

**ATTORNEY GENERAL OF CROSS RIVER STATE**

**Vs.**

- 1. FEDERAL REPUBLIC OF NIGERIA**
- 2. ATTORNEY GENERAL OF THE FEDERATION**

**SC.45/2019**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY, 17<sup>TH</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

<b>OLABODE RHODES-VIVOUR</b>	<b>JUSTICE, SUPREME COURT</b>
<b>MARY UKAEGO PETER-ODILI</b>	<b>JUSTICE, SUPREME COURT</b>
<b>OLUKA YODE ARIWOOLA</b>	<b>JUSTICE, SUPREME COURT</b>
<b>MUSA DATTIJO MUHAMMAD</b>	<b>JUSTICE, SUPREME COURT</b>
<b>KUDIRAT M. O. KEKERE-EKUN</b>	<b>JUSTICE, SUPREME COURT</b>
<b>JOHN INYANG OKORO</b>	<b>JUSTICE, SUPREME COURT</b>
<b>SIDI DAUDA BAGE</b>	<b>JUSTICE, SUPREME COURT</b>

*ACTION:- Constitutional provisions – Violations thereof – Where a party intends to sue against the violation of constitution – Whether he can initiate action under section 46 of the constitution.*

*ACTION:- Justiceability thereof – whether distinct from Locus standi*

*CONSTITUTIONAL LAW:- CFRN 1999 – Section 232 thereof – Interpretation thereto – Whether provides for the original jurisdiction of the Supreme Court.*

*CONSTITUTIONAL LAW:- CFRN 1999 (as amended) – Section 6(6)(b) – Nature and purport.*

*COURT:- Competence – What determines.*

*COURT:- Jurisdiction – How determined*

*COURT:- Jurisdiction thereof – Fundamental nature – Whether any proceedings conducted in absence of jurisdiction amount to a nullity.*

*COURT:- Jurisdiction thereof – Original and appellate jurisdiction – Distinction*

*COURT:- Jurisdiction thereof – Where statutory provisions are not followed in invoking courts jurisdiction – Whether no such compliance will deny court of its jurisdiction.*

*COURT:- Supreme Court – Jurisdiction thereof – Interpretation of the Constitution – Whether Supreme Court will not exercise its original jurisdiction merely for the purpose of interpreting the constitution as this can be done in both its appellate or original jurisdiction.*

*COURT:- Supreme Court – Original jurisdiction thereof – Conditions thereto – The principle in **A-G Anambra State Vs. A-G Federation (2007) 12 NWLR (Pt. 1047) 4***

*COURT:- Supreme Court – Original jurisdiction thereof – Nature and purport – Whether to invoke the Supreme Court original jurisdiction the dispute must involve the interest of the federation and the states.*

*COURT:- Supreme Court – Original jurisdiction thereof – Nature thereof – Whether it involves dispute between a state or states and the federation.*

*COURT:- Supreme Court – Original jurisdiction thereof – Section 232(1) of CFRN 1999 (as amended) – Whether original jurisdiction is exercisable between the federation and the state or between states – The principle in **A.G Anambra State Vs. A-G federation (2007) 12 NWLR (Pt. 1047)1 at 94.***

*COURT:- Supreme Court – Original jurisdiction thereof – Section 232 CFRN construed – Whether the dispute that will invoke the original jurisdiction of the Supreme Court must not be a personal dispute – The principle in **A-G Anambra Vs. A-G Federation (2007) LPELR 603.***

*COURT:- Supreme Court – Original jurisdiction thereof – Where a party seeks the interpretation of the constitution – Whether Supreme Court will not invoke its original jurisdiction merely for these purpose.*

*COURT:- Supreme Court – Original jurisdiction thereof – Where subject matter of suit is personal to an individual – Whether such action is incapable of invoking the original jurisdiction of the Supreme Court.*

*PARTIES:- Concept of locus standi – Rationale – The principle in **Sunday Adegbite Taiwo Vs. Serah Adegboro & 2 Ors (2011) 5 SC (Pt.11) p. 179.***

*PARTIES:- Locus standi – A party who brings an action must be one in which civil rights and obligation invoke the jurisdiction of the court – Whether plaintiff must be the proper party to sue.*

*PARTIES:- Locus standi – Connotation*

*PARTIES:- Locus standi – How determined.*

*PARTIES:- Locus standi – Meaning – The principle in **Inakoju Vs. Adeleke (2007) 4 NWLR (Pt.1025) 423***

*PARTIES:- Locus standi – When is a party said to have a locus standi – The principle in **Nyame Vs. FRN (2010) 42 NSCQR 54***

*PARTIES:- Locus standi – Where a party commences an action to seek a relief without any enforceable right – Whether such a party has no locus standi*

*PARTIES:- Locus standi – Where a persons locus standi is challenged – Onus on party – Whether must not only show that the action is justiciable but his legal right has been breached.*

*PARTIES:- Locus standi – Where laws are violated or are been violated by any authority – Whether every Nigerian has locus standi to ensure that those laws are not violated.*

*PRACTICE AND PROCEDURE:- Action – Preliminary objection thereto – Whether must be determined first – Rationale.*

*PRACTICE AND PROCEDURE:- Ouster of jurisdiction – Where plaintiff lacks locus standi – Whether such finding automatically oust the jurisdiction of the court.*

*STATUTE:- CFRN 1999 (as amended) – Section 232(1) thereof – The nature and purport of original jurisdiction of the Supreme Court.*

*STATUTE:- Constitution of Federal Republic of Nigeria – Interpretation thereof – Proper approach thereto – The principle in **Elelu-Habeeb Vs. Attorney-General of the Federation (2012)13 NWLR (Pt. 1318) 423.***

*STATUTE:- Interpretation thereof – Relevant principles – Whether when the words of a statute are clear and unambiguous they should be given their plain and ordinary meaning.*

*WORDS AND PHRASES:- "Dispute" – Meaning*

*WORDS AND PHRASES:- "Locus standi" – Meaning*

*WORDS AND PHRASES:- Dispute – Meaning*

### **Issues for Determination**

**Whether, having regard to the facts of the case and the reliefs sought in the originating summons, the plaintiff has locus standi or standing to invoke the original jurisdiction of the Supreme Court to determine the plaintiff's suit as constituted.**

### **Facts of the Matter**

**The plaintiff on behalf of cross River State Government commence this action by means of originating summons against the Federal government as defendant. Whereby he sought the interpretation of some provision of the constitution especially as it leads to the role of the National Judicial Council.**

**Consequently, the plaintiff claim some declaratory and injunctive reliefs against the defendant as it relate to the trial and suspension of Ho. Justice Onnoghen .**

**The defendant filled a preliminary objection to the action challenging the locus standi of the plaintiff.**

**In dismissing the application, the Supreme Court held**

**Held:** *(Unanimously dismissing the action)*

1. *The nature and purport of Section 232(1) of CFRN 1999 (as amended)*  
**Section 232 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides as follows:**

**"The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends." (P.....para.....)**

2. *The meaning of "Locus standi"*  
**Locus standi, what does it mean? It is a latin phrase meaning "place of standing." That is, the right to institute an action or right to be heard in a court or tribunal or in a given forum. In other words, the phrase denotes legal capacity to institute proceedings in a court of law. Standing to sue therefore is not dependent on the success or merit of the case, it is a condition precedent to a**

determination on the merits. See; **Thomas Vs. Olufosoye (1986) 1 NWLR (Pt.18) 669 at 685.** It therefore follows that if the plaintiff has no locus standi or standing to sue, it is not necessary to consider whether there is a genuine case on the merits, his action must be struck out for being incompetent. See; **Senator Abraham Adesanya Vs. The President of the Federal Republic of Nigeria & Anor (1981) 1 All NLR 32; (1981) 5 SC 112; (1981) 2 NCLR 358. )** (*P.....para.....*)

3. *Facts not in controversy are admitted*

**First and foremost, from the questions raised and the reliefs sought by the plaintiff in the originating summons; the affidavit evidence and documents attached as annexures, the following facts are not in dispute having been admitted or not denied and are deemed established, requiring no further proof.**

- **This action was instituted by the Government of Cross River State through the chief law officer of the State as the plaintiff.**
- **The Hon. Mr. Justice Walter Samuel Nkanu Onnoghen GCON is the Chief Justice of Nigeria.**
- **The said Hon. Mr. Justice Walter Samuel Nkanu Onnoghen GCON is an indigene of Cross River State .**
- **The Hon. Mr. Justice Onnoghen is presently on suspension from the office of the Chief Justice of Nigeria by the President of the Federal Republic of Nigeria with effect from Friday 25<sup>th</sup> January, 2019 .**
- **The Hon, Mr. Justice Onnoghen is presently standing trial before the Code of Conduct Tribunal on charge No.CCT/ABJ/01/19 between the Federal Republic of Nigeria Vs. Justice Onnoghen Nkanu Walter Samuel.** (*P.....para.....*)

4. *Matters in dispute*

**However, what is in dispute in my view, includes the followings:**

**Whether the suspension of the Hon. Mr. Justice Walter Nkanu Samuel Onnoghen as the Chief Justice of Nigeria by the President of the Federal Republic of Nigeria on Friday 25<sup>th</sup>**

**January, 2019 was constitutional, having regard to the fact that there had been no formal complaint of any misconduct of the said Hon. Justice Onnoghen to the National Judicial Council by the President.**

**Whether the plaintiff can properly invoke the original jurisdiction of this court in the determination of the suit as constituted. (P.....para.....)**

5. *What locus standi in a plaintiff connotes*  
**Generally, in Nigeria, it is a constitutional requirement that in order to enable a person maintain an action before a court or tribunal, and this is limited to the prosecution of matters relating to the civil rights and obligations of the plaintiff, be that plaintiff a person, a group of persons, a statutory body, a government, an authority or any other juristic person, there must exist in such plaintiff the standing to sue. In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have or are in danger of being violated or adversely affected by the act complained of See; Section 6(6) of the 1999 Constitution of the Federal Republic of Nigeria (as amended); Adesanya Vs. The President of FRN (supra); Kayode Bakare & Ors Vs. Ajose-Adeogun & Ors (2014)6 NWLR (Pt.1403) 320; (2014) 1 SCNJ 255; (2014) , All FWLR (Pt.737)611. (P.....para.....)**
6. *Distinction between locus standi and justiceability*  
**Ordinarily, when a party's standing to sue is in issue, in an action, the question that arises is whether the person whose standing is being challenged is a proper party to request an adjudication of a particular issue but not whether the issue is indeed justiceable. See; Buraimoh Oloriode & Ors Vs. Oyebi & Ors (1984) 5 SC 16; (1984) SC NLR 390. (P.....para.....)**
7. *A party who has no enforceable right does not have locus standi*  
**It is trite law that it is only the person in whom is vested the aggregate of the enforceable rights in a cause that has the standing to sue. Therefore, where a person commences an action to claim a relief which on the facts of the matter is enforceable to another person, then the former person cannot succeed, for want of locus standi. The reason being that there is no dispute between them. In the instant case, the facts deposed to in the affidavits filed in support of the originating summons did not show that the plaintiff had vested in it any enforceable right to sue the defendants. See; Oloriode Vs. Oyebi (Supra); Egolum Vs. Obasanjo (1999) 7 NWLR (Pt.611) 423; A.G. Anambra Vs. A.G. Federation (2007) 12 NWLR (Pt.1047) 1 at 94. (P.....para.....)**

8. *Distinction between original and appellate jurisdiction of a court*  
**It is clear on record that it is the original jurisdiction of the Supreme Court that is being invoked by the plaintiff not the appellate jurisdiction. A court is said to have original jurisdiction in a particular matter when that matter can be initiated before it, while a court will have appellate jurisdiction when it can only go into the matter on appeal after it had been adjudicated on by a court of first instance. See; Teliat A. C. Sule Vs. Nigerian Cotton Board (1985) 6 SC 62 at 191.**

**As I earlier indicated, it is the original jurisdiction of the Supreme Court that is being invoked by the plaintiff in this case. There is no doubt that the Supreme Court has original jurisdiction in certain matter between specific parties. (P.....para.....)**

9. *Supreme Court can only exercise its original jurisdiction in a civil case between federation and the state or states.*

**Section 232(1) of the 1999 Constitution (as amended) provides as follows:**

**“S.232(1) The Supreme Court shall to the exclusion of any other court have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.**

- (2) In addition to the jurisdiction conferred upon it by sub-section (1) of this Section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any act of the National Assembly. Provided that no original jurisdiction shall be conferred upon the Supreme Court with respect to any criminal matter.”**

**In Attorney General of Anambra State Vs. Attorney General of the Federation (supra) at 72-73, the Supreme Court, per Onnoghen, JSC (as he then was) when considering the above provisions of the constitution in relation to the original jurisdiction of the Supreme Court, opined as follows;**

**“.....from the provisions of Section 232 (1)of the 1999 Constitution (supra), it is very clear and it is now settled law that for the Supreme Court to exercise its original jurisdiction in a civil case between the Federation and the State or states or between States, the following conditions must exist.**

- (i) A dispute between the Federation and a State or States or between States; and**

- (ii) The dispute must involve a question of law or fact or both; and
- (iii) The dispute must pertain to the existence or extent of a legal right.

See; AG Bendel State Vs. A.G of the Federation (1982) 3 NCLR 1; A.G of the Federation Vs. A.G of Imo State (1983) 4 NCLR 178; A.G of the Federation Vs. A.G of Abia State (2001) 11 NWLR (Pt.725) 689."

His Lordship, the Hon. Justice Onnoghen, JSC (as he then was) in the same judgment further opined as follows:-

"In constructing or interpreting the word "dispute" for the purposes of invoking the original jurisdiction of this court, it has been held that the word should be given such meaning that will effectuate rather than defeat the purposes of that section of the constitution. From the plain and simple meaning of the word in question, it is very clear that the dispute that must invoke the original jurisdiction of the Supreme Court must not be a personal dispute particularly as the purpose of the Constitution is not to make personal dispute a subject of the original jurisdiction of the Supreme Court. It is also the requirement of the Section 232(1) of the 1999 Constitution that the dispute must relate to the existence or extent of a legal right, which must not be personal."  
(P.....para.....)

10. *Supreme Court will not exercise its original jurisdiction merely for the purpose of interpreting the constitution*

It is note worthy that the learned senior counsel for the plaintiff had argued that the questions being raised and the reliefs being sought by the plaintiff in this case are on the proper interpretation of the provisions of the 1999 constitution (as amended).

There is no doubt, that pursuant to Sections 6(1) and 232(1) of the Constitution, the Supreme Court has the jurisdiction to interpret the constitution whether on appeal or in exercise of its original jurisdiction, the court will however, not exercise its original jurisdiction merely because the issue in the suit involves the interpretation of the constitution, where the matter is not fit for the exercise of its jurisdiction. See; A.G. Anambra Vs. A. G. of the Federation (Supra). It is not enough for a plaintiff to merely state that an act by the defendant is illegal or unconstitutional without showing how his civil rights and obligations are breached or threatened. See; A.G. Adamawa & Ors Vs. A. G. Federation (2005) 12 SCM 1. (P.....para.....)

11. *There is no dispute between Cross River State Government and Federal Republic of Nigeria*

**I have carefully considered the questions raised for determination and the reliefs sought by the plaintiff as earlier stated. And the affidavit evidence and the annexed documents, I am unable to see where lies the dispute between the Government of Cross River State and the Federal Republic of Nigeria as to confer the plaintiff with standing to invoke the original jurisdiction of the Supreme Court.**

**There is no doubt that the issue involved in this matter, inter alia, is the suspension of Mr. Justice Walter Samuel Nkanu Onnoghen, GCON from office as the Chief Justice of Nigeria by the President of the Federal Republic of Nigeria. And without going into the merit or otherwise of the action of the President in suspending the Hon. The Chief Justice of Nigeria, one wonders how that has created a dispute between the Government of Cross River State as an entity and the Federal Republic of Nigeria. In my view, the appropriate person to challenge the suspension and subsequent trial before the code of conduct tribunal is the officer who is on suspension but certainly not the Cross River State of which the Hon. Justice Onnoghen is said to be an indigene. I am therefore not in the slightest doubt that the plaintiff in this case lacks the required standing to institute this action as constituted. In other words, the original jurisdiction of the Supreme Court is not being properly invoked to adjudicate over this matter. (P.....para.....)**

12. *Lack of locus standi oust the jurisdiction of the court*

**Where a plaintiff is held to lack the locus standi to maintain an action, the finding goes to the issue of jurisdiction as it automatically denies the court jurisdiction to adjudicate further in the action. See; Alhaji Saka Opobiyi & Anor Vs. Iayiwola Muniru (2011) 12 SC (Pt. 111) 88.**

**In the circumstance, for lacking in the required locus standi to institute this action which in turn renders the Supreme Court incompetent to adjudicate on it, the preliminary objection is sustained, and this action, without any further ado, is liable to being struck out. This, to say the least, is not the appropriate court and the plaintiff is not the proper party, for any aggrieved party to ventilate whatever grievance is thought to exist, on the suspension of the Hon. Mr. Justice Walter Samuel Nkanu Onnoghen, GCON from office as the Chief Justice of Nigeria. Having come to the above irresistible conclusion, there is no need to further consider the merits of the originating summons filed by the plaintiff. The preliminary objection succeeds and it is upheld. (P.....para.....)**

13. *A finding of lack of locus standi goes to the issue of jurisdiction*  
**Where, as in this suit the defendants' allege that the plaintiff lacks locus standi to maintain the action, if found to be correct, it goes to the issue of jurisdiction as it denies the court jurisdiction to determine the action.**

**Indeed in Sunday Adegbite taiwo Vs. Serah Adegboro & 2 Ors (2011) 5SC (Pt.11) p. 179.**

**I did say that:**

**“The rule about locus standi developed primarily to protect the courts from being used as a playground by professional litigants, or, and meddle some interlopers, busy bodies who really have no real stake or interest in the subject matter of the litigation.”**

*(P.....para.....)*

14. *Principles of interpretation of statutes*  
**It has long been the position of the law that when provisions of the constitution and indeed of a statute are clear and free from ambiguity they should be given their plain meaning without any embellishments. See Mobil Vs. F.B.I.R (1977) 3SC p.53; Toriola Vs. Williams (1982) 7SC p. 27.**

**The additional original jurisdiction does not apply to this suit since the suit is not between the National Assembly and the President or any of the State House of Assembly, or any State of the Federation.**

**The suit is between a State and the Federation. Such suits are covered by Section 232(I) of the Constitution. Furthermore Section 232(i) of the Constitution should be interpreted to give effect to the restrictive original jurisdiction of the court. On no account should the section be interpreted to enlarge its scope. I am satisfied that the words used in Section 232(i) of the Constitution are simple, clear and free from ambiguity, so for this court to exercise its original jurisdiction in a civil suit between the Federation and States or between States there must be:-**

- (a) a dispute between the Federation and a State or**
- (b) the dispute must involve a question of law or fact or both;**
- and**
- (c) the dispute must pertain to the existence or extent of a legal right. (P.....para.....)**

15. *Plaintiff must show how his civil rights and obligations are breached*  
**What this preliminary objection is saying is that the plaintiff is not the proper person to sue for the reliefs claimed and the Supreme Court does not have original jurisdiction to hear the claims even if brought by the proper person.**

The respondents are not contending that the claim is not justiciable. I must further observe that it is not enough for the plaintiff to state that the act by the respondents is illegal or unconstitutional.

The plaintiff must go further to show how its (the Cross River State Government) civil rights and obligations are breached or threatened. The plaintiff would have locus standi where the reliefs claimed would confer some benefit on him (i.e. the plaintiff).

Locus standi will be accorded to a plaintiff who shows that his legal rights and obligations have been, or are being in danger of being violated or adversely affected. Has the plaintiff been able to establish this? No. A careful examination of the reliefs claimed reveals that they are all personal to Hon. Justice Walter Samuel Nkanu Onnoghen. The dispute is between his lordship and the Federal Government and he has a legal right which is personal to him and it involves both law and facts.

This dispute does not affect Cross River State, nor are they for the benefit of Cross River State, and the cause of action does not create a legal right for cross River State. The suit is of no benefit to Cross River State. Cross river State Government's rights are not in danger of being violated. Furthermore the legal rights alleged to have been infringed are those personal to his lordship. The rights or constitutional powers of the government of Cross River State are not in any way infringed, or are they in danger, or those of the people of Cross River State. It is a fatal error for the plaintiff to file this suit in the corporate capacity of the State. (*P.....para.....*)

*Per Rhodes Vivour (JSC)*

By the provisions of Section 6(I) and 232(i) of the constitution the top court has jurisdiction to interpret the constitution on appeal and in its original jurisdiction. The court would exercise its original jurisdiction where the mater falls within Section 232(i) or Act No. 3 of 2002, provided the correct parties are before the court and the suit involves the interpretation of the constitution.

Much as it is allowed for persons who are aware of a breach of the constitution to file action in court, such actions call for caution; if the litigant desires to invoke the original jurisdiction of the Supreme Court such actions must comply strictly with the requirements of the provisions of the Constitution which provides for the original jurisdiction of this court. If there is not strict compliance with the constitution this court may be submerged in litigation by busy bodies with no real stake in what they pursue. For example the plaintiff has no locus standi to file this suit. The suit is of no benefit to the plaintiff.

It must now be abundantly clear that the plaintiff has no locus standi to institute this suit in the Supreme Court under its original jurisdiction. His lordship has a cause of action but unfortunately one that cannot be heard in the Supreme Court in its original jurisdiction for the simple reason that his lordship

**is not a State. See Section 232(I) of the Constitution. The proper forum for these claims is a High Court.**

**In view of the fact that the plaintiff lacks locus standi to maintain the action, this court has no jurisdiction to determine the action.**

**The preliminary objection has merit. It is sustained. The need to consider the merits of this suit is no longer necessary since the preliminary objection has merit. The suit is hereby struck out. (P.....para.....)**

16. *Dispute has a constitutional dimension*

**The basic contest as I see it is, whether or not there is a dispute as contemplated under Section 232 (1) CFRN upon which the plaintiff, Cross River State, a federating entity or unit can activate the original jurisdiction of the Supreme Court as against the Federal Republic of Nigeria by seeking the interpretation of the Constitutional provisions stated above upon the happening of the prosecution of Justice Walter Onnoghen, Chief Justice of Nigeria and the follow up suspension by the Federal Government acting through the President of Nigeria. What I see as being asked of court is if the prosecution and suspension have been carried out in line with the Constitution. (P.....para.....)**

17. *Every Nigerian has locus standi to ensure that laws are not violated*

**This court has held in *Fawehinmi Vs. Akilu & Anor* (1987) 4 NWLR (Pt.67) 797 that when laws are broken every Nigerian is his brother's keeper. That is to say that every Nigerian has locus standi to ensure that laws are not violated or flouted.**

**Again in *A. G. Bendel State Vs. A. G. Federation* (1981) LPELR - 605, the Apex Court said that any person aware or who believes that any provision of the Constitution has been flouted has civil right/obligation that is, locus standi to go to court to ensure that governance is consistent with the Constitution.**

**The point of disagreement as can be discerned from the two opposing sides is that while the defendants objectors take the view that there is no dispute for which the State of Cross River can agitate the original jurisdiction of the Apex Court, the plaintiff/respondent disagrees. (P.....para.....)**

18. *The meaning of "Dispute"*

**Oxford Advanced Learners' Dictionary Int. Students Edition 7<sup>th</sup> Edition page 423 defines dispute to be:-**

- (a) **A conflict or controversy especially one that has given rise to a particular law suit.**
- (b) **An argument or a disagreement between two people, groups or countries.**
- (c) **To question whether a thing is true and valid.**

- (d) To argue or disagree strongly with somebody about something.

**Blacks Law Dictionary Ninth Edition page 540 presents the definition on dispute to be - controversy.**

**The same Black's Law Dictionary at page 378 defines controversy to be - A disagreement or dispute. (P.....para.....)**

*Per Odili (JSC)*

**Another way to say it is that in this democratic Nigerian nation there are three arms of government; Executive, Legislature and Judiciary and then the Executive sets in motion an extra-judicial prosecution since no reference had been made to the National Judicial Council before prosecuting a judicial officer and making an order that deprives him of rights to fair hearing and the same executive acting through the Nigerian President orders and effects the suspension of Justice Walter Onnoghen, Chief Justice of Nigeria, again without recourse to the National Judicial Council the body duly empowered with the disciplinary authority over judicial officers including the said individual and can one rightly say a dispute has not arisen for which any state of the federation and particularly state of origin from which the individual came to be a Nigerian would sit back and do nothing. I think not.**

**I say so because what has presented has the capacity if not properly addressed to destroy the structural foundation on which the nation is built. Therefore the plaintiff as any other person or state has the locus standi to rush to the Supreme Court in alarm at what it has seen as a flouting of the Constitution and a thorough violation of its provisions, The Supreme Court itself is duty bound to hear the plaintiff and the defence on the grievance of the plaintiff in the apex court's position as the custodian of our Constitution. See Section 232 (1) CFRN; Attorney-General of Lagos State Vs. Attorney-General of the Federation (2004) NSCQR Vo1.20, Page 99 at 186-187; A. G. Bendel State Vs. A. G. Federation (1981) LPELR - 605; Fawehinmi Vs. Akilu (1987) LPELR - 1257; Section 46 of the 1999 Constitution of the Federal Republic of Nigeria (As Amended).**

**Indeed emphasis need be given that what has emerged as the subject matter of the interpretation of the provisions of the Constitution of the Federal Republic of Nigeria relating to the separation of powers of the three arms of government, namely, Executive, Legislature and Judiciary. Also on the front burner is the matter of the independence of the judiciary as issue held sacred in a Federation to which all the federating entities, states and citizenry are assured of their protection according to law.**

**It is a misrepresentation of the substance of what is on ground to allege that the contest is personal to Justice Walter Onnoghen and it is his individual**

**legal fight is in given the coloration of a dispute between State and Federation. It is not so. (P.....para.....)**

19. *Approach of court to the interpretation of constitution*  
**In the case of Elelu-Habeeb Vs. Attorney-General of the Federation (2012) 13 NWLR (Pt.1318) 423 at 520, an appeal I had the privilege of being in the panel, Adekeye JSC stated thus:-**

**"Whether the court is called upon to interpret any provisions of the Constitution, it must advert its mind to the fact that our Constitution is the basic document that regulates the affairs of the nation by setting out the functions and powers of the different components of government namely the executive, the legislature and the judiciary. It also regulates the relationship between the citizens of the state. The various arms of the government at all levels are bound by the constitution and have a duty to ensure its enforcement. A court as the custodian of the Constitution cannot close its eyes to the infringement of the Constitution. If any arm of the government including the court itself acts unconstitutionally, the court has the inherent power under Section 6 (6) of the Constitution to intervene". (words in barracks and underlining supplied).**

**Furthermore, earlier at page 514 paras E-G, it was held that:-**

**"Contrary to the opinion of the lower court, a litigant can seek declaration of the Federal High Court on the interpretation of the Constitution as it affects the Federal Government or its agencies, in so far as it affects his or her legal right. If any citizen perceives any threat to his right, access to court for interpretation of the Constitution to prevent damage to his right or preserve the right must be free and without any hindrance. Any citizen must be free to approach the court where the claim relates to him or in any way touches the power, authority, obligation and responsibility of the Federal Government or its agencies". (Underlining supplied).**

**In his contribution in the above case, Mohammed, JSC (as he then was) at page 491 paras A-E also held thus:-**

**"The golden rule governing the interpretation of constitutional provisions is that the words used in the provisions must prima facie be given their ordinary meaning where such words are not ambiguous. The words used in the provisions of the Constitution must also be given liberal interpretation as stated in the leading cases on the subject of constitutional interpretation in Nafiu Rabiu Vs. The State (1980) 8-11 SC 130 at 149, (1981) NCLR 293 and Senate of the National Assembly Vs. Momoh (1983) 4 NCLR 269.**

**In the present case, there is no doubt whatsoever that the dispute that was brought before the trial Federal Court in the originating summons that was filed before it involves the subject of provisions dealing with the procedure made in the 1999 Constitution for taking disciplinary action against a Chief Judge of a State found wanting in the discharge of his functions to warrant his removal from office. It is therefore necessary in my view to examine all the relevant provisions contained in the constitution governing the procedure for the appointment and removal of judicial officers. This is because while a constitutional power should not be used to attain an unconstitutional result, the language of the constitution, where clear and unambiguous must be given its plain and evident meaning". (Underlining supplied).**

**The pathway to the interpretative module to take as above shown in the case of Elelu-Habeeb (supra), then raises the question of whether the CFRN recognises and guarantees the doctrine of separation of powers along with the checks and balances relating to the Legislative, Executive and Judicial arms of Government. (P.....para.....)**

20. *The constitution provides separation of powers*  
**To tackle that question, I shall firstly refer to Sections 4, 5 and 6 CFRN which provide as follows:-**

**"4.(1): The legislative powers of the Federal Republic of Nigeria shall be vested in National Assembly for the Federation which shall consist of a Senate and House of Representatives.**

**5.(1): Subject to the provisions of this Constitution, the executive powers of the Federation (a) shall be vested in the President.....**

**6.(1): The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation".**

**I agree with learned counsel for the plaintiff that the above provisions of the constitution have received several judicial pronouncements including Kayili Vs. Yibuk (2015) 7 NWLR (Pt. 1457) 26 at p.55 where this court held (Per OGUNBIYI, JSC), thus:-**

**"The constitution is very clear and specific on separation of the Powers between the arms of government to wit the executive, legislature and the judiciary at both federal and state levels; thus the executive cannot exercise or usurp the powers of the judiciary and vice versa".**

**See also (i) Elelu-Habeeb Vs. A.G. Federation (2012) 13 NWLR (Pt.1318) 423 at P.520 paras. G-E (Per ADEKEYE, JSC);**

**(ii) Nganjiwa Vs. Federal Republic of Nigeria (2018) 4 NWLR (Pt.1609) 301 at P.343 paras. F-G (Per OBASEKI-ADEJUMO, JCA). (P.....para.....)**

21. *The constitutional duties of National Judicial Commission*

**On the question regarding the disciplinary control over judicial officers, a reference to Section 153 (1), 158 (1) paragraphs 21 (a) (i) and (b) of Part 1 of the Third Schedule to the 1999 Constitution (as amended) would offer the beacon of light and I so refer thus:-**

**"153,(1): There shall be established for the Federation the following bodies, namely -  
(i) National Judicial Council**

**158.(1): In exercising its power to make appointments or to exercise disciplinary control over persons, the Code of Conduct Bureau, the National Judicial Council, the Federal Civil Service Commission, the Revenue Mobilisation and the Fiscal Commission, the Federal Character Commission, and the Independent National**

**Electoral Commission shall not be subject to the direction or control of any other authority or person.**

**21.(a)(I): The National Judicial Council shall have power to recommend to the President from among the list of person submitted to it by-**

- (i) The Federal Judicial Service Commission, persons for appointment to the offices of the Chief Judge of Nigeria, the Justices of the Supreme Court, the President and Justice of the Court of Appeal, the Chief Judge and Judge of the Federal High Court, and**

**21.(b): recommend to the President the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph, and to exercise disciplinary control over such officers". (Underlining supplied1.**

**In Elelu-Habeeb Vs. A.G. Federation (supra) at Pp.492-293 paragraphs F-B, it was held per MOHAMMED, JSC (as he then was) stated thus:-**

**"It is quite plain from the provisions of paragraph 21 sub-paragraphs (c) and (f) of Part 1 of the Third Schedule to the constitution of the Federal Republic of Nigeria 1999, that the National Judicial Council is the body that had been assigned the duty and responsibility of recommending to the Governors of the States of the Federation suitable persons for appointments to the offices of Chief judges of the States and other judicial officers, the same National Judicial Council is also empowered under sub-paragraph (d) of paragraph 21 to recommend to the Governors of the States the removal from office of the Chief judges of the states and other judicial officers of the states and also to exercise disciplinary control over such Chief Judges of the states and other judicial officers of the States. Therefore, from these very clear provisions of the Constitution which are very far from being ambiguous, the Governors of the States and the Houses of Assembly of the State cannot exercise disciplinary control touching the removal of the Chief Judges of the States or other officers in the States". (P.....para.....)**

22. *National Judicial Counsel is the sole body to recommend to the president the appointment or removal of judicial officer*

**It can be said that Elelu-Habeeb had to do with State Judicial Officer but coming along in a similar tone but embracing Judicial Officers at the National level is the case of: Nganjiwa Vs. Federal Republic of Nigeria (supra) at Pp.340-341, paragraphs E-H, it was also held (Per OBASEKI-ADEJUMO, JCA), thus:-**

**"A cumulative reading of these relevant provisions of Section 153 (1), 158 (1), paragraph 21 (b) of Part 1 of the Third Schedule of the 1999 Constitution (as amended) is to the effect that the National Judicial Council (NJC) is the sole body with authority to recommend to the President for the appointment and removal of any Judicial Officer at the Federal level and also exercise disciplinary control over Judicial Officers.**

**In line with paragraph 21 (h) and (i) thereof, the NJC which has the power to collect, control and disburse all monies for the judiciary and to deal with all other matters relating to policy and administration, and it is in this regard that National Judicial Policy of April, 2016; Judicial Discipline Regulations of 9<sup>th</sup> March 2017; Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria of February 2016; Revised NJC Guidelines and procedural rules for the appointment of judicial officers of all superior courts of record in Nigeria of 3<sup>rd</sup> November, 2014 were all formulated.**

**It is relevant to note that the Revised Code of Conduct for judicial Officers of February 2016 at page 2 thereof states:-**

- 1. The code applies to all categories of Judicial Officers throughout the Federation as defined in this code.**
- 2. Violation of any Rules contained in this code shall constitute judicial misconduct and or, misbehaviour and shall attract disciplinary actions".**

**Rule 3 makes provision in relation to fidelity to the Constitution and the Law.**

- "3. A Judicial Officer should be true and faithful to the Constitution and the law, uphold the course of justice by abiding with the provisions of the Constitution and the Law and. should acquire and maintain professional competence".**

**Rule 10 prohibits the acceptance of gift, bequest, loan, favour, benefit, advantage, bribe etc. It provides:-**

- (iii) A judge shall not give or take and shall not encourage or condone the giving or taking of any benefit, advantage, bribe however disguised for anything done or to be done in the discharge of a judicial duty.**

**The appellant, presently a judge of the Federal High Court, was charged vide a criminal information for conduct/acts which are tantamount to a breach of his oath of office and breaches contained in the Revised Code of Conduct of February, 2016 and which are at the same time offences under the Criminal Law.**

**The Judicial oath is administered at the swearing in of a Judicial officer as contained in the 7<sup>th</sup> Schedule of the Constitution. As a serving judge, the appellant is under the management, control and disciplinary 'jurisdiction' of the National Judicial Council as envisaged under paragraph 21 (b) Part 1 of the Third Schedule to the 1999 Constitution (as amended). The foregoing has been affirmed in a host of judicial authorities including Elelu-Habeeb & Anor Vs. A.G. Federation (supra); Opene Vs. NJC (supra); Abdullahi Vs. Governor; Kano Vs. State (supra)".**

**Again with regard to the breach of judicial officer occurring and the role of the NJC in that regard, Obaseki-Adejumo JCA stated in Nganjiwa Vs.FRN (supra) thus:-**

**"Whenever a breach of judicial oath occurs, it is a misconduct itself, then the NJC is the appropriate body to investigate such breaches by the judicial officer and if found to be so, such judicial officer shall face disciplinary action and the NJC may, recommend the removal of such a judicial officer to the appropriate authority which is either the President in the case of a Federal Judicial Officer or the Governor of the State in the case of a State judicial Officers and/or take other actions appropriately. When this is done and accepted by the appropriate authority in compliance with the provisions of the Constitution, then the relevant law enforcement agent or agency is at liberty to make the said judicial officer face the wrath of the law.**

**Any act done by the law enforcement agent or agency in violation of the above is tantamount to denying the NJC its powers to discipline Judges in accordance with the provisions**

of Section 153 (1) and paragraph 21 part 1 of the Third Schedule of the 1999 Constitution (as amended). See paragraph 21 (a) and (b) of the third schedule, part 1 of the 1999 Constitution (as amended) respectively. Whenever there is an allegation of official misconduct against a judicial officer and the above stated process is not adhered to, it amounts to jumping the gun and ipso facto a direct violation of the Constitution.

Recourse to the National Judicial Council is a condition precedent as clearly set out by the Constitution, and any attempt by any Agency of Government to by-pass the council will amount to failure to observe condition precedent thereby leading to flagrant violation of the Constitution".

Learned justice of the Court of Appeal, Obaseki-Adejumo JCA took the view that a condition precedent exists before a charge can be filed against a judicial officer in order to inure the court of jurisdiction to try the case. That stance in my humble view tallies with what I see as the correct interpretation of sections 153 (1), 158 (1) paragraph 21 (b) of Part 1 of the Third Schedule of Constitution of the Federal Republic of Nigeria and Section 292 (1) of the same Constitution.

I shall quote the said Section 292 (1) of the Constitution of the Federal Republic of Nigeria, thus:-

**“292(1): A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances:**

- (a) In the case of-
- (i) **Chief Justice of Nigeria .... by the President acting on an address supported by 2/3 majority of the Senate;**

*(P.....para.....)*

23. *Code of conduct tribunal cannot try a judicial officer without records to the National Judicial Council*

The case of Okoya Vs. Santilli (supra) cited by the defence could not have said it better for our purpose and even in line with the position taken by the plaintiff. That is to say that while the regular courts are enjoined to keep within their space and not encroach on matters within the exclusive preserve of the Code of Conduct Tribunal, in the same vein, the Code of Conduct Tribunal has no business veering into the arena circumscribed by the same Constitution for the National Judicial Council or take on a judicial officer without the matter concerning a particular individual clearing the first hurdle which is the

recourse to the National Judicial Council or NJC for short. See Sections 153, 158, 21 (a) of the Constitution of the Federal Republic of Nigeria, Part 1 of the Third Schedule. (*P.....para.....*)

*Per Odili (JSC)*

The defence has made much on the fact that all that was done to Justice Onnoghen was suspension and nothing more which stance the plaintiff challenges the executive authority to do so. It is for emphasis that I reiterate the dictum of Obaseki-Adejumo JCA in *Nganjiwa Vs. FRN (supra)* as I see no other interpretation to be rendered for Sections 153 (t), 158 (I), Paragraph 21 (b) of Part 1 of the Third Schedule of the 1999 Constitution (as amended) that the National Judicial Council (NJC) is the sole body with authority to recommend to the President for the appointment and removal of any judicial officer at the Federal level including, Justice Onnoghen CJN and the NJC has the authority to exercise disciplinary control over the same judicial officers. Therefore, the President cannot exercise any disciplinary control touching the Federal Judicial Officers including the Chief Justice of Nigeria without the matter being first referred to him by the NJC.

The case of *Elelu-Habeeb Vs. A. G. Federation (supra)* is relevant in this instance as there is no by-passing the NJC to get at any judicial officer, Federal or State.

The definition as fully explained by Oguntade JSC in *Longe Vs. FBN* shows that 'suspension' though a temporary privation or deprivation, cessation or stoppage of or from the privileges and rights of persons remains a disciplinary action, a power exclusive to the National Judicial Council which is not available to either the President in the case of Federal Judicial Officers or the Governors in the case of State Judicial Officers without clearing from the NJC. It is a condition precedent and cannot be by-passed or over shot and when done as such renders the act done in disregard of the condition precedent, null and void.

I have no difficulty in distinguishing the *A. G. Federation Vs. A. G. Anambra State (supra)* because at the base of the contest in the case above is the Governorship context of Peter Obi, an indigene of Anambra State, a contest that was the internal affairs of people of Anambra State, a federating unit whose entity in that regard is respected and the Federal Government ought not to be dragged into a dispute as to who would emerge or who has emerged to govern the entity.

That situation is different from the one at hand which has to do with the removal or suspension of the Chief Justice of Nigeria, the concern of every Nigerian and of each state of the federation. Therefore where it looks as if the institution, the Judiciary of Nigeria, the judicial personnel operating therein and above all, the judiciary occupying the third arm position in the government

of Nigeria, is under encroachment, violation, attack outside the constitution, then no one should temporise in reacting . The federating units, States and particularly the state of origin of the occupant of the institutional position should cry out with the weapon endowed by the constitution which is what has happened in this case with the plaintiff rushing in with the authority, given it by Section 232 CFRN to ignite the original jurisdiction of the Supreme Court.

The act of the Cross River State as plaintiff is commendable in our nation so that the patriotic zeal we all hope for would be ignited in persons knowing that when their rights are trampled upon, a Nation or State that cares would not let them down. With that, one would with eyes closed, defend with all he has the integrity of the Nation. This should be encouraged and not denigrated.

See *Fawehinmi Vs. Akilu & Anor (1987) LPELR - 1257*; *A. G. Bendel State Vs. A. G. Federation (1981) LPELR - 605*. (*P.....para.....*)

24. *The fundamental nature of jurisdiction*  
 The issue of jurisdiction in our adjudication process remains a fundamental one. Once raised it must be determine one way or another for if the Court proceeds without the necessary jurisdiction the eventual decision, no matter how well the court conducted the proceedings, is a nullity. This is thus the stage to decide whether or not indeed this court has jurisdiction to proceed on plaintiff's claim in order to save time of the parties and the court. See *Madukolu Vs. Nkemdilim (1962) 1 SCNLR 34* and *Adeyemi Vs. Opeyori (1976) 9 - 10 SC 18*. (*P.....para.....*)
25. *Plaintiff must be the proper party to sue.*  
 I entirely agree with learned counsel to the defendants that it is only when the civil rights and obligation of the person invokes the jurisdiction of the court are in issue for determination that the judicial powers of the court may be exercised. The principle is that standing is only accorded to a plaintiff who shows that his civil right and obligation have been violated or threatened by the intended defendant sought to be sued. Put differently, the plaintiff must be the proper party to sue. See *Senator Abraham Adesanya Vs. The President Of The Federal Republic Of Nigeria & Anor (1981) 5 SC 112*, *Buraimoh Oloriade & Ors Vs. Oyebi & Ors (1984) 5 SC 16* and *Kayode Bakare & Ors Vs. Ajose Adeogun & Ors (2014) 1 SCNJ 255*. (*P.....para.....*)
26. *The nature and purport of 232 CFRN 1999 (as amended)*  
 Section 232 of the 1999 Constitution (as amended) pursuant to which the plaintiff institutes its action provides:-

**“232 (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.**

**(2) In addition to the jurisdiction conferred upon it by subsection (1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred Upon it by any Act of the National Assembly.”**

**In my firm and considered view, the foregoing section of the Constitution is precise and unambiguous. The applicable rule of interpretation here, the golden rule, is that the words used in the section must be given their natural and ordinary meaning unless doing so will result in absurdity or inconsistency with the rest of the Constitution. See Peoples Democratic Party & Anor Vs. Independent National Electoral Commission & Ors (1999) LPELR - 24856 (SC) and DR. Olubukola Abubakar Vs. Federal Republic of Nigeria (2016) 40013 (SC).**

27. *The nature of dispute that will invoke the original jurisdiction of the Supreme Court must not be a personal dispute*

**In AG Anambra Vs. AG Federation (2007) LPELR - 603 (SC), Tobi JSC (of blessed memory) delivering the lead judgment of the court enthused on Section 232 of the 1999 Constitution (as amended) as follows:-**

**“The original jurisdiction of this court is provided for in Section 232 of the Constitution of the Federal Republic of Nigeria, 1999. The jurisdiction includes any dispute between the Federation and a State or between States. Although this suit is commenced by the Attorney-General of Anambra State against the Attorney-General of the Federation, the dispute is in respect of when the four-year tenure of the Governor of Anambra State, Mr. Peter Obi, will expire. The declaration sought is that the four- year tenure should be reckoned from 17<sup>th</sup> March, 2006 when the Governor subscribed to the oath of allegiance and the oath of office. In my view, the matter does not affect the State Government. And what is more, there is no dispute against the Federal Government. In effect, no dispute arises between the Anambra State Government and the Federal Government of Nigeria. As a matter of law, the**

**Federal Government qua Government of the Federation has nothing to do in respect of the tenure, of a Governor.**  
*(Underlining mine for emphasis).*

**Onnoghen JSC (as he then was) opined in his concurring contribution thus:-**

**"In constructing or interpreting the word "dispute" for the purposes of invoking the original jurisdiction of this court, it has been held that the word should be given such meaning that will effectuate rather than defeat the purposes of that section of the Constitution. From the plain and simple meaning of the word in question, it is very clear that the dispute that must invoke the original jurisdiction of the Supreme Court must not be a personal dispute particularly as the purpose of the Constitution is not to make personal dispute a subject of the original jurisdiction of the Supreme Court. It is also the requirement of the Section 232(1) of the 1999 Constitution that the dispute must relate to the existence or extent of a legal right, which must not be personal."** *(Underlining mine for emphasis).*

**My lords, we are bound by the foregoing decision of this court. In the instant suit it is evident from the originating summons that the cause of action by virtue of which the plaintiff sets out to invoke the original jurisdiction of this court is as to the civil rights and obligation of Hon. Justice Onnoghen, the Hon. CJN, the plaintiff perceives are violated and or threatened with violation by the defendants rather than the plaintiff's own rights and obligation. On the authorities, therefore, it lacks the necessary standing to invoke the court's jurisdiction under Section 232 of the Constitution. (P.....para.....)**

28. *Preliminary objection must be determined first*

**It is a fundamental principle of law that once a preliminary objection is raised challenging the jurisdiction of the court to entertain a cause or matter, it must be determined first before the consideration of any other matter, for in the event that the court lacks jurisdiction, a hearing on the merit would be an exercise in futility. Thus, even where the objection is taken along with the substantive suit, as in this case, the preliminary objection must be determined first. See: N.D.P. Vs INEC (2013) 6 NWLR(Pt. 1350) 392; Garba Vs. Mohammad (2016) LPELR – 40612 (SC) @ 57 B; F.B.N. Plc. Vs. TSA Ind. Ltd (2010) 15 NWLR (Pt. 1216) 247. (P.....para.....)**

29. *Definition of "Locus standi"*

"Locus Standi" was defined in the case of **Inakoju Vs. Adeleke (2007) 4 NWLR (Pt. 1025) 423 @ 601 - 602 G – D** as follows:

***"Locus Standi or Standing is the legal right of a party to an action to be heard in litigation before a court of law or tribunal. The term entails the legal capacity of instituting or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever.***

***It is the law that to have locus standi to sue, the plaintiff must show sufficient interest in the suit. One criterion of sufficient interest is whether the party could have been joined as a party to the suit. Another criterion is whether the party seeking redress will suffer some injury or hardship from the litigation.***

***A party who seeks a declaratory relief in the constitution must show that he has a constitutional interest to protect and that the interest is violated or breached to his detriment The interest must be substantial, tangible and not vague, intangible or caricature. In ascertaining whether the plaintiff in an action has locus standi, pleadings, that is the statement of claim must disclose a cause of action vested in the plaintiff and the rights or obligations or interest of the plaintiff which have been violated."***

See also: **Thomas Vs. Olufosoye (1986) 1 NWLR (Pt.18) 669 @ 685; Daniel Vs. INEC (2015) LPELR - 24566 (SC) 47 A-D. (P.....para.....)**

30. *How to determine locus standi*

**In B.B. Apugo & Sons Ltd Vs O.H.M.B. (2015) LPELR - 40598 (SC) @ 85 - 86 B - A,** it was held by this court that there are two tests for determining whether a person has locus standi. (1) The action must be justiciable, and (2) There must be a dispute between the parties. We are concerned with the second test here. It is also settled law that *locus standi* is a threshold issue that affect the jurisdiction of the court. Where the plaintiff lacks *locus standi*, the court would have no jurisdiction to entertain the suit. See: **Daniel Vs. INEC (supra). (P.....para.....)**

31. *The nature and purport of Section 232 CFRN*

**By this suit, the plaintiff seeks to invoke the original jurisdiction of this court. The question is whether it has the *locus sandi* to do so?**

The circumstances in which the Supreme Court may exercise original jurisdiction in a cause or matter are set out in Section 232 of the 1999 Constitution, as amended, which provides:

"232(1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.

