment, convicted the accused appellant and sentenced him to death by hanging.

Dissatisfied with this judgment the Appellant has now appealed to the Supreme Court.

1. *On proof and ingredients of murder -*

In **OKERE VS. IGP (2021) LPELR – 53079 (SC) (PP. 16 – 17 PARAS. C – C)**, this Court held per Abba Aji, JSC thus :

***'on the offence of murder, which the Appellant is charged with, the prosecution could use any of the under mentioned methods to prove murder: (a) Through evidence of eye witness or witnesses (b) Through voluntary confessional statement of the accused or accused persons, and (c) Through circumstantial evidence. See AGBOOLA V THE STATE (2013) LPELR 20652 (SC). Any of the above mentioned methods could be adopted by the prosecution to-- establish the offence of murder by proving the under listed ingredients of the offence of murder, namely:- (1) The death of a human being (2) That the death was caused by the act or commission of the accused person and (3) That the act of the accused was done intentionally or with knowledge that death or grievous bodily***

*harm was the probable consequence. See OKEKE V THE STATE (1999) 2 NWLR (PT 590) 246 AT 273, Per SANUSI, JSC in AKINSUWA V. STATE (2019) LPELR – 47621 (SC) (PP. 23 – 25, PARA. E)."*

*2. On whether it was proved that the deceased died -*

On the first ingredient of murder, learned counsel for the Appellant has argued that there is nothing to show that indeed there is a deceased and that there was no medical report before the court. Counsel further contended that PW1 never said that the deceased died in her presence and the witness said that when she saw the Appellant hit him with a cutlass, she cried for help and the deceased was rushed to the hospital by neighbours, The Appellant's counsel has argued further that PW3 was in no position to testify that the deceased died because it would amount to hearsay evidence. I am taken aback by this argument as it is ridiculous.

In **PRINCEWILL VS. THE STATE (1994) 6 NWLR (PT. 353) AT 715**, this Court held per Iguh, JSC that the simplest way of establishing the identity of a deceased person, the subject of a charge of murder or manslaughter, is evidence of identification by someone who knew the deceased while he was alive. PW1 knew the deceased before he died and she witnessed the attack. PW1 saw

the deceased being cut with a cutlass and she saw him being rushed to the hospital. Consequently, it is natural *for* her to know the feedback about his health as they (the deceased and PW1) lived in the same neighbourhood, if not she would not be in court testifying in the matter concerning his death .

PW3 went to the hospital where the victim was rushed to and confirmed that he was indeed dead. Also, the Appellant's confessional statements to the police which was admitted at the trial court proved that indeed there is a deceased person as the Appellant had confessed that "I did not mean to kill him."

These three evidence confirm that indeed the Sola Folorunsho who is the deceased in this charge actually died.

The Respondent had tendered the photographs of the deceased, however, the learned counsel for the Appellant has argued that a person cannot be determined to be dead by looking at a picture. I find this argument laughable. PW3, who is a police officer had testified that he went to the hospital and confirmed that the deceased died. I believe this is sufficient evidence. Consequently, the first ingredient of murder was proved by the Respondent.

*3. On whether confessional statement when direct and positive can establish the guilt of the accused -*

On the second ingredient of murder that the death of the deceased was caused by the acts and omission of the Appellant. Did the Respondent prove the guilt of the Appellant beyond reasonable doubt by proving all the ingredients of the offence?

PW1 had testified that she saw with her two naked eyes the Appellant hitting the deceased with a cutlass. Also, there is a solid confessional statement which was admitted into evidence without any objection(s) from the Appellant's counsel before the court wherein the Appellant stated that he hit the deceased with a cutlass but did not mean to kill him. The law is trite that an accused person can be convicted solely on his confession if the confession is positive and direct in the admission of the offence charged. In other words, voluntary confession of guilt whether judicial or extra judicial, if it is direct and positive is sufficient proof of the guilt and is enough to sustain a conviction, so long as the court is satisfied with the truth of such a confession. See cases of **SOLOLA VS. STATE (2005) 11 NWLR (PT. 937) 460** and **EDHIGERE VS. STATE (1996) 8 NWLR (PT. 464) 1**.

4. *On whether prosecution prove guilt of the accused beyond all reasonable doubt -*

In **ASIMI VS. STATE (2016) LPELR – 40436 (SC)**, this Court per Rhodes-Vivour, JSC at Pp 14 – 15 paras E – C stated succinctly that:

***'Once, an extra-judicial confession has been proved as in this case to have been made voluntarily and it is positive and unequivocal, amounting to an admission of guilt (such as the Appellant's confessional statement, Exhibit P6) a court can convict on it even if the Appellant retracted or resiled from it at trial. Such an afterthought does not make the confession inadmissible. It is desirable but not mandatory that there is general corroboration of important incidents and not that retracted confession should be corroborated in each material particular.'***

The confessional statement of the Appellant, the testimony of PW1 who witnessed the crime and saw the Appellant hit the deceased with a cutlass together with the testimony of PW3 who said that at about 10.00pm on the day of the crime, the Appellant entered the police station with a cutlass in his hand, declaring that he wanted to report the case are all collaborative. Thus, the second ingredient had been established .

*5. On proof of cause of death -*

In the case of **SANSANI VS. STATE (2022) LPELR - 57954 (SC) (PP. 24 – 25 PARAS. E)**, it was held per Peter Odili that:

***'The cause of death can be proved by direct or circumstantial evidence. The direct evidence required to prove the cause of death must be clear as to connect the deceased person with the act of the accused. The circumstantial evidence that will meet the requirements of the law of onus of proof, is the evidence that fixes the accused to the crime with sufficient cogency which excluded that someone else had committed the crime. '***

The Appellant's confessional statement proved the cause of death as injuries from cuts from a cutlass and also the testimony of PW1 points to it.

*6. On whether the appellant had the intention to kill the deceased -*  
Did the prosecution prove the 3<sup>rd</sup> ingredient of murder, which is that the death of the deceased was intentional with the knowledge that death or grievous bodily harm is the probable consequence of the Appellant's act or omission?