(2) In addition to the jurisdiction conferred upon it by Subsection (1) of this section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by an Act of the National Assembly. Provided that no original jurisdiction shall be conferred on the Supreme Court with respect to any criminal matter."

(P.....para.....)

32. *Conditions that must exist before Supreme Court exercises its original jurisdiction*  
**In A.G. Anambra State Vs. A.G. Federation (2007) 12 NWLR (Pt. 1047) 4 @ 57 D-E, this court held that the following conditions must exist for the exercise of the court's original jurisdiction:**

- (a) a dispute between the Federal Government and a State Government; or between State Governments;
- (b) the dispute must involve a question of law or fact or both; and
- (c) the dispute must pertain to the existence or extent of a legal right. (P.....para.....)

33. *The meaning of "dispute"*  
**In the same case, it was held that the word 'dispute' for the purpose of invoking the original jurisdiction of the court is a conflict or controversy that has given rise to a particular law suit. It was also defined as acts, argument, debate, claims as to rights, whether in law or fact, varying opinion, whether passive or violent or any anxiety or disquiet. One of the essential features of a dispute for the purpose of invoking the original jurisdiction of the court is that the dispute must pertain to the legal relations of the parties in such a manner as to show that they have adverse legal interests in the subject matter of the suit. It is also trite that the Supreme Court cannot exercise its original jurisdiction to determine any dispute between individuals or between persons and Federal or State**

**Government. See: Plateau State Vs. A.G. Federation (2006) 3 NWLR (Pt.967) 346 @ 393 C-D. (P.....para.....)**

34. *To invoke the Supreme Court original jurisdiction the dispute must involve the interest of the federation and states.*

**See also: A.G. Federation Vs. A.G. Anambra State (2017) LPELR- 43491 (SC) @ 19 -27 F-C, per Okoro, JSC where it was held that Section 232(1) of the 1999 Constitution, while creating *in personam* jurisdiction over the Federation and a State or between States, it limits substantially, the subject matter jurisdiction to only disputes between the Federation and a State or between States. His Lordship held that to invoke the original jurisdiction of the court, the dispute must involve the interest of the Federation as a unit and a State or States. (P.....para.....)**

*Per Kekere Ekun (JSC)*

**In determining whether the plaintiff has the necessary *locus standi* to bring this suit, recourse has to be made to its claim as captured in the originating summons. I am in agreement with learned counsel for the defendants that a careful perusal of the affidavit in support of the summons and the reliefs sought, reveal that the subject matter of the suit relates to:**

- (a) **The validity of Charge No. CCT/ABJ/10/19 between Federal Government of Nigeria Vs. Hon. Justice Onnoghen, Nkanu Walter Samuel pending before the code of conduct Tribunal.**
- (b) **The body vested with the powers to appoint, recommend and remove judicial officers; and**
- (c) **The jurisdiction of the Code of Conduct Tribunal to try Justice Onnoghen, Nkanu Walter Samuel on alleged offences bordering on non-declaration of assets. (See paragraphs 2, 3, 6, 7 and 9 of the affidavit in support of the originating summons.**

**The question then arises: Do any of these issues constitute a dispute between the government of Cross Rivers State and the Federation of Nigeria? I do not think so. There is no doubt that the questions involved in this suit are very weighty and their determination on the merit will have far-reaching consequences for the Nigerian Judiciary as an arm of government. Whether or not the Code of Conduct Tribunal has jurisdiction over any judicial officer for any act of alleged official misconduct without a formal complaint of such**

**misconduct first being made to the National Judicial Council having regard to Section 153(1), 158(1) and paragraph 21(b) of Part 1 of the Third Schedule to the 1999 Constitution, as amended, is no doubt justiciable and worthy of consideration by a court of competent jurisdiction. Given the facts of this case, this court lacks the competence to determine the suit in its original jurisdiction. (P.....para.....)**

35. *Subject matter of the suit is personal*

**The catalyst for the institution of this suit was the filing of Charge No. CCT/ABJ/10/19 against Hon. Mr. Justice Walter Samuel Nkanu Onnoghen, Chief Justice of Nigeria, before the Code of Conduct Tribunal by the Executive arm of Government through the Attorney General of the Federation. It is averred that Hon. Mr. Justice Walter Samuel Nkanu Onnoghen is an indigene of Cross River State and the highest judicial officer in the State. Learned senior counsel for the plaintiff contended that having regard to the coincidental state of origin of Hon, Mr, Justice Onnoghen, it is the duty of any responsible State Government to ensure that none of its subjects is violated constitutionally. He strongly maintained that the subject matter of the suit is not personal to Hon. Mr. Justice Onnoghen but pertains to the office of the Chief Justice of Nigeria as an institution and the entire Judiciary.**

**Throughout his submissions, the learned senior counsel failed to demonstrate what legal right Cross River State seeks to protect by this suit. I am inclined to agree with learned counsel for the defendants that the subject matter of this suit is personal to Hon. Mr. Justice Onnoghen.**

**The office of Chief Justice of Nigeria is not a prerogative of Cross River State. Whether or not the Federal Government rode roughshod over the powers of the National Judicial Council in instituting the charges against the Hon. Mr. Justice Onnoghen, is at the best, an issue to be taken up by Hon. Mr. Justice Onnoghen and/or the National Judicial Council and not the Cross River State government. (P.....para.....)**

36. *Nature of action against violation of constitution*

**Learned senior counsel relied on the authority of A.G. Bendel State Vs. A.G. Federation (1981) LPELR -605 (SC) in support of the contention that any person who is aware of or believes that any provision of the constitution has been flouted, has the civil right/obligation to go to court to ensure that governance is in conformity with the Constitution. The issue is whether it is only by invoking the original jurisdiction of this court that this can be achieved? Again the question must be answered in the negative. As rightly observed by learned counsel for the defendants, Section 46 of the Constitution unambiguously provides:**

**"46(1) Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress." (P.....para.....)**

37. *Supreme Court will not exercise its original jurisdiction merely for the interpretation of the constitution*

**Another argument on behalf of the plaintiff is that it seeks the interpretation of the Constitution as it relates to the separation of powers between the Executive and the Judiciary. It was held in A.G. Anambra State Vs A.G. Federation @ 89 – 90 B - C (supra), that although the Supreme Court has jurisdiction to interpret the constitution, whether on appeal or in exercise of its original jurisdiction, it would not exercise its original jurisdiction simply because the issue in a suit involves the interpretation of the constitution where the matter is not fit for the exercise of its original jurisdiction.**

**In the instant case, it is my considered view that the plaintiff lacks the *locus standi* to invoke the original jurisdiction of this court. (P.....para.....)**

38. *Conditions which must exist before supreme Court invoke its original jurisdiction*

**The conditions which must exist before this court can invoke its original jurisdiction on a matter, in the light of the provision of section 232 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has been spelt out in a litany of decided cases as follows:**

- (a) a dispute between the Federation and a State or States and between states;
- (b) the dispute must involve a question of law or fact both; and
- (c) the dispute must pertain to the existence of a legal right.

**See A-G. Anambra State Vs. A-G, Federation (2007) 12 NWLR (Pt. 1047) 1. Per Onnoghen, J.S.C. (as he then was) at page 73; A. G. Bendel State Vs. A.G. of the Federation (1981) 3 NCLR 178; Attorney General of the Federation Vs. Attorney General of Abia State (2001) 11 NWLR (Pt. 725) 689. (P.....para.....)**

39. *The dispute must be between the federation and states*

**The provision of section 232 of the 1999 Constitution has already been reproduced in the lead judgment and I adopt same to reiterate the point that under the section, a legal right must exist, and the dispute must be between the Federation and a state or states or between states. In the instant case, a careful perusal of the affidavit in support of the originating summons reveals that the plaintiff has commenced this action in respect of rights personal to the**

**Honorable Chief Justice of Nigeria. Mr. Justice Walter Samuel Nkanu Onnoghen, GCON, which rights are being threatened. The right of the plaintiff as a state of the Federation is not threatened. The plaintiff has not been able to disclose any enforceable right to sue in this matter. Therefore the reliefs sought cannot be supported by virtue of section 232 of the Constitution. (P.....para.....)**

40. *The nature and purport of Section 6(6)(b) of CFRN 1999 (as amended)*  
**Section 6(6)(b)**

**"6. (1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts establishment for the Federation.**

**(6) The judicial powers vested in accordance with the foregoing provisions of this section –**

**(b) shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;**

**Section 232(1)**

**232. (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a state or between- states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends." (P.....para.....)**

41. *When a state government can invoke the original jurisdiction of the Supreme Court*  
**Clearly, by virtue of the above provisions, a State Government may be able to invoke the original jurisdiction of this court subject to stipulated constitutional criteria. See Attorney-General of the Federation Vs, Attorney-General of Imo State (1983) 4 NCLR 178, where this court held that before original jurisdiction of this Court is invoked under section 212 of the 1979 Constitution (in pari materia with Section 232(1) of the 1999 Constitution as amended), the following must be satisfied:**

- "1.) There must be a justiciable dispute involving any question of law or facts**  
**2. The dispute must be between the federation and a state in**

**its capacity as one of the constituent units of the federation; or between the Federation and more State than one in their capacities as members of the constituent units of the Federation; or**

- 3. between State in their aforesaid capacities, and the dispute must be one on which the existence or extent of a legal right in the aforesaid capacity is involved.”**

**See also Governor of Ondo State Vs. President of the Federation (1985) 6 NCLR 681; Governor Of Kaduna State Vs. The President of The Federal Republic of Nigeria (1981) 2 NCLR 786; President Of The Federal Republic of Nigeria Vs. Governor of Kano State (1982) 3 NCLR 819.**

**The above are constitutional conditions to invoking original jurisdiction of this court. A suit that seeks to invoke original jurisdiction of the Supreme Court in breach of the above constitutional requirements will be incompetent, and the plaintiff will also be lacking in locus standi to institute same. The court has in several landmark decisions considered the issue of locus standi to entail the legal capacity of instituting or commencing an action in a competent court of law; See Inakoju Vs. Adeleke (2007) All FWLR (Pt.353) 1 at 96; Thomas Vs. Olufosoye (1986) 2 SC 325, Momoh Vs. Jimo Olotu (1979) ALL NLR 117, at 123, A.G. ANAMBRA Vs. EBOH (supra). (P.....para.....)**

**42. *The meaning of locus standi***

**Locus standi is a condition precedent to instituting an action before a court of law. It is a legal voice with which the plaintiff amplifies his legal rights over and above those of ordinary men. The issue of locus standi constitutes a condition precedent to the institution of any action before a court of law. For an action to be maintainable the person instituting it must have legal capacity, otherwise the court is robbed of necessary jurisdiction to entertain it. Whenever the issue of locus standi is raised, the court before whom the action is pending is under a duty to determine it first before going into the merit of the action itself. See A.G Federation Vs. Abubakar (2007) 10 NWLR (Pt.1041) 1 at 75; Adewunmi Vs. Ogebelle (1983) 4 WCLR (volume 4) 662 at 677 where the court further extended the frontiers of locus standi to the effect that a general interest common to all members of the public is not a litigable interest to allow standing and that a citizen, without more, has no right. (P.....para.....)**

43. *When a plaintiff is said to have locus standi*  
**Judicial parameters of locus standi had been set in the case of Abacha & Anor Vs. AG Federation 82: ORS (2013) LPELR-21479. The court also pronounced on the nature of locus standi citing in the case of Nyame Vs. Federal Republic of Nigeria (2010) 42 NSCQR 54 and held that:**

**“The term locus standi entails the legal capacity of instituting, initiating or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance from anybody or person whatsoever including the provisions of any law.**

**The fundamental aspect of locus standi is that it focuses on the party seeking to get its complaint heard before the court. It is settled law that the plaintiff will have locus standi in a matter only if he has a special interest or alternatively if he can show that he has sufficient or special interest in the performance of the duty sought to be enforced or where the interest is adversely affected .....**” (P.....para.....)

*Per Bage (JSC)*

**The defendants had relied on the provisions of Section 232(1) to contend that the plaintiff has no legal right to institute this action in the way and manner It had done given the subject matter of the suit and the real essence of the reliefs being sought herein. The law and principle of locus standi is intended to provide effective sieves or filters against legal, procedural and more importantly constitutional absurdities of this nature. Moreso, this is a situation in which the act complained of has not in any way or manner affected civil right and/or obligations of the plaintiff over and above that States of the Federation.**

**The Office of the CJN is not that of a State but of the whole Federation of Nigeria. There is nothing in the Constitution or the law, in my most humble view that confers exceptional locus standi in the Government of Cross-River State beyond the fact that Hon., Mr. Justice Onnoghen is an indigene. The Nigerian Constitution should not be subjected or succumb to legal pettiness of this nature. Even if there are legal rights to be pursued, Hon. Justice Onnoghen or the judicial regulatory institution- the NJC, are both best vested with locus standi to institute actions in the court of law in line with section 46(1) of the Constitution, which states:**

**"46. (1) Any person who alleges that any of the provisions of this Chapter has been; is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress." (P.....para.....)**

44. *How to determine whether a court has jurisdiction*

**The settled position of law is that for the court to be competent to exercise jurisdiction over a matter, it is a necessary condition that- the proper parties be identified. See EHINDIMHEN Vs. MUSA (2000) 8 NWLR (Pt.669) 540 at 569. In determining whether or not a court has jurisdiction, without delving into the merit or otherwise of the case, all that the court needs do is to look at the writ of summons and statement of claim of the claimant in this case the originating summons, to establish the basis of the suit on which the court may anchor its jurisdiction. See ADEYEMI Vs. Opeyori (1976) 9-20 SC 31.**

**A careful look at the originating summons filed by the plaintiff shows that it is self-serving, speculative and unreasonable. The plaintiff lacks competence to institute this action at the Supreme Court as a Section 232(1) suit. Furthermore, this suit lacks all essential ingredients for the purpose of conferring jurisdictional competence in this court to hear and determine the suit in its original jurisdiction as laid down in Madukolu Vs. Nkemdilim (1962) 2 SCLR, 341. (P.....para.....)**

45. *What determines competences of a court*

**This position of the law has long been settled in this case as to the principles which must be satisfied before the court can competently entertain a suit:**

- "a. The court is properly constituted as regards members and qualification of the members of the bench, such that no member is disqualified for one reason or the other;**
- b. The subject matter of the case is within its jurisdiction, and there is no feature in the case, which prevents the court from exercising jurisdiction; and**
- c. The case comes before the court by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction."**

**Beyond needless emotional or sentimental colourations, it is clear that the Plaintiff lacks locus standi to commence this suit in view of the subject matter of the suit, see Plateau State of Nigeria & Anor. Vs. Attorney-General of The Federation & Anor. (2006) NSCQLR Volume 25, page 179 at 187; A.G**

**Anambra State Vs. A.G Federation (2007) 12 NWLR (Pt. 1047), Basinco Motors Ltd Vs. Woermann-Line (2009) 39 NSCQR 284, and Joseph Oyewole Vs. Karimu Akande & Anors (2009) NSCQR volume 39, at page 207.**

**There is no point re-characterising the facts of the case to confer this court with original jurisdiction. As rightly contended by the defendants, the real essence of this case relate to:**

- "(a) the validity of Charge No. CCT/ABJ/01/19 between the FGN Vs. Hon. Justice Onnoghen Nkanu Walter Samuel;**
- (b) the body vested with powers to appoint, recommend and remove judicial officers; and**
- (c) the jurisdiction of the Code of Conduct Tribunal to try Hon. Justice Onnoghen for alleged offences relating to non-declaration of assets." (P.....para.....)**

46. *Suit did not disclose any dispute between the parties*  
**This suit does not disclose any dispute between the plaintiff (Cross-River State) as an entity and the defendants as contemplated under Section 232(1) of the Constitution, as there must be a real dispute between the plaintiff (Cross River State) and the defendants (Government of the Federation) for this court to assume effectual or have its original jurisdiction crystallised. See Attorney-General of Lagos State Vs. Attorney-General of The Federation (2004) NSCQR volume 20, page 99 at pages 186-187. (P.....para.....)**
47. *Court has no jurisdiction where statutory provisions are not followed*  
**We need to restate the position of this court that where a statute or the Constitution of the Federal Republic of Nigeria sets out conditions for the activation or invocation of a court's jurisdiction, failure of a plaintiff to comply, abide or follow the statutory conditions or procedural steps will deny the court of competence to proceed in the proceedings. See Mainstreet Bank Capital Ltd & Anor Vs. Nigeria Reinsurance Corporation Plc (2018) 14 NWLR (Pt.1640) at 423. (P.....para.....)**
48. *The relief sought are not for the benefit of the plaintiff*  
**What more should I add or say in view of the above beyond amplifying the obvious facts that this suit is defective. This suit needlessly and unjustifiably attempted to over-drag this court into murky waters!!! This is because the reliefs sought in this matter are not for the benefits of Cross River State as an entity. The ultimate beneficiary is Hon. Mr. Justice Onnoghen and/or the NJC. The plaintiff would appear to me acting as a meddlesome interloper or**

**unsolicited mourner who, for certain personal reasons which may or may not be noble, opted to 'cry and shed tears' more than the actual bereaved person(s). (*P.....para.....*)**

**Lead Judgement:**

**Representations:**

**C. E. Nwosu, (SAN), Mrs. N. A. Rabana, (SAN). C. M. Ume, (SAN) with J.J.O. Ogbaduma (Esq.) and E. E. Ayogu (Esq.) for the plaintiff.**

**Dayo Apata (SGF) with T. A. Gazali (Esq.) (CSC), Adedayo Ogundele, (PSC) O. A. Oloruntogbe (SSC) and H. Ajaima-Hamza (SSC) for the defendants.**

**BERNARD EGBA  
VS  
THE STATE**

**SC.92/2014**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY, 3<sup>RD</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**OLABODE RHODES -VIVOUR  
OLUKAYODE ARIWOOLA  
CHIMA CENTUS NWEZE  
AMINA ADAMU AUGIE  
EJEMBI EKO**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Proof thereof – Whether the overt acts of the conspirators and inference therefrom constitute conspiracy – The principle in **Abacha vs. State (2002) 11 NWLR (pt. 779) 437.***

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Conviction thereon – Where prosecution fails to prove the substantive offence – Whether it does not make conviction for conspiracy inappropriate.*

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Proof thereof – Whether deduced by inference.*

*CRIMINAL LAW: “Conspiracy – Nature and purport.*

*CRIMINAL LAW: Conspiracy – Meaning – The principle in **Oduneye vs. The state (2001) 1 SC (pt. 1). 1***

*CRIMINAL LAW: Conspiracy – What constitutes – Whether it is the meeting of minds of the conspirators that constitutes the offence of conspiracy.*

*CRIMINAL LAW: Conspiracy – Where accused persons did an act in furtherance of their common purpose – Whether they can be convicted for offence of conspiracy.*

*JUDGMENTS AND ORDERS: Whether the integrity and sanctity of courts judgments are presumed until the contrary is proved.*

*PRACTICE AND PROCEDURE: Appeal – Concurrent findings – Onus on appellant – Where appellant fails to show exceptional circumstance – Whether concurrent findings will not be disturbed.*

*PRACTICE AND PROCEDURE: Cross-examination – Where a party fails to Cross – examine his opponent's witness on a particular matter – Whether failure amounts to acceptance of that evidence.*

*PRACTICE AND PROCEDURE: Record of proceedings – Where a party intends to challenge correctness of record of proceedings – Whether such party is bound to file an affidavit.*

#### **Issue for Determination**

**Whether on the totality of the evidence adduced on record, the lower court was right in finding the appellant guilty for the offence of conspiracy?**

#### **Facts of the Matter**

**The accused appellant with Boniface Deshika were charged at the High Court of Justice Bauchi for the offences of conspiracy and attempt to kill the Auditor-General of the State.**

**The accused person pleaded not guilty to the two count charge. In proof of its case, the prosecution called four witnesses and tendered several exhibits. The appellant and his co-accused testified on their behalf and called no witness.**

**At the end of trial the trial court dismissed the case of the prosecution. They appealed to the Court of Appeal which allowed their appeal in part. Consequently, the appellant on record has further appealed to the Supreme Court.**

**Held:** *(Unanimously dismissing the appeal)*

**1. The meaning of “conspiracy”**

**Now although a "conviction for conspiracy is not without its inherent**

difficulties ...” per Achike, JSC in *Oduneye vs. The State* [2001] 1 SC (pt. 1) 1, 6 -7, this court has outlined the basic ingredients that define the said offence. It has, thus, been defined as the agreement by two or more persons to do or cause to be done an illegal act or legal act by illegal means. *The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed*, *Obiakor vs. The State* [2002] 6 SC (pt. 11) 33, 39 -40; *Dabo and Anor vs. The State* [1977] 5 SC 22; *Onyenye vs. The State* [2012] All FWLR (pt. 643) 1810; *Kaza vs. The State* [2008] 1 - 2 SC 151, 164 - 165; *Njovens vs. The State* [1973] 5 SC 17. (*P.....Paras.....*).

2. *Conspiracy is deduced by inference*

Due to the nature of the said offence, it is rarely or seldomly proved by direct evidence. It is, thus, permissible, for a court to find in favour of proof of the offence of conspiracy as a matter of inference to be deduced from certain criminal acts of the parties concerned. The bottom line of the offence is the 'meeting of minds of the conspirators to commit an offence and the meeting of the minds needs not be physical, *Adejobi vs. State* [2011] 12 NWLR (pt. 1261) 347, 375.

Simply put, in a charge of conspiracy, proof of actual agreement is not always easy to come by, *Usufu vs. State* [2007] 3 NWLR (pt. 1020) 94. As a result, courts, now, infer conspiracy and convict on it if they are satisfied that the accused persons pursued, by their acts, the same object, one performing one part of the act and the other performing the other part of the same act so as to complete their unlawful design, *Tanko vs. The State* [2008] 16 NWLR (pt. 1114) 597, 637 - 638. (*P.....Paras.....*).

3. *Failure to cross-examine a witness on a particular matter*

My Lords, it is difficult to fathom the basis of the impeachment of the above finding and conclusion. It has long been established that where an adversary fails to cross-examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence, *Oforlete vs. State* [2000] 12 NWLR (pt. 681) 415; *Gaji and Ors vs. Paye* [2003] 8 NWLR (pt. 823) 583; *Akinbiyi vs. Anike* (1959) WRNLR 16; *Nwankwere vs. Adewunmi* (1962) WRNLR 298, 302; *Amadi vs. Nwosu* [1992] 6 SCNJ 59, 71; *Okoro vs. The State* (2012) LPELR-7846 (SC). (*P.....Paras.....*).

4. *It is the meeting of minds that constitutes the offence of conspiracy*

As noted above, it is, thus, permissible, for a court to find in favour of proof of the offence of conspiracy as a matter of inference to be deduced from certain criminal acts of the parties concerned. The bottom line of the offence is the meeting of minds of the conspirators to commit an offence and the meeting of the minds needs not be physical, *Adejobi vs. State* [2011]

12 NWLR (pt. 1261) 347, 375. This, evidently, was what the lower court did here. In my humble view, that was the correct approach, *Tanko vs. The State* (supra); *Adejobi vs. State* (supra).

The lower court did not stop there. It went ahead to instantiate the specific acts done in furtherance of their agreement. According to the court, they are:

- (i) The approaching of PW1 by the second respondent intimating him of what the first respondent wanted to be done;
  - (ii) The act of the second respondent in telephoning the first respondent in the presence of PW1 in Bayan Gari Ward, Bauchi town and telling him that the PW1 had accepted to execute the plot to kill Pw2;
  - (iii) The part payment of N70,000.00 to PW1 for the execution of the plot; -
  - (iv) The act of taking the PW1 together with the second respondent to the office, residence of PW2, and the making available of the photograph of PW2 to the PW1, in addition to providing the home address at Tafawa Balewa to PW1 for the purpose of execution of the plot.

[page 274 of the record].

Against the above background, the court found that "having regard to the definition of the offence of criminal conspiracy in Section 96 (1) of the Penal Code, the offence of criminal conspiracy has been committed by the respondents," [page 274 of the record]. Accordingly, the court found in favour of the proof of the offence of criminal conspiracy as alleged in count one of the charge.

In my humble view, it is difficult to fault these inferences from the facts as presented at the trial court, *Kaza vs. The State* (2008) 5 SCM 70, 104; *The State vs. Salawu* (2011) LPELR- 8252 (SC)38 - 39. Like the lower court, I consider it sufficient that the prosecution, established by the evidence led, the circumstances from which the lower court considered it safe and reasonable to infer or presume the conspiratorial acts of the accused persons, *Deboh and Anor vs. The State* (1977) LPELR - 904 (SC) 25 -26; [1977] 5 SC 122. (*P.....Paras.....*).

- 5. *The accused person did something in furtherance of a common purpose*  
After all, as indicated earlier, evidence of conspiracy is usually a matter of inference from surrounding facts and circumstances. I take the humble view that, unlike the trial court, the lower court, rightly, inferred conspiracy from the fact of the accused persons doing things towards a

common purpose, namely, the intention of killing the Auditor General, *Clark vs. The State* [1986] 4 NWLR (pt. 35) 381; *Aje vs. The State* [2006] 8 NWLR (pt. 982) 345, 363; *Majekodunmi vs. R.* (1952) 14 WACA 64; *Mulcahy vs. R.* (1868) L. R. 3. H. L. 306, 317.

Others include: *Haruna vs. State* [1972] 8 - 9 SC 174; *Garba vs. COP* [2007] 16 NWLR (pt. 1060) 378, 400; *Oduneye vs. The State* [2001] 2 NWLR (pt. 697) 311, 324; *Njovens vs. The State* [1973] 5 SC 17; *Nwosu vs. State* [2004] 15 NWLR (pt. 897) 466; *Busari vs. The State* (2015) LPELR – 24279 (SC) 24 - 25; *Nwosu vs. State* [2004] 15 NWLR (pt. 897) 466; *Babarinde and Ors vs. The State* (2013) LPELR - 21896 (SC); *Sule vs. The State* [2009] 17 NWLR (pt. 1169) 33; *Balogun vs. A- G. Ogun State* [2002] 6 NWLR (pt. 763) 512; *Omotola and Ors vs. The State* [2009] 7 NWLR (pt. 1139) 148. (*P.....Paras.....*).

6. *Failure to prove the substantive offence does not make conviction for conspiracy inappropriate*

My Lords, if must be noted that failure to prove the substantive offence, as happened at the trial court, does not make conviction for conspiracy inappropriate. The said offence, in itself, is a separate and distinct offence, independent of the actual offence, *Balogun vs. A- G. Ogun State* (*supra*); [2002] 2 SC (Pt. 11) 89; [2002] 2 SCNJ 196; *Alufohai vs. State* (2014) LPELR - 24215 (SC) 20 -21. (*P.....Paras.....*).

7. *The integrity and sanctity of court's judgment are presumed until the contrary is proved*

Before concluding this judgment, I would like to comment on what the appellant termed first issue. Without more, he contended that the judgment of the trial court is a nullity. This is rather curious, to say the least. The integrity and sanctity of court's proceedings, including judgements and rulings, are presumed until the contrary is proved, *Odiase vs. Agho* (1972) 1 All NLR (pt. 1) 170; *Fororunsho vs. Adeyemi* (1975) 1 NMLR 128; *Balogun vs. Adejobi* (1995) 2 NWLR (pt. 376) 131.

It is this principle that dictated the rule that the court and parties are bound by the records as certified: certified records which are presumed correct unless the contrary is proved, *Gonzee (Nig) Ltd vs. NERDC* (2005) 13 NWLR (pt. 943) 643, 646. (*P.....Paras.....*).

8. *A party who intends to challenge the correctness of records must swear to an affidavit*

A party who intends to impugn or challenge the correctness of the records, therefore, must swear to an affidavit setting out the facts or part of the proceedings as wrongly stated in the record. Such affidavit must be served

on the Judge or Registry of the court concerned, *Ehikioya vs. C.O.P.* (1992) 4 NWLR (pt. 233) 57; *Sommer vs. F.H.A.* (1992) 1 NWLR (pt. 219) 548; *Texaco Panama Inc vs. SPDC Nig Ltd* (2002) 5 NWLR (pt. 759) 209; *Gonzee (Nig) Ltd vs. NERDC* (supra) 646. (*P.....Paras.....*).

9. *The meaning of "Conspiracy"*

The appellant was convicted for the offence of conspiracy, which is "*an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective*" - see **Black's Law Dictionary 9<sup>th</sup> Ed.** It is the meeting of two or more minds to carry out an unlawful purpose or carry out a lawful purpose in an unlawful way that constitutes the offence of conspiracy; and it is a separate offence from the crime that is the object of the conspiracy.

In other words, the bedrock of the offence is the agreement to do something unlawful, which means that there can be no conspiracy, unless at least two persons conspire - see *Ikemson vs. State* (1989) 3 NWLR (Pt. 110) 455 SC, *Njovens vs. State* (1973) NNLR 76, *Erim vs. State* (1994) 5 NWLR (Pt. 346) 522. (*P.....Paras.....*).

10. *How to establish the offence of conspiracy*

The best evidence, it is said, is obtained from one of the conspirators or from inferences - see *Abacha vs. State* (2002) 11 NWLR (Pt. 779) 437 SC and *Njovens vs. The State* (supra), wherein this court, per Coker, JSC, explained the principle, as follows:

The overt act or omission, which evidences conspiracy, is the **actus reus** and the **actus reus** of each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Caesar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other- - - They need not all have started the conspiracy at the same time for a conspiracy started by some person may be joined at a later stage or later stages by others. The gist of the offence of conspiracy is the meeting of the minds of the conspirators. This is hardly capable of direct proof, for the offence of conspiracy is complete by the agreement to do the act or make the omission complained about. Hence, conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common

between them and in proof of conspiracy, the acts or omissions of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators. It is, therefore, the duty of the court in every case of conspiracy to ascertain as best as it could, the evidence of the complicity of any of those charged with that offence.

In this case, PW1, who reported the assassination plot to the Police, gave a detailed account of where and when the appellant instructed him to assassinate the Auditor-General of the State, so that he could "*take over that position*", and the money he got from the appellant to carry out the said criminal assignment, which was paid in instalments.

PW1 was the key Witness, and his testimony remained unshaken during cross-examination, therefore, the two lower courts were right, in my view, to act on his uncontradicted and unchallenged evidence, in finding the appellant guilty as charged for the offence of conspiracy. (*P.....Paras.....*).

11. *Supreme court not in a position to intervene with concurrent findings*  
Obviously, there is more than enough evidence established by the prosecution to support the concurrent findings of the trial court and Court of Appeal, and this court is not in the position to intervene. (*P.....Paras.....*).
12. *Appellant did not effectively discredit evidence*  
In the concurrent judgments of both the trial court and the lower court the issue was resolved against the appellant; hence this further appeal. The two courts below believed the undiscredited evidence of Mr. Ndayo Bassev, who testified as the PW.1. The appellant did not effectively discredit the evidence. (*P.....Paras.....*).
13. *There was no exceptional circumstances*  
I agree with the lower court that the PW.1 was not discredited by the cross-examinations. The trial court and the lower court believed him. That finding cannot be impeached.  
The appellant has not shown what exceptional circumstances would warrant this court to interfere with the concurrent judgments of the two courts below. Accordingly, I endorse the judgment of my learned brother C. C. Nweze, JSC and enter in favour of the respondent an order dismissing the appeal. I affirm the judgment of the lower court.

**Lead Judgement:**

**Representation**

Emeka Ozoani for the appellant; with him, Ikechukwu Okoye;  
Hussani Isaq Magaji, CSC, MOJ, Bauchi State, for the respondent.

**CENTUS NWEZE, (JSC) (DELIVERING THE LEAD JUDGMENT):**

1. **CHIEF AMADI -DIKE-OGU**
2. **CHIEF HARRISON CHUKWU**
3. **CHIEF EJEKWU WOBO**  
*(For themselves and on behalf of all the other members of the Rumueme Council of Chiefs and other Indigenes of Rumueme Community)*

**Vs.**

**OWHONDA FRANK AMADI & 11 OTHERS**  
*(For themselves and on behalf of all the members of the Rumueme Council of Chiefs, Elders and Owhor Holders)*

**SC.460/2010**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY 31<sup>ST</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

<b>MUSA DATIJO MUHAMMAD</b>	<b>JUSTICE, SUPREME COURT</b>
<b>KUMAI BAYANG AKAAHS</b>	<b>JUSTICE, SUPREME COURT</b>
<b>JOHN INYANG OKORO</b>	<b>JUSTICE, SUPREME COURT</b>
<b>SIDI DAUDA BAGE</b>	<b>JUSTICE, SUPREME COURT</b>
<b>UWANI MUSA ABBA AJI</b>	<b>JUSTICE, SUPREME COURT</b>

*ACTION:- Abuse of court process – Nature and Meaning – The principle in Ntuks Vs. NPA (2007) 13 NWLR (Pt. 1051) 392.*

*PRACTICE AND PROCEDURE:- Abuse of court process – Where an applicant has*

*filed two applications on the same subject matter – Applicants intends to withdraw the previous application in preference to the later – Whether procedure does not amount to abuse of court process.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Application to adduce fresh evidence is not the exclusive preserve of the applicants – Whether the respondent can make an application for fresh evidence on relevant facts.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Conditions thereof*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Conditions which must co-exist – The principle in **Owata Vs. Anyigor (1993) 2 NWLR (Pt. 276) 380.***

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Guiding principles – Whether the paramount consideration before the court is furtherance of justice.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Power of appellate court to receive fresh evidence on appeal – Whether an appellate court has power to receive fresh evidence on appeal under special circumstance.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Relevant factors to be considered – The principle in **CPC and Anor Vs. Ombugadu & Anor (2013) LPELR – 21007 (SC).***

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Where a party intends to adduce fresh evidence on appeal – Whether such evidence must be relevant.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Where the fresh evidence sought to be admitted on appeal will have a critical and decisive effect on the case – Whether application to adduce fresh evidence will be granted.*

*PRACTICE AND PROCEDURE:- Appeal – Issue of law – Where a point of law if raised will determine an appeal – Whether court should encourage and support such a process.*

#### **Issue for Determination**

**Whether the Appellants/Applicants have met the conditions for**

**the grant of this application.**

### **Facts of the Matter**

**The appellant/applicants brought a motion on notice in the Supreme Court under order 2 rule 12(1) of the Supreme Court Rules 1999 praying for an order of the court to adduce further evidence.**

**The said additional evidence relates to colonial intelligence report procured from the archives. The application was supported by an affidavit and grounds for the application.**

**The respondent filed a 57 paragraphs affidavit in opposition. The Supreme Court considered both the affidavit and counter-affidavit.**

**Held:** (*Unanimously allowing the application*)

1. *Effect where a point of law if raised will determine appeal*

**The law is settled that a point of law can be raised on a preliminary objection by a party to a suit if the point of law will be decisive of the whole litigation. Therefore, where there is a point of law which if decided one way would impact on the justice of the case, as in the instant case, that advantage ought to be taken of the facilities afforded by the rules of court to have it disposed as soon as raised. See *N.V. Scheep Vs. MV "S. Araz"* (2000) 12 SCNJ 24, (2001) FWLR (Pt.34) 543; *Everett Vs. Ribbands* (1952) 2 QB 198; *Addis Vs. Crocker* (1961) 1 QB 11; *Madu Vs. Ononuju* (1986) 3 NWLR (Pt.26) 23; *Yeoman Credit Ltd. Vs. Latter* (1961) 2 All ER 281. "Per Ogbuagu JSC. (*P.....para.....*)**

2. *Meaning of "abuse of court process"*

**Beyond doubt, what constitutes abuse of court process involves circumstances and situations of infinite variety and conditions and referred the court to a number of judicial authorities including *Lokpobiri Vs. Ogola* (2016) (Pt.1499) 328; *Commissioner for Education, Imo State Vs. Amadi* (2013) 13 NWLR (Pt.1370) 33; *Ogboru Vs. Uduaghan* (2013) 13 NWLR (Pt.1370) 33; *Echaka Cattle Ranch Ltd. Vs. N.A.C.B Ltd* (1998) 4 NWLR (Pt.547) 526; and *O.S.S.I.E.C. Vs. NCP*(Supra).**

**As succinctly enunciated by this court in *Ntuks Vs. NPA* (2007) 13 NWLR (Pt.1051) 392, this court had expressed a detailed opinion that:**

**"Abuse of court process generally means that a party in litigation takes a most irregular, unusual and precipitate**

**action in the judicial process for the sake of action qua litigation, merely to waste valuable litigation time. It is an action which is one (or more) too many; an action that could be avoided by the party without doing any harm to the matter in dispute. The process of the court is used mala fide to overreach the adversary to the direct annoyance of the court. The court process is initiated with malice or some premeditated or organised vendetta, aimed at frustrating either the quick disposal of the matter or the abatement of the matter for no good cause. The court process could also be said to be abused where there is no iota of law supporting it. In other words, the court process is premised or founded on frivolity or recklessness."- Per. TOBI, J.S.C." (P.....para.....)**

3. *Implication where an applicant who has filled two motions on the same subject matter intends to withdraw the former*

**In the instant case, it would be impossible to establish abuse unless the applicant desires to proceed with both applications at hearing. This is not the case here. As held by this court in NV Scheep Vs. MV Araz (supra), there is no intention on the part of the appellants to proceed with the two applications. Quite frankly, an intention had been clearly evinced by the said appellants that they intend to withdraw the defective motion of 3/10/2013, and that the new motion filed on 5/6/2018 will be relied on at hearing. Unless we intend to stand the law or established procedure on its head, there is no element of abuse in this circumstance. (P.....para.....)**

4. *An appellate court can receive fresh evidence on appeal under special circumstances*

**The law is that ordinarily, an appellate court is wary of receiving fresh evidence not available at the stage of trial. The appellate court is not however inhibited, but only treads with caution in accepting fresh evidence on appeal.**

**The position of the law is that the power of an appellate court to receive further or fresh evidence on appeal is rarely exercised but is not taken away, extinguished or inhibited. As held by this court in Owata Vs. Anyigor (1993) 2 NWLR (Pt.276) 380, P 383-384, an appellate court can receive further evidence on questions of fact but such further evidence is only received on special grounds and that the court generally exercised this power with great circumspection.**

*(P.....para.....)*

5. *Conditions necessary for receiving further evidence on appeal*  
**Thus, before receiving fresh evidence on appeal, an appellate court would need to be sure that the party seeking to adduce such evidence has fulfilled the following conditions:**
- "1) **A formal application is brought exhibiting the fresh evidence or document sought to be adduced. This was not one of the conditions in OWATA's case but now being made a requirement given the rarity and cautionary approach with which such application must be considered.**
  - 2) **The evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial.**
  - 3) **If the fresh evidence is admitted it would have an important but not necessarily crucial effect on the whole case.**
  - 4) **If the evidence sought to be adduced is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible.**
  - 5) **Additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicants, if it had been available at the trial court.**
  - 6) **The evidence must be material and weighty even if not conclusive. Where the evidence sought to be adduced is immaterial and irrelevant, it will be rejected."** *(P.....para.....)*
6. *In an application to adduce further evidence on appeal, evidence in question must be relevant.*  
**The above conditions must all co-exist in an application seeking this unusual discretion. Most importantly, the last condition becomes first as the evidence sought to be adduced must be relevant. This is because it is**

settled principle of law that relevance is the basis of admissibility. The applicants/appellants have approached this court with the application under consideration seeking, essentially, leave to adduce further evidence at the hearing of this appeal in the forms of the 1928- 1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, CTC of which was obtained from the Nigerian National Archives, Ibadan.

Beyond the factual narratives, the ground on which the application is brought are cognisable and compelling. The appellants/applicants premised their application on 8 grounds, as follows:

- "1) That both appellants and respondents are in agreement that the EBERA or OROEBARA Group (otherwise known as ORAZI or the RUMUORAZI Group) has always produced the head of Rumueme. The common ground of disagreement has been; which branch in Ebara (Oroazi) group has been producing the head of Rumueme to wit: is it Nyenweli Nsirim, who heads the appellants' Rumueme Council of Chiefs or the 8<sup>th</sup> respondent (Ohahuru Samuel Akaninwo) who head the Respondents' Rumueme Council of Chiefs, Elders and Owhor holders.
- 2) That this core issue is answered conclusively by the document sought to produced and received as further evidence in this appeal to wit: the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, a pre-independence Intelligence Report of British Government.
- 3) That the existence of the said document (i.e. the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government), was not known to the appellants/applicants' until 28<sup>th</sup> July, 2010 when the appellant/ applicants' new counsel stumble on it while undertaking research on another subject as the Nigerian National Archives, Ibadan.
- 4) That this colonial document (an independent and unbiased Intelligence Report of the Colonial Government) is credible, reliable and capable of being believed. conflicting traditional histories put forward by the two sides in this

**appeal by resort to this unbiased, credible, reliable and believable historical document.**

- 6) That no oral evidence is required as the said document speaks for itself and corroborates and compliments existing oral testimonies in the Record of Appeal and the said document, if received, will have an important, crucial and indeed pivotal effect on this appeal.**
- 7) That it is in the interest of both the appellants and the respondents that this independent antique document (the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government) is received in that it states the correct and independently investigated historical headship/rulership of Rumueme as at 1928-1931.**
- 8) That this honourable court has in several instances and cases sought to discourage judges from basing their judgements on mere beliefs and/or disbelief. That from record of appeal (pages 276, lines 8-25) it is clear the judgment of the lower court and that of the trial court**
- 5) That this Archival is applicable under the rule in *Kojo Vs. Bonsie* to resolve the two courts were wholly founded on the beliefs and/or disbeliefs of the trial court who merely stated that he disbelieved the appellants and believed the respondents without stating the basis for his beliefs and/or disbeliefs, this Archival document takes this appeal from the realm of beliefs and/or disbeliefs unto the firm grounds of proof." (P.....para.....)**

7. *Application for fresh evidence on appeal is not exclusive preserve of the applicants*

**Given the circumstances of this appeal, would fresh evidence undermine or strengthen the justice in this case, bearing in mind that a grant or refusal of this application does not dispose-off the substantive appeal? The answer certainly is a capital NO. Allowing fresh evidence to be adduced in this appeal by a requesting or desiring party is not the exclusive preserve of the applicants. The respondents may as well have taken benefit by applying to adduce any such fresh but relevant evidence. (P.....para.....)**

8. *Relevant considerations to be applied by court in an application for fresh evidence on appeal*

**Whichever way one looks at it, what should be paramount in the mind of the court is whether permitting fresh evidence to be adduced will be in furtherance of the course of justice to the extent that it would assist the court to resolve the issue before it fairly, justly and equitably.**

**In view of this, I share the view as expressed in the submission of the appellants/applicants that the grant of the reliefs sought would only permit them to adduce further evidence in the form of Exhibit A which is attached to the affidavit in support of the motion. This, clearly, will assist the court determine the more authentic history between traditional history stated by the appellants and that of the respondents. (P.....para.....)**

9.

*Conditions for granting fresh evidence on appeal*

**For an application to receive fresh evidence on appeal to be granted, the following conditions must co-exist namely:-**

1. **It must be shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**
2. **That the fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.**
3. **The evidence must be such as is presumably to be believed; in other words it must be apparently credible although it need not be incontrovertible. See: Owata Vs. Anyigor (1993) 2 NWLR (Pt. 276) 380; UBA Plc Vs. B.T.L Industries Ltd (2005) 10 NWLR (Pt. 933) 356; Ehinlanwo Vs. Oke (2008) 16 NWLR (Pt. 1113) 357. (P.....para.....)**

10. *Fresh evidence to be adduce on appeal should be relevant*

**The fresh evidence should be relevant to the appeal.**

**My learned brother, Bage JSC had found that Exhibit “A” which is attached to the affidavit in support of the motion will assist the court to determine the more authentic history between the claim of the appellants and that of the respondents. I also hold the same view. (P.....para.....)**

11. *Conditions which must co-exist before fresh evidence is received on appeal*

**By way of expatiation, I wish to add that the paramount duty of this court**

**is to do substantial justice between parties. What therefore matters to this court is whether receiving fresh evidence will be in furtherance of the course of justice to the extent that it would assist the court to resolve the issue before it fairly, justly and equitably.**

**The conditions which must co-exist before an appellate court would consider receiving fresh evidence have been well spelt out in the lead judgment following the decision of this court in the case of *Owata Vs. Anyigor* (1993) 2 NWLR (Pt. 276) 380, as follows:**

- “(1) it must be shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**
- (2) The fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.**
- (3) The evidence must be such as is presumably to be believed or in other words it must be apparently credible although it need not be incontrovertible.**

**These three conditions must all be satisfied together and at the same time".** (*P.....para.....*)

12. *Fresh evidence sought to be tendered will enhance the course of justice*  
**It is instructive to note that, the fresh evidence sought to be adduced has to be relevant to the suit otherwise it would be rejected.**

**In the instant appeal, I hold the view that receiving fresh evidence, to wit. Exhibit "A" attached to the appellant's application would in no way undermine justice rather it would further the course of justice by assisting this court to resolve the issues in the substantive appeal fairly, justly and equitably. More importantly, the grounds on which the application is premised, which include a clear description of when and how the appellants/applicants' new counsel came by the evidence sought to be adduced, are to my mind compelling enough that this court cannot gloss over.**

**To this end, I hold the view that the course of justice will better be served by the grant of this application. The appellants/applicants have satisfied the condition for the grant of this application.** (*P.....para.....*)

*Per Abba Aji (JSC)*

**Parties and counsel are advised to adequately prepare for their cases and not to waste the precious time of the court with flimsy and frivolous applications especially with regard to bringing in fresh evidence. The taking of fresh evidence is not a rule of pleading but a panacea out of a necessity or special and unavoidable circumstance to proffer justice to a given case.**

**The leave to adduce fresh evidence is grantable usually to obviate the need and necessity of not crying after spilled milk or when the head is cut off since justice is not only for the party seeking it but for all, especially in our judicial jurisprudence of precedents and case laws. Again, since honourable justices and judges are human beings and therefore not infallible, they can make mistakes or commit errors at any time like any other mortals. Thus, the desideratum of considering some fresh evidence not available at the time the case came up for hearing.**

**Some of the reasons for allowing further evidence on appeal are where the matter arose *ex improviso* which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led: R. v. Dora Harris (1927) 28 Cox 432. See also Per OGUNTADE, J.S.C in UBA Plc. Vs. BTL IND. LTD (2005) LPELR-8065 (SC). The procedure for admitting further evidence on appeal is not at the disposal of an indolent or not diligent litigant. The procedure cannot be used for the repair of a case at the end of the trial. It is not designed to overreach the other party or spring surprise at the other party when the appeal is heard. See Per TOBI, J.S.C in Okoro & Ors Vs. Egbuoh & Ors (2006) LPELR-2491(SC). (P.....para.....)**

13. *Factors relevant to be considered in granting application for fresh evidence on appeal*

**The appellate court is duly empowered to admit fresh evidence in respect of matters which occurred after the proceedings and judgment of the trial court so long as the guidelines for such admission are met. The principles which an appellate court must take into consideration in the judicious exercise of its power to grant leave to adduce new evidence are: (a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court. (b) In respect of other evidence other than in (a) above, as for instance in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence only on special grounds. (c) The evidence to be adduced should be such as if admitted, it would have an important not necessarily crucial effect on the whole case; and (d) The evidence**

**must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible. See Per PETER-ODILI, J.S.C in CPC & ANOR Vs. Ombugadu & Anor (2013) LPELR-21007(SC). (P.....para.....)**

14. *Evidence sought to be admitted would have critical and decisive effect on the case.*

**I think the interest of justice requires that the application be granted as per the reliefs sought by the appellants/applicants. A party to litigation cannot be shut out and the court precluded on technical grounds from receiving further evidence that will assist the parties and the court and the society or community at large. There is no doubt that the evidence sought to be adduced if, admitted, would not only have a critical but a decisive effect on the whole case. In the instant case, it is necessary to receive such evidence for the just disposal of the case. To refuse to admit the additional evidence tantamount to injustice to all. (P.....para.....)**

*Lead Judgement:*

**Representations**

**L. V. C. Michael-Atata, for the appellant/applicant.**

**Chief Collins B. Adele, for the respondent.**

**SIDI DAUDA BAGE, (JSC) (Delivered the Lead Judgment):** By a Motion on

**EFFIOM EDET BASSEY  
Vs.  
THE STATE**

**SC.236/2014**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY 3<sup>RD</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**OLABODE RHODES-VIVOUR  
OLUKAYODE ARIWOOLA  
AMINA ADAMU AUGIE  
EJEMBI EKO  
UWANI MUSA ABBAJI**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*CRIMINAL LAW AND PROCEDURE:- Criminal cases – Proof thereof – Whether court must evaluate the totality of evidence called by the prosecution to determine whether it have proved case beyond reasonable doubt.*

*CRIMINAL LAW AND PROCEDURE:- Defences – Provocation – Conjunctive element thereof – What accused must establish.*

*CRIMINAL LAW AND PROCEDURE:- Defences – Provocation – How determined – Whether must be considered in light with the station in life of the accused – The principle in **Owhoruke Vs. Cop (2015) LPELR 24820 SC.***

*CRIMINAL LAW AND PROCEDURE:- Defences – Provocation – Where a party*

*successfully pleas provocation – Whether it will reduce sentence of death to manslaughter.*

*CRIMINAL LAW:- Defences – Accident – Nature and purport – The principle in Adelumola Vs. the State (1988) 1 NWLR (Pt. 73) 683.*

*CRIMINAL LAW:- Defences – Accident – When occurs*

*CRIMINAL LAW:- Defences – Provocation – Nature thereof – Whether may be triggered by rage or anger leading to temporarily loss of self control – The principle in Kaza Vs. State (2008) LEPLR 1683 SC.*

*EVIDENCE:- Confessional statement – Admissibility thereof – When to object thereto – Whether at the point when the statement is sort to be tendered.*

*PRACTICE AND PROCEDURE:- Evidence of accused – Where prosecution did not offer any evidence to disprove what accused said in court – Whether evidence of accused will be deemed to have been accepted.*

*STATUTE:- Criminal Code Law of Cross River State 2004 – Section 24 thereof – The principle of defence of accident.*

### **Issues for Determination**

- a) **Was the Court of Appeal right to have affirmed the decision of the trial court that the defence of accident was unavailing to the appellant as to relieve him of criminal responsibility in the death of the deceased? ("Accident Issue")**
- b) **Considering the evidence, was the Court of Appeal right to have affirmed the rejection by the trial court, of the defence of provocation set up by the appellant? (Provocation Issue)**
- c) **Did the prosecution prove the guilt of the appellant beyond reasonable doubt? ("Proof beyond reasonable doubt issue").**

### **Facts of the Matter**

**The accused appellant was charged before the High Court of Cross River State on a one-count charge of murder to which he pleaded not guilty.**

**In prove of its case, the prosecution called one witness, while the appellant**

testified himself and did not call any other witness. The information states that the accused murdered one Ukpong Edem Essien by stabbing him with a knife. At the end of trial, the accused was convicted as charged and sentenced to death by hanging. He unsuccessfully appealed to the Court of Appeal, hence this further appeal to the Supreme Court.

**Held:** *(Unanimously allowing the appeal in part)*

1. *When to object to admissibility of a confessional statement*

In my view, the appellant is making a mountain out of a molehill with his contention concerning Exhibit 1, which he had not objected to, at the appropriate time. It is settled that the appropriate time to make such an objection is when the statement made by an accused to the Police is being tendered; not when the accused opens his defence or during that defence - see *Ogudo Vs. State (supra)*. Yes, the prosecution ought to have done a better job of explaining why the said *PC Elemura Luke* was not able to be in court, and why the statement recorded by PW1 himself, was not tendered in court.

But in the circumstances of this case, the fact that *PC Elemura Luke* was not in court himself to tender the appellant's statement, which he recorded at Mbukpa Police Station, is of no moment in this appeal. *(P.....para.....)*

2. *The nature and purport of Section 24 of the Criminal Code Law of Cross River State 2004*

What did PW1 say that was any different from what the appellant told the court in his evidence as DW1? The appellant narrated more or less the same story in his evidence and under cross-examination, he said that at the Police Station, he was asked what happened between him and his brother, the deceased, and he told them what happened; and he said YES to the question put by prosecution counsel that he had "*opportunity of telling the Police the story [he] just told the court today*". Thus, even if Exhibit 1 is expunged from the record, what PW1 said the appellant admitted to him, is consistent with his evidence as DW1.

As to the accident issue, Section 24 of the Criminal Code Cap. C.16 Vol.3 Laws of Cross River State, 2004 provides *inter-alia* that:

Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident. *(P.....para.....)*

3. *When an event is said to have occurred by accident*

**Obviously, the respondent is right; the concurrent findings of the two lower courts on this issue cannot be questioned. As Oputa, JSC, pointed out in *Adelumola Vs. The State (1988) 1 NWLR (Pt. 73) 683-***

**It seems to me that the expression, "an event which occurs by accident", used in Section 24 - describes an event totally unexpected by the doer of the act and also not reasonably to be expected by any ordinary person, the reasonable man of the law; in other words, the test is both subjective from the standpoint of the doer of the act, as well as objective from the standpoint of the ordinary man of common prudence. The event should, to qualify as accidental, be a surprise both to the doer of the act that caused it, and a surprising thing to all and sundry. An event is thus accidental if it is neither subjectively intended or objectively foreseeable by the ordinary man of prudence. (*P.....para.....*)**

4. *When event occurred by accident*

**An event is said to be an accident when the act by which it is caused, is not done with the intention of causing it, and when its occurrence as a consequence of the act, is not so probable that a person of ordinary prudence, ought under the circumstances in which it is done, to take reasonable precaution against it -- see *Umoru Vs. The State (supra)*, and *Thomas Vs. State (supra)*, wherein this court held that an accused person cannot take refuge on a defence of accident for a deliberate act even if he did not intend the eventual result. In this case, the appellant, to use his own words, picked up a knife to frighten the deceased, and it was in the struggle for the knife that the knife stabbed the deceased.**

**What the law says is that an event, which occurs by accident, connotes an act totally unexpected, unwilled, unintentional and without any fault, as against an act, which is deliberate, willed or intentional - see *Thomas Vs. State (supra)*. In this case, even if the appellant had no intention of stabbing the deceased to death, the very act of picking up a knife, during a fight, cannot be anything else but a deliberate act.**

**The appellant testified that the deceased continued beating him, even inside the house. Under cross-examination he said the deceased "*beat to the point where the knife was*", and he picked it up frighten him. Obviously, a knife, not to mention a kitchen knife, is a sharp instrument; a lethal weapon, and the appellant, picking up a knife in a fight, *even* if it was to frighten the deceased, who was beating him up, cannot be an "*unwilled***

**act'; it is what I would call "enemy action", which proved fatal. So, the Court of Appeal was right to affirm the trial court's finding that:**

**An accident is the result of an unwilled act, an event, which occurs without the fault of the person alleged to have caused it. A willed, deliberate act, therefore, negatives the defence of accident. For the defence of accident to avail the [appellant] it must be shown that [his] stabbing of the deceased occurred independently of the exercise of his will. That is not the situation in the instant case. Consequently, the defence of accident is definitely unavailable to the [appellant]. (P.....para.....)**

5. *Provocation must be considered in light of station in life of the accused*  
**Clearly, the point of divergence is the station in life of the appellant.**  
**It is settled that provocation must be considered in the light of particular circumstances of the case, which includes the station in life of the accused, and the society in which he lives - see Lado Vs. State (supra). Thus, the test is whether a reasonable man in the street or status of the accused would have been provoked to commit the offence - see Kaza Vs. State (2008) LPELR- 1683(SC) Shalla V. State (2007)18 NWLR (Pt. 1066) 240 and Oworuke Vs. COP (2015) LPELR-24820(SC), wherein Rhodes-Vivour, JSC, observed that:**

**There is no set standard of retaliation expected from a reasonable man; it all depends on the accused appellant's station in life. A reasonable man is a reasonable man of the accused person's standing in life and to a large extent, his cultural background. (P.....para.....)**

6. *Appellant was provoked by the deceased*  
**In this case, the appellant and the deceased were both manual labourers, and from the picture painted by the appellant, which must be accepted completely, since the prosecution did not adduce any evidence to counter or challenge it, there is no question that the appellant had been provoked by the deceased. (P.....para.....)**
7. *Provocation may be triggered by rage or anger leading to temporarily loss of self control*  
**The Court of Appeal held that the "annoyance or anger the appellant felt was not the same as losing self-control and acting in the heat of passion that would amount to provocation on law". But that is not entirely correct; it has**

been held, and by this court that provocation may be triggered by rage or anger, etc., on the part of the accused to the person that offered the provocation - see *Kaza Vs. State* (supra), wherein Tobi, JSC, stated:

**Provocation is an action or conduct, which arises suddenly in the heat of anger. Such action or conduct is premeditated. by resentment, rage or fury on the part of the accused to the person that offered the provocation. Because of the anger, resentment, rage or fury, the accused suddenly and temporarily loses his passion and-self-control, a state of mind, which results in the commission of the offence.**  
(P.....para.....)

*Per Augie (JSC)*

“From the facts, imagine a labourer, who off-loaded timber from canoes, and who is hungry, being not only denied of his share of the payment for the job done, but also being threatened and beaten seriously for asking for his own share of the money, so he can get something to eat that day.

That is the situation the appellant depicted in his evidence in court. He was hungry after a hard day's job offloading timber from canoes and asked the deceased for his share of the money paid for the job they did, so he could eat; the deceased not only threatened to beat him for asking for the money to eat; the deceased carried out his threat by beating him outside the house, beating him even after people separated them, and beating him inside the house, where backed into a corner, the appellant saw the kitchen knife, which he picked up to frighten the deceased, and while they were both struggling for the knife, the deceased got stabbed.

The prosecution did not present the court with any evidence at all to dispute the appellant's account of what happened. It called only PW1, who admitted under cross-examination that he was not there at the time, and that there was no autopsy carried out on the body of the deceased. With no evidence to dispute the appellant's story, his account of events remained unchallenged - *Mathew Vs. State* (2018) LPELR-43716(SC), and the lower courts ought to have done a better job of evaluating same.” (P.....para.....)

8. *There was no evidence by the prosecution to disprove what the appellant said in court.*

So, without considering or even referring to what the appellant had said that he ran out, after the deceased "*left house*" to go and watch music; the

**Court of Appeal concluded that the defence of provocation did not avail the appellant because he had run away immediately after the act. That may have been the prosecution's case, but there was no evidence adduced by the prosecution to disprove what the appellant said in court, and the law says it must be accepted as true - Mathew Vs. State (*supra*).**

**Be that as it may, it is clear from the decisions of the lower courts that the indices or pieces of *evidence*, which indicate that the appellant was provoked by the deceased, were glossed over or totally overlooked. (P.....para.....)**

9. *Nature of provocation*

**As I said earlier, provocation is an action or conduct premeditated by anger, resentment, rage or fury that causes the accused to suddenly and temporarily lose his passion and self-control, a state of mind, which results in the commission of the offence - see Kaza Vs. State (*supra*). What is more, the test is whether a reasonable man of the appellant's station in life could have been provoked to commit the crime - see Lado Vs. State (*supra*), Owhoruke Vs. COP (*supra*) and Kaza Vs. State (*supra*). (P.....para.....)**

10. *Appellant was provoked considering his station in life*

**In this case, the appellant submitted that the deceased and himself “were labourers and, [so] less sophisticated and enlightened persons”, thus, the wrongful seizure of his income coupled with the beatings would have provoked an ordinary man in his station in life, to do what he did.**

**I agree. Given his background, the resentment, rage, annoyance or anger felt towards the deceased, who' deprived him of money to eat; and beating him up seriously and continuously, while he was still hungry; is enough to provoke an ordinary man of the Appellant's station in life.**

**As far as this issue is concerned, I agree with the appellant that the lower courts failed to evaluate the whole evidence adduced before the trial court properly; and it is, certainly, my view that “*from the facts, evidence and circumstances of the case*”, as the Court of Appeal put it, the defence of provocation avails the appellant; and that is my decision. (P.....para.....)**

11. *Effect of a successful plea of provocation*

**The question is what orders to make because a successful plea of provocation does not exculpate the appellant; it is a mitigating factor, which has the effect of whittling down the punishment for murder to that for manslaughter see Galadima Vs. State (2012) LPELR-15530(SC).**

**In this case, the appellant was sentenced to death for murder but**

with a successful plea of provocation in his kitty, which makes him guilty of manslaughter; not murder, his sentence will be reduced accordingly.

In the final analysis, this appeal succeeds and it is hereby allowed. The Court of Appeal's decision affirming the conviction and sentence of death imposed on the appellant by the trial court is, therefore, set aside. In its place, I enter a verdict finding the appellant guilty of the offence of manslaughter. He is sentenced to a term of seven years imprisonment which starts running from the date he was remanded in Police custody.

The records show that the appellant was arrested on 24/11/2010, and has been in Police and prison custody since then. He is, therefore, deemed to have served out his sentence of seven years imprisonment, and I hereby order that he be released from prison custody forthwith.  
(P.....para.....)

12. *Prosecution was only able to prove manslaughter*

Even though the prosecution charged the appellant for murder, by their tendering of Exhibit 1 they were only able to establish against the appellant an offence of manslaughter.

In Exhibit 1 the appellant narrated how his, deceased brother, a bully, had earlier threatened that after the day's labour of "off-loading" timber from a boat the appellant was - not going to be paid. The narration continues thus

- So after we finished off-loading the people paid us, but my own brother Ukpong surposed to pay me was N1,200.00 (out of) which he paid me N1,000.00 left with N200.00. At that juncture I refused to collect the N1000.00. From there I started quarrelling with him. At that point - my late brother Ukong said that he was not going to pay me again. Then he said that if I have remember when he beat at the filling station. There, at the front of our compound we started fighting which in the process of this fight my brother's power becomes heavier than my own power before I now picked bottle and stabbed him at the side of his stomach before I ran away and left him there. Actually I killed him brother, Ukpong over the N200.00 matter

Apparently swayed by the admission of the actus reus: "Actually I killed my brother Ukpong over N200 matter", the trial court erroneously took Exhibit 1 for a confession to the charge of murder. The conviction of the appellant for murder was predicated on that erroneous belief that Exhibit 1 was an outright confession. It was not.

**In Exhibit 1 the appellant had raised a defence of provocation. The deceased seized his money. He and the deceased quarrelled over it. A fight ensued and in the course of the fight and in the heat of the passion he picked a bottle and stabbed the deceased with it, without any premeditation and at the spur of the moment.**

**It is clear that the trial court did not properly evaluate Exhibit 1 beyond the admission only of the *actus reus*. The necessary *mens rea* for the alleged murder was absent with the plea of provocation following the seizure of the appellant's money, the quarrel and the subsequent fight during which the appellant, without premeditation and in the rage, fury and in the heat of passion upon which having lost self-control, he stabbed the deceased to death. (P.....para.....)**

13. *The court must evaluate totality of evidence before reaching its decision*  
**I agree, as found by my learned brother, AMINA ADAMU AUGIE, JSC, that "from the facts, evidence and circumstances of the case", even only on the prosecution's case alone, the defence of provocation availed the appellant. The lower court erred in affirming the conviction and sentence of the appellant without properly, evaluating the, totality of the evidence at the total. It is trite that the court must evaluate the totality of the *evidence* called by the prosecution in order to determine whether the prosecution have proved their case against the defendant beyond reasonable doubt: BOY MUKA & ORS. Vs. THE STATE (1976) 9,-10 SC 193, at 205. (P.....para.....)**
14. *Effect of a successful plea of provocation*  
**The, defence of provocation, being merely a mitigating factor and not an absolutely 'exculpating defence, only entitles the accused person to be convicted for manslaughter and not murder: GALADIMA Vs. THE STATE (2012) LPELR - 15530 (SC); Sections 284 and 318 of the criminal code law of Cross-Rivers State.**  
**The appellant had been incarcerated since November 24<sup>th</sup>, 2010 for the unlawful killing of his brother, Ukpong. The concurrent judgments of the two courts below had completely overlooked the defence of provocation, under Sections 284 and 318 of the Criminal Code which the appellant had pleaded in the circumstances and evidence of this case. It is for the forgoing that I endorse the opinion of my learned brother, A. A. Augie, JSC that the appeal be allowed and the death sentence imposed on the appellant commuted to a term of imprisonment. The appeal is accordingly allowed. (P.....para.....)**
15. *Deceased action was provocative*

**The testimony of the appellant appears to me very striking and believable since there was no eye witness to the crime except the story of the appellant herein. His evidence seems consistent and correlated. His case appears like that of a man pushed and boxed to the corner. Although the deceased cannot be around to hear from him, his action is most provocative to any reasonable man. If you could be frightened with a knife and still went ahead to have' your way, then' he has a share of the blame for his death. It is commonly said that a wood insect that will gather sticks on his own head, will carry them. In other words, the fly that will insist to follow the corpse into the grave must be buried with the corpse! (P.....para.....)**

*16. Elements of provocation*

**The three conjunctive elements which a defendant; who wants to avail himself of this special defence of provocation must' prove are that: (a) There was the deceased person's act of provocation which caused his loss of self-control; (b) He killed the deceased in the heat of passion and (c) At the time of killing, the heat of passion had not waned. See Per NWEZE, J.S.C in EZE Vs. STATE (2018) LPELR-44967(SC), Per ADIO, J.S.C in AKPAN Vs. STATE (1994) LPELR-382(SC). In the instant appeal, the deceased provoked the appellant by his statement, the denial of his entitlement and with the beatings he gave him. The proportionality of the retaliation is that they both struggled with, the knife either for defence or for destruction on whosoever might be chanced to prevail. (P.....para.....)**

*17. The defence of provocation does not exonerate the accused.*

**Since provocation is not an exculpatory defence but an attenuating or a mitigating defence, where available, it merely, attenuates, dis-rates or demotes the offence from murder to manslaughter. In effect, the defence of provocation does not exonerate the accused person. It only earns him a mitigation of the punishment due for the offence of murder to a sentence for manslaughter. See Per CHIMA CENTUS NWEZE, J.S.C in UKPONG Vs. STATE (2019) LPELR-46427(SC).  
(P.....para.....)**

**Lead Judgement:**

**Representations**

**Appellant absent (not represented)**

**Greg I. Okem, (Esq.), (DPP Cross River State), with Etek Olabode, (Esq.),**

**(Assistant Director,  
MOJ, Cross River State), and Blessing Egwu, (Esq.),**

**(S.S.C., MOJ, Cross River State) For the respondent AMINA ADAMU AUGIE,  
JSC (Delivered the Lead Judgment):**

**FRIDAY UZIM  
Vs.  
THE STATE**

**SC. 877/2015**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY 17<sup>TH</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**OLABODE RHODES-VIVOUR  
OLUKAYODE ARIWOOLA  
CHIMACENTUS NWEZE  
AMINA ADAMU AUGIE  
ADAMU PAUL GALUMJE**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – objection thereto –  
Whether the appropriate time is when confessional statement is sort to be  
tendered.*

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – Objection to its  
voluntariness – Duty on trial court thereto – Whether to conduct trial-within-  
trial.*

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – Retraction thereof –  
Whether court can convict on the retracted confessional statement –  
Conditions thereto.*

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – Retraction thereof – How to test its veracity – The principle in **R. Vs. Sykes (1913) 8.C.A.R. 233, 236***

*CRIMINAL LAW AND PROCEDURE:- Retracted confessional statement – Weight to be attached thereto – How determined.*

*CRIMINAL LAW AND PROCEDURE:- Trial-within-trial – Purpose – Whether meant to test voluntariness of confessional statement.*

*CRIMINAL LAW AND PROCEDURE:- Criminal cases – Prove thereof – Whether prosecution not bound to call all available witnesses.*

*EVIDENCE:- Confessional statement – Admissibility thereof – Distinction between involuntariness and retraction – The principle in **Ikpassa Vs. Bendel State (1981) NSCC 300***

*EVIDENCE:- Corroboration and corroborative evidence – Meaning and purport – The principle in **Rex Vs. Baskerville (1916) 2 KB 658.***

*EVIDENCE:- Tainted witness – Meaning – Whether the mere fact of blood relationship does not make a witness tainted.*

*EVIDENCE:- Vital witness – Meaning – Whether the failure of prosecution to call a witness is fatal to its case.*

*WORDS AND PHRASES:- Tainted witness – Meaning.*

### **Issues for Determination**

- 1. Whether the Court of Appeal was right in affirming the conviction of the appellant after having agreed that the failure of the prosecution to call Supol Ijinla as a witness in the matter amounted to withholding of evidence contrary to Section 149(a) of the Evidence Act?**
- 2. Whether the Court of Appeal was right in affirming the conviction of the Appellant based on the appellant's purported confessional statements?**
- 3. Whether having regard to the totality of evidence adduced in this case, the prosecution proved beyond reasonable doubt the guilt of the appellant.**

### Facts of the Matter

The accused appellant with others were charged before the High Court of Lagos on a two count charge of conspiracy to commit robbery and armed robbery. The accused appellants and others were alleged to have robbed one Inah Elias of his recharge cards at gun point. In prove of its case, the prosecution called four witnesses while the accused appellants testified on their behalf. At the end of trial, the accused appellant was convicted as charged and sentenced to death by hanging. He unsuccessfully appealed to the Court of Appeal. Hence, this further appeal to the Supreme Court.

**Held:** (*Unanimously dismissing the appeal*)

1. *Failure to call a vital witness is fatal to the case of the prosecution*  
**A vital witness is a witness, whose evidence may determine the case one way or the other, and it is settled that the failure to call such a witness is fatal to the Prosecution's case - Onah Vs. State (1985) 3 NWLR (Pt. 12) 236 SC. (P.....para.....)**
  
2. *The prosecution is entitled to call only the witnesses it considers relevant to its case*  
**It is also well settled that the prosecution is entitled to call only the witnesses that it considers relevant to its case. In effect, it is for the prosecution to determine the direction of its case and which witness to call to prove its case, and once it discharges that burden on it to prove its case beyond reasonable doubt, it does not matter that a particular witness was not called to give evidence. (P.....para.....)**
  
3. *Distinction between confessional statement involuntarily made and one which is disowned*  
**This issue needs unravelling because different principles of law govern admissibility of a confessional statement disowned, and the one that is objected to as involuntarily made, see Ikpasa Vs. Bendel State (1981) NSCC 300, where Udoma, JSC, explained:**

**A distinction is usually drawn - - between a confession objected to on the ground that it was not made at all - - in which case such a confession may be said to have been retracted, and a confession objected on the ground that it was not voluntary in that although an accused person agreed to have made the confession, his complaint would be that he was forced or induced to make it. In the latter case, what is**

attacked is the admissibility in evidence of the confession, therefore, a trial-within-trial must be held -- to determine whether or not the confession was voluntary. If at the end of trial, the court [concludes] that the confession was not voluntary, then it is not admissible in evidence - - In the former case, where the confession is wholly retracted, the question as to whether or not the confession is admissible - - does not arise - - The trial judge is entitled to admit the confession in evidence -- and thereafter decide - - whether or not -- the accused did make the statement as alleged by the police.

Where the accused contends that he did not make the confession, the trial court is entitled to admit it in evidence, and thereafter, decide whether he made the statement at the conclusion of trial. Thus, a trial-within-trial is not required in such circumstances.

But where the accused agreed that he made the confession, and complains that he was forced or tortured to make it, this calls into question its admissibility, and the trial court must, therefore, hold a trial-within-trial to determine its admissibility in evidence. The issue of voluntariness is kept distinct from the issue of guilt; and this is carried out by insulating the enquiry into voluntariness in a compartment that is completely separate from the main trial.

In effect, an accused has the right to have the question of his confession's admissibility tried as a separate and distinct issue. So, he can go into the witness-box on the issue of voluntariness, without being exposed to general cross-examination on the issue of his guilt- see *Ifaramoye Vs. The State (2017) LPELR-42031 (SC)*. (*P.....para.....*)

4. *The purpose of a trial-within-trial*  
A trial-within-trial is used to test voluntariness of a confession; not what value or weight to attach to the evidence. In other words, the question of the value and what weight to attach to a confession admitted in evidence after a trial-within-trial is a different matter altogether, as "*admissibility*" and "*weight*" are not the same thing. For instance, the fact that a document was admitted in evidence, with or without objection, does not necessarily mean that it made out or established the evidence contained therein which must be accepted by the trial court. As Tobi, JSC, pointed out in *Abubakar Vs. Chuks (2007) 18 NWLR (Pt. 1066) 386 at 403 "It is not automatic"*. (*P.....para.....*)
5. *When to object to the admissibility of a confessional statement*

**As to Exhibit P4, which the appellant admitted that he made at Alausa Police Station, his attempt to bring its admissibility into question in this appeal must be stopped in its tracks because it is settled that the appropriate time to object to the admissibility of a confessional statement on the ground of involuntariness is when the statement is being tendered; not when the accused person opens his defence or during that defence - *Ogudo Vs. State (supra) (P.....para.....)***

6. *The court can convict on the retracted confessional statement of the accused person*

**It is a well-established principle that the court can convict on the retracted confessional statement of the accused person. But the court is enjoined to satisfy itself that the confession was free, voluntary and properly taken, and that it passed the six tests to be applied to a confession that was suggested by Ridley. J., in *R. Vs. Sykes (1913) 18 CR App R 233. (P....para.....)***

7. *The questions a court will ask itself in determining the weight to attach to confessional statement, retracted or not retracted*

**As the Court of Appeal pointed out, in determining the weight to attach to a confessional statement, retracted or not, the court must ask itself the following questions;**

- *Is there anything outside the confession, which shows that it may be true?*
- *Is it corroborated in anyway?*
- *Are the relevant statements of fact made in it most likely true as far as they can be tested?*
- *Did the accused have an opportunity to commit the offence?*
- *Is the confession possible?*
- *Is the confession consistent with other facts, which have been ascertained and established?*

**In other words, it is desirable to find independent evidence; that is, to have some evidence outside the confession, however slight, of circumstances, which make it probable that the confession made by the accused was true - see *Queen Vs. Itule (1967) 2 SCNLR 183; Edhigere Vs. State (1996) 8 NWLR (Pt. 464) 1 at 13 - 74*. In this case, the two lower courts were convinced of the guilt of the appellant, based on the evidence presented by the prosecution witnesses. *(P....para.....)***

8. *Meaning of corroboration and corroborative evidence*  
Now, "**corroboration**" as explained by Lord Reading, CJ. in *Rex Vs. Baskerville* [1916] 2 KB 658, must be independent evidence, which affects an accused by connecting or tending to connect him with the crime. It must be evidence, which implicates him, that is, which confirms in some material particular not only the evidence that the crime was committed, but that the accused committed it. So, corroborative evidence is evidence that shows that the story that the Accused committed the crime is true, and not merely that the crime has been committed, but that it was committed by him. (P....para.....)
9. *Definition of a tainted witness*  
Now, the accepted definition of a tainted witness is a person, who is either an accomplice or who, by the evidence he gives, may and could be regarded as having some personal purpose to serve. So, his evidence should be treated with considerable caution "*and examined with a tooth comb*" - see *Adetola Vs. State* (1992) 4 NWLR (Pt. 235) 267 and *Egwumi Vs. State* (2013) 13 NWLR (Pt. 1372) 525. (P....para.....)
10. *The blood relationship between a victim and the prosecution witness is not sufficient to make the witness a tainted witness*  
However, it is well settled that the fact that there is a blood relationship between a victim and the prosecution witness is not sufficient in itself to make him a tainted witness, whose evidence is unreliable, unless corroborated - see *Egwumi Vs. State* (*supra*), *Omotayo & Ors Vs. State* (2009) LPELR-2663(SC), and *Omotola Vs. State* (2009) 7 NWLR (1139) 148 wherein Ogbuagu. JSC, observed:

A case is not lost on the ground that those, who are witnesses, are members of the same family or community What is important is their credibility and that they are not tainted witnesses. This is because the prosecution should not be encouraged to call hired witnesses, especially in murder cases of capital offences. Justice, it is said, will be defeated, if the prosecution of any accused person can only commence, when and only when, witnesses are neither related to the accused nor are members of the same family - - The evidence of a relation can be accepted, if cogent enough to rule out the possibility of deliberate falsehood and bias - - There is no law, which prohibits blood relations, from testifying for the prosecution where such witness a relation is the victim of the crime committed.

So, the blood relationship of a witness with the victim of a crime cannot be regarded as a basis to describe his evidence as untrue, biased or tainted. It is a different matter if the witness did not see what he claimed to have witnessed or his evidence is incredible. But the mere fact that he is related to the victim of the crime is not sufficient in itself to describe the witness as a tainted witness or tar him with the same brush and ask that his evidence be rejected. (*P....para.....*)

11. *Distinction between retraction and involuntariness of a confessional statement*  
 With respect, learned counsel for the appellant, in his submission on issue two, failed to distinguish between two dissimilar situations with regard to statements of accused persons, namely, the retraction or denial of a statement and an objection to its voluntariness. Now, with regard to the retraction of extra-judicial statements, the law is settled that a retraction or denial of a confessional statement does not affect its admissibility.

This has long been settled in the very old cases of *R. Vs. Sapele and Anor* (1952) 2 FSC 74; *R Vs. Itule* (1961) All NLR 462; the relatively old decisions of *Ikpasa Vs. The State* [1981] 9 SC 7; *Akpan Vs. State* (1992) LPELR -381 (SC) 36; *Osakwe Vs. State* [1994] 2 SCNJ 57; *Nwangbomu Vs. The State* [1994] 2 NWLR (Pt. 327) 380; *Bature Vs. State* [1994] 1 NWLR (Pt. 320) 267; *Eragna and Ors Vs. The AG, Bendel (1994)* LPELR -(SC) 30; *Idowu Vs. State* [1998] 11 NWLR (Pt. 574) 354; as well as the more recent decisions of *Silas Sule Vs. State* (2009) LPELR -3125 (SC) 28-30, G-B; *FRN Vs. Iweka* (2011) LPELR -9350 (SC) 53; *Oseni Vs. The State* (2012) LPELR -7833 (SC) 22-23. (*P....para.....*)

12. *The principle in R. Vs. Skyes (1913) 8C.A.R 233, 236*  
 What the law enjoins, in such situations, is the application of the principles which should be considered in determining whether or not to believe and act on such a confession which an accused person resiled from as enunciated in *R. Vs.Sykes* (1913) 8 C. A. R. 233, 236; *Kanu Vs. The King* (1952) 14 WACA 30; *The Queen Vs. Obiasa* (1962) 1 All NLR 651; [1962] 1 SCNLR 137; *Obosi Vs. The State* (1965) NMLR 129.

Other cases include: *Onochie and Ors Vs. The Republic* (1966) NMLR 307; *Jafiya Kopa Vs. The State* (1971) 1 All NLR 150 *Dawa Vs. The State* [1980] 8 -11 SC 236; *Ejinima Vs. The State* [1991] 5 LRCN 1640, 1671; *Arthur Onyejekwe Vs. The State* [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444; *Aiguoreghian and Anor. Vs. The State* [2004] 3 NWLR (Pt.860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt.1) 65.

These are: whether there is anything outside the confession which may vindicate its veracity; whether it is corroborated in any way; whether

its contents, if tested, could be true; whether the defendant had the opportunity of committing the alleged offence; whether the confession is possible and the consistency of the said confession with other facts that have been established, *Osetola and Anor Vs. The State* (2012) LPELR -9348 (SC) 32-33, G-D; *Kareem Vs. FRN* [2002] 7 SCM 73; *Akpan Vs. The State* [2001] 11 SCM 66. (P....para.....)

13. *What the trial court is required to do to determine the voluntariness or otherwise of a confessional statement*

The other dissimilar situation relates to objections as to the involuntariness of a confessional statement. Thus, where, in a criminal trial, an accused person challenges the admissibility of his confessional statement on the ground of its involuntariness, the trial court is required to conduct a trial -within-trial [mini trial or *voire dire*] to determine its admissibility before receiving it in evidence, *R. Vs. Onabanjo* (1936) WACA 43; *R. Vs. Kassi and Ors* (1939) 5 WACA 154; *Obidiozor and Ors Vs. The State* (1987) LPELR - 2170 (SC) 17; E- F.

As this court explained in *FRN Vs. Borishade* [2015] 5 NWLR (pt 1451) 155 [per Nweze, JSC]:

... the *raison detre* for the evolution of the mini trial or *voire dire* procedure is to arm the trial court with a procedural mechanism for sifting the chaff of involuntary, and, hence, inadmissible evidence from the wheat of admissible evidence whose cogency and probative value are indubitable. The cases on this point are legion: they are countless. Only one or two of them will be cited here, *Ogudo Vs. The State* [2011] 12 SC (Pt. 1) 71; *Ibeme Vs. The State* (2013) LPELR -20138 (SC); *Auta Vs. State* [1975] 4 SC 0125; *Effiong Vs. State* [1978] 8 NWLR (Pt. 562) 362; *Lasisi Vs. State* (2013) LPELR -20183 (SC) 29; *The State Vs. Rabiun* (2013) LPELR -1982 (SC); *Ogudo Vs. The State* (2011) LPELR -860 (SC); *Obidiozo Vs. State* [1987] 4 NWLR (pt 67) 748; *Ogunye Vs. State* [1999] 5 NWLR (Pt. 604) 548, 570.

Scholars are, also, unanimous on this issue, I. H. Dennis, *The Law of Evidence* [Second Edition] (London: Sweet and Maxwell, 2002) 184; L. O. Aremu, "The Voluntariness of Confessions in Nigerian Law," in *1977-1980 Nigerian Law Journal*, 32; J. Amadi, *Contemporary Law of Evidence in Nigeria* [Vol. 1] (Port Harcourt: Pearl Publishers, 2011) 324; M. A. Owoade, "Voluntariness of Confessions in Nigerian

**Law - Need for Reform," in 1987 *Nigerian Current Law Review* 179. (P....para.....)**

**Lead Judgement:**

**Representation**

**A. Oleru (Esq.), for the appellant Rotimi Seriki (Esq.), for the respondent**

**AMINA ADAMU AUGIE, JSC (Delivered the Lead Judgment):**

**JOHN HINGAH BIEM**

**Vs.**

- 1. SOCIAL DEMOCRATIC PARTY**
- 2. INDEPENDENT NATIONAL RESPONDENT SELECTORAL COMMISSION (INEC)**
- 3. DR. STEPHEN TERUNGWA HWANDE**

**SC. 341/2019**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**TUESDAY, 14<sup>TH</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS:**

**OLABODE RHODES - VIVOUR  
KUMAI BAYANGAKAAHS  
CHIMACENTUS NWEZE  
AMIRU SANUSI  
AMINA ADAMU AUGIE**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*ACTION:- Cause of action – Nature and meaning.*

*ACTION:- Cause of action – When statute barred – How determined.*

*ELECTION PETITION:- Substitution of candidate – Where a party alleges wrongful substitution after an election – Whether it is the date of the alleged substitution rather than the date of the primary election that will determine whether action is statute barred.*

*LEGISLATION:- Rules of Federal High Court – Powers of the Chief Judge of the Federal High Court thereto – Whether derived from the constitution.*

*PRACTICE AND PROCEDURE:- Affidavit evidence – Conflicts therein – Where there is a conflict in affidavit, court can resolve conflicts by calling oral evidence.*

*SERVICE:- Federal High Court Rules – Service outside jurisdiction – Or.6 r. 31*

*federal High Court Rules – Whether means service outside Nigeria, which does not require endorsement under Section 97 of the Sheriffs and Civil Process Act.*

*STATUTE:- CFRN 1999 (as amended) – Section 285(9) thereof – Nature and purport thereof – Time within which to file election petitions.*

### **Facts of the Matter**

The plaintiff appellant sued the defendant respondents at the Feral High Court Makurdi Judicial Division by means of an originating summons claiming some declaratory and injunctive reliefs against the respondents who were the defendants in respect of primary election of social democratic party.

He claimed that he scored the highest number of votes, but that the name of the 3<sup>rd</sup> defendant was sent as the winner of the election to INEC.

The trial Federal High Court entered judgment against the defendants. The 1<sup>st</sup> defendant appealed against the said judgment to the Court of Appeal which was allowed in part.

The present appellant on record has now appealed to the Supreme Court.

**Held:** *(Unanimously allowing the appeal)*

1. *How to determine whether an action is statute barred in an action for wrongful substitution*

In order to determine whether originating summons taken out by the plaintiff/appellant is statute barred as envisaged in Section 285(9) of the Constitution, the date of occurrence of the event, decision or action complained of, in this case the date of discovery, as there is no evidence that the decision was communicated to the appellant prior to 6/11/2018 even though he got wind that the substitution was on 3/11/2018. Even if it is considered that the cause of action accrued on 3/11/2018, the appellant took out the originating summons on 8/11/2018. The 14 days stipulated in Section 285 (9) had not lapsed when the action was commenced. It is not the date the results of the primaries were announced that ignited the cause of action but the substitution of the appellant's name with that of the 3<sup>rd</sup> respondent as the person duly nominated by the party to contest the Gubernatorial Election of 2019 in Benue State. By the act of substitution the result of the primaries were tampered with. Having participated in the primaries, the appellant had a vested right to sue if he was wrongly substituted. The action commenced by the appellant is therefore not statute barred. *(P.....para.....)*

2. *How to resolve conflicts in affidavit*

The law is well settled that when a court is faced with affidavits which are irreconcilably in conflict, the judge hearing the case in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call See: *Falobi Vs. Falobi* (1976) 9-10 SC 1 at p. 9. This court in *Alfa Vs. Attai* (2018) 5 NWLR (Pt. 1611) 59 endorsed the caution given by the Court of Appeal that the procedure of originating summons ought not to be used where the facts are or are likely to be in dispute. It was stressed in the contributory judgement of my Lord, Rhodes-Vivour JSC supra at page 92 that where there are material contradictions on facts that can only be resolved by calling evidence no court would resolve such conflicts in affidavits without calling oral evidence. However, where there are documents before the court from which the conflicts in the affidavit evidence can be resolved, there would be no need to call oral evidence. See: Section 123 of the Evidence Act, 2011. See also *Ezechukwu Vs. Onwuka* (2016) 5 NWLR (Pt. 1506) 529. There were no substantial disputes as to facts in this case. The only divergence is that while the appellant claimed to have emerged the winner of the primaries in which he and two other candidates namely, Barrister Innocent Daagba and Mr. Matthew Asemanyian Dubu, the cross-appellant and 3<sup>rd</sup> respondent maintained that the 3<sup>rd</sup> respondent was the fourth candidate who also contested the primaries and won: hence his name was forwarded to the 2<sup>nd</sup> respondent as the Gubernatorial candidate of the Social Democratic Party(SDP) for the 2019 General Election. In order to justify his emergence as the candidate of the Party, he was issued the Certificate of Return (Exhibit 9) dated 10<sup>th</sup> October, 2018. (P.....para.....)