No one hits another human being with a cutlass and expects a smile or a party. A cutlass is a dangerous weapon capable of causing grievous harm when used to inflict wounds or pains. The Appellant is a male adult of a sound mind, who is expected to know the natural consequences of his actions. If the Appellant slapped the deceased and he died, we can subject this to the reasonable man's test and say that he could not have meant to kill him because slaps naturally should not cause death. But using a cutlass on someone is totally different. I believe the Appellant intended to cause the death of the deceased. I make bold to say that the Respondent proved the guilt of the Appellant beyond reasonable doubt.

In the light of the foregoing, issue one is therefore resolved against the Appellant.

*7. On whether there was no material inconsistency in the testimonies of witnesses -*

I cannot see any material inconsistency in the testimonies of the Respondent's witnesses as argued by the learned counsel for the Appellant. At page 13 of the further amended Appellant's brief of argument, the Appellant's counsel submitted that the testimony of PW1 was contradictory and went ahead to state how the said testimony was contradictory.

The Appellant has argued that PW1 had said in her statement that she did not see the Appellant enter through the back door into the house and so her testimony and eye witness account that she saw the Appellant hit the deceased with a cutlass should be disregarded .

This argument is baseless. The fact that PW1 did not see the Appellant enter the house does not in any way prevent her from seeing him hit the deceased. Consequently, this argument is disregarded .

The learned counsel *for* the Appellant has also argued that the testimony of PW3 was highly contradictory because the witness started his testimony on page 39 of the Record of Appeal that:

***'I know the accused. On the 4th of March, 2009 at about 20.30hours, A case of murder was reported against the accused person. The victim was rushed to a nearby clinic. On my getting to the clinic with the complainant, the victim died. The corpse was kept in the clinic while the complainant waited there. I went back to the station. At about 2200 hours, the accused came to the station with a cutlass in his hand that he wanted to report a case.'***

This testimony is very straightforward and self-explanatory. PW3 was at work and someone came in to report a murder case. PW3 followed the person to the hospital since it was nearby. He and the complainant were told that the person had died. He went back to the police station. A few hours later, the Appellant entered with a cutlass and report a case and he then discovered that the Appellant was connected to the case that has first been reported.

Again, I will say that the Appellant's argument that PW3 was at the police station when a murder case was reported and therefore could not have been at the hospital to witness the death of the deceased is ridiculous. The argument is crafted to waste the time of this Court as it is totally baseless. PW3 never testified as an eye witness to the crime, he only went to the hospital which was near the police station to follow up on the case and he confirmed the death of the deceased . PW3 testified that he was at the police station when the Appellant came in with a cutlass saying he had a case to report. I therefore hold that the testimony of PW3 is solid and credible and is devoid of contradictions.

*8. On whether medical evidence although essential is not always desirable to prove the cause of death -*

The learned counsel *for* the Appellant has argued that there was no investigation to determine who owned the cutlass, whose blood was on the cutlass and that no autopsy was conducted on the deceased to determine the cause of death. These arguments are baseless in the face of the solid eyewitness testimony of PW1, PW3 and the confessional statement of the Appellant. The Appellant himself brought the cutlass to the police station and said he used it on the deceased. Why then would the prosecution need

to test the blood on the cutlass? When PW3 was testifying that the Appellant came into the police station with the cutlass, neither the Appellant nor his counsel raised any objection to this statement, I do not see how the fact that the Respondent did not test the blood on the cutlass or tender the cutlass is fatal to their case.

It is trite law that medical evidence is not always essential, although desirable, to prove cause of death. Consequently, where medical evidence is lacking, the court is perfectly entitled to infer the cause of death from the circumstances. See **FRANK ONYENAKEYA VS. THE STATE (1964) NMLR 34** and **LORI VS. THE STATE (1980) 8 – 11 SC 81 AT 97**. Indeed, where the cause of death is obvious, as in the instant case, medical evidence may be unnecessary or can even be dispensed with or inferred. See generally, the cases of **TONARA BAKURI VS. THE STATE (1965) NMLR 163**; **ADAMU KUMO VS. THE STATE (1968) NMLR 227** and **OKON VS. THE STATE (1991) 8 NWLR (PT. 210) 424**.

*9. On whether court can convict based on a retracted confessional statement -*

Lastly, the learned counsel for the Appellant has argued that the trial court was wrong to have convicted the Appellant based on a resiled and retracted confessional statement.

First and foremost, when the confessional statement was being tendered by PW2, the Appellant's counsel was present in court and raised no objection to it. It was during the defence that the Appellant stated that he did not write the statement and just merely signed beneath it, thus amounting to denying ever making it. It is trite law that a court can safely convict an accused person on a retracted confessional statement.

In the case of **MOHAMMED VS. STATE (2014) LPELR 22916 (SC) (PP. 54 – 55 PARAS. E)**, this Court held per Muhammad, JSC that:

***'The confessional statement of an accused person, where same is found to be voluntary and unequivocal, provides the best evidence of the person's guilt. Resiling from the statement does not make it unreliable. The court can still admit and convict on a retracted confession if satisfied that the statement was indeed made by the accused person and the circumstances***

***under which the statement was made guarantee the credibility of the content of the confessional statement. This Court has, as part of the very principle, insisted that before the trial court convicts purely on the basis of a retracted confessional statement, it ensures that some corroborative evidence outside the confession abides making the truth in the content of the retracted confession probable."***

The Court of Appeal in its judgment held at pages 144 145 of the Record of Appeal that:

***'It is my view that on all the issues raised, the judgment of the learned trial judge provided reasonable and justified grounds for the decision. This was a clear and barbaric case of murder where in the Appellant soon after the gruesome murder went to the police with the murder weapon the cutlass to make a report of an assault on himself ostensible to provide a defence for himself or set up an alibi....***

***The fact of going to the police station with the murder weapon almost contemporaneously with the murder of the deceased in my view form part of the res gestae and forms one huge transaction with the killing of the deceased; Section 7 of the Evidence Act.***

***Having considered all the grounds of appeal and the issues that arose therefrom, I see no reason whatsoever to disturb the findings and decision of the trial court. "***

I agree with the position of the trial court and Court of Appeal. Even though the Appellant had argued that the findings of the trial court and the court below were perverse, thus, occasioning a miscarriage of justice and urging this Court to interfere, I however do not see any reason to interfere. The judgments were well written and the evidences properly evaluated .

On this note issue two is therefore resolved against the Appellant.

In the circumstances, I hold that this appeal is bereft of merit and same is therefore hereby dismissed.

Names of Justices who sat on the appeal: John INYANG Okoro, Tijjani Abubakkar, Habeeb Adewale . O. Abiru, Jamilu Yammama Tukur, Mohammed Baba Idris.

Appeal No. SC/319/2017

Date of Judgment: Friday, 4th July, 2025

Names of Counsel: . . . . , . . . ., with D. Edughele, Esq., for the Appellant. . . . .  
. . . ., . . . ., for the Respondent.

**MOHAMMED BABA IDRIS, (Delivering lead Judgment) :** This is an appeal against the judgment of the Court of Appeal, Ibadan Judicial Division in Appeal No. CA/IB/247C/2014 delivered CORAM: Nonyerem Okoronkwo, JCA, Ali Abubakar Babandi Gumel, JCA and Haruna Simon Tsammani, JCA on the 30<sup>th</sup> day of June, 2016 wherein the court below upheld the conviction of the Appellant by the Ogun State High Court on the grounds that the Respondent proved its case *of* murder against the Appellant beyond reasonable doubt.

The Appellant was arraigned before the High Court of Ogun State on a one count charge reproduced hereunder thus:

*'STATEMENT OF OFFENCE*

*MURDER, contrary to Section 319 (1) of the Criminal Code, Laws of Ogun State of Nigeria 2006.*

*PARTICULARS OF OFFENCE*

*AYOOLA ADEKUNLE (M) on or about the 4th day of March, 2009 at Isale Owoade Egba in the Abeokuta judicial Division murdered Sola Folorunsho."*

The Appellant pleaded not guilty to the charge and the Prosecution opened its case and called 3 (three) witnesses i.e. PW1, PW2 and PW3 respectively.

PW1 in her testimony stated that she knew the accused and the deceased and that they were regular faces at her house. The witness stated that on the fateful day, the Appellant came to her house and later left and later returned, entered came to knock at his door and they informed him that they wanted to play music in front of his house. The Appellant said he did not know the people and that they were about 5 in number. The Appellant stated further that he refused their request to play music in front of his house and told them they could not play any music because it was already past

midnight but they however attacked him and hit him with an iron rod but he ran into safety and reported to the police and he was then detained and he gave the police the iron rod. The Appellant admitted knowing the deceased but maintained that he did not kill him.

The defence closed their case and the parties filed and adopted their respective final written addresses and the matter was adjourned for judgment.

The trial court delivered its judgment on the 6<sup>th</sup> day of January, 2014, and held that the Prosecution proved the case against the Appellant beyond reasonable doubt by proving the ingredients of murder against the Appellant and consequently found the Appellant guilty of the charge and sentenced him to death by hanging.

Dissatisfied with the judgment of the trial court, the Appellant appealed to the Court of Appeal vide a Notice of Appeal dated the 8<sup>th</sup> day of April, 2014, raising 3 (three) Grounds of Appeal. In its judgment, the Court of Appeal held that the Respondent proved the guilt of the Appellant beyond reasonable doubt and that the Appellant had unconsciously corroborated the evidence against him by going to the police station with the cutlass which was said to have been the murder weapon. Consequently, the court below affirmed

the judgment of the trial court and the Appellant's appeal was accordingly dismissed.

Still dissatisfied with the judgment of the Court of Appeal, the Appellant has appealed to this Court vide a Notice of Appeal dated the 19<sup>th</sup> day of July, 2016 which was amended by an order of this Court on the 8<sup>th</sup> March, 2021 and thereafter further amended raising 4 (four) Grounds of Appeal. The parties thereafter filed and exchanged their respective briefs of argument.

The Appellant filed an Appellant's Brief of Argument dated the 29<sup>th</sup> day of December, 2022, wherein these 4 (four) issues were formulated for the determination of the appeal as follows :

- I. ***Whether the Court of Appeal was right in holding that the trial court provided reasonable and justifiable grounds for the decision of the trial court evidence before the trial court.*** (Distilled from Ground One of the Amended Notice of Appeal)
- II. ***Whether the Court of Appeal was right in affirming the decision of the trial court which sentenced the Appellant for murder relying on the Appellant's confessional statement, when the case of the Respondent is riddled with contradictions and the confessional statement when the***

**case of the Respondent is riddled with contradictions and the confessional statement was not corroborated.** (Distilled from Ground Two of the Amended Notice of Appeal)

**III. Whether the Court of Appeal was right in holding that there is no reason to disturb the findings and decision of the trial court despite the material contradictions in Prosecution's case and the wrong evaluation of evidence adduced at the trial court.** (Distilled from Ground Three of the Amended Notice of Appeal)

**IV. Whether the Court of Appeal was right when it failed to hold that the trial court misdirect itself in law when it applied a wrong standard of proof and relied on hearsay evidence in convicting and sentencing the Appellant to death for murder.** (Distilled from Ground Four of the Amended Notice of Appeal)

On the first issue, the learned counsel for the Appellant submitted that the law has imposed a duty on the Respondent to prove the case against the Appellant beyond reasonable doubt and the Appellant is presumed innocent unless and until this is done, Reliance was placed on the provisions of Section 135 of the

Evidence Act, 2011 and Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

It was argued that *for* a person to be convicted of murder, the prosecution must prove all the ingredients of murder beyond reasonable doubt. It was submitted further that the Respondent did not lay a single shred of evidence before the court to show that indeed there was a deceased person. It was argued that there was no medical evidence to show that the victim died and there was no eye witness report to confirm it.

It was argued that PW1 had testified that the said deceased was attacked in her presence and rushed to the hospital but did not provide further details on whether he survived it. It was also argued that PW3 testified that the deceased died at the hospital but had contradicted himself when he said that he was at the police station when the murder case was reported, thus amounting to an inconsistent statement. The Court was urged to discountenance PW3's testimony *for* being unreliable.