3. *Power of the Chief Judge of Federal High Court to make rules.*

The submissions of learned counsel for the appellant are well founded. Section 19(1) of the Federal High Court Act provides that the Court shall have and exercise jurisdiction throughout the Federation, and for that purpose the whole area of the Federation shall be divided into Judicial Divisions. This is for administrative convenience and for dispatch of business as the Chief Judge may direct any of the judges to sit in any Judicial Division in the country. This is unlike the State High Court where the Chief Judge of the State can exercise a similar power only within the state. The power vested in the Chief Judge of the federal High Court to make rules of court are not derived from the Sheriffs and Civil

**Process act but from Sections 254 of the Constitution and 44 of the Federal High Court Act.**

**Section 254 of the Constitution of the Federal Republic of Nigeria states:-**

**"Subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court".**

**The Federal High Court Act which is deemed to have been enacted by the National assembly stipulates in Section 14(1)(s) that -**

**“The Chief Judge may with the approval of the President, make Rules of Court for carrying this Act into effect, and in particular and without prejudice to the generality of the foregoing, for all or any of the following purposes and matters –**

- (s) for providing for the service or execution of any writ, warrant, order or other process issuing out of the court, the payment of mileage allowance before or after service or execution, the conditions precedent before any such process or process of certain classes will be served or executed and the procedure to be followed after the service or execution of such process", See: Boko Vs. Nungwa (2019) 1 NWLR (Pt. 1654) 395. (P.....para.....)**

**4. *The principle in Odua Investment Co. Ltd Vs. Talabi (1997) 10 NWLR (Pt. 523) 1***

**The decision in Odua Investment Co. Ltd Vs. Talabi supra upon which the lower court based its decision to nullify the writ is distinguishable from this case. In that case the respondent instituted an action against the appellant and one other person in the High Court of Lagos State claiming certain declaratory reliefs and in the writ of summons, the appellant's address for service was put as "Cocoa House Complex Ibadan". The appellant was served in Ibadan, Oyo State, a place outside the territorial jurisdiction of Lagos State High Court. There was no endorsement on the writ as required by Section 97 of the Sheriffs and Civil Process Act, to the effect that the writ was to be served out of the jurisdiction of the court. The period within which to enter appearance was also stated to be eight days**

and no leave of court or judge was obtained to serve the writ out of jurisdiction. The full court decided by a majority of 6-1 that non-compliance with Section 97 and/or Section 99 of the Sheriffs and Civil Process Act and the rule of court requiring leave of the court or a judge for a writ to be served out of jurisdiction renders the writ and/or service of it voidable and the defendant who complains of such non-compliance is entitled *ex debito justitiae* to have same set aside. (P.....para.....)

5. *Service outside jurisdiction under Federal High Court Rules means service outside Nigeria*

The submission by learned counsel for the 1<sup>st</sup> respondent/cross-appellant that the principal legislation that deals with the service of court processes of any court in Nigeria is the Sheriffs and Civil Process Act is therefore not correct as it relates to the Federal High Court. It is only true of the State High Courts and the FCT High Court because their jurisdiction is circumscribed by the territory each State occupies and the Federal Capital Territory. The service of any process issued by the Federal High Court can be carried under the Sheriffs and Civil Process Act, if such service is to be executed outside the territory of Nigeria. Order 6 Rule 31 of the Federal High Court Rules interprets outside jurisdiction to mean outside the Federal Republic of Nigeria. Thus to hold that an originating summons which was issued out of the registry of the Federal High Court, Warri which was addressed for service at Abuja outside Delta State where the originating summons was issued from should be nullified because it did not comply with Section 97 of the Sheriffs and Civil Process Act as this court did in *Izeze Vs. INEC* (2018) 11 NWLR (Pt. 1629) 110 at 132 did not take cognisance of Section 19 of the Act and Order 6 Rule 31. I am of the considered view that the originating summons issued by the Federal High Court, Makurdi which is to be served in Abuja cannot be considered to be service outside jurisdiction and therefore does not require to be endorsed as a concurrent writ. (P.....para.....)

6. *The Nature and purport of Section 285(9) of CFRN*  
Section 285 (9) of the Constitution (fourth alternation No. 21) Act 2017 provides that:

- (9) Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit.”

It has been said in a plethora of cases that provisions of the Constitution

should be read and interpreted without embellishments. Where the words used are clear and free from ambiguity they should be given their ordinary meaning. See *AG Anambra State Vs. A.G Federation (1993) 6 NWLR (pt.302) p.692.*

*(P.....para.....)*

7. *The meaning and nature of cause of action*

This facts briefly are that the appellant contested the primary election of his party, the SDP (1<sup>st</sup> respondent) on 3<sup>rd</sup> October 2018. He contested the gubernatorial primaries. He was declared the winner, but instead of the 1<sup>st</sup> respondent sending his name to the 2<sup>nd</sup> respondent, (INEC) as its candidate for the gubernatorial elections, it sent the name of the 3<sup>rd</sup> respondent, and this was done on 6<sup>th</sup> November 2018.

Cause of action is the entire set of circumstances that give rise to an enforceable claim and consists of two elements namely:

- (a) the "wrongful act of the defendant which gives rise to the cause of complaint, and
- (b) the consequential damage. See *A.G Rivers State Vs. A.G Bayelsa State (2012) 7 SC (Pt. II) p. 110.*

The act of the 1<sup>st</sup> respondent forwarding the name of the 3<sup>rd</sup> respondent to INEC instead of the appellant's name gives the appellant his cause of action; and that occurred on 6<sup>th</sup> November 2018. The appellant filed his action by an originating summons on 8<sup>th</sup> November, 2018.

*(P.....para.....)*

8. *How to determine whether an action is statute barred*

To determine if the suit is statute barred, the court examines the originating process to know when the plaintiffs cause of action, or wrong complained off occurred and comparing that date with the date the suit was filed. If the suit is brought outside the time prescribed by the section of the Constitution or applicable legislation it is statute barred. See *Asaboro Vs. Pan Ocean Oil Corp Nig Ltd (2017) 7 NWLR (Pt.1563)p.42; Obiefuna Vs. Okoye (1961)ALLNLR p.351.*

A suit filed outside the prescribed period offends the provision of the section. The plaintiff would have a cause of action but one that cannot be enforced.

The appellant's action was not statute barred as it was filed well within 14 days after he had a cause of action on 6<sup>th</sup> November 2018. His suit was filed on 8<sup>th</sup> November 2018. *(P.....para.....)*

**Lead Judgement:**

**Representations:**

**T. D. Pepe (Esq.), with T. Azoom for appellant/cross-respondent**

**S. Aruwa (Esq.), (with him Messrs P. T. Soje, E. E. Mmeni, M. I. Balogun and A. I. Idris) for 1<sup>st</sup> respondent/cross-appellant.**

**Ayoola Ajayi (Esq.) for 2<sup>nd</sup> respondent**

**O. Ogundiran (Esq.), for 3<sup>rd</sup> respondent.**

KUMAI BAYANG AKAAHS, JSC (Delivered the lead judgment):

**WAHAB ALAO  
VS  
THE STATE**

**SC.973/2015**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY, 31<sup>ST</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**MUSADATTIJO MUHAMMAD  
KUMAI BAYANG AKAHHS  
JOHN INYANG OKORO  
EJEMBI EKO  
UWANI MUSA ABBAJI**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*COURT: Administration of justice – Approach thereto – Whether Courts have shifted away from narrow technical approach to justice.*

*CRIMINAL LAW AND PROCEDURE: Armed robbery – Elements thereof – What prosecution must prove.*

*CRIMINAL LAW AND PROCEDURE: Confessional Statement – Denial thereof – Whether mere denial does not make a confessional statement inadmissible especially where there are other corroborating evidence.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Objection thereto – Where accused objects to the involuntariness of a confessional statement – Whether objection must be done at the point statement is sought to be tendered.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction thereof – Whether court will determine weight to be ascribed thereto – Relevant conditions thereof.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction thereof – Approach of court thereto.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Validity thereof – How determined.*

*CRIMINAL LAW AND PROCEDURE: Criminal cases – Standard of proof thereof – Whether proof beyond reasonable doubt does not mean proof beyond all shadows of doubt.*

*CRIMINAL LAW AND PROCEDURE: Guilt – Proof thereof – Whether a free and voluntary confession is a sufficient proof of guilt.*

*CRIMINAL LAW AND PROCEDURE: Guilt of an accused – Proof thereof – Methods thereto.*

*CRIMINAL LAW AND PROCEDURE: Identification – Where the confessional statement of the accused fixes him to the scene of crime – Whether the issue of identification parade is no longer relevant.*

*EVIDENCE: Confessional statement – Relevancy thereof – Whether it is the best evidence which can be relied upon to convict the accused.*

*EVIDENCE: Confessional statement – Where a confessional statement is obtained in an oppressive or any illegal manner – Whether such confessional statement is inadmissible in law Section 29 of Evidence Act 2011 Considered.*

*STATUTE: Evidence Act – Section 29 thereof – Nature and purport – Principles relating to confessional statement.*

*STATUTE: Evidence Act 2011 – Section 135 thereof – Nature and purport – Nature of proof required in criminal cases.*

### **Issue for Determination**

**Whether court below was wrong in upholding the decision of the trial court to the effect that the prosecution had proved its case of conspiracy and armed robbery against the appellant beyond reasonable doubt.**

### **Facts of the Matter**

This appeal arose from the judgment of the Court of Appeal, Ibadan Division delivered on 6<sup>th</sup> December, 2013. In its judgement, the court below upheld the decision of the learned trial judge, Adeniran J. which had convicted and sentenced the appellant for the charge of armed robbery on 12<sup>th</sup> July 2012.

Being dissatisfied with the decision of the lower court, the appellant filed the instant appeal vide a notice of appeal dated 16<sup>th</sup> June, 2014 and filed 20<sup>th</sup> December, 2013 wherein he raised three (3) grounds of appeal.

The appellant was charged together with Fatai Busari, OsuolaleTijani, Mumini Adisa and Sunday Okafor at the High Court of Oyo State with offences of conspiracy to commit armed robbery and armed robbery contrary to Section 5(b) of the Robbery and Firearms (Special Offences) Act Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1999 and the offence of Armed Robbery contrary to Section 1(2)(a) and (b) of the Robbery and Firearms (Special Offences) Act. Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1990.

The offence was alleged to have been committed at Mobil Petrol Station, Challenge, Ibadan, Oyo State on November 18<sup>th</sup> 1994 by robbing one Alhaji Nurudeen Kolawole ('the deceased') of the sum of N150,000.00 (One Hundred and Fifty Thousand Naira) and in the process killed the deceased. At trial, the appellant Fatai Busari and Mumini Adisa were found guilty and convicted for the offences and sentenced to death by hanging or execution by firing squad as contained in the judgement of the trial court.

The appellant was dissatisfied with the said judgement and filed an appeal at the court below. The court below delivered its judgement on 6<sup>th</sup> December, 2013 and dismissed the appellant's appeal and confirmed the conviction and sentence of the trial court. Still being dissatisfied, the appellant sought to explore right of further, final appeal to the Supreme Court.

**Held:** *(Unanimously dismissing the appeal)*

1. *The nature and purport of section 135 of Evidence Act 2011*

**The point that must be made, and clearly made, is that the appeal before us borders on conspiracy to commit the offence of armed robbery and the actual act of armed robbery. The offence of conspiracy to commit armed robbery is charged pursuant to Section 5 (b) of the *Robbery and Firearms (Special Offences) Act Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1999* and while the actual act of Armed Robbery is charged pursuant to Section 1(2)(a) of the of the *Robbery and Firearms (Special Offences) Act Laws of the Federation of Nigeria*.**

**The offence for which the appellant is charged is a very serious one, and by virtue of Section 135(1) of the Evidence Act 2011, the offence must be strictly proved by cogent and convincing evidence that leaves no iota or doubts or scepticism in the minds of the parties and members of the public, and I dare say this court. The section provides:**

**"135. Standard of proof where commission of crime in issue; and burden where guilt of crime etc. asserted.**

- (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.**
- (2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action." (P.....Paras.....).**

2. *Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt*

**It is now well settled that in our criminal jurisprudence, in order for the prosecution to succeed whenever the commission of a crime is in issue against an accused person, he is under a duty to establish its case beyond reasonable doubt. It must however be noted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt.**

**It is settled law that in criminal proceedings, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt and this would be achieved by ensuring that all the necessary and vital ingredients of the charge or charges are proved by evidence. See *Yongo vs. Commissioner of Police* (1992) LPELR - 3528 (SC), (1992) 4 SCNJ 113, *Ogundiyan vs. The State* (1991) LPELR - 2333 (SC), (1991) 3 NWLR (Pt.181) 519, *Akigbe vs. Iog* (1959) 4 FSC 203, *Onubogu vs. The State* (1974) 9 SC 1 at 20, *Babuga vs. The State* (1996) LPELR - 701 (SC), (1996) 7 NWLR (Pt.460) 279. (P.....Paras.....).**

3. *The nature and purport of section 29 of Evidence Act 2011*  
**Section 29 states conditions for making confession relevant.**

- "(1) In any proceedings a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.**
- (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, it is**

represented to the court that the confession was or may have been obtained -

- (a) by oppression of the person who made it; or
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.
- (3) In any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either paragraph (a) or (b) of subsection (2) of this section.
- (5) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture."  
(P.....Paras.....).

4. *Confessional statement obtained by duress is inadmissible*

**What is the essence of the above provisions? There is no ambiguity in the law. Clearly, the law intends that any confessional statement obtained in an oppressive or any illegal manner is liable to be vitiated for not being voluntary, and is thus inadmissible in law. That was the decision of this court in State vs. Salawu (2011) 18 NWLR (Pt.1279) Pages 580 at 605, Para C-F. (P....Paras.....).**

5. *Mere denial does not make confessional statement inadmissible*

**The appellant contention seems compelling; to the extent that he did not make the confessional statement (Exhibit "P"). However, denial does make confessional statement inadmissible particularly where there are other forms of evidence before the court, like in the instant appeal.**

*(P.....Paras.....).*

6. *Methods of proving guilt of an accused*

**The guilt of the appellant is not premised solely on Exhibit "P" assuming, but without conceding that it was wrongly evaluated. In Nigeria, the law provisions give the prosecution the choice or options for proving its case beyond reasonable doubt. A prosecutor may deploy all three options or a combination of options. The offence of an accused may be proved by:**

- "(I) a confessional statement of the accused;**
- (ii) Evidence of an eye witness; or**
- (iii) Circumstantial evidence."**

**See Igri vs. The State (2012) 16 NWLR (Pt.1327) 522; Oguno vs. The State (2013) 15 NWLR (Pt.1376) at 1; Ibrahim vs. The State (2014) 3 NWLR (Pt.1394) 305; Ogedengbe vs. The State (2014) 12 NWLR (Pt.1421) 338 and Umar vs. The State (2014) 13 NWLR (Pt.1425) at 497. *(P.....Paras.....).***

7. *Confessional statement is the best evidence and can be relied upon to convict an accused.*

**The law is that, by virtue of the provisions of Sections 28 of the Evidence Act, confessional statement is tenable and admissible. Confessional statement is the best evidence to ground conviction and, as held in a number of cases, it can be relied upon solely where voluntary. The criminal guilt of an accused person could be established by confessional statement, circumstantial evidence and evidence of an eye witness. A confessional statement does not become inadmissible even if the accused person denied having made it. See for example Partick Ikemson & 2 Ors vs. The State (1989) 3 NWLR (Pt.110) 455 at 476 Para D; Joseph Idowu vs. The State (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt.680) 48, Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.438) 530 at 537 Para D-E; Samuel Theophilus vs. The State (1996) 1 NWLR (Pt.423) Page 139 at 155 Para A-B; and Awopeju vs. The State (2002) 3 MJSC 141 at 151. *(P.....Paras.....).***

8. *The six way test of a true confession*

**It is admitted that a court may rely solely on confessional statement, particularly where such is denied. In this case, Exhibit "P" would appear to satisfy the six way test of a true confession namely:**

- "i) Whether the confession is the truth;**
- ii) Whether the confession was corroborated;**

- iii) **Whether the confession was free as can be tested;**
- iv) **Whether the appellant had opportunity to commit the crime;**
- v) **Whether the confession was possible; and**
- vi) **Whether the confession was consistent with other proved or ascertained facts."**

See **Kanu vs. The State (1952) 14 WACA 30; Mbenu vs. The State (1988) 3 NWLR (Pt.84) 615; Stephen vs. The State (1986) 5 NWLR (Pt.46) 978; and Udo vs. The State (1976) 8-9 S.C. 234; Ogudo vs. The State (2011) 12 S.C. (Pt.1) 71 at 79. (P.....Paras.....).**

9. *Elements of robbery*

**The essential ingredients of robbery as constituted under Section 2(1) of the Robbery and Firearms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria, 2004 are that: (i) there was robbery or series of robberies; (ii) that each robbery was an armed robbery; (iii) that the accused person was one of those who took part in the robbery.**

**The unassailable evidence before the trial court was in two folds. Exhibit "P", a confessional statement which though voluntary was denied by the appellant, and the evidence of other witnesses. Leaving aside the retraction of the confessional statement, Exhibit "P", which I doubt was even retracted in this circumstance; the evidence before the court was so overwhelming, as rightly observed by the trial court and affirmed by the court below. (P.....Paras.....).**

10. *Courts have shifted away from technical approach to justice*

**On identification, the appellant had submitted that an identification parade was necessary in the circumstances of the case because the appellant was never mentioned as one of those who took part in the commission of the offence of robbery. In the instant case, the appellant's attempt at overplaying the issue of identification parade is, in my view, cheap and untenable. It was an attempt at escaping justice by relying on mere irregularity or technicality to avoid the conviction and sentence validly imposed on him for the crime he has committed. See **Solola & Anor. vs. The State (2005) All FWLR (Pt.269) 1751. Courts generally have deliberately shifted away from narrow technical approach to justice to now pursue the course of substantial justice. See **Makeri Smelting Co. Ltd. vs. Access Bank (Nig.) Plc (2002) 7 NWLR (Pt.766) 447 at 476-477. (P.....Paras.....).******

11. *Where issue of identification not necessary*

Identification parade would have been necessary if the identity of the appellant was in doubt. That is not the case in the instant appeal. Moreso, the confessional statement shows clearly that he jointly participated in committing the offence that led to the death of the deceased person. The appellant mentioned the name of other co-accused persons (Fatai Busari, Osulale Mumuni Adisa and Sunday Okafor and himself) as members of the gang who came from Lagos to Ibadan and carried out the robbery that led to the death of the deceased. How best to identify a self-confessing accused person other than by his self-identification?

Clearly, the trial court and the lower court have reached sound, unassailable decisions on finding of facts which this court will not disturb. Frankly, there is no reason to do otherwise than to uphold the decisions of the trial court and court below. It is in view of the foregoing that I resolve the sole issue I have formulated in this appeal against the appellant. I hold that this appeal lacks merit and is accordingly dismissed. The conviction and sentence of the appellant by the court below is hereby reconfirmed. (P.....Paras.....).

12. *How to ascribe weight to a confessional statement*

When a confessional statement is admitted in evidence but is later retracted, the trial court should test its truthfulness and veracity by examining the statement in the light of other credible evidence to determine what weight to attach to the statement by considering the following:-

- (a) Whether there is anything outside the confession to show that it is true.
- (b) Whether it is corroborated.
- (c) Whether the facts contained in the statement are true as far as they can be tested.
- (d) Whether the accused person had the opportunity to commit the offence
- (e) Whether the confession is possible
- (f) Whether it is consistent with other facts ascertained and proved at the trial. See: *Dawa vs. State* (1980) 8-11 SC236; *Osetola vs. State* (2012) 17 NWLR (Pt. 1329) 251.

The trial judge meticulously considered these factors before arriving at the conclusion that the facts contained in the statements of the accused agree substantially in some material particulars with the evidence of PW1, PW2 and

**PW4 as regards the operation at Mobil Petrol Station, Challenge, Ibadan. The concurrent findings of both the trial court and the Court of Appeal Ibadan have not been shown to be perverse by learned counsel for the appellant. The reasons given by my learned brother, Bage JSC that the appeal is devoid of merit accord with mine and it is accordingly dismissed. (P.....Paras.....).**

13. *Confessional statement is the best pointer to commission of crime*  
**It is trite law that a confessional statement made by an accused person, which is properly admitted in evidence is, in law, the best pointer to the truth of the role played by such accused person in the commission of the offence. See Oseni vs. State (2012) 5 NWLR (Pt. 1293) 351, FRN vs. Iweka (2013) (2 ors) 3NWLR (Pt. 1341)285. (P.....Paras.....).**
14. *Attitude of court to retracted confessional statement*  
**The retraction of a confessional statement does not render confession inadmissible. The fact that an accused person denies making a confessional statement to the police, does not render such extra judicial statement inadmissible merely because the accused person denies having made it. What the court is expected to do to determine the weight to be attached to a retracted confessional statement is to test its truthfulness and veracity by examining the said statement in the light of other credible available evidence.**  
**The court would consider whether:**
- (a) **There is anything outside that Confessional statement to show that it is true;**
  - (b) **It is corroborated;**
  - (c) **The facts stated in it are true as far as it can be tested;**
  - (d) **The accused person had the opportunity of committing the offence;**
  - (e) **The accused person's confession is possible;**
  - (f) **The Confession is consistent with the other facts ascertained and proved at the trial. See**

**Osetola vs. State (2012) 17 NWLR (Pt. 1329) 251 at page 278; Dawa vs. State (1980) 8-11 SC 236.**

**In the instant appeal, the appellant named the Co-accused persons as members of the gang who took part in the robbery in his Confessional statement. This clearly is a pointer to the fact that he knew something**

**BERNARD EGBA  
VS  
THE STATE**

**SC.92/2014**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY, 3<sup>RD</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**OLABODE RHODES -VIVOUR  
OLUKAYODE ARIWOOLA  
CHIMACENTUS NWEZE  
COURT  
AMINA ADAMU AUGIE  
EJEMBI EKO**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME  
COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Proof thereof – Whether the overt of the conspirators and inference therefrom constitute conspiracy – The principle in **Abacha vs. State (2002) 11 NWLR (pt. 779) 437.***

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Conviction thereon – Where prosecution fails to prove the substantive offence – Whether it does not make conviction for conspiracy inappropriate.*

*CRIMINAL LAW AND PROCEDURE: Conspiracy – Proof thereof – Whether deduced by inference.*

*CRIMINAL LAW: “Conspiracy – Nature and purport.*

*CRIMINAL LAW: Conspiracy – Meaning – The principle in **Oduneye vs. The state (2001) 1 SC (pt. 1). 1***

*CRIMINAL LAW: Conspiracy – What constitutes – Whether it is the meeting of minds of the conspirators that constitutes the offence of conspiracy.*

*CRIMINAL LAW: Conspiracy – Where accused persons did an act in furtherance of their common purpose – Whether they can be convicted for offence of conspiracy.*

*JUDGMENTS AND ORDERS: Whether the integrity and sanctity of courts judgments are presumed until the contrary is proved.*

*PRACTICE AND PROCEDURE: Appeal – Concurrent findings – Onus on appellant – Where appellant fails to show exceptional circumstance – Whether concurrent findings will not be disturbed.*

*PRACTICE AND PROCEDURE: Cross-examination – Where a party fails to Cross – examine his opponent's witness on a particular matter – Whether failure amounts to acceptance of that evidence.*

*PRACTICE AND PROCEDURE: Record of proceedings – Where a party intends to challenge correctness of record of proceedings – Whether such party is bound to file an affidavit.*

### **Issue for Determination**

**Whether on the totality of the evidence adduced on record, the lower court was right in finding the appellant guilty for the offence of conspiracy?**

### **Facts of the Matter**

**The accused appellant with Boniface Deshika were charged at the High Court of Justice Bauchi for the offences of conspiracy and attempt to kill the Auditor-General of the State.**

**The accused person pleaded not guilty to the two count charge. In proof of its case, the prosecution called four witnesses and tendered several exhibits. The appellant and his co-accused testified in their behalf and called no witness.**

**At the end of trial the trial court dismissed the case of the prosecution. They appealed to the Court of Appeal which allowed their appeal in part. Consequently, the appellant on record has further appealed to the Supreme Court.**

**Held:** *(Unanimously dismissing the appeal)*

**1. The meaning of “conspiracy”**

**Now although a "conviction for conspiracy is not without its inherent difficulties ..." per Achike, JSC in *Oduneye vs. The State* [2001] 1 SC (pt. 1) 1, 6 -7, this court has outlined the basic ingredients that define the said offence. It has, thus, been defined as the agreement by two or more persons to do or cause to be done an**

illegal act or legal act by illegal means. *The actual agreement alone constitutes the offence and it is not necessary to prove that the act has in fact been committed*, *Obiakor vs. The State* [2002] 6 SC (pt. 11) 33, 39 -40; *Dabo and Anor vs. The State* [1977] 5 SC 22; *Onyenye vs. The State* [2012] All FWLR (pt. 643) 1810; *Kaza vs. The State* [2008] 1 - 2 SC 151, 164 - 165; *Njovens vs. The State* [1973] 5 SC 17. (*P.....Paras.....*).

2. *Conspiracy is deduced by inference*

Due to the nature of the said offence, it is rarely or seldomly proved by direct evidence. It is, thus, permissible, for a court to find in favour of proof of the offence of conspiracy as a matter of inference to be deduced from certain criminal acts of the parties concerned. The bottom line of the offence is the meeting of minds of the conspirators to commit an offence and the meeting of the minds needs not be physical, *Adejobi vs. State* [2011] 12 NWLR (pt. 1261) 347, 375.

Simply put, in a charge of conspiracy, proof of actual agreement is not always easy to come by, *Usufu vs. State* [2007] 3 NWLR (pt. 1020) 94. As a result, courts, now, infer conspiracy and convict on it if they are satisfied that the accused persons pursued, by their acts, the same object, one performing one part of the act and the other performing the other part of the same act so as to complete their unlawful design, *Tanko vs. The State* [2008] 16 NWLR (pt. 1114) 597, 637 - 638. (*P.....Paras.....*).

3. *Failure to cross-examine a witness on a particular matter*

My Lords, it is difficult to fathom the basis of the impeachment of the above finding and conclusion. It has long been established that where an adversary fails to cross-examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence, *Oforlete vs. State* [2000] 12 NWLR (pt. 681) 415; *Gaji and Ors vs. Paye* [2003] 8 NWLR (pt. 823) 583; *Akinbiyi vs. Anike* (1959) WRNLR 16; *Nwankwere vs. Adewunmi* (1962) WRNLR 298, 302; *Amadi vs. Nwosu* [1992] 6 SCNJ 59, 71; *Okoro vs. The State* (2012) LPELR-7846 (SC). (*P.....Paras.....*).

4. *It is the meeting of minds that constitutes the offence of conspiracy*

As noted above, it is, thus, permissible, for a court to find in favour of proof of the offence of conspiracy as a matter of inference to be deduced from certain criminal acts of the parties concerned. The bottom line of the offence is the meeting of minds of the conspirators to commit an offence and the meeting of the minds needs not be physical, *Adejobi vs. State* [2011] 12 NWLR (pt. 1261) 347, 375. This, evidently, was what the lower court did here. In my humble view, that was the correct approach, *Tanko vs. The State* (supra); *Adejobi vs. State* (supra).

The lower court did not stop there. It went ahead to instantiate the specific

acts done in furtherance of their agreement. According to the court, they are:

- (i) The approaching of PW1 by the second respondent intimating him of what the first respondent wanted to be done;
- (ii) The act of the second respondent in telephoning the first respondent in the presence of PW1 in Bayan Gari Ward, Bauchi town and telling him that the PW1 had accepted to execute the plot to kill PW2;
- (iii) The part payment of N70,000.00 to PW1 for the execution of the plot; -
- (iv) The act of taking the PW1 together with the second respondent to the office, residence of PW2, and the making available of the photograph of PW2 to the PW1, in addition to providing the home address at Tafawa Balewa to PW1 for the purpose of execution of the plot.

[page 274 of the record].

Against the above background, the court found that "having regard to the definition of the offence of criminal conspiracy in Section 96 (1) of the Penal Code, the offence of criminal conspiracy has been committed by the respondents," [page 274 of the record]. Accordingly, the court found in favour of the proof of the offence of criminal conspiracy as alleged in count one of the charge.

In my humble view, it is difficult to fault these inferences from the facts as presented at the trial court, *Kaza vs. The State* (2008) 5 SCM 70, 104; *The State vs. Salawu* (2011) LPELR- 8252 (SC)38 - 39. Like the lower court, I consider it sufficient that the prosecution, established by the evidence led, the circumstances from which the lower court considered it safe and reasonable to infer or presume the conspiratorial acts of the accused persons, *Deboh and Anor vs. The State* (1977) LPELR - 904 (SC) 25 -26; [1977] 5 SC 122. (*P.....Paras.....*).

5. *The accused persons did something in furtherance of a common purpose*  
After all, as indicated earlier, evidence of conspiracy is usually a matter of inference from surrounding facts and circumstances. I take the humble view that, unlike the trial court, the lower court, rightly, inferred conspiracy from the fact of the accused persons doing things towards a common purpose, namely, the intention of killing the Auditor General, *Clark vs. The State* [1986] 4 NWLR (pt. 35) 381; *Aje vs. The State* [2006] 8 NWLR (pt. 982) 345, 363; *Majekodunmi vs. R.* (1952) 14 WACA 64; *Mulcahy vs. R.* (1868) L. R. 3. H. L. 306, 317.

Others include: *Haruna vs. State* [1972] 8 - 9 SC 174; *Garba vs. COP* [2007] 16 NWLR (pt. 1060) 378, 400; *Oduneye vs. The State* [2001] 2 NWLR (pt. 697) 311, 324; *Njovens vs. The State* [1973] 5 SC 17; *Nwosu vs. State* [2004] 15 NWLR (pt. 897) 466; *Busari vs. The State* (2015) LPELR – 24279

(SC) 24 - 25; *Nwosu vs. State* [2004] 15 NWLR (pt. 897) 466; *Babarinde and Ors vs. The State* (2013) LPELR - 21896 (SC); *Sule vs. The State* [2009] 17 NWLR (pt. 1169) 33; *Balogun vs. A- G. Ogun State* [2002] 6 NWLR (pt. 763) 512; *Omotola and Ors vs. The State* [2009] 7 NWLR (pt. 1139) 148. (*P.....Paras.....*).

6. *Failure to prove the substantive offence does not make conviction for conspiracy inappropriate*

My Lords, it must be noted that failure to prove the substantive offence, as happened at the trial court, does not make conviction for conspiracy inappropriate. The said offence, in itself, is a separate and distinct offence, independent of the actual offence, *Balogun vs. A- G. Ogun State* (supra); [2002] 2 SC (Pt. 11) 89; [2002] 2 SCNJ 196; *Alufohai vs. State* (2014) LPELR - 24215 (SC) 20-21. (*P.....Paras.....*).

7. *The integrity and sanctity of court's judgment are presumed until the contrary is proved*

Before concluding this judgment, I would like to comment on what the appellant termed first issue. Without more, he contended that the judgment of the trial court is a nullity. This is rather curious, to say the least. The integrity and sanctity of court's proceedings, including judgements and rulings, are presumed until the contrary is proved, *Odiase vs. Agho* (1972) 1 All NLR (pt. 1) 170; *Fororunsho vs. Adeyemi* (1975) 1 NMLR 128; *Balogun vs. Adejobi* (1995) 2 NWLR (pt. 376) 131.

It is this principle that dictated the rule that the court and parties are bound by the records as certified: certified records which are presumed correct unless the contrary is proved, *Gonzee (Nig) Ltd vs. NERDC* (2005) 13 NWLR (pt. 943) 643, 646. (*P.....Paras.....*).

8. *A party who intends to challenge the correctness of records must swear to an affidavit*  
A party who intends to impugn or challenge the correctness of the records, therefore, must swear to an affidavit setting out the facts or part of the proceedings as wrongly stated in the record. Such affidavit must be served on the Judge or Registry of the court concerned, *Ehikioya vs. C.O.P.* (1992) 4 NWLR (pt. 233) 57; *Sommer vs. F.H.A.* (1992) 1 NWLR (pt. 219) 548; *Texaco Panama Inc vs. SPDC Nig Ltd* (2002) 5 NWLR (pt. 759) 209; *Gonzee (Nig) Ltd vs. NERDC* (supra) 646. (*P.....Paras.....*).

9. *The meaning of "Conspiracy"*

The appellant was convicted for the offence of conspiracy, which is "*an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective*" - see Black's Law Dictionary 9<sup>th</sup> Ed. It

is the meeting of two or more minds to carry out an unlawful purpose or carry out a lawful purpose in an unlawful way that constitutes the offence of conspiracy; and it is a separate offence from the crime that is the object of the conspiracy.

In other words, the bedrock of the offence is the agreement to do something unlawful, which means that there can be no conspiracy, unless at least two persons conspire - see *Ikemson vs. State* (1989) 3 NWLR (Pt. 110) 455 SC, *Njovens vs. State* (1973) NNLR 76, *Erim vs. State* (1994) 5 NWLR (Pt. 346) 522. (*P.....Paras.....*).

10. *How to establish the offence of conspiracy*

The best evidence, it is said, is obtained from one of the conspirators or from inferences - see *Abacha vs. State* (2002) 11 NWLR (Pt. 779) 437 SC and *Njovens vs. The State* (*supra*), wherein this court, per Coker, JSC, explained the principle, as follows:

The overt act or omission, which evidences conspiracy, is the actus reus and the actus reus of each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Caesar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other- - They need not all have started the conspiracy at the same time for a conspiracy started by some person may be joined at a later stage or later stages by others. The gist of the offence of conspiracy is the meeting of the minds of the conspirators. This is hardly capable of direct proof, for the offence of conspiracy is complete by the agreement to do the act or make the omission complained about. Hence, conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them and in proof of conspiracy, the acts or omissions of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators. It is, therefore, the duty of the court in every case of conspiracy to ascertain as best as it could, the evidence of the complicity of any of those charged with that offence.

In this case, PW1, who reported the assassination plot to the Police, gave a detailed account of where and when the appellant instructed him to assassinate the Auditor-General of the State, so that he could "*take over that position*", and

**A** the money he got from the appellant to carry out the said criminal assignment, which was paid in instalments.

**B** PW1 was the key Witness, and his testimony remained unshaken during cross-examination, therefore, the two lower courts were right, in my view, to act on his uncontradicted and unchallenged evidence, in finding the appellant guilty as charged for the offence of conspiracy. (P.....Paras.....).

11. *Supreme court not in a position to intervene with concurrent findings*  
**C** Obviously, there is more than enough evidence established by the prosecution to support the concurrent findings of the trial court and Court of Appeal, and this court is not in the position to intervene. (P.....Paras.....).

12. *Appellant did not effectively discredit evidence*  
**D** In the concurrent judgments of both the trial court and the lower court the issue was resolved against the appellant; hence this further appeal. The two courts below believed the undiscredited evidence of Mr. Ndayo Bassev, who testified as the PW.1. The appellant did not effectively discredit the evidence. (P.....Paras.....).

13. *There was no exceptional circumstances*  
**E** I agree with the lower court that the PW.1 was not discredited by the cross-examinations. The trial court and the lower court believed him. That finding cannot be impeached.

**F** The appellant has not shown what exceptional circumstances would warrant this court to interfere with the concurrent judgments of the two courts below. Accordingly, I endorse the judgment of my learned brother C. C. Nweze, JSC and enter in favour of the respondent an order dismissing the appeal. I affirm the judgment of the lower court.

**G Representation**

Emeka Ozoani for the appellant; with him, Ikechukwu Okoye; Hussani Isaq Magaji, CSC, MOJ, Bauchi State, for the respondent.

**H** **CENTUS NWEZE, (JSC) (DELIVERING THE LEAD JUDGMENT):** At the High Court of Bauchi State, holden at Bauchi, the appellant in this appeal, with one Boniface Odeshika, was arraigned on two counts for the offences of conspiracy and attempt to kill the Auditor - General of the State. Sequel to their not guilty plea, the case went on trial. The respondent called four witnesses and tendered several exhibits. On their part, the appellant and his co-accused nelson Bernard Odeshika, testified in court .They subsequently, closed their case.

**I** On July 4<sup>th</sup> 2011, the High Court, Hamidu, J. (hereinafter, simply, referred to as

**A** "the trial court"), in a fifty-Five page judgement, held that " the prosecution have failed to prove beyond reasonable doubt the offences of criminal conspiracy and attempt to commit culpable homicide punishable under Sections 97 and 229 of the Penal Code Law." Accordingly, it acquitted and discharged the accused persons on the two count charges.

**B** Displeased with the outcome of the proceedings at the trial court, the respondent appealed to the Court of Appeal, Jos Division, (the lower court, for short), which affirmed the trial court's acquittal of the accused persons on the count of attempted murder. The lower court, however, allowed the appeal on criminal conspiracy. It convicted and sentenced the appellant to three years imprisonment. It

**C** further imposed a fine of N5, 000.00 for the offence of criminal conspiracy.

**D** This appeal to this court is the appellant's expression of his dissatisfaction with the said judgement. Although the appellant formulated five issues and the respondent put forward three issues for the determination of this appeal, I take the view that only one issue, as formulated by the respondent, is determinative of this appeal. It was couched 'thus:

**"Whether on the totality of the evidence adduced on record, the lower court was right in finding the appellant guilty for the offence of conspiracy?"**

**E**

#### **ARGUMENTS ON THE ISSUE APPELLANT'S SUBMISSIONS**

**F** At the hearing of the appeal on February 7<sup>th</sup> 2019, the learned counsel for the appellant, Emeka Ozoani, adopted the amended appellant's brief filed on September 6<sup>th</sup> 2017, although deemed, properly, filed and served on November 28<sup>th</sup> 2017. He, equally, adopted the reply brief filed on February 9<sup>th</sup> 2018.

**G** On this issue, he submitted that, upon the consideration of the entire evidence all the record, the respondent did not prove the allegation of conspiracy against the appellant beyond reasonable doubt, Section 176 of the Evidence Act, 2011; **Nwodo vs. State [1991] 4 NWLR (pt. 185) 341; Musa vs. State [1976] 9-10 SC 305.**

**H** Learned - counsel cited page 155 of the record for the finding of the trial court. He, equally, referred to page 156 of the record, for the trial court's view that the prosecution failed to prove the allegation against the appellant. He urged the court to set aside the decision of the lower court.

#### **RESPONDENT'S ARGUMENTS**

**I** On his part, Husssani Magaji, Chief State Counsel, Bauchi State Ministry of Justice, for the respondent, adopted the brief filed on February 2<sup>nd</sup> 2018. On this issue; he first pointed out that this court would not interfere with the findings of the lower court so long as the said findings are supported by legally admissible evidence and they are not perverse and have not led to a miscarriage of justice, **Azabada vs. State (2014) LPELR- 23017 (SC); MUSA vs. The State (2013) LPELR - 19932 (SC); Oruwari**

**A** vs. **Osler (2012) LPELR - 19764 (SC)** and so many other cases.

He contended that the prosecution can prove its case by any or the combination of the following means: by confession of the accused person; by direct evidence of an eye witness and by circumstantial evidence, **Abirton vs. The State (2013) LPELR - 20807 (SC)**. He drew attention to page 14 of the appellant's brief for the concession

**B** that the evidence of the PW1 was the testimony of the direct evidence of an eye witness. He referred to the testimony of PW1 at page 21 of the record.

He pointed out that the finding of the lower court that the evidence against the appellant, in proving his participation in the conspiracy, was proffered by PW1, Ndayo Bassey.

**C** He noted that the evidence against the first respondent, in proving his participation in the conspiracy, was that given by PW1, Ndayo Bassey. This witness testified that the second respondent called on him sometime in March, 2010. The second respondent intimated him of what the first respondent wanted to be done, that is, the elimination of PW2, the Auditor-General of Bauchi State. PW1 agreed to

**D** execute the plan.

He, further, explained that the second respondent telephoned the first respondent. The first respondent went to meet them in Bayan Gari Ward, Bauchi whereat the plan was discussed; the sum of N150,000.00 was agreed upon to be paid to PW1 by the first respondent. In fact, the first respondent paid N70,000.00, the balance was to be paid after the execution of the plan. The first respondent gave PW1 the photograph of PW2 who was to be killed. The first respondent took PW2 and the second respondent to the office and residence of PW2.

**E** When they could not meet PW2 at the two places, his home address in Tafawa Balewa town was made available to him. The first accused person even told him that there would be a meeting where PW2 would be in attendance which could be an opportunity to execute the plan. It was after all these events that the witness decided not to execute the plan. He reported the matter to the police.

**F** Learned counsel pointed out that the first respondent did not cross-examine PW2 with a view to testing the veracity or credibility of, his testimony. He, therefore, maintained that the evidence of PW1 on what the first respondent did in the plan to kill PW2 was neither discredited, controverted nor challenged. He submitted that where evidence is neither discredited nor challenged under cross-examination, a court of law can rely on it to convict.

**G** He maintained that to prove the offence of criminal conspiracy, the evidence need not be direct, it could be inferred from the circumstances of the case, **Adejobi vs. State [2011] 12 NWLR (pt. 1261) 347, 375**.

**H** He, then, contended that the evidence of PW1, Ndayo Bassey, as enumerated above and the confessional statement of the second respondent have established certain acts done by the first and second respondents in furtherance of their agreement or plan to kill Alhaji Usman Aliyu, the Auditor-General of Bauchi State sometime in March, 2010.

**I**

**A** He contended that, in view of the foregoing, having regard to the definition of the offence of criminal conspiracy in Section 96 (1) of the Penal Code, the respondents committed the offence of criminal conspiracy. He maintained that they ought to have been found guilty and convicted for committing this offence by the trial court.

**B RESOLUTION OF THE ISSUE**

As shown above, the lower court, having acquitted and discharged the accused persons on the offence of attempt to commit culpable homicide, proceeded to find them guilty of the offence of conspiracy under Section 96 of the Penal Code (supra).

**C** Now although a "conviction for conspiracy is not without its inherent difficulties ...” per Achike, JSC in **Oduneye vs. The State [2001] 1 SC (pt. 1) 1, 6 -7**, this court has outlined the basic ingredients that define the said offence. It has, thus, been defined as the agreement by two or more persons to do or cause to be done an illegal act or legal act by illegal means. *The actual agreement alone constitute the offence and it is not necessary to prove that the act has in fact been committed*, **Obiakor vs. The State [2002] 6 SC (pt. 11) 33, 39 -40; Dabo and Anor vs. The State [1977] 5 SC 22; Onyenye vs. The State [2012] All FWLR (pt. 643) 1810; Kaza vs. The State [2008] 1 -2 SC 151, 164 - 165; Njovens vs. The State [1973] 5 SC 17.**

**D** Due to the nature of the said offence, it is rarely or seldom proved by direct evidence. It is, thus, permissible, for a court to find in favour of proof of the offence of conspiracy as a matter of inference to be deduced from certain criminal acts of the parties concerned. The bottom line of the offence is the 'meeting of minds of the conspirators to commit an offence and the meeting of the minds need not be physical, **Adejobi vs. State [2011] 12 NWLR (pt. 1261) 347, 375.**

**E** Simply put, in a charge of conspiracy, proof of actual agreement is not always easy to come by, **Usufu vs. State [2007] 3 NWLR (pt. 1020) 94.** As a result, courts, now, infer conspiracy and convict on it if they are satisfied that the accused persons pursued, by their acts, the same object, one performing one part of the act and the other performing the other part of the same act so as to complete their unlawful design, **Tanko vs. The State [2008] 16 NWLR (pt. 1114) 597, 637 - 638.**

**F** At the trial court, one Ndayo Basse testified on August 3<sup>rd</sup> 2010, as PW1. His evidence-in-chief went thus:

**G** ... Yes I know the first accused [person]. Somebody introduced him to me, I know the second accused [person]. He was introduced to me by the first accused [person]. On 26<sup>th</sup> March, 2010, the second accused [person] met me at Sayan Gari and approached me and we went to a different location where we sat and had a confidential talk which he brought to me, He told me that he has a senior brother who is working with the office of the State Auditor General, He told me that the brother has a problem and ask (sic) him what was the problem and he said he has a boss in front of him and he want to

**A** take over that position and the only way he can take the position is to assassinate the boss, I asked him how was it to be done and he told me they have gone around to a lot of other places and they were advised to eliminate the man by shooting. I then asked him where was the brother he now called him with phone. In an interval of ten -

**B** fifteen minutes. We came to where I was waiting, He took me to a man with a red car who was sitting inside the car. That man, that is, the first accused [person] drove the three of us into the Ministry of Works Area Office; Bayan Gari. We parked under a tree and had discussions. I asked the second accused [person] whether he told me what to do and he said yes. The first accused [person] promised to pay N150, 000 for me to kill the man, then I asked him for part payment then he gave me N40,000,00 then N25,000.00, N31,000,00, instalmentally the amount reached N70, 000. 00. \

**C**

**D** He first invited me to the Auditor General's Office for me to know the man, when we reach (sic) there that day, the man was not on sit (sic). So we all left the office and he promise (sic) to came (sic) later in the evening with the photograph of the man which he did and the telephone no (sic) of the man, He took me to the man's residence in GRA and he gave me the address of the man in his village at Tafawa Balewa .... Being not an assassin, I finally decided and reported him to the Police.

**E**

[pages 21 - 22 of the record]

**F** The lower court's position was that:

**G** ... the first respondent had all the time and opportunity to discreet (sic, discredit) PW1, if what he said were not true. He did not. *The evidence of PW1 on what the first respondent did in the plan to kill PW1 has not been discredited; not controverted and not challenged.* Where evidence is not discredited under cross-examination or challenged by the opposing side, a court of law can rely on it to convict. To prove the offence of criminal conspiracy, the evidence need not be direct, it could be inferred from the circumstances of the case.

**H**

[pages 272 - 272 of the record; italics supplied]

**I** My Lords, it is difficult to fathom the basis of the impeachment of the above finding and conclusion. It has long been established that where an adversary fails to cross-examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence, *Oforlete vs. State* [2000] 12 NWLR (pt. 681) 415; *Gaji and Ors vs. Paye* [2003] 8 NWLR (pt. 823) 583; *Akinbiyi vs. Anike* (1959)

**A** WRNLR 16; Nwankwere vs. *Adewunmi* (1962) WRNLR 298, 302; *Amadi vs. Nwosu* [1992] 6 SCNJ 59, 71; *Okoro vs. The State* (2012) LPELR-7846 (SC).