The learned counsel for the Appellant submitted that the tendering of a picture of the supposed deceased does not prove anything since breathing and living activities cannot be determined

through a picture. It was argued further that since the death of the deceased was not proved, the Prosecution failed to prove that the actions and omission of the Appellant caused the death of the deceased and that the cutlass which was said to be the alleged murder weapon was not tendered and neither was an autopsy conducted.

It was argued further that the prosecution failed to prove that the act of the Appellant was intended to cause the death of the deceased since the Respondent did not prove the first two ingredients and that the only piece of evidence that spoke of the alleged attack of the alleged deceased is the Appellant's retracted confessional statement and it was not corroborated by any evidence. It was argued further that there was nothing linking the Appellant to the death of the deceased. Reference was made to the case of **SUNDAY VS. STATE (2018) ALL FWLR (PT. 548) PAGE 874 AT 911 – 912.**

The learned counsel *for* the Appellant submitted further that the failure of the Respondent to prove the ingredients of murder against the Appellant should amount to the issue being resolved in his favour.

On issue two, the learned counsel *for* the Appellant argued that the evidence of the Respondent against the Appellant was a bunch of contradictions. It was argued that PW1 who was the main witness, did not give evidence capable of being relied upon as it was fraught with a lot of contradictions and lacks probative value.

It was argued further that there was no investigation carried out to determine the owner of the blood on the cutlass recovered by PW3 from the Appellant. It was submitted that there were discrepancies and contradictions in the case of the Respondent and the totality of their evidence must be rejected by the Court. Reliance was placed on the case of **KWAGSHIR VS. THE STATE (1995) 3 NWLR CPT. 386) AT 664.**

It was also argued that the confessional statement of the Appellant cannot be relied on as outside it, there is nothing that corroborates it. The case of **OGUDO-VS. THE STATE (2011) 18 NWLR (PT. 1278) PAGE 1026** was cited in support. It was argued that corroboration was necessary before a confessional statement can be relied on as held in the case of **NSOFOR VS. THE STATE (2005) ALL FWLR (PT. 242) PAGE 397 AT 417.**

On issue three, the learned counsel for the Appellant submitted that the Respondent's evidence against the Appellant was

based on suspicion and that this cannot ground a conviction.

Reference was made to the case of **ONAGORUWA VS. THE STATE (1993) 7 NWLR (PT. 303) PAGE 49 AT 93**. It was argued further that the Respondent failed to prove the guilt of the Appellant beyond reasonable doubt and that once there are doubts, the case must be resolved in favour of the Appellant.

It was submitted that there are cogent reasons for this Court to interfere with the decisions of the two lower courts and the reasons are that: the Respondent cannot be said to have proved that the Appellant killed the deceased; there are many discrepancies in the Respondent's witnesses' testimony; the Appellant was convicted on a retracted confession statement; and the unreliable testimony of PW1. It was argued that these were reasons enough *for* this Court to interfere with the concurrent findings of the two lower courts.

On issue four, the learned counsel *for* the Appellant argued that there was a misapplication of the standard of proof in this case. It was argued that the standard of proof in criminal cases is proof beyond reasonable doubt and nothing less. It was further submitted that the trial court while evaluating the evidence decided to pick and choose versions of testimonies that sounded plausible. It was

argued that the testimonies of the Respondent's witnesses amounted to hearsay evidence because the appropriate persons who could confirm the death of the deceased were the persons present at the hospital when the deceased died and not those who got to hear about the death .

The Court was urged to allow the appeal and set aside the judgment of the two lower courts.

In response, the Respondent filed an Amended Respondent's Brief of Argument deemed properly filed on the 10<sup>th</sup> day of April, 2025 and settled by Ogbenero–E'.- L. Ideh, Esq . In the said Amended Respondent's Brief of Argument, these 2 (two) issues were formulated for the determination of the appeal as follows:

**1. *Whether the lower court was right in affirming the conviction and sentencing of the Appellant, on the trial court's findings that there was proof beyond reasonable doubt that the Appellant committed the offence of murder.***

(Grounds 1, 2 and 3 of the Amended Notice of Appeal)

**2. *Whether the learned trial judge duly acted on probative evidence and properly applied the correct standard of proof in her evaluation of the defence advance by the***

***Appellant before arriving at her finding and/or decision.***  
(Distilled from Ground 4 of the Amended Notice of Appeal).

On issue one, the learned counsel for the Respondent submitted that the Respondent discharged the burden of proof placed on it by law against the Appellant by proving his guilt beyond reasonable doubt. It was also argued that the Respondent proved all the ingredients of the offence of murder against the Appellant.

It was argued that the evidence of PW1 was clear and straightforward, devoid of any contradictions. It was argued that PW 1 had testified that she saw the Appellant hit the deceased with a cutlass which corroborates the evidence before the Court and that the fact that the witness did not see the Appellant enter her house cannot disqualify her testimony of what she saw him do. The Court was urged to hold that PW1 was a credible eye witness and her testimony was solid and direct and it was also corroborated by PW3.

The learned counsel *for* the Respondent also submitted that the fact that PW3 was at the station and later at the hospital to confirm that the deceased died cannot be said to be a contradiction at all. It was submitted that the arguments of the

learned counsel for the Appellant should be regarded as baseless and misconceived.

It was argued further that if a finding of fact by the trial court is supported by evidence, an appellate court will not substitute the findings of the lower court with its own simply because it does not agree with it and will resist the interference with such findings unless it is obviously perverse. Reliance was placed on the cases of **OGELE VS. DARE (2008) LPELR – 3727** and **FAGBENRO VS. AROGBADI (2006) LPELR – 1227 (SC)**. It was submitted further that the evidence before the court on the cause of death of the deceased is overwhelming and there is direct evidence from PW1 and PW3 that the deceased died.