In effect, the lower court was right when it held that:

**B** ... the first respondent had all the time and opportunity to discredit (sic, discredit) PW1, if what he said were not true. He did not. *The evidence of PW1 on what the first respondent did in the plan to kill PW1 has not been discredited, not controverted and not challenged.*

**C** Where evidence is not discredited under cross-examination or challenged by the opposing side, a court of law can rely on it to convict. To prove the offence of criminal conspiracy, the evidence need not be direct, it could be inferred from the circumstances of the case.

[pages 272 - 272 of the record; italics supplied]

**D** As noted above, it is, thus, permissible, for a court find in favour of proof of the offence conspiracy as a matter of inference to be deduced from certain criminal acts of the parties concerned. The bottom line of the offence is the meeting of minds of the conspirators to commit an offence and the meeting of the minds need not be physical, **Adejobi vs. State** [2011] 12 NWLR (pt. 1261) 347, 375. This, evidently, was what the

**E** lower court did here. In my humble view, that was the correct approach, **Tanko vs. The State (supra)**; **Adejobi vs. State (supra)**.

The lower court did not stop there. It went ahead to instantiate the specific acts done in furtherance of their agreement. According to the court, they are:

- F** (i) The approaching of PW1 by the second respondent intimating him of what the first respondent wanted to be done;
- (ii) The act of the second respondent in telephoning the first respondent in the presence of PW1 in Bayan Gari Ward, Bauchi town and telling him that the PW1 had accepted to execute the plot to kill PW2;
- G** (ili) The part payment of N70,000.00 to PW1 for the execution of the plot; -
- H** (iv) The act of taking the PW1 together with the second respondent to the office, residence of PW2, and the making available of the photograph of PW2 to the PW1, in addition to providing the home address at Tafawa Balewa to PW1 for the purpose of execution of the plot.

**I** [page 274 of the record].

**A**

Against the above background, the court found that "having regard to the definition of the offence of criminal conspiracy in Section 96 (1) of the Penal Code, the offence of criminal conspiracy has been committed by the respondents," [page 274 of the record]. Accordingly, the court found in favour of the proof of the offence of criminal conspiracy as alleged in count one of the charge.

**B**

In my humble view, it is difficult to fault these inferences from the facts as presented at the trial court, *Kaza vs. The State* (2008) 5 SCM 70, 104; *The State vs. Salawu* (2011) LPELR- 8252 (SC)38 - 39. Like the lower court, I consider it sufficient that the prosecution, established by the evidence led, the circumstances from which the lower court considered it safe and reasonable to infer or presume the conspiratorial acts of the accused persons, *Deboh and Anor vs. The State* (1977) LPELR - 904 (SC) 25 -26; [1977] 5 SC 122.

**C**

After all, as indicated earlier, evidence of conspiracy is usually a matter of inference from surrounding facts and circumstances. I take the humble view that, unlike the trial court, the lower court, rightly, inferred conspiracy from the fact of the accused persons doing things towards a common purpose, namely, the intention of killing the Auditor General, *Clark vs. The State* [1986] 4 NWLR (pt. 35) 381; *Aje vs. The State* [2006] 8 NWLR (pt. 982) 345, 363; *Majekodunmi vs. R.* (1952) 14 WACA 64; *Mulcahy vs. R.* (1868) L. R. 3. H. L. 306, 317.

**D****E**

Others include: *Haruna vs. State* [1972] 8 - 9 SC 174; *Garba vs. COP* [2007] 16 NWLR (pt. 1060) 378, 400; *Oduneye vs. The State* [2001] 2 NWLR (pt. 697) 311, 324; *Njovens vs. The State* [1973] 5 SC 17; *Nwosu vs. State* [2004] 15 NWLR (pt. 897) 466; *Busari vs. The State* (2015) LPELR – 24279 (SC) 24 - 25; *Nwosu vs. State* [2004] 15 NWLR (pt. 897) 466; *Babarinde and Ors vs. The State* (2013) LPELR - 21896 (SC); *Sule vs. The State* [2009] 17 NWLR (pt. 1169) 33; *Balogun vs. A- G. Ogun State* [2002] 6 NWLR (pt. 763) 512; *Omotola and Ors vs. The State* [2009] 7 NWLR (pt. 1139) 148.

**F****G**

My Lords, it must be noted that failure to prove the substantive offence, as happened at the trial court, does not make conviction for conspiracy inappropriate. The said offence, in itself, is a separate and distinct offence, independent of the actual offence, *Balogun vs. A- G. Ogun State* (supra); [2002] 2 SC (Pt. 11) 89; [2002] 2 SCNJ 196; *Alufohai vs. State* (2014) LPELR - 24215 (SC) 20 -21.

**H**

Before concluding this judgment, I would like to comment on what the appellant termed first issue. Without more, he contended that the judgment of the trial court is a nullity. This is rather curious, to say the least. The integrity and sanctity of court proceedings, including judgements and rulings, are presumed until the contrary is proved, *Odiase vs. Agho* (1972) 1 All NLR (pt. 1) 170; *Fororunsho vs. Adeyemi* (1975) 1 NMLR 128; *Balogun vs. Adejobi* (1995) 2 NWLR (pt. 376) 131.

**I**

It is this principle that dictated the rule that the court and parties are bound by the records as certified: certified records which are presumed correct unless the contrary is proved, *Gonzee (Nig) Ltd vs. NERDC* (2005) 13 NWLR (pt. 943) 643, 646.

**A** A party who intends to impugn or challenge the correctness of the records, therefore, must swear to an affidavit setting out the facts or part of the proceedings as wrongly stated in the record. Such affidavit must be served on the Judge or Registry of the court concerned, **Ehikioya vs. C.O.P. (1992) 4 NWLR (pt. 233) 57; Sommer vs. F.H.A. (1992) 1 NWLR (pt. 219) 548; Texaco Panama Inc vs. SPDC Nig Ltd (2002) 5 NWLR (pt. 759) 209; Gonzee (Nig) Ltd vs. NERDC (supra) 646.**

**B** Now, as the learned counsel for the respondent, rightly, argued, the certified true copy of the judgement which the lower court acted on could be found at pages 106 -163 of the record. At page 163 of the record, the judgement of Kunaza N, Harridu, J was certified by Saidu Abdulkareem, Assistant Chief Registrar, (Appeals) of the High Court of Justice, Bauchi.

**C** It is, therefore, difficult to decipher the premise of the arguments of the appellants. In any event, from the clear entry on page 163 of the record, I do not see any reason for impugning the judgement of the trial court.

**D** In all, having regard to all I have said above, I do not find any merit in this appeal. I therefore, have no hesitation in dismissing it as being devoid of any merit. I affirm the judgement of the lower court.

Appeal dismissed.

**Chima Centus Nweze**  
*Justice, .supreme Court*

**E** **RHODES-VIVOUR, (JSC):** I have had the advantage of reading in draft the leading judgment of my learned brother Nweze JSC. I agree with his lordship that there is no merit in this appeal.

**F** The judgment of the Court of Appeal is affirmed.  
Appeal dismissed.

**Olabode Rhodes- Vivour**  
*Justice Supreme Court*

**G** **ADAMU AUGIE, (JSC):** I read in draft the lead judgment just delivered by my learned brother - Nweze, JSC, and I agree with him that this appeal must be dismissed, since there is no redeeming feature in this appeal to hold otherwise.

**H** The appellant was convicted for the offence of conspiracy, which is "*an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective*" - see Black's Law Dictionary 9<sup>th</sup> Ed. It is the meeting of two or more minds to carry out an unlawful purpose or carry out a lawful purpose in an unlawful way that constitutes the offence of conspiracy; and it is a separate offence from the crime that is the object of the conspiracy.

**I** In other words, the bedrock of the offence is the agreement to do something unlawful, which means that there can be no conspiracy, unless at least two persons conspire - see **Ikemson vs. State (1989) 3 NWLR (Pt. 110) 455 SC, Njovens vs. State (1973) NNLR 76, Erim vs. State (1994) 5 NWLR (Pt. 346) 522**. The best evidence, it

**A** is said, is obtained from one of the conspirators or from inferences - see **Abacha vs. State (2002) 11 NWLR (Pt. 779) 437 SC and Njovens vs. The State (supra)**, wherein this court, per Coker, JSC, explained the principle, as follows:

**B** **The overt act or omission, which evidences conspiracy, is the actus reus and the actus reus of each and every conspirator must be referable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Caesar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other-**

**C** **They need not all have started the conspiracy at the same time for a conspiracy started by some person may be joined at a later stage or later stages by others. The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof, for the offence of conspiracy is complete by the agreement to do the act or make the omission complained about. Hence, conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them and in proof of conspiracy, the acts or omissions of any of the conspirators in furtherance of the common design may be and very often are given in evidence against any other or others of the conspirators. It is, therefore, the duty of the court in every case of conspiracy to ascertain as best as it could, the evidence of the complicity of any of those charged with that offence.**

**D**

**E**

**F**

**G** In this case, **PW1**, who reported the assassination plot to the Police, gave a detailed account of where and when the appellant instructed him to assassinate the Auditor-General of the State, so that he could "*take over that position*", and the money he got from the appellant to carry out the said criminal assignment, which was paid in instalments.

**H** **PW1** was the key Witness, and his testimony remained unshaken during cross-examination, therefore, the two lower courts were right, in my view, to act on his uncontradicted and unchallenged evidence, in finding the appellant guilty as charged for the offence of conspiracy.

Obviously, there is more than enough evidence established by the prosecution to support the concurrent findings of the trial court and Court of Appeal, and this court is not in the position to intervene.

**I** It is for this and the other eloquent reasons in the lead judgment that I too dismiss this appeal and affirm the Court of Appeal's decision.

**Amina Adamu Augie,**

**A** *Justice, Supreme Court*  
**EJEMBI EKO, (JSC):** The only issue in this appeal, as correctly found by my learned brother, C. C. Nweze, JSC, in the judgment just delivered, which judgment I had a preview of, is:

**B** **whether on the totality of evidence adduced on the record, the lower court was right in finding the appellant guilty for the offence of conspiracy?**

It is an issue of fact.

**C** In the concurrent judgments of both the trial court and the lower court the issue was resolved against the appellant; hence this further appeal. The two courts below believed the undiscredited evidence of Mr. Ndayo Bassev, who testified as the PW.1. The appellant did not effectively discredit the evidence. The damning evidence - in - chief and under cross-examinations of the PW.1 as can be found at pages 21 - 23 are:

**D** **Pw1: NDAYO BASSEY, affirmed, speaks English. live along Jos Road at Wuntin Dada Bauchi State. Christian. I am Businessman. Internal Decorator in tiles and POP. Yes I know the 1<sup>st</sup> accused. Somebody introduced him to me by the 1<sup>st</sup> accused on 26<sup>th</sup> March, 2010 and the 2<sup>nd</sup> accused met me at Bayan Gari and approached me and we went to a different location where we sat and had a confidential talk which he brought to me. He told me that he has a senior brother who is working with the office of the State Auditor General. He told me that the brother has a problem and ask him what was the problem and he said he has a boss in front of him and he want to take over that position and the only way he can take the position is to assassinate the boss. I asked him how was it to be done and he told me they have gone around to a lot of other places and they were advised to eliminate the man by shooting. I then asked him where was the brother he now called him with him phone. In an interval of 10 - 15 minutes. We came to where I was waiting. He took me to a man with a red car who was sitting inside the car. The man that is the 1<sup>st</sup> accused drove the 3 of us into the Ministry of Works area office Bayan Gari.**

**H** **We parked under a tree and had discussions. I asked the 2<sup>nd</sup> accused whether he told me what to do and he said yes. The 1<sup>st</sup> accused promised to pay N150,000.00 for me to kill the man then I asked him for part payment then he gave me N40,000.00 then N25,000.00, N31,000,00 instalmentally until the amount reached N70,000.00.**

**I** **He first invited me to the Auditor General's Office for me to**

**A** know the man, when we reach there that day the man was not on sit. So we all left the office and the promise to come later in the evening with the photograph of the man which he did and the telephone no. of the man. He took me to the man's residence, in GRA and he gave me the address of the man in his village at T. Balewa. The description of his cars, official and personal.

**B** After some days he told me that they will be having conference and that will be the right time to carry the execution.

**C** For the fact that he has advanced me to do the job gave him two weeks within which to do the job. Being not an assassin I finally decided and reported him to the Police.

Sanya said that is all for the witness.

**D** XXX Ben Ogbuchi.  
Yes I made statement to the Police regarding what I said. I wrote the statement by myself. I made one statement to the police. I signed it what I said is what I wrote in my statement I am not a killer. I have never been convicted in criminal conspiracy. I never intended to be involved in any criminal activity in my life. I met the 2<sup>nd</sup> accused on 26<sup>th</sup> March, 2010. I know him in person when I was living in Bayan Gari. I have never seen the 1<sup>st</sup> accused prior to 26<sup>th</sup> March, 2010. Yes I was given N70,000.00 I did not produce the money at the Police Station. I did not produce any part of the amount at the police Station. I did not intend to carry out any act. I did not agree to carry out the act that is why I reported the matter to the police. I did not do anything in furtherance of the agreement to assassinate. I did not know the Auditor General prior to 26<sup>th</sup> March, 2010.

**E**

**F**

**G** During our discussion at the Ministry of works nobody witnessed it. It spent the money that was given to me for my personal use. I only met the Auditor General which he was invited to the Police Stations. The Auditor General was not aware of the plans to assassinate. The 1<sup>st</sup> accused me that he was acted as Auditor General while we were in his car. I have never been involved in any criminal activity. Yes I was once detained in the Police Station because we fought with my girl friend and I was even taken to remand. I was not happy when I was arrested and taken to remand I have some Policemen that I know as friends. Based on the report I made to Police kin this case I am an informant. I don't think there is any difference from what I told the court and the statement I made to the

**H**

**I** police.

**A**

**I did not lie to the court when I told the court that the 1<sup>st</sup> accused invited me to his office and we went together. Yes this is my statement, my signature is there.**

**B**

**Safiya said she has no objection.**

**Court: The statement of Mr. Ndam Bassey on Police D19 is hereby admitted in evidence and marked Exhibit "A"**

**C**

**I did not state in any statement that the 1<sup>st</sup> accused brought me to his office and the residence of the Auditor General. Ahmed is what I know as the name of the Auditor General. I never knew the Auditor General before. If the Auditor General is close to me I can identify him because of the facial mark. I never did anything for the 2<sup>nd</sup> accused to think I was a criminal and that is why I did not agree with anyone to carry out the assignment.**

**D**

**C. C. Abana:**

**Before the 26<sup>th</sup> March, 2010 I have involve myself with the 2<sup>nd</sup> accused in any criminal act.**

**E**

**Sometime ago I heard that the 2<sup>nd</sup> accused was involved in robbery case and taken to prison, there is no link between me and the 2<sup>nd</sup> accused if not for this case. I don't know how much the 2<sup>nd</sup> accused was given it is between him and the 1<sup>st</sup> accused. I only brought the 2<sup>nd</sup> accused a bottle of bear for bringing me into the matter. When we went to the office the 2<sup>nd</sup> accused was not there but when we went to the auditors house, the 2<sup>nd</sup> accused was present. I don't know whether the 2<sup>nd</sup> accused knew the Auditor General in person I did not go to the Auditor General house for any reason.**

**F**

**G**

**I have never reported any Criminal activity to the police prior to this. I made the statement to the Police the same day I reported the matter to them. I can not remember the exact date I reported the matter to the police but it aims a Sunday in June. We have never had any deal with the 2<sup>nd</sup> accused apart from this issue.**

**H**

**I**

**Each time I go to the 2<sup>nd</sup> accused therefore he was present whenever we discuss the issue. When the 1<sup>st</sup> accused took us to the Area Office Ministry of Works. The 2<sup>nd</sup> accused was there. It is not stated in my statement to the Police that when the 1<sup>st</sup> accused took him to Area**

**A**            **Office Ministry of Works, the 2<sup>nd</sup> accused house to arrest him. Not it was the 2<sup>nd</sup> accused who took the Police to the 1<sup>st</sup> accused house to arrest him.**

**B**            I agree with the lower court that the PW.1 was not discredited by the cross-examinations. The trial court and the lower court believed him. That finding cannot be impeached.

**C**            The appellant has not shown what exceptional circumstances would warrant this court to interfere with the concurrent judgments of the two courts below. Accordingly, I endorse the judgment of my learned brother C. C. Nweze, JSC and enter in favour of the respondent an order dismissing the appeal. I affirm the judgment of the lower court.

                Appeal dismissed.

**Ejembi Eko**  
*Justice, Supreme Court*

**D**

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**I**

1. **CHIEF AMADI -DIKE-OGU**
2. **CHIEF HARRISON CHUKWU**
3. **CHIEF EJEKWU WOBO**

*(For themselves and on behalf of all the other members of the Rumueme Council of Chiefs and other Indigenes of Rumueme Community)*

**Vs.**

**OWHONDA FRANK AMADI & 11 OTHERS**

*(For themselves and on behalf of all the members of the Rumueme Council of Chiefs, Elders and Owhor Holders)*

**SC.460/2010**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY 31<sup>ST</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**MUSA DATIJO MUHAMMAD  
KUMAI BAYANG AKAAHS  
JOHN INYANG OKORO  
SIDI DAUDA BAGE  
UWANI MUSA ABBA AJI**

**SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*ACTION:- Abuse of court process – Nature and Meaning – The principle in **Ntuks Vs. NPA (2007) 13 NWLR (Pt. 1051) 392.***

*PRACTICE AND PROCEDURE:- Abuse of court process – Where an applicant has filed two applications on the same subject matter – Applicants intends to withdraw the previous application in preference to the later – Whether procedure does not amount to abuse of court process.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Application to adduce fresh evidence is not the exclusive preserve of the applicants – Whether the respondent can make an application for fresh evidence on relevant facts.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Conditions thereof*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Conditions which must co-exist – The principle in **Owata Vs. Anyigor (1993) 2 NWLR (Pt. 276) 380.***

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Guiding principles – Whether the paramount consideration before the court is furtherance of justice.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Power of appellate court to receive fresh evidence on appeal – Whether an appellate court has power to receive fresh evidence on appeal under special circumstance.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Relevant factors to be considered – The principle in **CPC and Anor Vs. Ombugadu & Anor (2013) LPELR – 21007 (SC).***

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Where a party intends to adduce fresh evidence on appeal – Whether such evidence must be relevant.*

*PRACTICE AND PROCEDURE:- Appeal – Fresh evidence thereto – Where the fresh evidence sought to be admitted on appeal will have a critical and decisive effect on the case – Whether application to adduce fresh evidence will be granted.*

*PRACTICE AND PROCEDURE:- Appeal – Issue of law – Where a point of law if raised will determine an appeal – Whether court should encourage and support such a process.*

### **Issue for Determination**

**Whether the Appellants/Applicants have met the conditions for the grant of this application.**

### **Facts of the Matter**

**The appellant/applicants brought a motion on notice in the Supreme Court under order 2 rule 12(1) of the Supreme Court Rules 1999 praying for an order of the court to adduce further evidence.**

**The said additional evidence relates to colonial intelligence report procure from the archives. The application was supported by an affidavit and grounds for the application.**

**The respondent filed an 57 paragraphs affidavit in opposition. The Supreme Court considered both the affidavit and counter-affidavit.**

**Held:** (*Unanimously allowing the application*)

1. *Effect where a point of law if raised will determine appeal*

**The law is settled that a point of law can be raised on a preliminary objection by a party to a suit if the point of law will be decisive of the whole litigation. Therefore, where there is a point of law which if decided one way would impact on the justice of the case, as in the instant case, that advantage ought to be taken of the facilities afforded by the rules of court to have it disposed as soon as raised. See *N.V. Scheep Vs. MV "S. Araz"* (2000) 12 SCNJ 24, (2001) FWLR (Pt.34) 543; *Everett Vs. Ribbands* (1952) 2 QB 198; *Addis Vs. Crocker* (1961) 1 QB 11; *Madu Vs. Ononuju* (1986) 3 NWLR (Pt.26) 23; *Yeoman Credit Ltd. Vs. Latter* (1961) 2 All ER 281. "Per Ogbuagu JSC. (*P.....para.....*)**

2. *Meaning of "abuse of court process"*

**Beyond doubt, what constitutes abuse of court process involves circumstances and situations of infinite variety and conditions and referred the court to a number of judicial authorities including *Lokpobiri Vs. Ogola* (2016) (Pt.1499) 328; *Commissioner for Education, Imo State Vs. Amadi* (2013) 13 NWLR (Pt.1370) 33; *Ogboru Vs. Uduaghan* (2013) 13 NWLR (Pt.1370) 33; *Echaka Cattle Ranch Ltd. Vs. N.A.C.B Ltd* (1998) 4 NWLR (Pt.547) 526; and *O.S.S.I.E.C. Vs. NCP* (Supra).**

**As succinctly enunciated by this court in *Ntuks Vs. NPA* (2007) 13 NWLR (Pt.1051) 392, this court had expressed a detailed opinion that:**

**"Abuse of court process generally means that a party in litigation takes a most irregular, unusual and precipitate action in the judicial process for the sake of action qua litigation, merely to waste valuable litigation time. It is an action which is one (or more) too many; an action that could be avoided by the party without doing any harm to the matter in dispute. The process of the court is used mala fide to overreach the adversary to the direct annoyance of the court. The court process is initiated with malice or some premeditated or organised vendetta, aimed at frustrating either the quick disposal of the matter or the abatement of the matter for no good cause. The court process could also be said to be abused where there is no iota of law supporting it. In other words, the court process is premised or founded on frivolity or recklessness."- Per. TOBI, J.S.C." (*P.....para.....*)**

3. *Implication where an applicant who has filled two motions on the same subject matter intends to withdraw the former*

**In the instant case, it would be impossible to establish abuse unless the applicant desires to proceed with both applications at hearing. This is not the case here. As held by this court in NV Scheep Vs. MV Araz (supra), there is no intention on the part of the appellants to proceed with the two applications. Quite frankly, an intention had been clearly evinced by the said appellants that they intend to withdraw the defective motion of 3/10/2013, and that the new motion filed on 5/6/2018 will be relied on at hearing. Unless we intend to stand the law or established procedure on its head, there is no element of abuse in this circumstance. (P.....para.....)**

4. *An appellate court can receive fresh evidence on appeal under special circumstances*

**The law is that ordinarily, an appellate court is wary of receiving fresh evidence not available at the stage of trial. The appellate court is not however inhibited, but only treads with caution in accepting fresh evidence on appeal.**

**The position of the law is that the power of an appellate court to receive further or fresh evidence on appeal is rarely exercised but is not taken away, extinguished or inhibited. As held by this court in Owata Vs. Anyigor (1993) 2 NWLR (Pt.276) 380, P 383-384, an appellate court can receive further evidence on questions of fact but such further evidence is only received on special grounds and that the court generally exercised this power with great circumspection.**

*(P.....para.....)*

5. *Conditions necessary for receiving further evidence on appeal*

**Thus, before receiving fresh evidence on appeal, an appellate court would need to be sure that the party seeking to adduce such evidence has fulfilled the following conditions:**

- "1) A formal application is brought exhibiting the fresh evidence or document sought to be adduced. This was not one of the conditions in OWATA's case but now being made a requirement given the rarity and cautionary approach with which such application must be considered.**
- 2) The evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial.**

- 3) **If the fresh evidence is admitted it would have an important but not necessarily crucial effect on the whole case.**
- 4) **If the evidence sought to be adduced is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible.**
- 5) **Additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicants, if it had been available at the trial court.**
- 6) **The evidence must be material and weighty even if not conclusive. Where the evidence sought to be adduced is immaterial and irrelevant, it will be rejected."**

*(P.....para.....)*

6. *In an application to adduce further evidence on appeal, evidence in question must be relevant.*

**The above conditions must all co-exist in an application seeking this unusual discretion. Most importantly, the last condition becomes first as the evidence sought to be adduced must be relevant. This is because it is settled principle of law that relevance is the basis of admissibility. The applicants/appellants have approached this court with the application under consideration seeking, essentially, leave to adduce further evidence at the hearing of this appeal in the forms of the 1928- 1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoda Division by the Southern Provinces of British Colonial Government, CTC of which was obtained from the Nigerian National Archives, Ibadan.**

**Beyond the factual narratives, the ground on which the application is brought are cognisable and compelling. The appellants/applicants premised their application on 8 grounds, as follows:**

- "1) **That both appellants and respondents are in agreement that the EBERA or OROEBARA Group (otherwise known as ORAZI or the RUMUORAZI Group) has always produced the head of Rumueme. The common ground of disagreement has been; which branch in Ebara (Oroazi) group has been producing the head of Rumueme to wit: is it Nyenweli Nsirim, who heads the appellants' Rumueme Council of Chiefs or the 8<sup>th</sup> respondent (Ohahuru Samuel Akaninwo) who head the Respondents' Rumueme Council of Chiefs, Elders and Owhor holders.**

- 2) **That this core issue is answered conclusively by the document sought to produced and received as further evidence in this appeal to wit: the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, a pre-independence Intelligence Report of British Government.**
- 3) **That the existence of the said document (i.e. the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government), was not known to the appellants/applicants' until 28<sup>th</sup> July, 2010 when the appellant/ applicants' new counsel stumble on it while undertaking research on another subject as the Nigerian National Archives, Ibadan.**
- 4) **That this colonial document (an independent and unbiased Intelligence Report of the Colonial Government) is credible, reliable and capable of being believed. conflicting traditional histories put forward by the two sides in this appeal by resort to this unbiased, credible, reliable and believable historical document.**
- 6) **That no oral evidence is required as the said document speaks for itself and corroborates and compliments existing oral testimonies in the Record of Appeal and the said document, if received, will have an important, crucial and indeed pivotal effect on this appeal.**
- 7) **That it is in the interest of both the appellants and the respondents that this independent antique document (the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government) is received in that it states the correct and independently investigated historical headship/rulership of Rumueme as at 1928-1931.**
- 8) **That this honourable court has in several instances and cases sought to discourage judges from basing their judgements on mere beliefs and/or disbelief. That from record of appeal (pages 276, lines 8-25) it is clear the judgment of the lower court and that of the trial c**

5) **That this Archival is applicable under the rule in Kojo Vs. Bonsie to resolve the two court were wholly founded on the beliefs and/or disbeliefs of the trial court who merely stated that he disbelieved the appellants and believed the respondents without stating the basis for his beliefs and/or disbeliefs, this Archival document takes this appeal from the realm of beliefs and/or disbeliefs unto the firm grounds of proof." (P.....para.....)**

7. *Application for fresh evidence on appeal is not exclusive preserve of the applicants*  
**Given the circumstances of this appeal, would fresh evidence undermine or strengthen the justice in this case, bearing in mind that a grant or refusal of this application does not dispose-off the substantive appeal? The answer certainly is a capital NO. Allowing fresh evidence to be adduced in this appeal by a requesting or desiring party is not the exclusive preserve of the applicants. The respondents may as well have taken benefit by applying to adduce any such fresh but relevant evidence. (P.....para.....)**

8. *Relevant considerations to be applied by court in an application for fresh evidence on appeal*  
**Whichever way one looks at it, what should be paramount in the mind of the court is whether permitting fresh evidence to be adduced will be in furtherance of the course of justice to the extent that it would assist the court to resolve the issue before it fairly, justly and equitably.**

**In view of this, I share the view as expressed in the submission of the appellants/applicants that the grant of the reliefs sought would only permit them to adduce further evidence in the form of Exhibit A which is attached to the affidavit in support of the motion. This, clearly, will assist the court determine the more authentic history between traditional history stated by the appellants and that of the respondents. (P.....para.....)**

9. *Conditions for granting fresh evidence on appeal*  
**For an application to receive fresh evidence on appeal to be granted, the following conditions must co-exist namely:-**

1. **It must be shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**
2. **That the fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.**
3. **The evidence must be such as is presumably to be**

**believed; in other words it must be apparently credible although it need not be incontrovertible. See: Owata Vs. Anyigor (1993) 2 NWLR (Pt. 276) 380; UBA Plc Vs. B.T.L Industries Ltd (2005) 10 NWLR (Pt. 933) 356; Ehinlanwo Vs. Oke (2008) 16 NWLR (Pt. 1113) 357.**

*(P.....para.....)*

10. *Fresh evidence to be adduce on appeal should be relevant*

**The fresh evidence should be relevant to the appeal.**

**My learned brother, Bage JSC had found that Exhibit “A” which is attached to the affidavit in support of the motion will assist the court to determine the more authentic history between the claim of the appellants and that of the respondents. I also hold the same view. (P.....para.....)**

11. *Conditions which must co-exist before fresh evidence is received on appeal*

**By way of expatiation, I wish to add that the paramount duty of this court is to do substantial justice between parties. What therefore matters to this court is whether receiving fresh evidence will be in furtherance of the course of justice to the extent that it would assist the court to resolve the issue before it fairly, justly and equitably.**

**The conditions which must co-exist before an appellate court would consider receiving fresh evidence have been well spelt out in the lead judgment following the decision of this court in the case of Owata Vs. Anyigor (1993) 2 NWLR (Pt. 276) 380, as follows:**

- “(1) it must be shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**
- (2) The fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.**
- (3) The evidence must be such as is presumably to be believed or in other words it must be apparently credible although it need not be incontrovertible.**

**These three conditions must all be satisfied together and at the same time”. (P.....para.....)**

12. *Fresh evidence sought to be tendered will enhance the course of justice*

**It is instructive to note that, the fresh evidence sought to be adduced has to be**

relevant to the suit otherwise it would be rejected.

In the instant appeal, I hold the view that receiving fresh evidence, to wit. Exhibit "A" attached to the appellant's application would in no way undermine justice rather it would further the course of justice by assisting this court to resolve the issues in the substantive appeal fairly, justly and equitably. More importantly, the grounds on which the application is premised, which include a clear description of when and how the appellants/applicants' new counsel came by the evidence sought to be adduced, are to my mind compelling enough that this court cannot gloss over.

To this end, I hold the view that the course of justice will better be served by the grant of this application. The appellants/applicants have satisfied the condition for the grant of this application. (*P.....para.....*)

*Per Abba Aji (JSC)*

Parties and counsel are advised to adequately prepare for their cases and not to waste the precious time of the court with flimsy and frivolous applications especially with regard to bringing in fresh evidence. The taking of fresh evidence is not a rule of pleading but a panacea out of a necessity or special and unavoidable circumstance to proffer justice to a given case.

The leave to adduce fresh evidence is grantable usually to obviate the need and necessity of not crying after spilled milk or when the head is cut off since justice is not only for the party seeking it but for all, especially in our judicial jurisprudence of precedents and case laws. Again, since honourable justices and judges are human beings and therefore not infallible, they can make mistakes or commit errors at any time like any other mortals. Thus, the desideratum of considering some fresh evidence not available at the time the case came up for hearing.

Some of the reasons for allowing further evidence on appeal are where the matter arose *ex improviso* which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led: *R. v. Dora Harris (1927) 28 Cox 432*. See also *Per OGUNTADE, J.S.C in UBA Plc. Vs. BTL IND. LTD (2005) LPELR-8065 (SC)*. The procedure for admitting further evidence on appeal is not at the disposal of an indolent or not diligent litigant. The procedure cannot be used for the repair of a case at the end of the trial. It is not designed to overreach the other party or spring surprise at the other party when the appeal is heard. See *Per TOBI, J.S.C in Okoro & Ors Vs. Egbuoh & Ors (2006) LPELR-2491(SC)*. (*P.....para.....*)

13. *Factors relevant to be considered in granting application for fresh evidence on appeal*

The appellate court is duly empowered to admit fresh evidence in respect of matters which occurred after the proceedings and judgment of the trial court so

**A** long as the guidelines for such admission are met. The principles which an appellate court must take into consideration in the judicious exercise of its power to grant leave to adduce new evidence are: (a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which

**B** have occurred after judgment in the trial court. (b) In respect of other evidence other than in (a) above, as for instance in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence only on special grounds. (c) The evidence to be adduced should be such as if admitted, it would have an important not necessarily crucial effect on the whole case; and (d) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible. See Per PETER- ODILI, J.S.C in CPC & ANOR Vs. Ombugadu & Anor (2013) LPELR-21007(SC). (*P.....para.....*)

**C**

**D**

14. *Evidence sought to be admitted would have critical and decisive effect on the case.*

**E** I think the interest of justice requires that the application be granted as per the reliefs sought by the appellants/applicants. A party to litigation cannot be shut out and the court precluded on technical grounds from receiving further evidence that will assist the parties and the court and the society or community at large. There is no doubt that the evidence sought to be adduced if, admitted, would not only have a critical but a decisive effect on the whole case. In the instant case, it is necessary to receive such evidence for the just disposal of the case. To refuse to admit the additional evidence tantamount to injustice to all.

**F** (*P.....para.....*)

**G** Representations

L. V. C. Michael-Atata, for the appellant/applicant.  
Chief Collins B. Adele, for the respondent.

**H** **SIDI DAUDA BAGE, (JSC) (Delivered the Lead Judgment):** By a Motion on Notice dated May 21<sup>st</sup> 2018 brought pursuant to Order 2 Rule 12(1) of the Supreme Court Rules (as amended in 1999) and under the inherent jurisdiction of this court, the appellants/applicants approached this court seeking the following Orders:

**I** "1) An Order of this honourable court granting the appellants/applicants leave to adduce further evidence at

- A**                    **the hearing of this appeal, to wit: the production of a certified true copy of the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, CTC of which was obtained from the Nigerian National Archives.**
- B**
- C**                    **3) An Order of this honourable court deeming the said 1928-1931 Intelligence Report on the Obia Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government duly certified by the Nigerian National Archives and attached herewith as Exhibit A, as properly received in evidence.**
- D**                    **4) And for such further or other Order(s) this honourable court may deem fit to make in the circumstances."**

The appellants/applicants premised their application on 8 grounds, as follows:

- E**                    **"1) That both appellants and respondents are in agreement that the EBERA or OROEBARA Group (otherwise known as ORAZI or the RUMUORAZI Group) has always produced the head of Rumueme. The common ground of disagreement has been; which branch in Ebara (Orozazi) group has been producing the head of Rumueme to wit: is it Nyenweli Nsirim, who heads the appellants' Rumueme Council of Chiefs or the 8<sup>th</sup> respondent (Ohahuru Samuel 3 Akaninwo) who head the respondents' Rumueme Council of Chiefs, Elders and Owhor holders.**
- F**
- G**
- H**                    **4) That this core issue is answered conclusively by the document sought to be produced and received as further evidence in this appeal to with: the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, a pre-independence Intelligence Report of British Government.**
- I**                    **5) That the existence of the said document (i.e. the 1928-**

- A**                    **1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government), was not known to the appellants/applicants' until 28<sup>th</sup> July, 2010 when the appellant/applicants' new counsel stumble on it while undertaking research on another subject the Nigerian National Archives, Ibadan.**
- B**
- C**                    **7) That this colonial document (an independent and unbiased Intelligence Report of the Colonial Government) is credible, reliable and capable of being believed.**
- D**                    **8) That this Archival is applicable under the rule in Kojo Vs. Bonsie to resolve the two conflicting traditional histories put forward by the two sides in this appeal by resort to this unbiased, credible, reliable and believable historical document.**
- E**                    **9) That no oral evidence is required as the said document speaks for itself and corroborates and compliments existing oral testimonies in the record of appeal and the said document, if received, will have an important, crucial and indeed pivotal effect on this appeal.**
- F**
- G**                    **8) That it is in the interest of both the appellants and the respondents that this independent antique document (the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government) is received in that it states the correct and independently investigated historical headship/rulership of Rumueme as at 1928-1931.**
- H**                    **9) That this honourable court has in several instances and cases sought to discourage Judges from basing their judgements on mere beliefs and/ or disbelief. That from record of appeal (pages 276, lines 8-25) it is clear the judgement of the lower court and that of the trial court were wholly founded on the beliefs and/or disbeliefs of the trial court who merely stated that he disbelieved the**
- I**

- A**                    **appellants and believed the respondents without stating the basis for his beliefs and/ or disbeliefs, this archival document takes this appeal from the realm of beliefs and/or disbeliefs unto the firm grounds of proof."**
- B**                    In support of the appellants/ applicants' application is a 21-paragraph affidavit deposed to by Leslie Victor Chizi Michaels of No. 8-10, St. Michaels Crescent, G.R.A. Phase III, Port Harcourt, Rivers State, to which three Exhibits, namely A, B, C were attached, the "A" being the Archival documents forming basis of this application, as well as a written address.
- C**                    On their part, the respondents filed a 57-paragraph counter- affidavit in opposition to the appellants/applicants' motion. The counter-affidavit was deposed to by Chief Collins B. Adele a traditional ruler and legal practitioner of No. 24, Ikwerre Road as well as a written address in opposition to the said motion.
- D**                    By way of reply, the appellants/applicants also filed a further affidavit of 31 paragraphs in reply to the respondents' counter-affidavit, also deposed to by Leslie Victor Chizi Michaels of No. 8 - 10, St. Michaels Crescent, G.R.A. Phase III, Port Harcourt, Rivers State as well as reply address dated July 14, 2018.
- E**                    An interesting twist was added to this application which I'll proceed to summarily deal with. The respondents filed a notice of preliminary objection to the appellants/applicants' motion for leave to adduce further evidence. The preliminary objection is dated 4<sup>th</sup> July, 2018 and essentially contended that the appellants/applicants' motion to adduce further evidence constituted or amounted to an abuse of court process in view of the fact that the appellants earlier motion of 3/10/2013 was still pending before this court. In the accompanying written address in support of the preliminary objection, the respondents/applicants
- F**                    relied on the case of **Nimb Ltd Vs. Union Bank of Nigeria (2004) 12 NWLR (Pt.888) 599, Ration 4 at 606; AG of Ondo State Vs. AG of Ekiti State (2001) 17 NWLR (Pt.743) Pg. 706 Ratio 20 at 731** where the court relied on **Doma Vs. Adamu (1999) 4 NWLR (Pt.598) at 311 and Benaplatic Ind. Ltd Vs. Vasilyev (1999) 10 NWLR (Pt.624) 620.**
- G**                    The respondents/applicants contended that the appellants' motions are seeking the same prayers, thus constituting abuse.
- H**                    In their reply, the appellants filed a counter affidavit of 21 paragraphs deposed to by Leslie Victor Chizi Michaels, a legal practitioner and founding solicitor of No. 8-10, St. Michaels Crescent, G.R.A. Phase III, Port Harcourt, Rivers State. In essence, the appellants contended that they had evinced an intention to withdraw the earlier motion on notice of 3/10/2013 being defective and shall, at the hearing, withdraw the said motion and rely on the new motion dated 5/6/2018. The
- I**                    appellants relied on the case of **NV Scheep Vs. MV Araz (2000) 15 NWLR**

**A** (Pt.691) 622 at 635, Ratio 10, Per KARIBI-WHYTE and submitted in conclusion that having expressed their intention to withdraw the defective Motion of 3/10/2013, the new motion filed on 5/6/2018 should not be considered to be an abuse of court process.

**B DETERMINATION OF THE PRELIMINARY OBJECTION TO THE APPLICATION**

The law is settled that a point of law can be raised on a preliminary objection by a party to a suit if the point of law will be decisive of the whole litigation. Therefore, where there is a point of law which if decided one way would impact on the justice of the case, as in the instant case, that advantage ought to be taken of the facilities afforded by the rules of court to have it disposed as soon as raised. See **N.V. Scheep Vs. MV "S. Araz" (2000) 12 SCNJ 24, (2001) FWLR (Pt.34) 543; Everett Vs. Ribbands (1952) 2 QB 198; Addis Vs. Crocker (1961) 1 QB 11; Madu Vs. Ononuju (1986) 3 NWLR (Pt.26) 23; Yeoman Credit Ltd. Vs. Latter (1961) 2 All ER 281.** "Per Ogbuagu JSC.

The preliminary objection raised by the respondents is anchored the facts that appellants/applicants' motion of 5/6/18 to adduce further evidence amounted or constituted an abuse of court process in view of the fact that the appellants' earlier motion of 3/10/2013 was still pending before this court.

Beyond doubt, what constitutes abuse of court process involves circumstances and situations of infinite variety and conditions and referred the court to a number of judicial authorities including **Lokpobiri Vs. Ogola (2016) (Pt.1499) 328; Commissioner for Education, Imo State Vs. Amadi (2013) 13 NWLR (Pt.1370) 33; Ogboru Vs. Uduaghan (2013) 13 NWLR (Pt.1370) 33; Echaka Cattle Ranch Ltd. Vs. N.A.C.B Ltd (1998) 4 NWLR (Pt.547) 526; and O.S.S.I.E.C. Vs. NCP(Supra).**

As succinctly enunciated by this court in **Ntuks Vs. NPA (2007) 13 NWLR (Pt.1051) 392**, this court had expressed a detailed opinion that:

**"Abuse of court process generally means that a party in litigation takes a most irregular, unusual and precipitate action in the judicial process for the sake of action qua litigation, merely to waste valuable litigation time. It is an action which is one (or more) too many; an action that could be avoided by the party without doing any harm to the matter in dispute. The process of the court is used mala fide to overreach the adversary to the direct annoyance of the court. The court process is initiated with malice or some premeditated or organised vendetta, aimed at frustrating either the quick**

**A** disposal of the matter or the abatement of the matter for no good cause. The court process could also be said to be abused where there is no iota of law supporting it. In other words, the court process is premised or founded on frivolity or recklessness."- Per. TOBI, J.S.C."

**B**

In the instant case, it would be impossible to establish abuse unless the applicant desires to proceed with both applications at hearing. This is not the case here. As held by this court in **NV Scheep Vs. MV Araz** (supra), there is no intention on the part of the appellants to proceed with the two applications. Quite frankly, an intention had been clearly evinced by the said appellants that they intend to withdraw the defective motion of 3/10/2013, and that the new motion filed on 5/6/2018 will be relied on at hearing. Unless we intend to stand the law or established procedure on its head, there is no element of abuse in this circumstance.

**C**

**D** In view of the foregoing, this preliminary objection fails and is hereby struck-out. I now proceed to determining the main application forming basis of this ruling, that is the appellants/applicants' motion on notice filed 5/6/2018 seeking leave of this court to adduce further evidence at the hearing of this appeal.

**E** **ISSUES FOR DETERMINATION OF THE APPLICATION**

In the argument in support of their application, the appellants /applicants formulated one issue for determination a page 3 of the written address in support of the motion, thus:

**F** **"Whether the Appellants/Applicants have met the conditions for the grant of this application."**

On their part, the respondents also formulated one issue:

**G** **"Whether there is ground or basis for this application and if the appellants/applicants complied or met the requirements implied in the grounds or basis of the application."**

**H** Clearly, both the applicants and respondents have formulated the same issue with different grammatical embellishments. The issue formulated by the applicants is simpler and straightforward compared to the seemingly convoluted issue formulated by the respondents. For the purpose of determining this application, I hereby adopt the issue formulated by the appellants/applicants.

**I** **ARGUMENTS AND RESOLUTION OF ISSUE**

The appellants/appellants argued that the power of an appellate court to receive

**A** further evidence is well amplified in the case of **Owata Vs. Anyigor** (1993) 2 NWLR (Pt.276) 380, P 383-384, Ratio 3, where the Supreme Court held that an appellate court can receive further evidence on questions of fact but such further evidence is only received on special grounds and that the court generally exercised this power with great circumspection. The appellants/applicants further relied on the case of **Akanbi Vs. Alao** (1989) 3 NWLR (Pt.108) 118 at 121-122, Ratio 7.

**B** The applicants relied on the above case and further contended that they have met the requirements enunciated by this court for receiving further evidence to wit: The 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government. The appellants/applicants further relied on the case of **Amaechi Vs. INEC** (2008) 5 NWLR (1080) 227 at 262-263 Ratio 42-45 to further drive home the contention that appellate court, like in this instance, will permit fresh evidence to be adduced in furtherance of justice and if it would assist the court to resolve the issue before the court.

**C** The appellants/applicants further urged this court to grant the reliefs sought and permit them to adduce Exhibit A in support of the motion to assist the court determine the more authentic history between traditional history stated by the appellants and that of the respondents in line with the rule in **Kojo Vs. Bonsie** (supra). The applicant further placed reliance on the case of **Okochi Vs. Animkwoi** (2003) 18 NWLR (Pt.851) SC 1 at 6, Ratio 3 which supports the position that the best way to test the traditional history is by reference to the acts of ownership or possession in recent years as established by evidence and by seeing which two competing histories is the most probable.

**D** In its concluding submission, the appellants/applicants urged this court to grant the application on the ground that it has fulfilled the conditions for the admission of further evidence.

**E** In their opposing arguments, the respondents contended that further evidence is only received on special grounds and that such powers is exercised by the appellate court reluctantly, See **Owata Vs. Anyigor** (1993) 2 NWLR (276) Page 380, Ratio 3 at 384.

**F** The respondents further contended that the basis of admissibility is relevance, quoting from section 1 of the Evidence Act. The respondents differed with the applicants on the contention that **Kojo Vs. Bonsie** is applicable in the circumstances of this application. The respondents insisted, by their submissions that the applicants have not complied with the requirements for the grant of an application of this nature, and that this is fundamental. The respondents relied on and quoted extensively from the case of **UBA Plc Vs. BTL Industries Limited** (2005) All FWLR (Pt.263) P 611, Ratio 3 at 615.

**G** In their final submission, the respondents urged this court to dismiss the application on the ground that the facts relied upon by the applicants/appellants are at variance with the records of proceedings before this court. The respondents stressed further that the report forming basis of the instant application is not admissible under

**A** the Evidence Act as the document represents the personal opinion of the author and lacking in credibility as there is no basis or background showing its relevance for the purpose of the issue in the matter.