With regard to the non-tendering of the cutlass said to be the murder weapon, the learned counsel *for* the Respondent submitted that there is no burden on the prosecution to tender every piece of evidence. It was argued that PW3 stated that the Appellant came to the police station with a cutlass to report the murder, and that PW1 had said she saw the Appellant hit the deceased with a cutlass and that the Appellant had in his extra judicial statement admitted that he used a cutlass to hit the deceased and thus, the non-tendering of the cutlass in the face of these evidence is not fatal to the Respondent's case and

does not render the conviction of the Appellant invalid. Reference was made to the case of **ESONU CHUKWUNYERE VS. THE STATE (2017) LPELR – 43725**.

It was argued that from the testimony of PWI and the confessional statement of the Appellant, it was clear that the Appellant intended to cause grievous harm to the deceased and intended to kill him. It was argued that when the confessional statement of the Appellant was tendered, there was no objection only for him to turn around and retract it during his testimony thus amounting to crying over spilt milk as held in the case of **MOHAMMED VS. STATE (2018) 5 NWLR (PT' 1613) PAGE 540 @ 567**. It was also argued that the Appellant can be convicted solely on his confessional statement without corroboration .

The Court was urged to discountenance the argument of the Appellant in this regard.

On the second issue, the learned counsel for the Respondent submitted that the trial court has the right to convict the Appellant on the confessional statement that was made voluntarily and admitted in evidence without any objection. It was argued that the learned trial judge evaluated all evidences before him before deciding the case and convicting the Appellant. It was submitted

further that it is settled law that except for instances of perverse findings, the determination of the credibility of witnesses and findings of fact are matters within the exclusive domain of the trial court and that appellate court will not substitute its own *for* that of the trial court. The case of **UDOFIA VS. STATE (1984) LPELR – 3306 (SC)** was cited in support. It was argued that the trial court decided this case on the standard of proof expected in criminal trials which is proof beyond reasonable doubt and this Court was urged to hold so.

The Court was urged to dismiss the appeal and affirm the judgment of the lower courts.

The Appellant also filed a reply brief deemed properly filed on 10<sup>th</sup> day of April, 2025.

The learned counsel for the Appellant re-emphasized that the identification of the Appellant by PW1 as the assailant of the deceased was unreliable because she had admitted not seeing him enter her house and that this made PW1's evidence inadequate and questionable and thus unsafe to be relied upon .

It was argued further that this Court has the power to interfere with the finding of facts in this instant case because the trial court

relied on questionable evidences and then made a perverse finding which later occasioned a miscarriage of justice. Reliance was placed on the case of **ISHOLA VS. UBN LTD (2005) 6 NWLR (PT. 922) PAGE 442 – 443 PARAS H – A.**

It was argued that there were material inconsistencies and lapses in the testimonies of the Prosecution's witnesses which makes them unsafe to be relied upon by any court of law and this Court was urged to hold so. Reference was made to the cases of **MBACHU VS. STATE (2018) 17 NWLR (PT. 1649) PAGE 395 AT 407 PARAS E – G** and **MUSA VS. STATE (2009) 15 NWLR (PT. 1165) PAGE 467 AT PAGE 501 – 502 PARAS H – E.** Reference was also made to the fact that the medical report and the murder weapon were not tendered, and that without doubt they ought to have been tendered. It was argued that it was necessary because there was no evidence linking the cause of death of the deceased to the Appellant. It was argued further that the trial court relied entirely on the Appellant's retracted confessional statement in proof of the vital third ingredient of murder without any corroboration which makes it wrong.

The learned counsel for the Appellant contended that the Respondent was wrong to have submitted that the Appellant ought to have appealed specifically against the judgment of the court

with regard to the reliance on the retracted confessional statement. It was argued further that the best people who could have told the Court that the deceased died were the neighbours that rushed the deceased to the hospital and not Pw3 as the testimony of PW3 amounted to hearsay evidence. It was submitted further that the concurrent findings of the two lower courts can only be relied upon if it is found not to be perverse and occasioning a miscarriage of justice.

The Court was urged to set aside the judgments of the lower courts and allow this appeal which will then led to the acquittal of the Appellant.

### **RESOLUTION OF THE ISSUES**

I have read and digested the brilliant submissions of learned counsel *for* the Appellant and Respondent contained in their respective briefs of argument and I have summarized the argument hereinabove. In order to resolve the issues in controversy in this appeal, I will proceed to adopt the issues formulated for the determination of the appeal by the Appellant. However, the said issues are similar and are repetitive, thus, I have decided to merge them into 2 (two) issues *for* determination as follows:

1. ***Whether the Prosecution proved the guilt of the Appellant beyond reasonable doubt?***
2. ***Whether the contradictions in the testimonies of the Respondent witnesses were material enough to have this Court discredit them?***

### **ISSUE ONE**

***Whether the Prosecution proved the guilt of the Appellant beyond reasonable doubt?***

The learned counsel for the Appellant has argued vehemently that the Respondent failed to prove the guilt of the Appellant beyond reasonable doubt as expected of it by law. It was argued further that the Respondent did not prove the ingredients of murder against the Appellant and thus, his conviction was a nullity.

In **OKERE VS. IGP (2021) LPELR – 53079 (SC) (PP. 16 – 17 PARAS. C – C)**, this Court held per Abba Aji, iSC thus :

*'on the offence of murder, which the Appellant is charged with, the prosecution could use any of the under mentioned methods to prove murder: (a) Through evidence of eye witness or witnesses (b)*

*Through voluntary confessional statement of the accused or accused persons, and (c) Through circumstantial evidence. See AGBOOLA V THE STATE (2013) LPELR 20652 (SC). Any of the above mentioned methods could be adopted by the prosecution to-- establish the offence of murder by proving the under listed ingredients of the offence of murder, namely:- (1) The death of a human being (2) That the death was caused by the act commission of the accused person/and (3) That the act of the accused was done intentionally or with knowledge that death or grievous bodily harm was the probable consequence. See OKEKE V THE STATE (1999) 2 NWLR (PT 590) 246 AT 273, Per SANUSI, JSC in AKINSUWA V. STATE (2019) LPELR – 47621 (SC) (PP. 23 – 25, PARA. E)."*

On the first ingredient of murder, learned counsel for the Appellant has argued that there is nothing to show that indeed there is a deceased and that there was no medical report before the court. Counsel further contended that PWI never said that the deceased died in her presence and the witness said that when she saw the

Appellant hit him with a cutlass, she cried for help and the deceased was rushed to the hospital by neighbours, The Appellant's counsel has argued further that PW3 was in no position to testify that the deceased died because it would amount to hearsay evidence. I am taken aback by this argument as it is ridiculous.

In **PRINCEWILL VS. THE STATE (1994) 6 NWLR (PT. 353) AT 715**, this Court held per Iguh, JSC that the simplest way of establishing the identity of a deceased person, the subject of a charge of murder or manslaughter, is evidence of identification by someone who knew the deceased while he was alive. PW1 knew the deceased before he died and she witnessed the attack. PW1 saw the deceased being cut with a cutlass and she saw him being rushed to the hospital. Consequently, it is natural *for* her to know the feedback about his health as they (the deceased and PW1) lived in the same neighbourhood, if not she would not be in court testifying in the matter concerning his death .

PW3 went to the hospital where the victim was rushed to and confirmed that he was indeed dead. Also, the Appellant's confessional statements to the police which was admitted at the trial court proved that indeed there is a deceased person as the Appellant had confessed that "I did not mean to kill him."

These three evidences confirm that indeed the Sola Folorunsho who is the deceased in this charge actually died.

The Respondent had tendered the photographs of the deceased, however, the learned counsel for the Appellant has argued that a person cannot be determined to be dead by looking at a picture. I find this argument laughable. PW3 who is a police officer had testified that he went to the hospital and confirmed that the deceased died. I believe this is sufficient evidence. Consequently, the first ingredient of murder was proved by the Respondent.

On the second ingredient of murder that the death of the deceased was caused by the acts and omission of the Appellant. Did the Respondent prove the guilt of the Appellant beyond reasonable doubt by proving all the ingredients of the offence?

PW1 had testified that she saw with her two naked eyes the Appellant hitting the deceased with a cutlass. Also, there is a solid

confessional statement which was admitted into evidence without any objection(s) from the Appellant's counsel before the court wherein the Appellant stated that he hit the deceased with a cutlass but did not mean to kill him. The law is trite that an accused person can be convicted solely on his confession if the confession is positive and direct in the admission of the offence charged. In other

words, voluntary confession of guilt whether judicial or extra judicial, if it is direct and positive is sufficient proof of the guilt and is enough to sustain a conviction, so long as the court is satisfied with the truth of such a confession. See cases of **SOLOLA VS. STATE (2005) 11 NWLR (PT. 937) 460** and **EDHIGERE VS. STATE (1996) 8 NWLR (PT. 464) 1**.

In **ASIMI VS. STATE (2016) LPELR – 40436 (SC)**, this Court per Rhodes-Vivour, JSC at Pp 14 – 15 paras E – C stated succinctly that:

*'Once, an extra-judicial confession has been proved as in this case to have been made voluntarily and it is positive and unequivocal, amounting to an admission of guilt (such as the Appellant's confessional statement, Exhibit P6) a court can convict on it even if the Appellant retracted or resiled from it at trial. Such an afterthought does not make the confession inadmissible. It is desirable but not mandatory that there is general corroboration of important incidents and not that retracted*

*confession should be corroborated in each material particular."*

The confessional statement of the Appellant, the testimony of PW1 who witnessed the crime and saw the Appellant hit the deceased with a cutlass together with the testimony of PW3 who said that at about 10.00pm on the day of the crime, the Appellant entered the police station with a cutlass in his hand, declaring that he wanted to report the case are all collaborative. Thus, the second ingredient had been established .

In the case of **SANSANI VS. STATE (2022) LPELR - 57954 (SC) (PP. 24 – 25 PARAS. E)**, it was held per Peter Odili that:

*'The cause of death can be proved by direct or circumstantial evidence. The direct evidence required to prove the cause of death must be clear as to connect the deceased person with the act of the accused. The circumstantial evidence that will meet the requirements of the law of onus of proof, is the evidence that fixes the accused to the crime with sufficient cogency*

*which excluded that someone else had committed the crime. "*

The Appellant's confessional statement proved the cause of death as injuries from cuts from a cutlass and also the testimony of PWI points to it.

Did the prosecution prove the 3<sup>d</sup> ingredient of murder, which is that the death of the deceased was intentional with the knowledge that death or grievous bodily harm is the probable consequence of the Appellant's act or omission?

No one hits another human being with a cutlass and expects a smile or a party. A cutlass is a dangerous weapon capable of causing grievous harm when used to inflict wounds or pains. The Appellant is a male adult of a sound mind, who is expected to know the natural consequences of his actions. If the Appellant slapped the deceased and he died, we can subject this to the reasonable man's test and say that he could not have meant to kill him because slaps naturally should not cause death. But using a cutlass on someone is totally different. I believe the Appellant intended to cause the death of the deceased. I make bold to say that the Respondent proved the guilt of the Appellant beyond reasonable doubt.

In the light of the foregoing, issue one is therefore resolved against the Appellant.

## **ISSUE TWO**

***Whether the contradictions in the testimonies of the Respondent witnesses were material enough to have this Court discredit them?***

I cannot see any material inconsistency in the testimonies of the Respondent's witnesses as argued by the learned counsel for the Appellant. At page 13 of the further amended Appellant's brief of argument, the Appellant's counsel submitted that the testimony of PWI was contradictory and went ahead to state how the said testimony was contradictory.

The Appellant has argued that PWI had said in her statement that she did not see the Appellant enter through the back door into the house and so her testimony and eye witness account that she saw the Appellant hit the deceased with a cutlass should be disregarded .

This argument is baseless. The fact that PWI did not see the Appellant enter the house does not in any way prevent her from

seeing him hit the deceased. Consequently, this argument is disregarded .