By way of further reply on points of law, the appellants/applicants contended further that the grounds relied upon in this application are supported by the records of the court and relevant. Relying on section 1 of the Evidence Act, the applicants contended that further evidence sought to be adduced is relevant to the fact in issue, and that the essence is to adduce evidence to supply missing evidence whose existence was not available and known to the parties at the time of the trial, See **Owata Vs. Anyigor** (supra); **Anatogu Vs. Iweka** (Pt.415) at 934, Para B-E. The appellants stressed further that the principle in **Kojo Vs. Bonsie** (supra) applies in land cases as well as chieftaincy matters, see **Daramola Vs. A.G. Ondo State** (2000) NWLR (Pt.665) 440 at 477, Para E-C; **Ajegwogbade Vs. Laniyu** (1999) 12 NWLR (Pt.633) 92, at 155.

**B**

**C**

**D** I have painstakingly considered the arguments of the parties in this appeal as far as the application under consideration is concerned. The law is that ordinarily, an appellate court is wary of receiving fresh evidence not available at the stage of trial. The appellate court is not however inhibited, but only treads with caution in accepting fresh evidence on appeal.

**E** The position of the law is that the power of an appellate court to receive further or fresh evidence on appeal is rarely exercised but is not taken away, extinguished or inhibited. As held by this court in **Owata Vs. Anyigor (1993) 2 NWLR (Pt.276) 380, P 383-384**, an appellate court can receive further evidence on questions of fact but such further evidence is only received on special grounds and that the court generally exercised this power with great circumspection. Thus, before receiving fresh evidence on appeal, an appellate court would need to be sure that the party seeking to adduce such evidence has fulfilled the following conditions:

**F**

**G** "1) **A formal application is brought exhibiting the fresh evidence or document sought to be adduced. This was not one of the conditions in OWATA's case but now being made a requirement given the rarity and cautionary approach with which such application must be considered.**

**H** 3) **The evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial.**

**I** 6) **If the fresh evidence is admitted it would have an important but not necessarily crucial effect on the whole**

- A** case.
- 7) **If the evidence sought to be adduced is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible.**
- B** 8) **Additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicants, if it had been available at the trial court.**
- C** 7) **The evidence must be material and weighty even if not conclusive. Where the evidence sought to be adduced is immaterial and irrelevant, it will be rejected."**

**D** The above conditions must all co-exist in an application seeking this unusual discretion. Most importantly, the last condition becomes first as the evidence sought to be adduced must be relevant. This is because it is settled principle of law that relevance is the basis of admissibility. The applicants/appellants have approached this court with the application under consideration seeking, essentially, leave to adduce further evidence at the hearing of this appeal in the forms of the **E** 1928- 1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, CTC of which was obtained from the Nigerian National Archives, Ibadan.

**F** Beyond the factual narratives, the ground on which the application is brought are cognisable and compelling. The appellants/applicants premised their application on 8 grounds, as follows:

- G** "1) **That both appellants and respondents are in agreement that the EBERA or OROEBARA Group (otherwise known as ORAZI or the RUMUORAZI Group) has always produced the head of Rumueme. The common ground of disagreement has been; which branch in Ebara (Oroazi) group has been producing the head of Rumueme to wit: is it Nyenweli Nsirim, who heads the appellants' Rumueme Council of Chiefs or the 8<sup>th</sup> respondent (Ohahuru Samuel Akaninwo) who head the Respondents' Rumueme Council of Chiefs, Elders and Owhor holders.**
- H**
- I** 3) **That this core issue is answered conclusively by the document sought to produced and received as further evidence in this appeal to wit: the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division**

- A** by the Southern Provinces of British Colonial Government, a pre-independence Intelligence Report of British Government.
- B** 5) That the existence of the said document (i.e. the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government), was not known to the appellants/ applicants' until 28<sup>th</sup> July, 2010 when the appellant/ applicants' new counsel stumble on it while undertaking research on another subject as the Nigerian National Archives, Ibadan.
- C**
- D** 6) That this colonial document (an independent and unbiased Intelligence Report of the Colonial Government) is credible, reliable and capable of being believed.
- E** 8) That this Archival is applicable under the rule in *Kojo Vs. Bonsie* to resolve the two conflicting traditional histories put forward by the two sides in this appeal by resort to this unbiased, credible, reliable and believable historical document.
- F** 9) That no oral evidence is required as the said document speaks for itself and corroborates and compliments existing oral testimonies in the Record of Appeal and the said document, if received, will have an important, crucial and indeed pivotal effect on this appeal.
- G** 10) That it is in the interest of both the appellants and the respondents that this independent antique document (the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government) is received in that it states the correct and independently investigated historical headship/ rulership of Rumueme as at 1928-1931.
- H**
- I** 9) That this honourable court has in several instances and cases sought to discourage judges from basing their

**A**                    **judgements on mere beliefs and/or disbelief. That from**  
**record of appeal (pages 276, lines 8-25) it is clear the**  
**judgment of the lower court and that of the trial court**  
**were wholly founded on the beliefs and/or disbeliefs of**  
**B**                    **the trial court who merely stated that he disbelieved the**  
**Appellants and believed the respondents without stating**  
**the basis for his beliefs and/or disbeliefs, this Archival**  
**document takes this appeal from the realm of beliefs**  
**and/or disbeliefs unto the firm grounds of proof."**

**C**                    Given the circumstances of this appeal, would fresh evidence undermine or  
strengthen the justice in this case, bearing in mind that a grant or refusal of this  
application does not dispose-off the substantive appeal? The answer certainly is a  
capital NO. Allowing fresh evidence to be adduced in this appeal by a requesting or  
desiring party is not the exclusive preserve of the applicants. The respondents may  
**D**                    as well have taken benefit by applying to adduce any such fresh but relevant  
evidence. Whichever way one looks at it, what should be paramount in the mind of  
the court is whether permitting fresh evidence to be adduced will be in furtherance  
of the course of justice to the extent that it would assist the court to resolve the issue  
before it fairly, justly and equitably.

**E**                    In view of this, I share the view as expressed in the submission of the  
appellants/applicants that the grant of the reliefs sought would only permit them to  
adduce further evidence in the form of Exhibit A which is attached to the affidavit in  
support of the motion. This, clearly, will assist the court determine the more  
**F**                    authentic history between traditional history stated by the appellants and that of the  
respondents.

**G**                    From the above analyses, I resolve in the affirmative the sole issue  
formulated for the determination of this application in favour of the  
appellants/applicants. I hold that this application has merit and is hereby  
accordingly granted as prayed.

**Sidi Dauda Bage,**  
*Justice, Supreme Court.*

**H**                    **KUMAI BAYANG AKAAHS, (JSC):** Learned counsel for the applicants, Mr.  
Michael-Atata brought the application praying this court for leave to adduce further  
evidence in this appeal which was supported with a 21 paragraph affidavit and a  
further affidavit filed on 16 July, 2018 and annexed to the affidavit the intelligence  
report contained at pages 147 and 151 on the Obia Clan, Ikwerre Tribe, Ahoada  
**I**                    Division of the Southern Provinces of the British Colonial Government which he  
stumbled upon at the National Archives Ibadan. It is meant to determine which

**A** branch in Ebara (Oroazi) group has been producing the head of Rumueme to wit: Is it Nyenweli Nsirim who heads the appellants' Rumueme Council of Chiefs or the 8<sup>th</sup> respondent (Ohahuru Samuel Akaninwo) who heads the respondents' Rumueme Council of Chiefs, Elders and Owhor holders. He said that the existence of the said document (i.e. the 1928-1931 Intelligence Report on the Obia clan Ikwerre Tribe, **B** Ahoadia Division by the Southern Provinces of British Colonial Government) was not known to the appellants/applicants until 28 July, 2010 and the said document is credible, reliable and capable of being believed. He contended that the document is applicable under the rule in **Kojo Vs. Bonsie (1957) 1 WLR 1223** to resolve the two conflicting traditional histories put forward by the two sides in this appeal. The application is being opposed.

**C** I read in draft the leading ruling of my learned brother, Bage JSC granting the application. I agree with him.

**D** For an application to receive fresh evidence on appeal to be granted, the following conditions must co-exist namely:-

4. **It must be shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**
5. **That the fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.**
6. **The evidence must be such as is presumably to be believed; in other words it must be apparently credible although it need not be incontrovertible. See: Owata Vs. Anyigor (1993) 2 NWLR (Pt. 276) 380; UBA Plc Vs. B.T.L Industries Ltd (2005) 10 NWLR (Pt. 933) 356; Ehinlanwo Vs. Oke (2008) 16 NWLR (Pt. 1113) 357.**

**E** The fresh evidence should be relevant to the appeal.

**F** My learned brother, Bage JSC had found that Exhibit "A" which is attached to the affidavit in support of the motion will assist the court to determine the more authentic history between the claim of the appellants and that of the respondents. I also hold the same view. Accordingly the application is meritorious and it is granted accordingly.

**G** **K. B. Akaahs**  
*Justice, Supreme Court*

**H**

**I**

**A** **MUSA DATTIJO MUHAMMAD, (JSC):** Having read in advance the lead ruling prepared by my learned brother **SIDI DAUDA BAGE** before his appointment as the Emir of Lafia which ruling has just been delivered, I agree with the reasoning and conclusion therein that the application to which the ruling relates **B** has merit. I grant same on the basis of the reasoning articulated in the lead ruling.

**Musa-Dattijo Muhammad,**  
*Justice, Supreme Court.*

**C** **JOHN INYANG OKORO, (JSC):** I have read before now in its draft form, the lead judgment just delivered by my brother, Sidi Dauda Bage, JSC.

I have perused the reasons and conclusion reached by my brother and I found them agreeable to my understanding of the law on the subject. I endorse his very detailed review of arguments canvassed on both sides and I adopt what he had done as mine.

**D** By way of expatiation, I wish to add that the paramount duty of this court is to do substantial justice between parties. What therefore matters to this court is whether receiving fresh evidence will be in furtherance of the course of justice to the extent that it would assist the court to resolve the issue before it fairly, justly and equitably.

**E** The conditions which must co-exist before an appellate court would consider receiving fresh evidence have been well spelt out in the lead judgment following the decision of this court in the case of **Owata Vs. Anyiojor (1993) 2 NWLR (Pt. 276) 380, as follows:**

- F**
- (1) it must be shown that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**
  - G** **(2) The fresh evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive.**
  - (3) The evidence must be such as is presumably to be believed or in other words it must be apparently credible although it need not be incontrovertible.**
- H**

These three conditions must all be satisfied together and at the same time".

**I** It is instructive to note that, the fresh evidence sought to be adduced has to be relevant to the suit otherwise it would be rejected.

In the instant appeal, I hold the view that receiving fresh evidence, to wit.

- A** Exhibit "A" attached to the appellant's application would in no way undermine justice rather it would further the course of justice by assisting this court to resolve the issues in the substantive appeal fairly, justly and equitably. More importantly, the grounds on which the application is premised, which include a clear description of when and how the appellants/applicants' new counsel came by the evidence sought to be adduced, are to my mind compelling enough that this court cannot gloss over.

To this end, I hold the view that the course of justice will better be served by the grant of this application. The appellants/applicants have satisfied the condition for the grant of this application and same is hereby granted as prayed. I so hold.

- C** **John Inyang Okoro**  
*Justice, Supreme Court*

- D** **UWANI MUSA ABBA AJI, (JSC):** I have had the advantage of reading before now, the lead judgment of my learned brother, **S. D. Bage, JSC**, just delivered.

Parties and counsel are advised to adequately prepare for their cases and not to waste the precious time of the court with flimsy and frivolous applications especially with regard to bringing in fresh evidence. The taking of fresh evidence is not a rule of pleading but a panacea out of a necessity or special and unavoidable circumstance to proffer justice to a given case.

- E** The leave to adduce fresh evidence is grantable usually to obviate the need and necessity of not crying after spilled milk or when the head is cut off since justice is not only for the party seeking it but for all, especially in our judicial jurisprudence of precedents and case laws. Again, since honourable justices and judges are human beings and therefore not infallible, they can make mistakes or commit errors at any time like any other mortals. Thus, the desideratum of considering some fresh evidence not available at the time the case came up for hearing.

- G** Some of the reasons for allowing further evidence on appeal are where the matter arose *ex improviso* which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led:

R. v. Dora Harris (1927) 28 Cox 432. See also Per OGUNTADE, J.S.C in **UBA Plc. Vs. BTL IND. LTD (2005) LPELR-8065 (SC)**. The procedure for admitting further evidence on appeal is not at the disposal of an indolent or not diligent litigant. The procedure cannot be used for the repair of a case at the end of the trial. It is not designed to overreach the other party or spring surprise at the other party when the appeal is heard. See Per TOBI, J.S.C in **Okoro & Ors Vs. Egbuoh & Ors (2006) LPELR-2491(SC)**.

- I** The appellants/applicants' motion of 21/5/2018 is seeking for amongst others:

**A**

- 1. An Order of this honourable court granting the appellants/applicants leave to adduce further evidence at the hearing of this appeal, to wit: the production of a certified true copy of the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, CTC of which was obtained from the Nigerian National Archives.**

**B**

**C**

The 8 grounds for the application are contained at pages 3-7 of the lead judgment of my learned brother. Grounds 2 and 3 cannot be overlooked:

**D**

- 2. That this core issue is answered conclusively by the document sought to be produced and received as further evidence in this appeal to wit: the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, a pre-independence Intelligence Report of British Government.**

**E**

**F**

- 3. That the existence of the said document (i.e. the 1928-1931 Intelligence Report on the Obia Clan, Ikwerre Tribe, Ahoada Division by the Southern Provinces of British Colonial Government, a pre-independence Intelligence Report of British Government), was not known to the appellants/applicants until 28<sup>th</sup> July, 2010 when the appellants/applicants' new counsel stumbled on it while undertaking research on another subject at the Nigerian National Archives, Ibadan.**

**G**

**H**

**I**

The appellate court is duly empowered to admit fresh evidence in respect of matters which occurred after the proceedings and judgment of the trial court so long as the guidelines for such admission are met. The principles which an appellate court must take into consideration in the judicious exercise of its power to grant leave to adduce new evidence are: (a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court. (b) In respect of other evidence other than in (a) above, as for instance in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence

**A** only on special grounds. (c) The evidence to be adduced should be such as if admitted, it would have an important not necessarily crucial effect on the whole case; and (d) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible. See Per PETER-ODILI, J.S.C in **CPC & ANOR Vs. Ombugadu & Anor (2013) LPELR-21007(SC)**.

**B** I think the interest of justice requires that the application be granted as per the reliefs sought by the appellants/applicants. A party to litigation cannot be shut out and the court precluded on technical grounds from receiving further evidence that will assist the parties and the court and the society or community at large. There is no doubt that the evidence sought to be adduced if, admitted, would not only have a critical but a decisive effect on the whole case. In the instant case, it is necessary to receive such evidence for the just disposal of the case. To refuse to admit the additional evidence tantamount to injustice to all.

**C** I endorse the reasons proffered by my learned brother **Bage, JSC**, allowing Exhibit A, which has graciously and unmitigatedly met the conditions for adducing fresh and further evidence since it will assist the court determine the more authentic history between traditional history stated by the appellants and that of the respondents.

**D**

**E** **Uwani Musa Abba Aji,**  
*Justice, Supreme Court.*

**F**

**G**

**H**

**I**

**EFFIOM EDET BASSEY**  
**Vs.**  
**THE STATE**

**SC.236/2014**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY 3<sup>RD</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**OLABODE RHODES-VIVOUR**  
**OLUKAYODE ARIWOOLA**  
**AMINA ADAMU AUGIE**  
**EJEMBI EKO**  
**UWANI MUSA ABBAJI**

**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**  
**JUSTICE, SUPREME COURT**

*CRIMINAL LAW AND PROCEDURE:- Criminal cases – Proof thereof – Whether court must evaluate the totality of evidence called by the prosecution to determine whether it have proved case beyond reasonable doubt.*

*CRIMINAL LAW AND PROCEDURE:- Defences – Provocation – Conjunctive element thereof – What accused must establish.*

*CRIMINAL LAW AND PROCEDURE:- Defences – Provocation – How determined – Whether must be considered in light with the station in life of the accused – The principle in **Owhoruke Vs. Cop (2015) LPELR 24820 SC.***

*CRIMINAL LAW AND PROCEDURE:- Defences – Provocation – Where a party successfully pleas provocation – Whether it will reduce sentence of death to manslaughter.*

*CRIMINAL LAW:- Defences – Accident – Nature and purport – The principle in **Adelumola Vs. the State (1988) 1 NWLR (Pt. 73) 683.***

*CRIMINAL LAW:- Defences – Accident – When occurred.*

*CRIMINAL LAW:- Defences – Provocation – Nature thereof – Whether may be triggered by*

*rage or anger leading to temporarily lose of self control – The principle in **Kaza Vs. State (2008) LEPLR 1683 SC.***

*EVIDENCE:- Confessional statement – Admissibility thereof – When to object thereto – Whether at the point when the statement is sort to be tendered.*

*PRACTICE AND PROCEDURE:- Evidence of accused – Where prosecution did not offer any evidence to disprove what accused said in court – Whether evidence of accused will be deemed to have been accepted.*

*STATUTE:- Criminal Code Law of Cross River State 2004 – Section 24 thereof – The principle of defence of accident.*

### **Issues for Determination**

- a) **Was the Court of Appeal right to have affirmed the decision of the trial court that the defence of accident was unavailing to the appellant as to relieve him of criminal responsibility in the death of the deceased? ("Accident Issue")**
- b) **Considering the evidence, was the Court of Appeal right to have affirmed the rejection by the trial court, of the defence of provocation set up by the appellant? (Provocation Issue)**
- c) **Did the prosecution prove the guilt of the appellant beyond reasonable doubt? ("Proof beyond reasonable doubt issue").**

### **Facts of the Matter**

**The accused appellant was charged before the High Court of Cross River State on a one-count charge of murder to which he pleaded not guilty.**

**In prove of its case the prosecution called on witness, the appellant testified himself and did not call any other witness. The information states that the accused murder his Ukpong Edem Essien by stabbing him with a knife. At the end of trial, the accused was convicted as charged and sentenced to death by hanging. He unsuccessfully appealed to the Court of Appeal. Hence this further appeal to the Supreme Court.**

**Held:** *(Unanimously allowing the appeal in part)*

1. *When to object to admissibility of a confessional statement*

**In my view, the appellant is making a mountain out of a molehill with his contention concerning Exhibit 1, which he had not objected to, at the appropriate time. It is settled that the appropriate time to make such an objection is when the statement made by an accused to the Police is being**

tendered; not when the accused opens his defence or during that defence - see *Ogudo Vs. State (supra)*. Yes, the prosecution ought to have done a better job of explaining why the said *PC Elemura Luke* was not able to be in court, and why the statement recorded by PW1 himself, was not tendered in court.

But in the circumstances of this case, the fact that *PC Elemura Luke* was not in court himself to tender the appellant's statement, which he recorded at *Mbukpa Police Station*, is of no moment in this appeal. (*P.....para.....*)

2. *The nature and purport of Section 24 of the Criminal Code Law of Cross River State 2004*

What did PW1 say that was any different from what the appellant told the court in his evidence as DW1? The appellant narrated more or less the same story in his evidence and under cross-examination, he said that at the Police Station, he was asked what happened between him and his brother, the deceased, and he told them what happened; and he said YES to the question put by prosecution counsel that he had "*opportunity of telling the Police the story [he] just told the court today*". Thus, even if Exhibit 1 is expunged from the record, what PW1 said the appellant admitted to him, is consistent with his evidence as DW1.

As to the accident issue, Section 24 of the Criminal Code Cap. C .16 Vol.3 Laws of Cross River State, 2004 provides *inter-alia* that:

Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident. (*P.....para.....*)

3. *When an event is said to have occurred by accident*  
Obviously, the respondent is right; the concurrent findings of the two lower courts on this issue cannot be questioned. As *Oputa, JSC*, pointed out in *Adelumola Vs. The State (1988) 1 NWLR (Pt. 73) 683-*

It seems to me that the expression, "an event which occurs by accident", used in Section 24 - describes an event totally unexpected by the doer of the act and also not reasonably to be expected by any ordinary person, the reasonable man of the law; in other words, the test is both subjective from the standpoint of the doer of the act, as well as objective from the standpoint of the ordinary man of common prudence. The event should, to qualify as accidental, be a surprise both to the doer of the act that caused it, and a surprising thing to all and sundry. An event is thus

**accidental if it is neither subjectively intended or objectively foreseeable by the ordinary man of prudence.**  
(P.....para.....)

4. *When event occurred by accident*

An event is said to be an accident when the act by which it is caused, is not done with the intention of causing it, and when its occurrence as a consequence of the act, is not so probable that a person of ordinary prudence, ought under the circumstances in which it is done, to take reasonable precaution against it -- see *Umoru Vs. The State (supra)*, and *Thomas Vs. State (supra)*, wherein this court held that an accused person cannot take refuge on a defence of accident for a deliberate act even if he did not intend the eventual result. In this case, the appellant, to use his own words, picked up a knife to frighten the deceased, and it was in the struggle for the knife that the knife stabbed the deceased.

What the law says is that an event, which occurs by accident, connotes an act totally unexpected, unwilled, unintentional and without any fault, as against an act, which is deliberate, willed or intentional - see *Thomas Vs. State (supra)*. In this case, even if the appellant had no intention of stabbing the deceased to death, the very act of picking up a knife, during a fight, cannot be anything else but a deliberate act.

The appellant testified that the deceased continued beating him, even inside the house. Under cross-examination he said the deceased "*beat to the point where the knife was*", and he picked it up frighten him. Obviously, a knife, not to mention a kitchen knife, is a sharp instrument; a lethal weapon, and the appellant, picking up a knife in a fight, *even* if it was to frighten the deceased, who was beating him up, cannot be an "*unwilled act*"; it is what I would call "*enemy action*", which proved fatal. So, the Court of Appeal was right to affirm the trial court's finding that:

An accident is the result of an unwilled act, an event, which occurs without the fault of the person alleged to have caused it. A willed, deliberate act, therefore, negatives the defence of accident. For the defence of accident to avail the [appellant] it must be shown that [his] stabbing of the deceased occurred independently of the exercise of his will. That is not the situation in the instant case. Consequently, the defence of accident is definitely unavailable to the [appellant]. (P.....para.....)

5. *Provocation must be considered in light of station in life of the accused*  
Clearly, the point of divergence is the station in life of the appellant.

It is settled that provocation must be considered in the light of particular circumstances of the case, which includes the station in life of the accused, and

the society in which he lives - see *Lado Vs. State* (supra). Thus, the test is whether a reasonable man in the street or status of the accused would have been provoked to commit the offence - see *Kaza Vs. State* (2008) LPELR- 1683(SC) *Shalla V. State* (2007)18 NWLR (Pt. 1066) 240 and *Owhoruke Vs. COP* (2015) LPELR-24820(SC), wherein Rhodes-Vivour, JSC, observed that:

There is no set standard of retaliation expected from a reasonable man; it all depends on the accused appellant's station in life. A reasonable man is a reasonable man of the accused person's standing in life and to a large extent, his cultural background.  
(P.....para.....)

6. *Appellant was provoked by the deceased*  
In this case, the appellant and the deceased were both manual labourers, and from the picture painted by the appellant, which must be accepted completely, since the prosecution did not adduce any evidence to counter or challenge it, there is no question that the appellant had been provoked by the deceased.  
(P.....para.....)
7. *Provocation may be triggered by rage or anger leading to temporarily loss of self control*  
The Court of Appeal held that the "annoyance or anger the appellant felt was not the same as losing self-control and acting in the heat of passion that would amount to provocation on law". But that is not entirely correct; it has been held, and by this court that provocation may be triggered by rage or anger, etc., on the part of the accused to the person that offered the provocation - see *Kaza Vs. State* (supra), wherein Tobi, JSC, stated:

Provocation is an action or conduct, which arises suddenly in the heat of anger. Such action or conduct is premeditated. by resentment, rage or fury on the part of the accused to the person that offered the provocation. Because of the anger, resentment, rage or fury, the accused suddenly and temporarily loses his passion and-self-control, a state of mind, which results in the commission of the offence. (P.....para.....)

*Per Augie (JSC)*

“From the facts, imagine a labourer, who off-loaded timber from canoes, and who is hungry, being not only denied of his share of the payment for the job done, but also being threatened and beaten seriously for asking for his own share of the money, so he can get something to eat that day.

**That is the situation the appellant depicted in his evidence in court. He was hungry after a hard day's job offloading timber from canoes and asked the deceased for his share of the money paid for the job they did, so he could eat; the deceased not only threatened to beat him for asking for the money to eat; the deceased carried out his threat by beating him outside the house, beating him even after people separated them, and beating him inside the house, where backed into a corner, the appellant saw the kitchen knife, which he picked up to frighten the deceased, and while they were both struggling for the knife, the deceased got stabbed.**

**The prosecution did not present the court with any evidence at all to dispute the appellant's account of what happened. It called only PW1, who admitted under cross-examination that he was not there at the time, and that there was no autopsy carried out on the body of the deceased. With no evidence to dispute the appellant's story, his account of events remained unchallenged - Mathew Vs. State (2018) LPELR-43716(SC), and the lower courts ought to have done a better job of evaluating same.”**  
(P.....para.....)

8. *There was no evidence by the prosecution to disprove what the appellant said in court.*

**So, without considering or even referring to what the appellant had said that he ran out, after the deceased "left house" to go and watch music; the Court of Appeal concluded that the defence of provocation did not avail the appellant because he had run away immediately after the act. That may have been the prosecution's case, but there was no evidence adduced by the prosecution to disprove what the appellant said in court, and the law says it must be accepted as true - Mathew Vs. State (*supra*).**

**Be that as it may, it is clear from the decisions of the lower courts that the indices or pieces of *evidence*, which indicate that the appellant was provoked by the deceased, were glossed over or totally overlooked. (P.....para.....)**

9. *Nature of provocation*

**As I said earlier, provocation is an action or conduct premeditated by anger, resentment, rage or fury that causes the accused to suddenly and temporarily lose his passion and self-control, a state of mind, which results in the commission of the offence - see Kaza Vs. State (*supra*). What is more, the test is whether a reasonable man of the appellant's station in life could have been provoked to commit the crime - see Lado Vs. State (*supra*), Owhoruke Vs. COP (*supra*) and Kaza Vs. State (*supra*). (P.....para.....)**

10. *Appellant was provoked considering his station in life*  
**In this case, the appellant submitted that the deceased and himself “were labourers and, [so] less sophisticated and enlightened persons”, thus, the wrongful seizure of his income coupled with the beatings would have provoked an ordinary man in his station in life, to do what he did.**  
**I agree. Given his background, the resentment, rage, annoyance or anger felt towards the deceased, who' deprived him of money to eat; and beating him up seriously and continuously, while he was still hungry; is enough to provoke an ordinary man of the Appellant's station in life.**  
**As far as this issue is concerned, I agree with the appellant that the lower courts failed to evaluate the whole evidence adduced before the trial court properly; and it is, certainly, my view that “from the facts, evidence and circumstances of the case”, as the Court of Appeal put it, the defence of provocation avails the appellant; and that is my decision. (P.....para.....)**
11. *Effect of a successful plea of provocation*  
**The question is what orders to make because a successful plea of provocation does not exculpate the appellant; it is a mitigating factor, which has the effect of whittling down the punishment for murder to that for manslaughter see Galadima Vs. State (2012) LPELR-15530(SC).**  
**In this case, the appellant was sentenced to death for murder but with a successful plea of provocation in his kitty, which makes him guilty of manslaughter; not murder, his sentence will be reduced accordingly.**  
**In the final analysis, this appeal succeeds and it is hereby allowed. The Court of Appeal's decision affirming the conviction and sentence of death imposed on the appellant by the trial court is, therefore, set aside. In its place, I enter a verdict finding the appellant guilty of the offence of manslaughter. He is sentenced to a term of seven years imprisonment which starts running from the date he was remanded in Police custody.**  
**The records show that the appellant was arrested on 24/11/2010, and has been in Police and prison custody since then. He is, therefore, deemed to have served out his sentence of seven years imprisonment, and I hereby order that he be released from prison custody forthwith. (P.....para.....)**
12. *Prosecution was only able to prove manslaughter*  
**Even though the prosecution charged the appellant for murder, by their tendering of Exhibit 1 they were only able to establish against the appellant an offence of manslaughter.**  
**In Exhibit 1 the appellant narrated how his, deceased brother, a bully, had earlier threatened that after the day's labour of "off-loading" timber from a boat the appellant was - not going to be paid. The narration continues thus**

- So after we finished off-loading the people paid us, but my own brother Ukpong surposed to pay me was N1,200.00 (out of) which he paid me N1,000.00 left with N200.00. At that juncture I refused to collect the N1000.00. From there I started quarrelling with him. At that point - my late brother Ukong said that he was not going to pay me again. Then he said that if I have remember when he beat at the filling station. There, at the front of our compound we started fighting which in the process of this fight my brother's power becomes heavier than my own power before I now picked bottle and stabbed him at the side of his stomach before I ran away and left him there. Actually I killed him brother, Ukpong over the N200.00 matter

Apparently swayed by the admission of the *actus reus*: "Actually I killed my brother Ukpong over N200 matter", the trial court erroneously took Exhibit 1 for a confession to the charge of murder. The conviction of the appellant for murder was predicated on that erroneous belief that Exhibit 1 was an outright confession. It was not.

In Exhibit 1 the appellant had raised a defence of provocation. The deceased seized his money. He and the deceased quarrelled over it. A fight ensued and in the course of the fight and in the heat of the passion he picked a bottle and stabbed the deceased with it, without any premeditation and at the spur of the moment.

It is clear that the trial court did not properly evaluate Exhibit 1 beyond the admission only of the *actus reus*. The necessary *mens rea* for the alleged murder was absent with the plea of provocation following the seizure of the appellant's money, the quarrel and the subsequent fight during which the appellant, without premeditation and in the rage, fury and in the heat of passion upon which having lost self-control, he stabbed the deceased to death. (P.....para.....)

13. *The court must evaluate totality of evidence before reaching its decision*  
I agree, as found by my learned brother, AMINA ADAMU AUGIE, JSC, that "from the facts, evidence and circumstances of the case", even only on the prosecution's case alone, the defence of provocation availed the appellant. The lower court erred in affirming the conviction and sentence of the appellant without properly, evaluating the, totality of the evidence at the total. It is trite that the court must evaluate the totality of the *evidence* called by the prosecution in order to determine whether the prosecution have proved their case against the defendant beyond reasonable doubt: *BOY MUKA & ORS. Vs. THE STATE* (1976) 9,-10 SC 193, at 205. (P.....para.....)

14. *Effect of a successful plea of provocation*  
**The, defence of provocation, being merely a mitigating factor and not an absolutely 'exculpating defence, only entitles the accused person to be convicted for manslaughter and not murder: GALADIMA Vs. THE STATE (2012) LPELR - 15530 (SC); Sections 284 and 318 of the criminal code law of Cross-Rivers State.**  
**The appellant had been incarcerated since November 24<sup>th</sup>, 2010 for the unlawful killing of his brother, Ukpong. The concurrent judgments of the two courts below had completely overlooked the defence of provocation, under Sections 284 and 318 of the Criminal Code which the appellant had pleaded in the circumstances and evidence of this case. It is for the forgoing that I endorse the opinion of my learned brother, A. A. Augie, JSC that the appeal be allowed and the death sentence imposed on the appellant commuted to a term of imprisonment. The appeal is accordingly allowed. (P.....para.....)**
15. *Deceased action was provocative*  
**The testimony of the appellant appears to me very striking and believable since there was no eye witness to the crime except the story of the appellant herein. His evidence seems consistent and correlated. His case appears like that of a man pushed and boxed to the corner. Although the deceased cannot be around to hear from him, his action is most provocative to any reasonable man. If you could be frightened with a knife and still went ahead to have' your way, then' he has a share of the blame for his death. It is commonly said that a wood insect that will gather sticks on his own head, will carry them. In other words, the fly that will insist to follow the corpse into the grave must be buried with the corpse! (P.....para.....)**
16. *Elements of provocation*  
**The three conjunctive elements which a defendant; who wants to avail himself of this special defence of provocation must' prove are that: (a) There was the deceased person's act of provocation which caused his loss of self-control; (b) He killed the deceased in the heat of passion and (c) At the time of killing, the heat of passion had not waned. See Per NWEZE, J.S.C in EZE Vs. STATE (2018) LPELR-44967(SC), Per ADIO, J.S.C in AKPAN Vs. STATE (1994) LPELR-382(SC). In the instant appeal, the deceased provoked the appellant by his statement, the denial of his entitlement and with the beatings he gave him. The proportionality of the retaliation is that they both struggled with, the knife either for defence or for destruction on whosoever might be chanced to prevail. (P.....para.....)**

- A** 17. *The defence of provocation does not exonerate the accused.*  
**Since provocation is not an exculpatory defence but an attenuating or a mitigating defence, where available, it merely, attenuates, dis-rates or demotes the offence from murder to manslaughter. In effect, the defence of provocation does not exonerate the accused person. It only earns him a mitigation of the punishment due for the offence of murder to a sentence for manslaughter. See Per CHIMA CENTUS NWEZE, J.S.C in UKPONG Vs. STATE (2019) LPELR-46427(SC).**

(P.....para.....)

**C Representations**

**Appellant absent (not represented)**

**Greg I. Okem, (Esq.), (DPP Cross River State), with Etek Olabode, (Esq.), (Assistant Director, MOJ, Cross River State), and Blessing Egwu, (Esq.),**

**D**

**(S.S.C., MOJ, Cross River State) For the respondent AMINA ADAMU AUGIE, JSC (Delivered the Lead Judgment):** The appellant, and four other labourers, including his senior brother, *Ukpong Edem Essien*, were engaged to offload timber from canoes at Jebes Creek along Jebes Area, Calabar. They were paid N6, 000.00 and the appellant's brother collected the appellant's share of N1, 200.00 but he only gave the appellant N1,000. 00. A fight arose between them over the balance of N200.00, during which the appellant stabbed his brother on the side of his rib with a "knife", which resulted in his death.

**E**

The appellant was arrested and taken to Mbukpa Police Station, before being transferred to State CID. He made statements admitting that he killed his brother over N200.00; but claimed it was an accident. The appellant was later arraigned before the High Court of Cross River State on a one-count charge of murder, to which he pleaded not guilty.

**F**

**G**

At the trial, the prosecution called one Witness, Cpl. Uwem Okon, of the State CID, who testified as PW1 that he arrested the appellant, who was transferred from Mbukpa Police Station, with, a case file that had extracts and the statement of the accused, etc. He identified the appellant's statement recorded by "*PC. Elemura Luke*" in the case file.

**H**

The defence counsel did not object to the said statement being tendered through PW1, and it, was admitted in evidence as Exhibit 1, and therein the appellant confessed that "*actually, I killed my brother, Ukpong, over N200 matter*". PW1 also recorded a statement from the said "*PC Elemura Luke*". This time, defence counsel objected on the ground that they were not availed with a copy to "*prepare our grounds*", but the objection was overruled, and it was admitted as Exhibit 2.

**I**

The appellant testified himself and did not call any other witness. In his evidence as DW1, he explained that the deceased asked him not to go along with them

**A** to carry the timber. He thought the deceased was joking and started working. When they were paid, the deceased did not even let him know the amount. He further testified as follows:

**B** **I asked him to give any amount to enable me eat. He said if I asked him for money again, he will beat me like a small baby I left him and went and reported to my senior brother. As he came back and discovered that I have reported him to our senior brother, he started beating me. He beat me seriously until passers-by and other compound people - separated us.**

**C** **He continued beating me I left him and entered the house and he continued pursuing me. Even inside the house, he continued beating me. As I turned back I saw a kitchen knife that my senior brother's wife used kept there. I frightened him with the knife but he tried to collect the knife from me. 2 of us dragged the knife till we jammed a chair and fell (sic) down. As we jammed the chair and fell down, the knife stabbed my brother. I did not know that it stabbed him when he left the house I ran out of the house to the barbing saloon to watch music - - I went back to - - greet him.**

**E** **Some people standing on the road held me and handed me over to Police.**

Under cross-examination by the prosecution's counsel, he stated that:

**F** **At the Police Station, I told them what happened between the deceased and I. I told them that my own share was N1,200. But the deceased did not give any N1,000 and held back N200. When the deceased held back the money I was annoyed because I was hungry and I told him to give me at least N500 for my feeding.**

**G** **The deceased is really very wicked and I was afraid he was going to kill me. I did not have it in my mind to kill the deceased. It is accidental and the work of the devil. I had the opportunity of telling the Police what I have said in court.**

**H** The learned trial judge, Ofem, J., delivered Judgment on 23/5/2013, wherein he considered whether the defences of accident, self-defence or provocation availed the appellant, and found to the contrary. Thus, the appellant was found guilty, and convicted and sentenced to death.

**I** Dissatisfied, he appealed, unsuccessfully, to the Court of Appeal. Further aggrieved, he appealed to this court with a notice of appeal containing three grounds of appeal and he formulated three issues for determination there-from in his brief of

**A** argument. The said issues are:

a) **Was the Court of Appeal right to have affirmed the decision of the trial court that the defence of accident was unavailing to the appellant as to relieve him of criminal responsibility in the death of the deceased? ("Accident Issue")**

**B**

d) **Considering the evidence, was the Court of Appeal right to have affirmed the rejection by the trial court, of the defence of provocation set up by the appellant? (Provocation Issue)**

**C**

e) **Did the prosecution prove the guilt of the appellant beyond reasonable doubt? ("Proof beyond reasonable doubt issue")**

**D** The respondent adopted the appellant's issues and I will also do same in dealing with this appeal. However, before I go into the main issues, there is a question of whether the said Exhibit 1 was properly received in evidence, to consider. The appellant contends that it was "*improperly received*" since "*no proper foundation in accordance with provisions of the Evidence Act, 2011, was laid*", before it was admitted in evidence.

**E** At the Court of Appeal, the appellant challenged the admissibility of Exhibit 1 on the ground that it was not tendered through *PC Elemura Luke*, who recorded it from him, and whose absence was not explained. He relied on Section 50 of the Evidence Act, 2011, which provides that: ,

**F** **In the case of a person employed in the public service of the Federation or of a State, who is required to give evidence for any purpose connected with a judicial proceeding, it shall be sufficient to account for his non-attendance at the hearing of the said judicial proceeding if there is produced to the court either a Federal or State Gazette or a telegram, an e-mail or letter purporting to emanate from the head of his department, sufficiently explaining to the satisfaction of the court his apparent default.**

**G**

**H** In its judgment delivered on 17/3/2014, the Court of Appeal held that –

**I** **The provisions only apply to the person mentioned therein, who was required by the prosecution, the defence or the court, to give evidence for any purpose connected with proceedings conducted by the court. Where the person was not required, directed or summoned by either the prosecution, for our purpose here, or the defence or the court as the case may be, then the provisions would**

**A** not apply and are not relevant for the purpose of admission of the evidence. PC Elemura Luke, who recorded Exhibit 1 (was) not" a person required to give evidence at the trial - - - Secondly, the provisions deal with only the absence of such a person or non-attendance at the hearing - - and NOT, the evidence of any statement made or recorded by him before the judicial proceedings of the court - --The provisions of Section 50 do not apply to Exhibit 1. Section 49 of the same Act provides that-

**B**

**C** Notwithstanding anything contained in this Act or any other law - - where in the course of any criminal trial, the court is satisfied that for any sufficient reason, the attendance of the Investigating Police Officer [IPO] cannot be procured; the written and signed statement of such an officer may be admitted in evidence by the court if-

**D** (a) The defence does not object to the statement being admitted; and (b) The court consents to the admission of the statement.

**E** These provisions appear to be relevant to admissibility of Exhibit 1. The Exhibit was admitted in evidence-- without any objection from the defence; the appellant and counsel, and the High Court consented to the admission by admitting it unconditionally. Exhibit 1 is admissible under Section 49 of the Evidence Act - - Because Exhibit 1 was a confessional statement made by appellant (which is consistent with his evidence in court relying on defence of accident), its admissibility is governed by - - Sections 28 & 29(1) & (2) of the Evidence Act.

**F**

**G** The appellant conceded that the Court of Appeal's finding regarding the inapplicability of Section 50 of the Evidence Act "*appears unassailable*"; and that Section 49 of the Evidence Act is the applicable provision; but argued that the said Section 49 was not complied with as no reason was given by the prosecution for the absence of the IPO "*PC Elemura Luke*."

**H** He urged this court to apply Section 22 of the Supreme Court Act and Section 101 of the Evidence Act; and compare the handwritings on Exhibits 1 & 2 to confirm that *PC Elemura Luke* recorded Exhibit 1 and prepared Exhibit 2, citing *Daniel-Kalio Vs. Daniel Kalio (2005) 4 NWLR (Pt. 915) 305*, *Kalonu Vs. Omokaro (2003) 8 NWLR (Pt. 821) 190*. It is his contention that the Court of Appeal ought not to have accorded Exhibit 1 any evidential value at all, and he cited the following authorities -

**I**

- **Obembe Vs. Ekele (2001) 10 NIVLR (Pt. 722) 677 at 693G-094d3;**

- A** - **Osuoha Vs. State (2010) 16 NWLR (Pt. 1219) 364;**  
 - **Haruna Vs. Modibbo (2004) 16 NWLR (Pt. 900) 487 at 544F- 5450;**  
 - **Lambert Vs. Nigerian Navy (2006) 7 NWLR (Pt. 980) 514 at 547A;**  
 - **Okezie Vs. Chairman, M.D.P.D.T (2010) 11 NLWR (Pt. 1206) 419;**  
 - **Olatunji Vs. Waheed (2012) 7 NWLR (Pt. 1298) 24 at 47C-F;**
- B** - **Olatunbosun Vs. N.I.S.E.R (1988) 19 NSCC 1025;**  
 - **N.D.I.C Vs. Okem Ent. Ltd. (2004) 10 NWLR (Pt. 880) 107 SC;**  
 - **NNPC Vs. Lutin Investment Ltd. (2006) 2 NWLR (Pt. 965) 506;**  
 - **Ahmed Vs. C.O.P, Bauchi State (2012) 9 NWLR (Pt. 1304) 104;**  
 - **Oguonzee Vs. State (1998) 5 NWLR (pt. 551) 521 at 571C;**
- C** - **Ogudo Vs. State (2011) 18 NWLR (Pt. 1278) 1 at 31E-G, 52G-53A;**  
 - **Azubuike Vs. Diamond Bank Pic. (2014) 3 NWLR (Pt. 1393); 115;**  
**Okosi & Anor Vs. State (1989) 1 NLWR (Pt. 100) 642; and**  
 - **Agbo Vs. State (2006) 6 NWLR (Pt. 977) 545.**

**D** His position is that if Exhibit 1 is expunged, there would be no evidence on which his conviction can stand; and that his own evidence was not shaken under cross-examination and should be accepted and acted on.

**E** The respondent submitted that the appellant's defence stands in sharp contrast to his confession, hence the attack on Exhibit 1; that Exhibit 1, which he made when the incident was still green in his mind, could not have been improperly received in evidence through PW1, who testified that the appellant and a case file was transferred to him; and apart from recording his statement, he also recorded a statement from *PC Elemura Luke*, the initial IPO, who transferred the case file to PW1 and from which Exhibit 1 was tendered and admitted in evidence.

**F** It also argued, citing *Edem Udo Vs. State (2006) 27 NSCQR 1*, that the prosecution is not bound to call all the available witnesses to prove its case; that the said Exhibit 1 was received in evidence without objection from defence counsel, after it was shown to the appellant, who identified and confirmed that he made it; that the appropriate time of retracting there-from was when it was being tendered, citing *Odey Vs. FRN (2008) All FWLR (Pt. 424) 1590* and *Ogudo V. State (supra)*.

**G** He further argued that even if the appellant is right, the law is that where admissible evidence is irregularly admitted without objection, its admission cannot be raised on appeal - *Uwaekweghinya Vs. State (2005) NWLR (Pt. 930) 227(sic)*; that the appellant's submissions regarding Exhibit 1 "*is unjustifiable, it is belated and should be discountenanced*"; that the trial court considered its probative value vis-a-vis his oral testimony and other available evidence to hold that the appellant is guilty of the offence, citing *Edamine Vs. State (1996) 26 LRCN 455*; and that even if Exhibit 1 were to be discountenanced or expunged, there is enough evidence to show that the deceased was indeed killed by the appellant.

**H** In my view, the appellant is making a mountain out of a molehill with his contention concerning Exhibit 1, which he had not objected to, at the appropriate time.

**A** It is settled that the appropriate time to make such an objection is when the statement made by an accused to the Police is being tendered; not when the accused opens his defence or during that defence - see *Ogudo Vs. State (supra)*. Yes, the prosecution ought to have done a better job of explaining why the said *PC Elemura Luke* was not able to be in court, and why the statement recorded by PW1 himself, was not tendered in court.

**B** But in the circumstances of this case, the fact that *PC Elemura Luke* was not in court himself to tender the appellant's statement, which he recorded at Mbukpa Police Station, is of no moment in this appeal. PW1 stated as follows:

**C** **I arrested the suspected (sic), who was transferred from Mbukpa Police Station with the case file. I recorded statement from him in the course of investigating the matter. He admitted that some days before he was transferred to State CID, somebody hired him and his brother to offload firewood at the cost of N6,000 only. While they were sharing that money with his brother (the deceased), they had misunderstanding over N200, which resulted to a fight. And that he took a knife with the intention of frightening his brother. In the process, he stabbed the brother with the knife [and] before medical attention could be given, the brother died.**

**E** What did PW1 say that was any different from what the appellant told the court in his evidence as DW1? The appellant narrated more or less the same story in his evidence and under cross-examination, he said that at the Police Station, he was asked what happened between him and his brother, the deceased, and he told them what happened; **F** and he said YES to the question put by prosecution counsel that he had "*opportunity of telling the Police the story [he] just told the court today*". Thus, even if Exhibit 1 is expunged from the record, what PW1 said the appellant admitted to him, is consistent with his evidence as DW1.