The learned counsel *for* the Appellant has also argued that the testimony of PW3 was highly contradictory because the witness started his testimony on page 39 of the Record of Appeal that:

*'I know the accused. On the 4th of March, 2009 at about 20.30hours, A case of murder was reported against the accused person. The victim was rushed to a nearby clinic. On my getting to the clinic with the complainant, the victim died. The corpse was kept in the clinic while the complainant waited there. I went back to the station. At about 2200 hours, the accused came to the station with a cutlass in his hand that he wanted to report a case.'*

This testimony is very straightforward and self-explanatory. PW3 was at work and someone came in to report a murder case. PW3 followed the person to the hospital since it was nearby. He and the complainant were told that the person had died. He went back to the police station. A few hours later, the Appellant entered with a

cutlass and report a case and he then discovered that the Appellant was connected to the case that has first been reported.

Again, I will say that the Appellant's argument that PW3 was at the police station when a murder case was reported and therefore could not have been at the hospital to witness the death of the deceased is ridiculous. The argument is crafted to waste the time of this Court as it is totally baseless. PW3 never testified as an eye witness to the crime, he only went to the hospital which was near the police station to follow up on the case and he confirmed the death of the deceased . PW3 testified that he was at the police station when the Appellant came in with a cutlass saying he had a case to report. I therefore hold that the testimony of PW3 is solid and credible and is devoid of contradictions.

The learned counsel *for* the Appellant has argued that there was no investigation to determine who owned the cutlass, whose blood was on the cutlass and that no autopsy was conducted on the deceased to determine the cause of death. These arguments are baseless in the face of the solid eyewitness testimony of PW1, PW3 and the confessional statement of the Appellant. The Appellant himself brought the cutlass to the police station and said he used it on the deceased. Why then would the prosecution need

to test the blood on the cutlass? When PW3 was testifying that the Appellant came into the police station with the cutlass, neither the Appellant nor his counsel raised any objection to this statement, I do not see how the fact that the Respondent did not test the blood on the cutlass or tender the cutlass is fatal to their case.

It is trite law that medical evidence is not always essential, although desirable, to prove cause of death. Consequently, where medical evidence is lacking, the court is perfectly entitled to infer the cause of death from the circumstances. See **FRANK ONYENAKEYA VS. THE STATE (1964) NMLR 34** and **LORI VS. THE STATE (1980) 8 – 11 SC 81 AT 97**. Indeed, where the cause of death is obvious, as in the instant case, medical evidence may be unnecessary or can even be dispensed with or inferred. See generally, the cases of **TONARA BAKURI VS. THE STATE (1965) NMLR 163**; **ADAMU KUMO VS. THE STATE (1968) NMLR 227** and **OKON VS. THE STATE (1991) 8 NWLR (PT. 210) 424**.

Lastly, the learned counsel for the Appellant has argued that the trial court was wrong to have convicted the Appellant based on a resiled and retracted confessional statement.

First and foremost, when the confessional statement was being tendered by PW2, the Appellant's counsel was present in

court and raised no objection to it. It was during the defence that the Appellant stated that he did not write the statement and just merely signed beneath it, thus amounting to denying ever making it. It is trite law that a court can safely convict an accused person on a retracted confessional statement.

In the case of **MOHAMMED VS. STATE (2014) LPELR 22916 (SC) (PP. 54 – 55 PARAS. E)**, this Court held per Muhammad, JSC that:

*'The confessional statement of an accused person, where same is found to be voluntary and unequivocal, provides the best evidence of the person's guilt. Resiling from the statement does not make it unreliable. The court can still admit and convict on a retracted confession if satisfied that the statement was indeed made by the accused person and the circumstances under which the statement was made guarantee the credibility of the content of the confessional statement. This Court has, as part of the very principle, insisted that before the trial court convicts purely on the basis of a retracted confessional statement, it ensures that*

*some corroborative evidence outside the confession abides making the truth in the content of the retracted confession probable."*

The Court of Appeal in its judgment held at pages 144 145 of the Record of Appeal that:

*'It is my view that on all the issues raised, the judgment of the learned trial judge provided reasonable and justified grounds for the decision. This was a clear and barbaric case of murder where in the Appellant soon after the gruesome murder went to the police with the murder weapon the cutlass to make a report of an assault on himself ostensible to provide a defence for himself or set up an alibi....*

*The fact of going to the police station with the murder weapon almost contemporaneously with the murder of the deceased in my view form part of the res gestae and forms one huge transaction with the killing of the deceased; Section 7 of the Evidence Act.*

*Having considered all the grounds of appeal and the issues that arose therefrom, I see no reason whatsoever to disturb the findings and decision of the trial court. "*

I agree with the position of the trial court and Court of Appeal. Even though the Appellant had argued that the findings of the trial court and the court below were perverse, thus, occasioning a miscarriage of justice and urging this Court to interfere, I however do not see any reason to interfere. The judgments were well written and the evidences properly evaluated .

On this note issue two is therefore resolved against the Appellant.

In the circumstances, I hold that this appeal is bereft of merit and same is therefore hereby dismissed. The judgment of the Court of Appeal, Ibadan Judicial Division in Appeal No. CA/IB/247C/2014 delivered on the 7<sup>th</sup> day of June, 2013 upholding the conviction of the Appellant by the trial court, is consequently affirmed.

: My lord and learned brother, MOHAMMED **BABA IDRIS**, JSC,

granted me the privilege of reading in draft the comprehensive leading judgement prepared and rendered in this appeal. I endorse the reasoning and conclusion and adopt the judgement as mine, I ha nothing extra to add.

I join my learned brother in holding that the Appellant's appeal without merit, and therefore deserves to be and is hereby dismissed.

Appeal dismissed.

: I have had the privilege of reading the draft of the lead judgment delivered by my learned brother, **Mohammed Baba Idris**, JSC, in this appeal. I agree entirely with his reasons and conclusion that the appeal be dismissed. I shall only make a few emphasis on the already established position of the law with regards to a murder trial.