**G** As to the accident issue, Section 24 of the Criminal Code Cap. C .16 Vol.3 Laws of Cross River State, 2004 provides *inter-alia* that:

**H** **Subject to the express provisions of this code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission, which occurs independently of the exercise of his will, or for an event which occurs by accident.**

On this issue, the trial court reviewed his evidence and held as follows: .

**I** **The defence of accident is definitely unavailable to the accused. Indeed, evidence adduced by the prosecution in this case, is without any clouds. The accused did not deny the incident which**

**A** resulted in the death of the deceased. His defence is that the knife he picked to frighten or threaten the deceased accidentally killed the deceased. I reject this defence of accident. In fact, it is a useless defence because in Exhibit 1, he categorically stated that he stabbed the deceased. He admitted killing the deceased because of N200 as follows: “Actually, I killed my brother over N200 matter”. I accept Exhibit 1 and reject the defence of accident raised by the accused person in his evidence in defence as an afterthought and punctured.- -- The defence of accident cannot, therefore, avail the accused person. He knew the probable consequence of pulling a knife against an opponent, who is defenceless. It will certainly cause grievous harm or kill. The fear that the deceased might kill him or overpower him does not avail the accused that defence. If by this defence, the accused is contemplating that he did not stab the deceased directly, then what of S. 308 CC, which makes indirect killing the act of the accused person, as the facts of this case reveal.

In affirming the trial court's decision, Court of Appeal also observed:

**E** By saying that he did not "have in mind to kill my brother", the appellant is understood to mean that he did not intend to kill his brother -- Intention may be inferred from the nature of an event and its relationship with the fact from which it resulted. Where the event is a natural consequence of the act in the sense that it follows, in the ordinary course of things and so reasonably expected whenever such an act was done, the doer of that act would be presumed to have intended the resultant event. In law, a person is presumed to intend the natural and probable consequence of his act or omission. Death or at least very grievous bodily harm, would be the result that any ordinary man of the appellant's position and circumstances in life, would expect from a stab on the side of the stomach of another person, with a bottle or knife, by a 23-year man such as the appellant.

**H** The Court of Appeal, therefore, agreed with the trial court that the said "*defence of accident did not avail the appellant*". The appellant insists that it "*was mistaken*". He cited the following cases on the said defence:

- I**
- **Dangari Vs. State (1968) 5 NSCC 196 at 200;**
  - **Sholuade Vs. Republic (1966) 1 All NLR 125;**
  - **Nwodo Vs. State (1991) 4 NWLR (Pt. 185) 341 at 355;**

- A** - **Iromantu Vs. State (1964) 1 AllNLR 311;**  
 - **Adelumola Vs. State (1988)' 1 NWLR (Pt. 73)' 683 at 692H-693**  
 - **Umoru Vs. State (1990) 3 NWLR (Pt. 138) 363 at 370H**  
 - **Bello & Ors Vs. Att. Gen., of Oyo State (1986) 5 NWLR (Pt. 45) 828;**  
 - **Chukwu Vs. State (1992) 1 NWLR (Pt. 217) 255 at 269; and**  
**B** - **Jimmy Vs. State (2013) 18 NWLR (Pt. 1386) 229.**

**C** He submitted that "*the event that led to the death of the deceased*" was the struggle between them over the knife during which they fell on a chair and the knife accidentally pierced the deceased, killing him; that his use of a knife to "*frighten*" the deceased may qualify as an "*intentional act*, but the "*jamming*" and "*falling down*" on a chair, was an "*event*" that occurred by accident, although it may have arisen from an intentional act, citing *Umoru Vs. State (supra)*; that it is trite that unless the evidence is palpably incredible, "*the court is not only entitled to, but has no reason not to accept it*", citing *Modupe Vs. State (1988) 4 NWLR (Pt. 87) 130*.

**D** Furthermore, that a party is entitled to rely on a favourable piece of *evidence* by the other party's witness, as it "is an admission against interest, citing Section 21 (1) of the Evidence Act, *Seismograph Service (Nig.) Ltd. Vs. Eyuafe (1976) 9-10 SC 135*, *Artra Ind. (Nig.) Ltd. Vs. NBCI (1998) 4 NWLR (Pt. 546) 357*, *Onisaodu Vs. Elewuju (2006) 13 NWLR (pt. 998) 517*, *Anigbogu Vs. Uchejigbo (2002) 10 NWLR (Pt. 776) 472*; and that given the evidence of PW1, it is difficult to find a legal basis for the court's opinion.

**E** He also argued that Section 308 of the Criminal Code, which says "*any person, who causes the death of another directly or indirectly, by any means whatsoever, is deemed to have killed that person*" was wrongly applied by the Court of Appeal to defeat his defence of accident; that Section 24 of the Criminal Code exculpates, relieves or completely exonerates a person from criminal responsibility, whether the cause of death results from a direct or indirect act of the person, as envisaged by Section 308 of the same Criminal Code or any of its other provisions, citing **Chukwu Vs. State (supra)**, **Nwodo Vs. State (supra)**; hence, contrary to the prescription in Section 308, it is immaterial that the cause of death is directly or indirectly attributable to his act; and that once it is shown that the event that resulted in the death was accidental, he would be completely exonerated of criminal liability notwithstanding provisions of Section 308 or any other provision, citing **Jimmy Vs. State (supra)**.

**F** On its part, the respondent cited **Thomas Vs. State (1994) NWLR (Pt. 337) 129** and **Oghor Vs. State (1990) 3 NWLR (Pt. 139) 484**, on the defence of accident. It also submitted, citing **Afolalu Vs. State (2010) 43 NSCQR 227** and **Ezeokonkwo Vs. Okeke (2002) MJSC 189**, that the two lower courts "*were in concurrence and ad idem that the defence of accident did not and could not availed the appellant*" and that this court would not ordinarily disturb the concurrent findings of the two lower courts unless such findings are shown to be perverse.

**G** Furthermore, that the appellant cannot just trigger a fight with the deceased,

**A** rush to a distance, bring out a knife, stab the deceased fatally and claim accident; thus, his defence is a "*classic after thought*".

Obviously, the respondent is right; the concurrent findings of the two lower courts on this issue cannot be questioned. As Oputa, JSC, pointed out in *Adelumola Vs. The State* (1988) 1 *NWLR* (Pt. 73) 683-

**B**

**It seems to me that the expression, "an event which occurs by accident", used in Section 24 - describes an event totally unexpected by the doer of the act and also not reasonably to be expected by any ordinary person, the reasonable man of the law; in other words, the test is both subjective from the standpoint of the doer of the act, as well as objective from the standpoint of the ordinary man of common prudence. The event should, to qualify as accidental, be a surprise both to the doer of the act that caused it, and a surprising thing to all and sundry. An event is thus accidental if it is neither subjectively intended or objectively foreseeable by the ordinary man of prudence.**

**C**

**D**

An event is said to be an accident when the act by which it is caused, is not done with the intention of causing it, and when its occurrence as a consequence of the act, is not so probable that a person of ordinary prudence, ought under the circumstances in which it is done, to take reasonable precaution against it -- see *Umoru Vs. The State* (*supra*), and *Thomas Vs. State* (*supra*), wherein this court held that an accused person cannot take refuge on a defence of accident for a deliberate act even if he did not intend the eventual result. In this case, the appellant, to use his own words, picked up a knife to frighten the deceased, and it was in the struggle for the knife that the knife stabbed the deceased.

**E**

**F**

What the law says is that an event, which occurs by accident, connotes an act totally unexpected, unwilled, unintentional and without any fault, as against an act, which is deliberate, willed or intentional - see *Thomas Vs. State* (*supra*). In this case, even if the appellant had no intention of stabbing the deceased to death, the very act of picking up a knife, during a fight, cannot be anything else but a deliberate act.

**G**

The appellant testified that the deceased continued beating him, even inside the house. Under cross-examination he said the deceased "*beat to the point where the knife was*", and he picked it up to frighten him. Obviously, a knife, not to mention a kitchen knife, is a sharp instrument; a lethal weapon, and the appellant, picking up a knife in a fight, *even if it was to frighten the deceased, who was beating him up, cannot be an "unwilled act"; it is what I would call "enemy action", which proved fatal. So, the Court of Appeal was right to affirm the trial court's finding that:*

**H**

**I**

**An accident is the result of an unwilled act, an event, which occurs without the fault of the person alleged to have caused it. A**

- A** willed, deliberate act, therefore, negatives the defence of accident. For the defence of accident to avail the [appellant] it must be shown that [his] stabbing of the deceased occurred independently of the exercise of his will. That is not the situation in the instant case. Consequently, the defence of accident is definitely unavailable to the [appellant].
- B**

The concurrent findings of the two lower courts on this issue STANDS.

- C** On the provocation issue, the defence counsel submitted at the trial court that the appellant was not raising the defence of provocation, but notwithstanding, the trial court considered it, because in its *view*:

- D** Having considered the evidence of the prosecution and the accused person- - there are some pieces of evidence therein pointing to the defence of provocation and the law enjoins me, in the circumstance, to mandatorily consider such defence so raised

After reviewing the evidence vis-a-vis this defence, the trial court held:

- E** For the act of provocation to avail an accused, the act complained of must occur on the spur of the moment and before there is time for passion to cool off -- The accused reacted to the words and even beatings of the deceased by attacking him with a lethal weapon -- It is to be emphasized also that mere anger is not enough provocation in law as the Accused confessed that he was annoyed by the spoken words to him by the deceased and by his refusal to give him his share of the money -- It is also obvious from Exhibit 1 - - that what he felt at the time they quarreled was annoyance and not provocation in the legal sense of the word The defence cannot, therefore, avail [him].
- F**

- G** The Court of Appeal held that the above conclusion that the defence of provocation "*does not avail the appellant from the facts, evidence and, circumstances of the case is unassailable*", It also reasoned as follows:

- H** The fulcrum of the defence, put up by the appellant was that the deceased refused to pay him his share of money due to him, beat him and he was annoyed thereby. Put another way, the appellant said he was angered by what the deceased did to him. As rightly stated by the High Court, anger alone, does not amount to loss of self-control, both actual and reasonable, an essential element for the defence of provocation to succeed. In both his evidence - - and
- I**

**A** Exhibit 1.the appellant did not give any indication or even reasonable impression that he lost self-control and was drowned by the heat of passion when he fought with the deceased in the process of which he stabbed him with a bottle or when the knife stabbed him. The appellant answered under cross-examination that his

**B** deceased brother was really a very wicked man with whom he was annoyed for refusal to give him the money in question and beating him. Stabbing the deceased with a knife in the circumstances it

**C** happened, leaves no reasonable doubt that the appellant was at the material time, in full control of his senses and knew very well what he was doing or did because he ran away from the scene immediately after that. A person, who lost self-control and who acted in the heat of passion would not instinctively know that he had done something from which he should run away. The annoyance or anger the appellant felt was not the same thing as

**D** losing self-control and acting in the heat of passion that would amount to provocation in law -- The essence of the element of loss of self-control in the defence of provocation, is that it gives rise to brain-storm that momentarily paralyses the power of self-control in the person affected and so negates the necessary mens rea of the

**E** alleged offence. It is crucial -- that the act held out as a natural and justifiable reaction of the person given the provocation, must not be done in self revenge, but in ventilation of a natural, sudden and contemporaneous feeling of anger caused by instant circumstances of the case, before there was time for the heat of passion to cool

**F** down. -- Similarly, the High Court was right that the stabbing of a brother, who was not armed with any weapon at all, by his junior brother, with a bottle or knife on the stomach, is out of proportion of the alleged words or beating with bare hands, said to have angered or annoyed [him]. It would have been different if [he] had

**G** retaliated the beating with his own bare hands or even a less lethal weapon such as a stick.

**H** In the Court of Appeal's view, the retaliation with a dangerous and lethal weapon such as a knife by the appellant, "*was outrageous and beyond reasonable proportion, and cannot be' attributed to heat of passion or loss of self-control, but to revenge, premised on intention*". It, therefore, found no reason to interfere with the trial court's finding on this issue.

**I** In this court, the appellant argued this issue "*without prejudice*", as he put it, to his primary contention that he killed his late elder brother by accident for which he should be absolved of criminal responsibility. But in the unlikely event that the defence of accident fails, which it has, he has argued in the alternative that he was provoked into

**A** killing him. He referred this court to Sections 283 and 318 of the Criminal Code. Section 283, which defines provocation, *provides inter alia* that it-

**B** **Includes any act or insult of such a nature as to be likely, when done to an ordinary person ... to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.**

Section 318 of the same Criminal Code also provides as follows

**C** **When a person who unlawfully kills another in circumstances which, but for the provisions of this Section, would constitute murder, does the act which ceases death in the heat of passion caused by grave and sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.**

**D** He also cited **R. Vs. Duffy (1949) 1 All ER 932, Q. Vs. Afonja & Ors, (1955) 15 WACA 26 and Chukwu Vs. State (1966) NMLR 274**, and submitted that a defence of provocation does not negative *mens rea*, but it is allowed as one, because the law considers that at the moment of the physical act resulting in the *actus reus*, the accused, by reason of passion arising from the act of provocation, was not master of his mind, and he may, therefore, be partially excused of criminal responsibility.

**E** Furthermore, that provocation consists of three elements namely: (i) the provocative incident, (ii) the loss of self-control, both actual and reasonable, and (iii) the retaliation, which must be proportionate to the provocation; and that they must co-exist for the said defence to avail an accused citing **Akang Vs. State (1971) 1 All NLR 47; Uraku Vs. State (1976) 10 NSCC 280, Biruwa V. State (1992) 1 NWLR (Pt. 220) 663 and Akpan Vs. State (1994) 9 NWLR (Pt. 368) 347.**

**F** He also submitted that since the Criminal Code does not spell out the acts that constitute provocation, what constitutes provocation will always turn on the facts of each case, and this may be verbal or physical or both, as in this case, where there were threats and blows; and that blows; and that blows and threatening gestures *have* been held to be provocative, citing **Lado Vs. State (1999) 9 NWLR (Pt. 619) 369**, wherein Wali; JSC, said:

**G** **H** **Blows as well as threatening gestures, if near, are enough and serious as to cause loss of self-control and may justify and indeed reduce the killing to culpable homicide not punishable with death, particularly where the community is primitive, less secure and less settled in habits ... Although the appellant used deadly weapon on the deceased, the evidence did not conclusively show that he intended to kill ...**

A

He argued that this *dictum* is apposite to the facts of this case, wherein there is nothing to show he *conclusively* intended to kill the deceased, "*particularly when his milieu or background is taken into consideration*", that it should be borne in mind that both of them "*were labourers and, as such, less sophisticated and enlightened persons*", therefore, the wrongful seizure of his income coupled with the beatings meted to him, would *have* provoked an ordinary man of his station in life to act in the same way he did; and that in the circumstances, given his background, the mode of resentment was proportionate to the provocation offered.

B

C

He also referred to *Nunyiewa Vs. State (1972) 7 NSCC 710*, which he considered relevant, wherein Coker, JSC, observed:

D

E

**In *Chukwu Obaji Vs. State (1965) 1 All NLR, 269*, this court - - made the following observations when dealing with the element of proportionality in the concept of provocation: -"It is not disputed that in applying this doctrine in the light of the interpretation given by the Nigerian Courts, the background of the accused and the circumstances of his locality are relevant facts which a jury should decide". With respect what the learned trial Judge was expected to assess and employ in his consideration of the plea of provocation was what the ordinary man or woman in the particular community would do in the particular instance and not what any person states that he would do.**

F

G

He also cited *Okpere Vs. State (1971) NSGC 1*; *Adeniyi Vs. State (1983) 1 NCR 1*; *State Vs. Abba Mohammed (1969) NMLR 296*, and submitted that there are striking similarities between the facts of those cases to the facts of this case, because in each case there was (a) a fight, (b) the deceased was not armed (c) the accused persons responded with deadly weapons and (d) regardless, the courts were convinced that the responses were proportionate to the provocation received, therefore, provocation as a defence availed each appellant.

He urged this court to apply the proposition of law in the *above* cases to the facts of this case because of their similarities. In this regard:

H

I

- **The deceased wrongly withheld income due to the appellant;**
- **There was argument and threatening acts from the deceased to him;**
- **A fight ensued and due to the fact that the deceased was more powerful than the appellant, he beat up the appellant mercilessly;**

- A** - **Passers-by intervened. Nonetheless, the deceased would not relent in his pummeling of the appellant.**
- **The appellant sought to avoid the fight by running away. The deceased would not let him be. He chased the appellant and continued to beat him;**
- B** - **The appellant was scared that he was going to die; and**
- **He picked up a knife and accidentally stabbed the deceased (not admitted) resulting in the death of the deceased.**

**C** He further submitted that in evaluating the evidence, the Court of Appeal did not take into account the several beatings he got from the deceased; and that it is settled that any decision arrived at without a proper or adequate evaluation of the evidence, cannot stand, citing **Oladehinde Vs. Cont. Textile Mills Ltd (1978) 2 SC 23; Onwuka Vs. Ediala (1989) 1 NWLR (Pt. 96) 182; Eze Vs. Okoloagu (2010) 3 NWLR (Pt. 1180) 183, Gabriel Vs. State (2010) 6 NWLR (Pt. 1190) 280.**

**D** He further argued that contrary to well settled principles of law, the prosecution did not disprove the defence of provocation he set up; that having raised the defence, it was incumbent on the prosecution to lead evidence to negative same, but the prosecution failed miserably to do so, therefore, that failure should be resolved in his favour, citing **Lado Vs. State (supra) and R Vs. Mcpherson (1957:) Cr.App, R. 213.**

**E** The respondent referred to cases earlier cited on the attitude of this court on the concurrent findings of the two lower courts, that is - **Afolalu Vs. State (supra) and Ezeokonkwo Vs. Okeke (supra)**, and urged this court not to disturb the findings by the two lower courts. It submitted that the degree of retaliation that the appellant used by stabbing the deceased must be proportionate to the provocation offered by the deceased, citing **Oladiran Vs. State (1986) 1 SC 171, Ekpenyong Vs. State (1993) 5 NWLR (Pt. 295) 513**; that the defence will not avail the appellant if there is evidence that there was a recess or possible recess in his mind for passion to cool; and that the defence is also not available to him, where there is evidence of any premeditated vendetta, citing **Usman 929 Vs. State (2008) 33 NSCQR (Pt. 2) 1351.**

**F** It further submitted that the appellant clearly stated that he was annoyed when the deceased refused to pay him when he was cross-examined by the prosecution, which is not enough provocation in law, as the trial court found; that he had an option to flee from the deceased, whom he said had overpowered him, but rather he elected to kill the defenceless deceased by stabbing him with a knife. So, the trial court's findings are based on a dispassionate appraisal of the entire evidence.

**G**

**H**

**I**

**A** On this issue, I find that I have to disagree with the respondent, which is why I set out the appellant's submissions with the authorities cited to back them up, because they paint a clear picture of this case, and show exactly where and why the two lower courts fell into error. Clearly, the point of divergence is the station in life of the appellant.

**B** It is settled that provocation must be considered in the light of particular circumstances of the case, which includes the station in life of the accused, and the society in which he lives - see **Lado Vs. State (supra)**. Thus, the test is whether a reasonable man in the street or status of the accused would have been provoked to commit the offence - see **Kaza Vs. State (2008) LPELR- 1683(SC) Shalla V. State (2007)18 NWLR (Pt. 1066) 240 and Owhoruke Vs. COP (2015) LPELR-24820(SC)**, wherein Rhodes-Vivour, JSC, observed that:

**D** **There is no set standard of retaliation expected from a reasonable man; it all depends on the accused appellant's station in life. A reasonable man is a reasonable man of the accused person's standing in life and to a large extent, his cultural background.**

**E** In this case, the appellant and the deceased were both manual labourers, and from the picture painted by the appellant, which must be accepted completely, since the prosecution did not adduce any evidence to counter or challenge it, there is no question that the appellant had been provoked by the deceased.

**F** The appellant as DW1 testified that when he asked the deceased to give "*any amount to enable [him] eat*", the deceased said that he would beat him "*like a small baby*", if the appellant asked him again for his share of the money, which they got for offloading timber from canoes. The deceased beat him and continued to beat him, even after the appellant entered the house, and it was when the deceased was beating him inside the house that the appellant saw the knife that he used on the deceased.

**G** Under cross-examination, he said -

**H** **When the deceased held back the money I was annoyed because I was hungry and I told him to give me at least N500 for my feeding. The deceased is really very wicked and I was afraid he is going to kill me. I did not have it in mind to kill my brother. Its only accidentally. It's the work of the devil. He started beating me inside the house. As I turned back I saw a knife and I picked the knife, we fought and jammed the chair and fell down and I did not know the knife stabbed at him. He did not give me any little grace to run out because he was more**

**I**

**A** power than me (sic). Because he beat up to the point where the knife was, I took the knife to frightened (sic) him.

The Court of Appeal held that the "*annoyance or anger the appellant felt was not the same as losing self-control and acting in the heat of passion that would amount to provocation on law*". But that is not entirely correct; it has been held, and by this court that provocation may be triggered by rage or anger, etc., on the part of the accused to the person that offered the provocation - see **Kaza Vs. State (supra)**, wherein Tobi, JSC, stated:

**B**

**C** Provocation is an action or conduct, which arises suddenly in the heat of anger. Such action or conduct is premeditated. by resentment, rage or fury on the part of the accused to the person that offered the provocation. Because of the anger, resentment, rage or fury, the accused suddenly and temporarily loses his

**D** passion and-self-control, a state of mind, which results in the commission of the offence.

From the facts, imagine a labourer, who off-loaded timber from canoes, and who is hungry, being not only denied of his share of the payment for the job done, but also being threatened and beaten seriously for asking for his own share of the money, so he can get something to eat that day.

**E** That is the situation the appellant depicted in his evidence in court. He was hungry after a hard day's job offloading timber from canoes and asked the deceased for his share of the money paid for the job they did, so he could eat; the deceased not only threatened to beat him for asking for the money to eat; the deceased carried out his threat by beating him outside the house, beating him even after people separated them, and beating him inside the house, where backed into a corner, the appellant saw the kitchen knife, which he picked up to frighten the deceased, and while they were both struggling for the knife, the deceased got stabbed.

**F**

**G** The prosecution did not present the court with any evidence at all to dispute the appellant's account of what happened. It called only **PW1**, who admitted under cross-examination that he was not there at the time, and that there was no autopsy carried out on the body of the deceased. With no evidence to dispute the appellant's story, his account of events remained unchallenged - **Mathew Vs. State (2018) LPELR-43716(SC)**, and the lower courts ought to have done a better job of evaluating same. For instance, the Court of Appeal found as follows against the appellant.

**H**

**I** **Stabbing the deceased with a knife in the circumstances it happened, leaves no reasonable doubt that the appellant was at**

**A** the material time, in full control of his senses and knew very well what he was doing or did because he ran away from the scene immediately after that. A person, who lost self-control and who acted in the heat of passion would not instinctively know that he had done something from which he should run away.

**B**

However, the appellant clearly stated as follows in his *evidence* in chief:

**C** The knife stabbed my brother and I did not know that it stabbed him when he left house, I ran out of the house to the barbing saloon to watch music. After that music, I went back to the house to come and greet him. So, some people standing on the road held me and handed me over to the Police that I was

**D** the one that killed my brother. I asked them which of my brother. They did not tell me but put me into the motor to Mbukpa Police Station.

**E** So, without considering or even referring to what the appellant had said that he ran out, after the deceased "*left house*" to go and watch music; the Court of Appeal concluded that the defence of provocation did not avail the appellant because he had run away immediately after the act. That may have been the prosecution's case, but there was no evidence adduced by the prosecution to disprove what the appellant said in court, and the law says it must be accepted as true - **Mathew Vs. State** (*supra*).

**F**

Be that as it may, it is clear from the decisions of the lower courts that the indices or pieces of *evidence*, which indicate that the appellant was provoked by the deceased, were glossed over or totally overlooked.

**G** As I said earlier, provocation is an action or conduct premeditated by anger, resentment, rage or fury that causes the accused to suddenly and temporarily lose his passion and self-control, a state of mind, which results in the commission of the offence - see **Kaza Vs. State** (*supra*). What is more, the test is whether a reasonable man of the appellant's station in life could have been provoked to commit the crime - see **Lado Vs. State** (*supra*), **Owhoruke Vs. COP** (*supra*) and **Kaza Vs. State** (*supra*).

**H**

**I** In this case, the appellant submitted that the deceased and himself "*were labourers and, [so] less sophisticated and enlightened persons*", thus, the wrongful seizure of his income coupled with the beatings would have provoked an ordinary man in his station in life, to do what he did.

I agree. Given his background, the resentment, rage, annoyance or anger felt

**A** towards the deceased, who' deprived him of money to eat; and beating him up seriously and continuously, while he was still hungry; is enough to provoke an ordinary man of the Appellant's station in life.

As far as this issue is concerned, I agree with the appellant that the lower courts failed to evaluate the whole evidence adduced before the trial court properly; and it is, certainly, my view that "*from the facts, evidence and circumstances of the case*", as the Court of Appeal put it, the defence of provocation avails the appellant; and that is my decision.

The question is what orders to make because a successful plea of provocation does not exculpate the appellant; it is a mitigating factor, which has the effect of whittling down the punishment for murder to that for manslaughter see **Galadima Vs. State (2012) LPELR-15530(SC)**.

In this case, the appellant was sentenced to death for murder but with a successful plea of provocation in his kitty, which makes him guilty of manslaughter; not murder, his sentence will be reduced accordingly.

In the final analysis, this appeal succeeds and it is hereby allowed. The Court of Appeal's decision affirming the conviction and sentence of death imposed on the appellant by the trial court is, therefore, set aside. In its place, I enter a verdict finding the appellant guilty of the offence of manslaughter. He is sentenced to a term of seven years imprisonment which starts running from the date he was remanded in Police custody.

The records show that the appellant was arrested on 24/11/2010, and has been in Police and prison custody since then. He is, therefore, deemed to have served out his sentence of seven years imprisonment, and I hereby order that he be released from prison custody forthwith.

**Amina Adamu Augie**  
*Justice Supreme Court*

**OLABODE RHODES-VIVOURE, (JSC):** I had the benefit of reading a draft copy of the leading judgment delivered by my learned brother, Augie JSC. For the reasons given, I agree that on the successful plea of provocation the Court of Appeal's decision affirming the conviction and sentence of death on the appellant by the trial court is hereby set aside, and in its place the appellant is guilty of manslaughter and sentenced to seven years imprisonment.

I agree that the appellant should be released from custody immediately in view of the correct observation of my learned brother, Augie JSC .

**Olabode Rhodes-Vivour**  
*Justice Supreme Court*

**EJEMBI EKO, (JSC):** The PW.1, the only witness who testified for the prosecution, was the *investigating* Police Officer. He was not an eye-witness. Through him the extra-

**A** judicial statement of the appellant which raised, in favour of the appellant, a defence justifying his killing of his overbearing violent and or canterkerous bully brother was tendered as Exhibit 1. The said statement, Exhibit 1, formed part of the prosecution's case.

**B** Even though the prosecution charged the appellant for murder, by their tendering of Exhibit 1 they were only able to establish against the appellant an offence of manslaughter.

In Exhibit 1 the appellant narrated how his, deceased brother, a bully, had earlier threatened that after the day's labour of "off-loading" timber from a boat the appellant was - not going to be paid. The narration continues thus

**C** - So after we finished off-loading the people paid us, but my own brother Ukpong surposed to pay me was N1,200.00 (out of) which he paid me N1,000.00 left with N200.00. At that juncture I refused to collect the N1000.00. From there I started quarrelling with him. At that point - my late brother Ukong said that he was not going to pay me again. Then he said that if I have remember when he beat at the filling station. There, at the front of our compound we started fighting which in the process of this fight my brother's power becomes heavier than my own power before I now picked bottle and stabbed him at the side of his stomach before I ran away and left him there. Actually I killed him brother, Ukpong over the N200.00 matter -

**F** Apparently swayed by the admission of the actus reus: Actually I killed my brother Ukpong over N200 matter", the trial court erroneously took Exhibit 1 for a confession to the charge of murder. The conviction of the appellant for murder was predicated on that erroneous belief that Exhibit 1 was an outright confession. It was not.

**G** In Exhibit 1 the appellant had raised a defence of provocation. The deceased seized his money. He and the deceased quarrelled over it. A fight ensued and in the course of the fight and in the heat of the passion he picked a bottle and stabbed the deceased with it, without any premeditation and at the spur of the moment.

**H** It is clear that the trial court did not properly evaluate Exhibit 1 beyond the admission only of the *actus reus*. The necessary *mens rea* for the alleged murder was absent with the plea of provocation following the seizure of the appellant's money, the quarrel and the subsequent fight during which the appellant, without premeditation and in the rage, fury and in the heat of passion upon which having lost self-control, he stabbed the deceased to death.

**I** I agree, as found by my learned brother, AMINA ADAMU AUGIE, JSC, that "from the facts, evidence and circumstances of the case", even only on the

**A** prosecution's case alone, the defence of provocation availed the appellant. The lower court erred in affirming the conviction and sentence of the appellant without properly, evaluating the, totality of the evidence at the total. It is trite that the court must evaluate the totality of the *evidence* called by the prosecution in order to determine whether the prosecution have proved their case against the defendant beyond reasonable doubt: **BOY MUKA & ORS. Vs. THE STATE (1976) 9,-10 SC 193,at 205.**

**B** The, defence of provocation, being merely a mitigating factor and not an absolutely 'exculpating defence, only entitles the accused person to be convicted for manslaughter and not murder: GALADIMA Vs. THE STATE (2012) LPELR - 15530 (SC); Sections 284 and 318 of the criminal code law of Cross-Rivers State.

**C** The appellant had been incarcerated since November 24<sup>th</sup>, 2010 for the unlawful killing of his brother, Ukpong. The concurrent judgments of the two courts below had completely overlooked the defence of provocation, under Sections 284 and 318 of the Criminal Code which the appellant had pleaded **in** the circumstances and evidence of this case. It is for the forgoing that I endorse the opinion of my learned brother, A. A. Augie, JSC that the appeal be allowed and the death sentence imposed on the appellant commuted to a term of imprisonment. The appeal is accordingly allowed. The consequential orders made in the lead judgment just delivered by my learned brother, A. A. Augie, JSC are hereby endorsed and adopted by me.

**Ejembi Eko**  
*Justice, Supreme Court*

**F** **UWANI MUSA ABBA AJI, (JSC):** I read in draft the lead judgment of my learned brother, Amina Adamu Augie, JSC, just delivered. I agree with the lucid reasoning and conclusion arrived thereat.

**G** The appellant with other 4 labourers including his elder brother, Ukpong Edem Essien, were engaged to offload timber from canoes at Jeb's Creek along Jeb's Area, Calabar. After the work, they were paid N6000 to share but the appellant's brother collected the appellant's share of N1200 and gave him only N1000 withholding the balance of N200. Resultantly, a fight ensued over the balance of N200, during which the appellant stabbed his elder brother, who died thereafter in the hospital.

**H** In his testimony, the appellant testified amongst other things that:

**I** **'I asked him to give any amount to enable me eat. He said if I asked him for money again, he will beat me like a small baby. I left him and went and reported to my senior brother. As he came back and discovered that I have reported him to our**

**A** senior brother, he started beating me. He beat me seriously until passersby and other compound people separated us. He continued beating me. I left him and entered the house and he continued pursuing me. Even inside the house, he continued beating me. As I turned back, I saw a kitchen knife that my senior brother's wife used kept there. I frightened him with the knife but he tried to collect the knife from me. 2 of us dragged the knife till we jammed a chair and fell down. As we jammed the chair and fell down, the knife stabbed my brother. I did not know that it stabbed him when he left the house I ran out of the house to the barbing saloon to watch music. I went back to greet him. Some people standing on the road held me and handed me over to police."

**D** He further testified under cross examination that:

**E** "When the deceased held back the money I was annoyed because I was hungry and told him to give me at least N500 for my feeding. The deceased is really very wicked and I was afraid he is going to kill me. I did not have it in mind to kill my brother. It is only accidental ....He started beating me inside the house. As I turned back I saw a knife and I picked *the* knife, we fought and jammed the chair and fell down and I did not know the knife stabbed him. He did not give me any little grace to run out because he was more powerful than me. Because he beat up to the point where the knife was, I took the knife to frighten him."

**G** The testimony of the appellant appears to me very striking and believable since there was no eye witness to the crime except the story of the appellant herein. His evidence seems consistent and correlated. His case appears like that of a man pushed and boxed to the corner. Although the deceased cannot be around to hear from him, his action is most provocative to any reasonable man. If you could be frightened with a knife and still went ahead to have ' your way, then' he has a share of the blame for his death. It is commonly said that a wood insect that will gather sticks on his own head, will carry them. In other words, the fly that will insist to follow the corpse into the grave must be buried with the corpse!

**H** The three conjunctive elements which a defendant; who wants to avail himself of this special defence of provocation must' prove are that: (a) There was the deceased person's act of provocation which caused his loss of self-control; (b) He killed the deceased in the heat of passion and (c) At the time of killing, the heat of

**A** passion had not waned. See Per NWEZE, J.S.C in **EZE Vs. STATE (2018) LPELR-44967(SC)**, Per ADIO, J.S.C in **AKPAN Vs. STATE (1994) LPELR-382(SC)**. In the instant appeal, the deceased provoked the appellant by his statement, the denial of his entitlement and with the beatings he gave him. The proportionality of the retaliation is that they both struggled with, the knife either for defence or for destruction on whosoever might be chanced to prevail.

**B**

Since provocation is not an exculpatory defence but an attenuating or a mitigating defence, where available, it merely, attenuates, dis-rates or demotes the offence from murder to manslaughter. In effect, the defence of provocation does not exonerate the accused person. It only earns him a mitigation of the punishment due for the offence of murder to a sentence for manslaughter. See Per CHIMACENTUS NWEZE, J.S.C in **UKPONG Vs. STATE (2019) LPELR-46427(SC)**.

**C**

On the foregoing therefore, I agree with my learned brother, AMINA ADAMU AUGIE, JSC, in his lead judgment for the discharge of the appellant having been entitled to the defence of provocation to attenuate the offence of murder to manslaughter and to consequently discharge the appellant having served the term for manslaughter.

**Uwani Musa Abba Aji**  
*Justice, Supreme Court*

**E**

**F**

**G**

**H**

**I**

**FRIDAY UZIM  
Vs.  
THE STATE**

**SC. 877/2015**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY 17<sup>TH</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**OLABODE RHODES-VIVOUR  
OLUKAYODE ARIWOOLA  
CHIMA CENTUS NWEZE  
COURT  
AMINA ADAMU AUGIE  
ADAMU PAUL GALUMJE  
COURT**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME**

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – objection thereto – Whether the appropriate time is when confessional statement is sort to be tendered.*

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – Objection to its voluntariness – Duty on trial court thereto – Whether to conduct trial-within-trial.*

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – Retraction thereof – Whether court can convict on the retracted convictional statement – Conditions thereto.*

*CRIMINAL LAW AND PROCEDURE:- Confessional statement – Retraction thereof – How to test its veracity – The principle in **R. Vs. Sykes (1913) 8.C.A.R. 233, 236***

*CRIMINAL LAW AND PROCEDURE:- Retracted confessional statement – Weight to be attached thereto – How determined.*

*CRIMINAL LAW AND PROCEDURE:- Trial-within-trial – Purpose – Whether meant to test voluntariness of confessional statement.*

*CRIMINAL LAW AND PROCEDURE:- Criminal cases – Prove thereof – Whether prosecution not bound to call all available witnesses.*

*EVIDENCE:- Confessional statement – Admissibility thereof – Distinction between involuntariness and retraction – The principle in **Ikpasa Vs. Bendel State (1981) NSCC 300***

*EVIDENCE:- Corroboration and corroborative evidence – Meaning and purport – The principle in **Rex Vs. Baskerville (1916) 2 KB 658**.*

*EVIDENCE:- Tainted witness – Meaning – Whether the mere fact of blood relationship does not make a witness tainted.*

*EVIDENCE:- Vital witness – Meaning – Whether the failure of prosecution to call a witness is fatal to its case.*

*WORDS AND PHRASES:- Tainted witness – Meaning.*

### **Issues for Determination**

1. **Whether the Court of Appeal was right in affirming the conviction of the appellant after having agreed that the failure of the prosecution to call Supol Ijinla as a witness in the matter amounted to withholding of evidence contrary to Section 149(a) of the Evidence Act?**
2. **Whether the Court of Appeal was right in affirming the conviction of the Appellant based on the appellant's purported confessional statements?**
3. **Whether having regard to the totality of evidence adduced in this case, the prosecution proved beyond reasonable doubt the guilt of the appellant.**

### **Facts of the Matter**

**The accused appellant with others were charged before the High Court of Lagos on a two count charge of conspiracy to commit robbery and armed robbery. The accused appellants and others were alleged to have robbed one Inah Elias of his recharge cards at gun point. In prove of its case, the prosecution called four witnesses while the accused appellants' testified on his behalf. At the end of trial, the accused appellant was convicted as charged and sentenced to death by hanging. He unsuccessfully appealed to the Court of Appeal. Hence, this further appeal to the Supreme Court.**

**Held:** *(Unanimously dismissing the appeal)*

1. *Failure to call a vital witness is fatal to the case of the prosecution*  
**A vital witness is a witness, whose evidence may determine the case one way or the other, and it is settled that the failure to call such a witness is fatal to the Prosecution's case - Onah Vs. State (1985) 3 NWLR (Pt. 12) 236 SC. (P.....para.....)**
  
2. *The prosecution is entitled to call only the witnesses it considers relevant to its case*  
**It is also well settled that the prosecution is entitled to call only the witnesses that it considers relevant to its case. In effect, it is for the prosecution to determine the direction of its case and which witness to call to prove its case, and once it discharges that burden on it to prove its case beyond reasonable doubt, it does not matter that a particular witness was not called to give evidence. (P.....para.....)**
  
3. *Distinction between confessional statement involuntarily made and one which is disowned*  
**This issue needs unravelling because different principles of law govern admissibility of a confessional statement disowned, and the one that is objected to as involuntarily made, see Ikpasa Vs. Bendel State (1981) NSCC 300, where Udoma, JSC, explained:**

**A distinction is usually drawn -- between a confession objected to on the ground that it was not made at all -- in which case such a confession may be said to have been retracted, and a confession objected on the ground that it was not voluntary in that although an accused person agreed to have made the confession, his complaint would be that he was forced or induced to make it. In the latter case, what is attacked is the admissibility in evidence of the confession, therefore, a trial-within-trial must be held -- to determine whether or not the confession was voluntary. If at the end of trial, the court [concludes] that the confession was not voluntary, then it is not admissible in evidence -- In the former case, where the confession is wholly retracted, the question as to whether or not the confession is admissible -- does not arise -- The trial judge is entitled to admit the confession in evidence -- and thereafter decide -- whether or not -- the accused did make the statement as alleged by the police.**

**Where the accused contends that he did not make the confession, the trial court**

is entitled to admit it in evidence, and thereafter, decide whether he made the statement at the conclusion of trial. Thus, a trial-within-trial is not required in such circumstances.

But where the accused agreed that he made the confession, and complains that he was forced or tortured to make it, this calls into question its admissibility, and the trial court must, therefore, hold a trial-within-trial to determine its admissibility in evidence. The issue of voluntariness is kept distinct from the issue of guilt; and this is carried out by insulating the enquiry into voluntariness in a compartment that is completely separate from the main trial.

In effect, an accused has the right to have the question of his confession's admissibility tried as a separate and distinct issue. So, he can go into the witness-box on the issue of voluntariness, without being exposed to general cross-examination on the issue of his guilt- see *Ifaramoye Vs. The State (2017) LPELR-42031 (SC)*. (P.....para.....)

4. *The purpose of a trial-within-trial*

A trial-within-trial is used to test voluntariness of a confession; not what value or weight to attach to the evidence. In other words, the question of the value and what weight to attach to a confession admitted in evidence after a trial-within-trial is a different matter altogether, as "*admissibility*" and "*weight*" are not the same thing. For instance, the fact that a document was admitted in evidence, with or without objection, does not necessarily mean that it made out or established the evidence contained therein which must be accepted by the trial court. As Tobi, JSC, pointed out in *Abubakar Vs. Chuks (2007) 18 NWLR (Pt. 1066) 386 at 403 "It is not automatic"*. (P.....para.....)

5. *When to object to the admissibility of a confessional statement*

As to Exhibit P4, which the appellant admitted that he made at Alausa Police Station, his attempt to bring its admissibility into question in this appeal must be stopped in its tracks because it is settled that the appropriate time to object to the admissibility of a confessional statement on the ground of involuntariness is when the statement is being tendered; not when the accused person opens his defence or during that defence - *Ogudo Vs. State (supra)* (P.....para.....)

6. *The court can convict on the retracted confessional statement of the accused person*

It is a well-established principle that the court can convict on the retracted confessional statement of the accused person. But the court is enjoined to satisfy itself that the confession was free, voluntary and properly taken, and that it passed the six tests to be applied to a confession that was suggested by Ridley, J., in *R. Vs. Sykes (1913) 18 CRApp R 233*. (P....para.....)

7. *The questions a court will ask itself in determining the weight to attach to confessional statement, retracted or not retracted*

**As the Court of Appeal pointed out, in determining the weight to attach to a confessional statement, retracted or not, the court must ask itself the following questions;**

- *Is there anything outside the confession, which shows that it may be true?*
- *Is it corroborated in anyway?*
- *Are the relevant statements of fact made in it most likely true as far as they can be tested?*
- *Did the accused have an opportunity to commit the offence?*
- *Is the confession possible?*
- *Is the confession consistent with other facts, which have been ascertained and established?*

**In other words, it is desirable to find independent evidence; that is, to have some evidence outside the confession, however slight, of circumstances, which make it probable that the confession made by the accused was true - see Queen Vs. Itule (1967) 2 SCNLR 183; Edhigere Vs. State (1996) 8 NWLR (Pt. 464) 1 at 13 - 74. In this case, the two lower courts were convinced of the guilt of the appellant, based on the evidence presented by the prosecution witnesses. (P....para.....)**

8. *Meaning of corroboration and corroborative evidence*

**Now, "corroboration" as explained by Lord Reading, CJ. in Rex Vs. Baskerville [1916] 2 KB 658, must be independent evidence, which affects an accused by connecting or tending to connect him with the crime. It must be evidence, which implicates him, that is, which confirms in some material particular not only the evidence that the crime was committed, but that the accused committed it. So, corroborative evidence is evidence that shows that the story that the Accused committed the crime is true, and not merely that the crime has been committed, but that it was committed by him. (P....para.....)**

9. *Definition of a tainted witness*

**Now, the accepted definition of a tainted witness is a person, who is either an accomplice or who, by the evidence he gives, may and could be regarded as having some personal purpose to serve. So, his evidence should be treated with considerable caution "and examined with a tooth comb" - see Adetola Vs. State (1992) 4 NWLR (Pt. 235) 267 and Egwumi Vs. State (2013) 13 NWLR (Pt. 1372) 525. (P....para.....)**

10. *The blood relationship between a victim and the prosecution witness is not sufficient to make the witness a tainted witness*

**However, it is well settled that the fact that there is a blood relationship between a victim and the prosecution witness is not sufficient in itself to make him a tainted witness, whose evidence is unreliable, unless corroborated - see Egwumi Vs. State (*supra*), Omotayo & Ors Vs. State (2009) LPELR-2663(SC), and Omotola Vs. State (2009) 7 NWLR (1139) 148 wherein Ogbuagu. JSC, observed:**

**A case is not lost on the ground that those, who are witnesses, are members of the same family or community What is important is their credibility and that they are not tainted witnesses. This is because the prosecution should not be encouraged to call hired witnesses, especially in murder cases of capital offences. Justice, it is said, will be defeated, if the prosecution of any accused person can only commence, when and only when, witnesses are neither related to the accused nor are members of the same family - - The evidence of a relation can be accepted, if cogent enough to rule out the possibility of deliberate falsehood and bias - - There is no law, which prohibits blood relations, from testifying for the prosecution where such witness a relation is the victim of the crime committed.**

**So, the blood relationship of a witness with the victim of a crime cannot be regarded as a basis to describe his evidence as untrue, biased or tainted. It is a different matter if the witness did not see what he claimed to have witnessed or his evidence is incredible. But the mere fact that he is related to the victim of the crime is not sufficient in itself to describe the witness as a tainted witness or tar him with the same brush and ask that his evidence be rejected. (P....para.....)**

11. *Distinction between retraction and involuntariness of a confessional statement*  
**With respect, learned counsel for the appellant, in his submission on issue two, failed to distinguish between two dissimilar situations with regard to statements of accused persons, namely, the retraction or denial of a statement and an objection to its voluntariness. Now, with regard to the retraction of extra-judicial statements, the law is settled that a retraction or denial of a confessional statement does not affect its admissibility.**

**This has long been settled in the very old cases of *R. Vs. Sapele and Anor* (1952) 2 FSC 74; *R Vs. Itule* (1961) All NLR 462; the relatively old decisions of *Ikpassa Vs. The State* [1981] 9 SC 7; *Akpan Vs. State* (1992) LPELR -381 (SC) 36;**

*Osakwe Vs. State* [1994] 2 SCNJ 57; *Nwangbomu Vs. The State* [1994] 2 NWLR (Pt. 327) 380; *Bature Vs. State* [1994] 1 NWLR (Pt. 320) 267; *Eragna and Ors Vs. The AG, Bendel (1994)* LPELR -(SC) 30; *Idowu Vs. State* [1998] 11 NWLR (Pt. 574) 354; as well as the more recent decisions of *Silas Sule Vs. State* (2009) LPELR -3125 (SC) 28-30, G-B; *FRN Vs. Iweka* (2011) LPELR -9350 (SC) 53; *Oseni Vs. The State* (2012) LPELR -7833 (SC) 22-23. (P....para.....)