The salient facts of the case which have led to this appeal are that: Sola Folorunsho is dead. He died from injuries sustained upon being cut with a cutlass by the Appellant. These set of facts are deducible from the Appellant's confessional statement which was corroborated by the PWI and PW3 , it is in evidence that the Appellant confessed to hitting the deceased

with a cutlass, howbeit denied intending to kill him. PW1 testifies that it was the Appellant that cut the deceased with a cutlass which caused his death and the PW3 confirmed that he saw the corpse of the deceased at the hospital. That upon his return from the hospital, the Appellant came to the station with a blood-stained cutlass to make a report of an attack on him, whereupon he was detained.

It is trite law that the ingredient for the offence of murder would only crystalize when it is established that the accused person killed the deceased intentionally or had intention of causing the deceased grievous bodily harm. See **Orisadipe Vs. State (2019) LPELR-55915 (SC); Njoku & Ors. Ps. State (2012) LPELR- 20608 (SC)** . Intention to cause death here can be inferred from the weapon used and the nature of wound inflicted on the deceased. See **Adarnu Ps. Kano Native Authority (1956)1 FSC.25; Orisakwe Vs. State (2004) LPE:LR- 27 64 LSC); Ejelikwu Vs. State (1993)7 NWLR (Pt.307)554.**

In this case, a machete cut to the back clearly reveals intention to either kill or cause greivious bodily harm. The Appellant can therefore not sustain his assertion that he did not mean to kill the deceased.

In summary, this appeal is lacking in merit and is hereby dismissed. I

affirm the judgment of the court below delivered on 7<sup>th</sup> June, 2013 which

upheld the conviction and sentence passed on the Appellant.

Appeal Dismissed.

This appeal is against the judgment of the Court of Appeal, Ibadan Judicial Division, delivered on the 30<sup>th</sup> of June, 2016 in Appeal No CA/IB/247<sup>c</sup>/2014, and which affirmed the conviction and sentence of the Appellant *for* the offence murder by the High Court of Ogun State in a judgment delivered on the 6<sup>th</sup> of January, 2014 in Suit No AB/9<sup>c</sup>/2011.

The fundamental question *for* determination in appeal is whether the learned Justices of the Court of Appeal were right when they upheld the findings of the High Court that the Respondent led sufficient and adequate cogent and credible evidence to prove the offence of murder charged against the Appellant beyond reasonable doubt. I have had the privilege of reading before now the lead judgment delivered by my learned brother, Mohammed Baba Idris, JSC. His Lordship has ably considered and resolved the all contentions of the parties in the appeal. I agree with the reasoning and abide the conclusion in the lead judgment that the appeal lacks merit and is very deserving of an order of dismissal.

The Respondent presented an unchallenged eye witness account of the unprovoked attack unleashed by the Appellant on the deceased with a cutlass as well as a detailed confessional statement wherein the Appellant admitted inflicting bodily harm on the deceased with a cutlass. The confessional statement was tendered in the course of trial

without objection, and, in fact, his Counsel admitted that the Appellant volunteered the statement. It was in his oral evidence in the course of his defence that the Appellant sought to challenge the contents of the confessional statement. The law is settled that where an accused person, like the Appellant in the instant case, fails to raise any objection to the admissibility of a confessional statement at the time of its tendering, the law implies that he agrees with everything in the statement and that it contains the truth on his role in the crime, and anything he says afterwards in the course of his oral evidence will be treated as an afterthought and discountenanced – **Smart Vs State** (2016) LPELR-40728(SC), **Musa Vs State** (2018) LPELR-43846(SC), **Olugbemi Vs State** (2023) LPELR 6033 1 (SC), **Yelli Vs State** (2023) 2 NWLR (Pt 1867) 39, **Lucky Vs State** (2024) 9 NWLR (Pt 1944) 461

The law is also settled that in situations where a confessional statement is admitted without objection, such as the above, a Court is entitled to convict an accused defendant solely on the basis of the confession where the confession is direct, positive and unequivocal, so long as it is satisfied of its truth, even without corroboration. In such circumstances, there is no need for a trial Court to look for evidence outside the confessional statement – **Stephen Vs State** (1986) 5 NWLR (Pt 46) 978, **Yahaya Vs State** (1986) 12 SC 282, **Oseni Vs State** (2012) 5 NWLR (Pt 1293) 351, **Idoko Vs State** (2018)-6 NWLR (Pt 1 614) 1 17, **State Vs Ahmed** (2020) LPELR 49497(SC), **Effiom Vs State** (2024) 10 NWLR (Pt 1946) 313, **Olanrewaju Vs State** (2024) 11 NWLR (Pt 1950) 493. This is premised on the reasoning that what an accused person says against his interest without police influence is most likely to be true – **Ikemson Vs State** (1989) 3 NWLR (Pt 110) 455, **Shurumo Vs State** (2010) 19 NWLFI (Pt 1226) 73, **Bassey Vs State** (2012) 12 NWLR (Pt 1314) 209, **Alao Vs State** (2019) 17 NWLFI (Pt 1702) 501. In **Musa Vs State** (2024) 62371 (SC) at Pages 21-22, this Court made this point thus:

"It is an accepted and settled principle of law that an accused person can be validly convicted on his confessional statement alone. Thus, once the Court is satisfied with the voluntariness of the statement, and it unequivocally admits the commission of the crime charged, it can freely convict. This is rrlore so when, as in the instant case, the statement was admitted without objection. The fact that the accused person retracted

the statement at the trial will not deter the Court from convicting him on his admission, so long as the Court is satisfied that the confession is true.”

A read through the confessional statement shows that it is direct, positive and unequivocal on the fact that the Appellant attacked the deceased and inflicted an injury on the deceased’s head with a cutlass. In the *face* of these facts and the law, it was an uphill task for the Appellant to convince this Court to tamper with the concurrent findings of the two lower Courts, and the Appellant did not give this Court any cause to do so.

I too hereby find no merit in the appeal. I dismiss the appeal and affirm judgment of the Court of Appeal. Ibadan Judicial Division, delivered on the 30<sup>th</sup> of June, 2016 in Appeal No CA/IB/247<sup>c</sup>/2014.

I read before now the draft of the lead judgment prepared by my

learned brother **MOHAMMED BABA IDRIS JSC** and I agree that the appeal

lacks merit and should be dismissed.

Appeal dismissed.