12. *The principle in R. Vs. Skyes (1913) 8C.A.R 233, 236*

What the law enjoins, in such situations, is the application of the principles which should be considered in determining whether or not to believe and act on such a confession which an accused person resiled from as enunciated in *R. Vs. Sykes* (1913) 8 C. A. R. 233, 236; *Kanu Vs. The King* (1952) 14 WACA 30; *The Queen Vs. Obiasa* (1962) 1 All NLR 651; [1962] 1 SCNLR 137; *Obosi Vs. The State* (1965) NMLR 129.

Other cases include: *Onochie and Ors Vs. The Republic* (1966) NMLR 307; *Jafiya Kopa Vs. The State* (1971) 1 All NLR 150 *Dawa Vs. The State* [1980] 8-11 SC 236; *Ejinima Vs. The State* [1991] 5 LRCN 1640, 1671; *Arthur Onyejekwe Vs. The State* [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444; *Aiguoreghian and Anor. Vs. The State* [2004] 3 NWLR (Pt.860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt.1) 65.

These are: whether there is anything outside the confession which may vindicate its veracity; whether it is corroborated in any way; whether its contents, if tested, could be true; whether the defendant had the opportunity of committing the alleged offence; whether the confession is possible and the consistency of the said confession with other facts that have been established, *Osetola and Anor Vs. The State* (2012) LPELR -9348 (SC) 32-33, G-D; *Kareem Vs. FRN* [2002] 7 SCM 73; *Akpan Vs. The State* [2001] 11 SCM 66. (P....para.....)

13. *What the trial court is required to do to determine the voluntariness or otherwise of a confessional statement*

The other dissimilar situation relates to objections as to the involuntariness of a confessional statement. Thus, where, in a criminal trial, an accused person challenges the admissibility of his confessional statement on the ground of its involuntariness, the trial court is required to conduct a trial -within-trial [mini trial or *voire dire*] to determine its admissibility before receiving it in evidence, *R. Vs. Onabanjo* (1936) WACA 43; *R. Vs. Kassi and Ors* (1939) 5 WACA 154; *Obidior and Ors Vs. The State* (1987) LPELR - 2170 (SC) 17; E- F.

As this court explained in *FRN Vs. Borishade* [2015] 5 NWLR (pt 1451) 155 [per Nweze, JSC]:

... the *raison detre* for the evolution of the mini trial or *voire dire*

**A** procedure is to arm the trial court with a procedural mechanism for sifting the chaff of involuntary, and, hence, inadmissible evidence from the wheat of admissible evidence whose cogency and probative value are indubitable. The cases on this point are legion: they are

**B** countless. Only one or two of them will be cited here, *Ogudo Vs. The State* [2011] 12 SC (Pt. 1) 71; *Ibeme Vs. The State* (2013) LPELR -20138 (SC); *Auta Vs. State* [1975] 4 SC 0125; *Effiong Vs. State* [1978] 8 NWLR (Pt. 562) 362; *Lasisi Vs. State* (2013) LPELR -20183 (SC) 29; *The State Vs. Rabi*

**C** *u* (2013) LPELR -1982 (SC); *Ogudo Vs. The State* (2011) LPELR -860 (SC); *Obidiozo Vs. State* [1987] 4 NWLR (pt 67) 748; *Ogunye Vs. State* [1999] 5 NWLR (Pt. 604) 548, 570.

**D** Scholars are, also, unanimous on this issue, I. H. Dennis, *The Law of Evidence* [Second Edition] (London: Sweet and Maxwell, 2002) 184; L. O. Aremu, "The Voluntariness of Confessions in Nigerian Law," in *1977-1980 Nigerian Law Journal*, 32; J. Amadi, *Contemporary Law of Evidence in Nigeria* [Vol. 1 ] (Port Harcourt: Pearl Publishers, 2011) 324; M. A. Owoade, "Voluntariness of Confessions in Nigerian Law - Need for Reform," in *1987 Nigerian Current Law Review* 179. (P....para.....)

## **F Representation**

**A. Olaleru (Esq.), for the appellant Rotimi Seriki (Esq.), for the respondent**

**G** **AMINA ADAMU AUGIE, JSC (Delivered the Lead Judgment):** The appellant was arraigned before the Lagos State High Court, on a two-count charge of conspiracy with "others now at large" to commit robbery and armed robbery, on or about **12<sup>th</sup> August 2005**, around Testing Ground Bus-Stop, Alausa, Lagos. They allegedly robbed one Inah Elias, a recharge card seller, of recharge cards, all valued at N95,000.00 while armed with a locally made pistol.

**H** The appellant, who was arraigned alone pleaded not guilty, and to prove its case, the prosecution called two police officers, as **PW1** and **PW2**: the said victim of the crime. Inah Elias, as **PW3**, and his brother Onoja Elias who witnessed the incident, as **PW4**.

**I** The appellant, who was arrested at the scene of the crime, was taken to Alausa Police Division before he was transferred to **State CID**, Panti, Yaba. where **PW1**, Sgt. Adigun Abolarin recorded the appellant's statement and being confessional, **PW1** said that he took it to a superior police officer, *Supol Ijinla*, to counter-sign.

**A** When prosecution counsel sought to tender the statement in evidence, the defence counsel objected on the ground that the appellant “*was chained hanged and beaten before he made the statement*” but after a trial-within-trial to test its admissibility, the said statement was admitted in evidence as **Exhibit P2**.

**B** **PW2**, PC Koko Imeh, of the Alausa Police Division, identified the statement recorded by one “*Osijeme*” at the Alausa Division, who did not testify. The defence counsel objected on the ground that it “*should be tendered through the Officer, who obtained it*”. The trial court overruled his objection and the statement made by the appellant at Alausa Division, was admitted as **Exhibit P4**.

**C** **PW3**, the victim, testified that appellant and another person, who came on a motorbike, asked for a “*N750 MTN recharge card*, which he gave to them, then the appellant pointed a gun at him and threatened to shoot him if he did not hand over his recharge cards. **PW3** complied then he grabbed the appellant from the motorbike, and they fell to the ground, but the rider of the motorbike, sped off. **PW3** said that he started shouting, and people came to his rescue, including a policeman [PW2], who took them to Alausa Division.

**D** In **Exhibit P4**, recorded at the Alausa Division, the appellant narrated how he picked up a gun “*along Railway line at Yaba*”, and his brother, Onyebuchi Nwutoro, an “*Okada rider*”, suggested that they should use the gun “*for robbery operation*”. He, more or less, confirmed PW3's account of what transpired during the robbery.

**E** However, in his testimony as **DW1** the appellant denied that he robbed PW3. He said he was a “*recharge card seller*” with PW3 at the same Testing Ground, Alausa, and he got roped in because:

**F** **One boy carrying bike now call me. As he called recharge card, we were about three or four that ran to go and sell because that is what we always do. When we got there, one boy first cut N750 00 card and give the boy. So, I look the boy and said I am the one you called why didn't you buy from me. He said I am sorry I have already taken from this boy so I now went back. So, after that, a few minutes the boy started shouting "ole, "ole" (thief). As he was chasing the boy, after he chased the boy, he came back and hook me on my neck that I spoke language to the boy that I am the one that said he should not pay him that he should take his card away. That is when we started fighting.**

**H**

The learned trial judge, Obadina. J., did not believe the appellant; he made this very clear in his judgment of **26/9/2012**, as follows:

**I** **The story of the defendant at the trial is an afterthought. He claimed to be a recharge card seller also at the same Testing Ground. If he was, how come his fellow recharge card sellers,**

**A** PW3 and PW4, did not know him and took him for a robber? What about the pistol found in his possession? He claimed no gun was found on him that it was when he was taken to one barracks that a Calaber Officer produced the gun and claimed he owned it. This story was not put to PW2 during cross-examination. I believe the account of PW2 on how the pistol was recovered PW3 the victim also identified the pistol found on [him]. Defence Counsel tried to make an issue on the inability of the victim to differentiate between a gun and a pistol. The submission goes to no issue. It is immaterial. The witness is not a ballisticsian. He is a recharge card seller. It is my finding that the prosecution proved the substantive count of armed robbery beyond reasonable doubt.

**B** On the conspiracy charge, the learned trial Judge held as follows:

**D** The statements [Exhibits P2 & P4] show clearly the modus operandi of the defendant and the Okada rider. The robbery was not their first robbery. Upon the arrest of the defendant the Okada rider zoomed off with the recharge cards of PW3. The two of them acted in concert and are partners in crime. I hold that the count of conspiracy is also established beyond reasonable doubt. I find the defendant guilty --

**E** And so, the trial court convicted the appellant for the "*offence of conspiracy and armed robbery*" and he was sentenced to death. The appellant appealed to the Court of Appeal, but in its judgment delivered on 25/3/2015, the Court of Appeal concluded as follows:

**F** A careful reading of the judgment of the court below reveals clearly that the findings of fact made by the learned trial judge accords with the evidence and the law on the points before him. The lower court- exhaustively and evaluated the evidence before it before arriving at the conclusion "that the prosecution proved the substantive count of armed robbery beyond reasonable doubt". I do not, therefore, find any basis for the disturbance of the findings made by the trial court. In saying this I am not unmindful of the submission made by the learned counsel for the appellant urging this court to view the failure of the respondent to invite Supol Ijinla to testify as withholding evidence which the respondent knew would be against it. See: Section 149(a) of the Evidence Act. The answer to that query is to be found in the

**A** **pronouncement of the Apex Court - - in Manawa Ogbodu Vs. State (1987) 1 NSCC 429 at 437.**

The Court of Appeal also found no reason to disturb the findings of the trial court on the conspiracy count and dismissed the appeal.

**B** The appellant appealed to this court with a notice of appeal containing seven grounds of appeal, and he has formulated three issues for determination in his brief of argument; the issues are-

**C** 1. **Whether the Court of Appeal was right in affirming the conviction of the appellant after having agreed that the failure of the prosecution to call Supol Ijinla as a witness in the matter amounted to withholding of evidence contrary to Section 149(a) of the Evidence Act?**

**D** 2. **Whether the Court of Appeal was right in affirming the conviction of the Appellant based on the appellant's purported confessional statements?**

**E** 3. **Whether having regard to the totality of evidence adduced in this case, the prosecution proved beyond reasonable doubt the guilt of the appellant.**

The respondent submits that the sole issue for determination is:

**F** **Whether in view of the totality of the evidence before the trial court, the learned justices of the Court of Appeal were right in affirming the judgment of the trial court convicting the appellant of the offences of conspiracy and armed robbery?**

**G** The respondent's issue is all embracing, but as the saying goes, only the wearer knows where the shoe pinches. The appellant's issues reflect his complaints on the judgment appealed against, therefore, I will adopt same in dealing with this appeal. **Issue 1** has to do with **Exhibit P2**, recorded by PW1 at the **State CID**, which PW1 took to his superior police officer. "*Supol Ijinla*", to counter-sign. At the trial-within-trial, the appellant as

**H** **DW1** stated as follows-

*It is true he [PW1/TW1] took me to his superior police officer. The man quarreled with him that he does not want them to be beating people like this in that place. When I was taken to Supol Ijinla I did not have any opportunity to complain to him about the beating.*

**I**

**A** Under cross-examination. **PW1 as TW1** denied this, as follows -

**B** **It is not true. My Supol only read the statement to him which he accepted that he made voluntarily. Anything he mentioned to me I put down for him. Any statement he volunteered I put it in writing for him.**

**C** The said "*Supol Ijinla*" was not called as a prosecution witness, and the appellant's contention is that he should have been called by the prosecution, as a vital witness in this matter. "*to clear the doubt and conflicting evidence adduced by the appellant and PW1, since it is only one version of the two stories that can be true*".

**D** He argued that the failure to call *Supol Ijinla* amounted to withholding of evidence, which the respondent knew would be against it, citing Section 149 (a) of the Evidence Act (now Section 167 (d) of the Evidence Act 2011). **State Vs. Azeez (2008) 14 NWLR (Pt. 1108) 439, State Vs. Salawu (2011) 18 NWLR (Pt. 1279) 580 and Ogudo Vs. State (2011) 18 NWLR (Pt. 1278) 1**; that the prosecution's excuse that *Supol Ijinla* was in Enugu on transfer raises serious doubts against the prosecution, which ought to have operated on the mind of the lower court, to resolve such doubts in his favour, citing Section 39 of the Evidence Act 2011: and that the lower court having agreed with him that failure to call *Supol Ijinla* amounts to withholding of evidence, ought not to have affirmed his conviction.

**E** Furthermore, that in justifying its position, the lower court relied on the case of **Manawa Ogbodu Vs. State (1987) NSCC 429** wherein this court held that the law does not impose a duty on the prosecution to call all those, who witness an event, as witnesses; that a court cannot approbate and reprobate at the same time, citing **Osolu Vs. OsoLo (1998) 1 NWLR (Pt. 535) 532** therefore, the lower court cannot blow hot and cold at the same time; that the case of **Manawa Ogbodu Vs. State (supra)** is not an exception to the strict provisions of Section 149(a) of the Evidence Act; and that the principle established in that case is not applicable here because:

**G** **The presence of *Supol Ijinla* was vital to the case of the appellant to clear the doubt created in the testimonies of the appellant and PW1. This would have been resolved if *Supol Ijinla* was called as a witness.**

**H** The respondent, however, submitted that it is obvious from its decision that the Court of Appeal merely reviewed the appellant's submission on the issue and disagreed with him that the failure to call *Supol Ijinla* to testify amounted to withholding evidence, and it cited **Ogbodu Vs. State (supra)** to support its position, therefore, **Ground 1** of the grounds of appeal does not arise from its decision, and his **Issue 1** is incompetent and ought to be discountenanced, citing **C.C.B. Plc. Vs. Ekperi (2007) 3NWLR(Pt. 1022)**

**A 493SC**

It argued in the alternative that even so, it is trite law that the prosecution is only required to call such number of witnesses or adduce any particular evidence, which it considers necessary to prove the guilt of the accused person beyond reasonable doubt, citing **Nwambe Vs. State** (1995) 3 *NWLR* (Pt. 384) 385. **Eze Vs. State** (2018) 11 *NWLR* (Pt. 1630) 353 SC; that the evidence of *Supol Ijinla* was not material in this case, as he only counter-signed the said **Exhibit P2**, recorded by **PW1**, who actually investigated the crime; and that **PW1's** testimony was sufficient to prove the investigation carried out by **State CID**, Panti, and it was absolutely unnecessary, therefore, to call *Supol Ijinla* to prove ingredients of the offences.

**B** Without any hesitation whatsoever, I will quickly say that the appellant's contention that the Court of Appeal blew hot and cold on the issue of whether the failure to call *Supol Ijinla* as a witness, amounted to withholding evidence, is totally groundless because, as the respondent said, the Court of Appeal disagreed with him.

**C** The Court of Appeal had already said that there was no basis for it to disturb the findings made by the trial court before it added:

**D** **In saying this I am not unmindful of the submission made by the learned counsel for the appellant urging this court to view the failure of the respondent to invite *Supol Ijinla* to testify as withholding evidence which the respondent knew would be against See: Section 149 (a) of the Evidence Act. The answer to that query is to be found in the pronouncement of the apex court on the question in *Manawa Ogbodu Vs. The State* 1987 1 NSCC 429 at 437 where the court held-**

**E** **"Where two or more persons are witnesses to an event, the law does not impose a duty on the prosecution to call all the persons as witnesses. What the law requires and the burden it imposed on the number of witnesses to be called is entirely that of the prosecution".**

**F** The Court of Appeal found that the trial court was right to find the appellant guilty as charged for armed robbery before addressing the defence counsel's submissions regarding the said issue, and it answered the "query" - whether the failure to call *Supol Ijinla* amounted to withholding evidence, with the decision of this court in **Ogbodu Vs. State** (*supra*); that the prosecution is not duty bound to call all those, who witnessed an event, as witnesses. It did NOT, therefore, agree with defence counsel's contention that failure to call *Supol Ijinla* as a witness, amounted to withholding evidence.

**G** All the same, the question in this appeal is whether the said "*Supol Ijinla*", who merely counter-signed **Exhibit P2**, which was recorded by **PW1** is a vital witness. A vital witness is a witness, whose evidence may determine the case one way or the

**A** other, and it is settled that the failure to call such a witness is fatal to the Prosecution's case - **Onah Vs. State (1985) 3 NWLR (Pt. 12) 236 SC.**

It is also well settled that the prosecution is entitled to call only the witnesses that it considers relevant to its case. In effect, it is for the prosecution to determine the direction of its case and which witness to call to prove its case, and once it discharges that burden on it to prove its case beyond reasonable doubt, it does not matter that a particular witness was not called to give evidence.

**B**

In this case, it is not for the appellant to demand or dictate to the prosecution that the said *Supol Ijinla* must be called to testify. The prosecution called **PW1** who actually recorded the statement made by the appellant at the **State CID**, to testify and the fact that it did not call *Supol Ijinla*, who merely counter-signed it, to testify, is not fatal to its case; it did not need *Supol Ijinla* to prove its case.

**C**

On the other hand, the appellant categorically stated at page 8 of his brief of argument that *the presence of Supol Ijinla was vital to the case of the appellant*. There is no legal boundary that hinders an accused from calling any witness he considers vital or essential to his defence. It is foolhardiness, in my view, for him to wait for the prosecution to call a witness he needs for his defence.

**D**

The prosecution has a duty to prosecute the accused within the ambit of the law. To that end, the law grants it the discretion to call any number of witnesses or adduce any particular evidence, to prove its case beyond reasonable doubt. It cannot focus on that, and at the same time consider calling a particular witness needed by the defence to clear doubts in the case it made out against him.

**E**

In other words, the prosecution cannot conduct its own case and that of the defence as well. Since the appellant felt strongly that the presence of the said *Supol Ijinla* was vital to his defence, he ought to have called him as his witness. He cannot complain or be seen to quarrel with the prosecution for not calling *Supol Ijinla*, as its prosecution witness; it did not need *Supol Ijinla* for its case.

**F**

It is the appellant, who considered him a vital witness, and the onus rested on him to call *Supol Ijinla* as his witness if, indeed, there were any doubts to clear. He cannot blame the prosecution, who had nothing to lose. for the absence of *Supol Ijinla* at the trial. **Issue 1** clearly lacks merit and it is resolved against the appellant.

**G**

**Issue2** is whether the Court of Appeal was right to affirm the appellant's conviction based on his two confessional statements, and his arguments are based on his evidence as **DW1** . He testified that after his fight with **PW3**, he was taken to a police barracks, where one "*Calabar man*" produced a gun and asked him to admit that he robbed **PW3** while armed with the gun. When he refused, they started beating him. Later, he was handed over to Policemen at the Alausa Police Division, where his statement was recorded.

**H**

He was taken to **State CID**, where he made two statements. The first one, was written by **PW1** who later tore it because he was not telling the truth. Then **PW1** coerced him into making another statement, which **PW1** recorded for him, but it was not read to him; and that one was admitted in evidence after the trial-

**I**

**A** within-trial.

In its judgment, the trial court said that after its finding in the trial-within-trial that the said statement was made voluntarily, "*the court cannot revisit this issue of voluntariness*". It also asked the questions "*a judge must ask himself*", and held as follows-

**B**

**Facts of this case apart from the confessions establish these tests. Defendant was arrested in the process of carrying out the robbery. The locally made pistol he used is an Exhibit before this court. His 1<sup>st</sup> statement which he made immediately after his arrest which he said he made voluntarily, corroborate the Panti statement which he retracted. The evidence of prosecution witnesses was not seriously challenged under cross-examination. I said earlier that I accept their evidence. They were witnesses of truth. I give weight to the two confessional statements of the defendant and will act on them accordingly the story of the defendant at trial is an afterthought.**

**C**

**D**

In affirming the trial Court's finding, the Court of Appeal also held:

**E**

**As I mentioned earlier; all the witnesses, who were privy to the events that occurred at the time of the arrest of the appellant and his being taken to Alausa Police Station denied the existence of the said Calabar man, who allegedly, ordered [his] beating before he was taken to SCID. With respect to the other statement recorded at SCID the lower court considered a trial-within-trial to ascertain the voluntariness or otherwise of the Statement and arrived at the conclusion that Exhibit P2 was made voluntarily I observed that in its ruling on the voluntariness or otherwise of the confessional statement made at SCID and in its final judgment the learned trial judge subjected the confessional statement to the requisite test which a court must consider in attaching weight to a confessional statement retracted. The questions a judge must ask himself are -**

**F**

**G**

**H**

**I**

- 1. Is there anything outside the confessional statement to show that it is true?**
- 2. Is it corroborated?**
- 3. Are the relevant statements made in it of facts true as far as they can be tested?**
- 4. Was the prisoner one who had the opportunity of committing the offence?**

**A** Looking through the records it is crystal clear that the learned trial judge had painstakingly subjected the confessions to the above tests and elaborately considered facts outside the confessions which shows that the confession was made voluntarily

**B** The appellant has canvassed arguments on this issue from pages 8 to 19 of his brief of argument. He argued that the Court of Appeal misconceived the position of the law regarding rules governing the manner of taking the statement of an accused by the police.

**C** He itemized his evidence and submissions thereon, and also addressed specific points. On involuntariness of the statements, he cited Sections 28, 29 (2) and 29(5) of the Evidence Act 2011; **Shalla Vs. State** (2007) 18 NWLR (Pt. 1066) 240, **Saidu Vs. State** (1982) 4 SC 47; **State Vs. Salawu** (*supra*), and submitted that the court has a duty to prevent any confessional statement, involuntarily made, even though it is true, from being admitted in evidence; and that his confessions were made due to the beating, torture, inhuman treatment and oppression he suffered in the hands of the police.

**D** On tests for determining veracity of a retracted confession, he cited **Ogudo Vs. State** (*supra*), and argued that the lower courts failed to apply the said tests before deciding to convict him; and there is nothing outside the said confessional statements, which “*corroborates or lends credence to proof of his criminal liability in the circumstances of this case*”. He urged this court to so hold.

**E** The respondent submitted that it is trite law that an accused can be convicted on the basis of a confessional statement alone; if it is direct, positive and unequivocal as to the commission of the crime that he is charged with, citing **Egboghonome Vs. State** (1993) 7 NWLR (Pt. 306) 383. **Re: Osakwe** (1994) 2 NWLR (Pt. 326) 273.

**F** It set out the tests to be applied by the court, citing **Dawa Vs. State** (1980) 8-71 SC 236. **Shazali Vs. State** (1998) NWLR (Pt. 93) 164, and argued that the trial court applied the said tests to **Exhibit P2** and **P4** before relying on the statements to convict the appellant; and that its findings was rightly affirmed by the Court of Appeal.

**G** It submitted that although the appellant claimed that he was first taken to Alausa Police Barracks before being taken to Alausa Police Station where he made **Exhibit P4, PW4** was not asked any question about his alleged beating under cross-examination by defence counsel; and the alleged beating was an afterthought as rightly held by the trial court and affirmed by the Court of Appeal.

**H** This issue needs unravelling because different principles of law govern admissibility of a confessional statement disowned, and the one that is objected to as involuntarily made, see **Ikpassa Vs. Bendel State** (1981) NSCC 300, where

**A** Udoma, JSC, explained:

**B** **A distinction is usually drawn -- between a confession objected to on the ground that it was not made at all -- in which case such a confession may be said to have been retracted, and a confession objected on the ground that it was not voluntary in that although an accused person agreed to have made the confession, his complaint would be that he was forced or induced to make it. In the latter case, what is attacked is the admissibility in evidence of the confession, therefore, a trial-within-trial must be held -- to determine whether or not the confession was voluntary. If at the end of trial, the court [concludes] that the confession was not voluntary, then it is not admissible in evidence -- In the former case, where the confession is wholly retracted, the question as to whether or not the confession is admissible -- does not arise -- The trial judge is entitled to admit the confession in evidence -- and thereafter decide -- whether or not -- the accused did make the statement as alleged by the police.**

**E** Where the accused contends that he did not make the confession, the trial court is entitled to admit it in evidence, and thereafter, decide whether he made the statement at the conclusion of trial. Thus, a trial-within-trial is not required in such circumstances.

**F** But where the accused agreed that he made the confession, and complains that he was forced or tortured to make it, this calls into question its admissibility, and the trial court must, therefore, hold a trial-within-trial to determine its admissibility in evidence. The issue of voluntariness is kept distinct from the issue of guilt; and this is carried out by insulating the enquiry into voluntariness in a compartment that is completely separate from the main trial.

**G** In effect, an accused has the right to have the question of his confession's admissibility tried as a separate and distinct issue. So, he can go into the witness-box on the issue of voluntariness, without being exposed to general cross-examination on the issue of his guilt- see **Ifaramoye Vs. The State (2017) LPELR-42031 (SC)**.

**H** In this case, appellant made two confessional statements, **Exhibit P2** was admitted in evidence after a trial-within-trial since he challenged its admissibility on the ground of involuntariness. In its ruling on the trial-with in-trial, the trial court observed that:

**I**

**A**        **The surrounding circumstances of this case weigh in favour of TWT7 [PW1]. He had no reason to coerce the defendant who was said to have been arrested at the scene with a gun --- I give weight to the testimony of TWT1[PW1] which was not discredited under cross-examination. I hold that the**

**B**        **defendant made ID1 voluntarily. The statement is accordingly admitted as Exhibit P2.**

**C**        A trial-within-trial is used to test voluntariness of a confession; not what value or weight to attach to the evidence. In other words, the question of the value and what weight to attach to a confession admitted in evidence after a trial-within-trial is a different matter altogether, as "*admissibility*" and "*weight*" are not the same thing. For instance, the fact that a document was admitted in evidence, with or without objection, does not necessarily mean that it made out or established the evidence contained therein which must be accepted by the trial court. As Tobi, JSC, pointed out in **Abubakar Vs. Chuks** (2007) 18 NWLR (Pt. 1066) 386 at 403 "*It is not automatic*".

**D**        In this case, **PW1** who tendered **Exhibit P2** at the main trial, testified as TWT1 at the trial-within-trial, and the trial court stated in its ruling that it believed **PW1** and did not believe the appellant. So, the question in this appeal is whether the lower courts were right to attach any value or weight to the appellant's confession in **Exhibit P2** in convicting him for the offences charged; not whether the said **Exhibit P2** was admissible in evidence in the first place.

**E**        As to **Exhibit P4**, which the appellant admitted that he made at Alausa Police Station, his attempt to bring its admissibility into question in this appeal must be stopped in its tracks because it is settled that the appropriate time to object to the admissibility of a confessional statement on the ground of involuntariness is when the statement is being tendered; not when the accused person opens his defence or during that defence - **Ogudo Vs. State** (*supra*)

**F**        In this case, defence counsel objected when **Exhibit P4** was being tendered but not on the ground that "*one Calabar man*" did something to the appellant that forced him to make a confession. He objected on the ground that it should have been tendered by "*the officer, who obtained it*", which was not a reason to question its admissibility at the trial court; and it is, certainly, not a reason to question its admissibility in this court. All his submissions on what a "*Calabar man*" did or did not do to him to make him confess, is of no moment in this appeal. The question, as with **Exhibit P2**, is whether the lower courts were right to rely on the said **Exhibit P4**.

**G**        It is a well-established principle that the court can convict on the retracted confessional statement of the accused person. But the court is enjoined to satisfy

**A** itself that the confession was free, voluntary and properly taken, and that it passed the six tests to be applied to a confession that was suggested by Ridley. J., in *R. Vs. Sykes (1913)* 18 CR App R 233. As the Court of Appeal pointed out, in determining the weight to attach to a confessional statement, retracted or not, the court must ask itself the following questions;

**B**

- *Is there anything outside the confession, which shows that it may be true?*

- *Is it corroborated in anyway?*

**C**

- *Are the relevant statements of fact made in it most likely true as far as they can be tested?*

- *Did the accused have an opportunity to commit the offence?*

- *Is the confession possible?*

**D**

- *Is the confession consistent with other facts, which have been ascertained and established?*

In other words, it is desirable to find independent evidence; that is, to have some evidence outside the confession, however slight, of circumstances, which make it probable that the confession made by the accused was true - see **Queen Vs. Itule** (1967) 2 SCNLR 183; **Edhigere Vs. State** (1996) 8 NWLR (Pt. 464) 1 at 13 - 74. In this case, the two lower courts were convinced of the guilt of the appellant, based on the evidence presented by the prosecution witnesses.

**E**

The appellant argued under **Issue 3** that the respondent did not fulfill the requirement of proving his guilt beyond reasonable doubt, and that the prosecution left more questions than answer.

**F**

He argued that PW4's evidence is tainted because **PW3** is his brother, and he cannot be expected to testify against his brother; that **PW1** ought to have interviewed other recharge cards sellers to ascertain whether he was a recharge card seller there or not and thereby confirm or rebut his statement that he was one of the recharge card sellers at the scene, and this having not been done; that there is nothing outside his statements to show that it is true.

**G**

He cited **Ani Vs. State** (2009) 16 NWLR (Pt. 1168) 443 **R. Vs. Eka** (1945) 11 WACA 39 on the need for the prosecution to prove its case beyond reasonable doubt, and submitted that it failed to provide sufficient evidence linking him to the offence of armed robbery, which is fatal to its case; and that apart from the said confession, **“there is nothing in form of evidence, positive and of the standard of proof required in criminal cases -- to justify [his] conviction”**.

**H**

On its part, the respondent, citing **Adeye Vs. Adesanya** (2001) 6 NWLR (Pt. 208) 1 SC submitted that this court can only interfere with concurrent findings of the two lower courts if the appellant is able to establish that the said findings were

**I**

**A** erroneous. It cited **Ariche Vs. State** (1993) 6 *NWLR* (Pt. 302) 752 **Nwaturuocha Vs. State** (2011) *LPELR-8119(SC)* on burden of proof, and argued that it was only obliged to adduce evidence that would suffice to establish the ingredients of the offences of conspiracy and armed robbery.

**B** It also cited **Ani Vs. State** (*supra*) **Bozin Vs. State** (1985) 2 *NWLR* (Pt. 8) 465 **Okosi Vs. A-G. Bendel State** (1989) 1 *NWLR* (Pt. 100) 442, **Nwachukwu Vs. State** (1985) 1 *NWLR* (Pt. 11) 218 on ingredients of the offence of armed robbery, and submitted that the trial court's findings based on the evaluation of evidence before it was rightly affirmed by the Court of Appeal, and there is nothing to suggest that such findings were perverse or not supported by evidence.

**C** It further argued that apart from **Exhibits P2 & P4**, there was sufficient direct oral evidence from PW2, PW3, and **PW4** as well as the exhibits it tendered at the trial court to justify his conviction; that the evidence of **PW3** was corroborated by **PW2** and **PW4**; that the appellant was arrested at the scene, and the gun used for the robbery was recovered from him; that **PW2** testified that a mob had gathered at the scene and were about to lynch the appellant, when he was arrested and taken to Alausa Police Station; and that the trial court found as a fact that their testimonies were credible.

**D** As to **PW4** being a tainted witness, it submitted that it is trite that the fact that a witness is related to the victim of a crime is not sufficient to make him a tainted witness, who has his own interest to serve, and as a result has a tendency to cover up the true facts of the case. citing **Akalonu Vs. State** (2001) 1 *NWLR* (Pt. 643) 165; that there is no evidence to suggest that **PW4** had any interest to serve by testifying as prosecution witness, other than interest of justice; that he denied knowing the appellant as a seller of recharge cards and was emphatic that appellant robbed **PW3** with a gun that day; and that there was, therefore, no justification for the lower courts to treat **PW4** as a tainted witness and discountenance his evidence.

**E** To put things in perspective, the appellant's argument is that there was no credible independent evidence upon which the lower courts relied on for corroboration of his confession statements; and no evidence showing that he committed the alleged offences.

**F** Now, "*corroboration*" as explained by Lord Reading, CJ. in *Rex Vs. Baskerville* [1916] 2 KB 658, must be independent evidence, which affects an accused by connecting or tending to connect him with the crime. It must be evidence, which implicates him, that is, which confirms in some material particular not only the evidence that the crime was committed, but that the accused committed it. So, corroborative evidence is evidence that shows that the story that the Accused committed the crime is true, and not merely that the crime has been committed, but that it was committed by him.

**G** In this case, the appellant placed himself at the scene of the crime, not only

**A** in his confessional statements. **Exhibits P2 and P4**, but also in his testimony in court as **DW1** in his account of events, he acknowledged that there was a boy on a bike, who had asked for recharge cards, and evidence adduced by the prosecution is that the assailants, who robbed **PW3**, had come there on a motorbike.

**B** He also said that he heard **PW3** shouting "ole" "ole" (thief) as **PW3** was chasing the boy on the bike, and that **PW3** came back and "hook [him] on the neck that [he] spoke language to the boy" which is when they starting fighting, and were taken to "Police Barracks".

**C** The appellant's contention is that there was no admissible and credible evidence before the lower court, which "situated him at the scene of the crime, and yet, by his own evidence at the trial, he not only "situated" himself at the scene of the crime, he actually connected himself to the boy on the bike, who **PW3** chased after, shouting "ole" "ole" (thief), which confirms that the boy on the bike had stolen something from **PW3**, and he was linked to it somehow; and that "somehow" is what **PW2, PW3 and PW4** narrated in court.

**D** **PW2** testified that he and other policemen were on patrol when they got a radio message that his patrol team should come and take a suspect, who was nearly being lynched by an angry mob. On getting to the scene of the crime, he said he saw the appellant;

**E** **Being held down by police officers while an angry mob surrounded him wanting to lynch him by force. He was handed over to my commander. That was how we took him to the station.**

**F** **PW4**, who is **PW3**'s brother, testified that he assisted his brother to hold down the appellant until "that task force from strabag came", assisted the brothers and took all of them to Alausa Police Station.

**G** The appellant insists that **PW4** is a tainted witness because he "cannot be expected to testify against his blood brother". Is that so?

**H** Now, the accepted definition of a tainted witness is a person, who is either an accomplice or who, by the evidence he gives, may and could be regarded as having some personal purpose to serve. So, his evidence should be treated with considerable caution "and examined with a tooth comb" - see **Adetola Vs. State** (1992) 4 *NWLR* (Pt. 235) 267 and **Egwumi Vs. State** (2013) 13 *NWLR* (Pt. 1372) 525.

**I** However, it is well settled that the fact that there is a blood relationship between a victim and the prosecution witness is not sufficient in itself to make him a tainted witness, whose evidence is unreliable, unless corroborated - see **Egwumi Vs. State** (*supra*), **Omotayo & Ors Vs. State** (2009) *LPELR-2663(SC)*, and

**A Omotola Vs. State (2009) 7 NWLR (1139) 148** wherein Ogbuagu. JSC, observed:

**B A case is not lost on the ground that those, who are witnesses,  
C are members of the same family or community What is  
D important is their credibility and that they are not tainted  
witnesses. This is because the prosecution should not be  
encouraged to call hired witnesses, especially in murder cases  
of capital offences. Justice, it is said, will be defeated, if the  
prosecution of any accused person can only commence, when  
and only when, witnesses are neither related to the accused nor  
are members of the same family - - The evidence of a relation  
can be accepted, if cogent enough to rule out the possibility of  
deliberate falsehood and bias - - There is no law, which  
prohibits blood relations, from testifying for the prosecution  
where such witness a relation is the victim of the crime  
committed.**

**E** So, the blood relationship of a witness with the victim of a crime cannot be regarded as a basis to describe his evidence as untrue, biased or tainted. It is a different matter if the witness did not see what he claimed to have witnessed or his evidence is incredible. But the mere fact that he is related to the victim of the crime is not sufficient in itself to describe the witness as a tainted witness or tar him with the same brush and ask that his evidence be rejected.

**F** In this case, the fact that **PW4 is PW3's** older brother, is not a reason to reject his evidence. There is nothing in his evidence to suggest that he had his personal purpose to serve as a witness. In fact, his evidence tallied with the evidence of other witnesses called by the prosecution. The trial court believed all four of them and when it comes down to credibility, this court is handicapped.

**G** This is so because assessing the credibility of witnesses is the pre-eminent duty of a trial court, and there is a presumption that its findings are right and correct until the contrary is shown. The appellant has not provided any reason to hold to the contrary, and the Court of Appeal was absolutely right to affirm its findings. This appeal totally lacks merit, and it is, hereby, dismissed.

**H** **Amina Adamu Augie,**  
*Justice, Supreme Court*

**I** **OLABODE RHODES-VIVOUR, (JSC):**I had the advantage of reading a draft of the leading judgment prepared by my learned brother, Augie JSC. For the reasons given I am in complete agreement with it. There is no merit in the appeal.

It is also dismissed by me.

**Olabode Rhodes-Vivour**

**A***Justice, Supreme Court*

**CHIMA CENTUS NWEZE, (JSC):** I had the advantage of reading the draft of the leading judgement which my Lord, Augie, JSC, delivered now. I agree with his Lordship that this appeal, being unmeritorious, deserves to be dismissed.

**B**

With respect, learned counsel for the appellant, in his submission on issue two, failed to distinguish between two dissimilar situations with regard to statements of accused persons, namely, the retraction or denial of a statement and an objection to its voluntariness. Now, with regard to the retraction of extra-judicial statements, the law is settled that a retraction or denial of a confessional statement does not affect its admissibility.

**C**

This has long been settled in the very old cases of *R. Vs. Sapele and Anor* (1952) 2 FSC 74; *R Vs. Itule* (1961) All NLR 462; the relatively old decisions of *Ikpassa Vs. The State* [1981] 9 SC 7; *Akpan Vs. State* (1992) LPELR -381 (SC) 36; *Osakwe Vs. State* [1994] 2 SCNJ 57; *Nwangbomu Vs. The State* [1994] 2 NWLR (Pt. 327) 380; *Bature Vs. State* [1994] 1 NWLR (Pt. 320) 267; *Eragna and Ors Vs. The AG, Bendel* (1994) LPELR -(SC) 30; *Idowu Vs. State* [1998] 11 NWLR (Pt. 574) 354; as well as the more recent decisions of *Silas Sule Vs. State* (2009) LPELR -3125 (SC) 28-30, G-B; *FRN Vs. Iweka* (2011) LPELR -9350 (SC) 53; *Oseni Vs. The State* (2012) LPELR -7833 (SC) 22-23.

**D****E**

What the law enjoins, in such situations, is the application of the principles which should be considered in determining whether or not to believe and act on such a confession which an accused person resiled from as enunciated in *R. Vs. Sykes* (1913) 8 C. A. R. 233, 236; *Kanu Vs. The King* (1952) 14 WACA 30; *The Queen Vs. Obiasa* (1962) 1 All NLR 651; [1962] 1 SCNLR 137; *Obosi Vs. The State* (1965) NMLR 129.

**F**

Other cases include: *Onochie and Ors Vs. The Republic* (1966) NMLR 307; *Jafiya Kopa Vs. The State* (1971) 1 All NLR 150 *Dawa Vs. The State* [1980] 8 -11 SC 236; *Ejinima Vs. The State* [1991] 5 LRCN 1640, 1671; *Arthur Onyejekwe Vs. The State* [1992] 4 SCNJ 1, 9; [1992] 3 NWLR (Pt. 230) 444; *Aiguoreghian and Anor. Vs. The State* [2004] 3 NWLR (Pt.860) 367; [2004] 1 SCNJ 65; [2004] 1 SC (Pt.1) 65.

**G**

These are: whether there is anything outside the confession which may vindicate its veracity; whether it is corroborated in any way; whether its contents, if tested, could be true; whether the defendant had the opportunity of committing the alleged offence; whether the confession is possible and the consistency of the said confession with other facts that have been established, *Osetola and Anor Vs. The State* (2012) LPELR -9348 (SC) 32-33, G-D; *Kareem Vs. FRN* [2002] 7 SCM 73; *Akpan Vs. The State* [2001] 11 SCM 66 .

**H****I**

The other dissimilar situation relates to objections as to the involuntariness of a confessional statement. Thus, where, in a criminal trial, an accused person challenges the admissibility of his confessional statement on the ground of its involuntariness, the trial court is required to conduct a trial -within-trial [mini trial or *voire dire*] to determine its admissibility before receiving it in evidence, *R. Vs. Onabanjo* (1936)

**A** WACA 43; *R. Vs. Kassi and Ors* (1939) 5 WACA 154; *Obidiozor and Ors Vs. The State* (1987) LPELR - 2170 (SC) 17; E- F.

As this court explained in *FRN Vs. Borishade* [2015] 5 NWLR (pt 1451) 155 [per Nweze, JSC]:

**B** ... the *raison detre* for the evolution of the mini trial or *voire dire* procedure is to arm the trial court with a procedural mechanism for sifting the chaff of involuntary, and, hence, inadmissible evidence from the wheat of admissible evidence whose cogency and probative value are indubitable. The cases on this point are legion: they are countless. Only one or two of them will be cited here, *Ogudo Vs. The State* [2011] 12 SC (Pt. 1) 71; *Ibeme Vs. The State* (2013) LPELR -20138 (SC); *Auta Vs. State* [1975] 4 SC 0125; *Effiong Vs. State* [1978] 8 NWLR (Pt. 562) 362; *Lasisi Vs. State* (2013) LPELR -20183 (SC) 29; *The State Vs. Rabi* (2013) LPELR -1982 (SC); *Ogudu Vs. The State* (2011) LPELR -860 (SC); *Obidiozo Vs. State* [1987] 4 NWLR (pt 67) 748; *Ogunye Vs. State* [1999] 5 NWLR (Pt. 604) 548, 570.

**E** Scholars are, also, unanimous on this issue, I. H. Dennis, *The Law of Evidence* [Second Edition] (London: Sweet and Maxwell, 2002) 184; L. O. Aremu, "The Voluntariness of Confessions in Nigerian Law," in *1977-1980 Nigerian Law Journal*, 32; J. Amadi, *Contemporary Law of Evidence in Nigeria* [Vol. 1 ] (Port Harcourt: Pearl Publishers, 2011) 324; M. A. Owoade, "Voluntariness of Confessions in Nigerian Law - Need for Reform," in *1987 Nigerian Current Law Review* 179.

**G** As, already, indicated above, the law is settled that a retraction or denial of a confessional statement does not affect its admissibility. This has long been settled in the very old cases of *R. Vs. Sapele and Anor* (*supra*); *R Vs. Itule* (*supra*); the relatively old decisions of *Ikpasa Vs. The State* (*supra*); *Akpan Vs. State* (*supra*); *Osakwe Vs. State* (*supra*); *Nwangbonu Vs. The State* (*supra*); *Bature Vs. State* (*supra*); *Eragna and Ors Vs. The AG, Bendel* (*supra*); *Idowu Vs. State* (*supra*); as well as the more recent decisions of *Silas Sule Vs. State* (*supra*); *FRN Vs. Iweka* (*supra*); *Oseni Vs. The State* (*supra*).

**H** It is for these, and the more elaborate, reasons in the leading judgement that I, too, hold that this appeal is devoid of merit. I hereby enter an order dismissing it.

**Chima Centus Nweze**  
*Justice, Supreme Court*

**I**

PAUL ADAMU GALINJE, (JSC): I have had the privilege of reading in draft, the

**A** judgment just delivered by my learned brother A. A. Augie JSC and I agree with the reasoning contained therein and the conclusion arrived thereat. The appellant was apprehended at the scene of the crime as he attempted to escape with the recharge cards he robbed at gun point. He confessed to the crime in his extra-judicial statement that was admitted in evidence as Exhibit P2, after a trial within trial. His attempt to repudiate Exhibit P2 as having been extracted under duress is an afterthought, and the trial court was right when the statement was finally admitted in evidence. The fact that the appellant was apprehended at the scene of the crime, coupled with his confessional statement, are sufficient to ground the conviction of the appellant.

**B**

**C** My Learned brother has as usual, thoroughly considered all the issues submitted for determination of this appeal. For the same reasoning as articulated in the lead judgment which I adopt as mine this appeal shall be and it is hereby dismissed.

Paul Adamu Galumje  
*Justice, Suprme Court.*

**D**

**E**

**F**

**G**

**H**

**I**

**JOHN HINGAH BIEM**

**Vs.**

- 1. SOCIAL DEMOCRATIC PARTY**
- 2. INDEPENDENT NATIONAL RESPONDENT SELECTORAL COMMISSION (INEC)**
- 3. DR. STEPHEN TERUNGWAHWANDE**

**SC. 341/2019**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**TUESDAY, 14<sup>TH</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS:**

**OLABODE RHODES - VIVOUR  
KUMAI BAYANGAKAAHS  
CHIMA CENTUS NWEZE  
COURT  
AMIRU SANUSI  
AMINA ADAMU AUGIE**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*ACTION:- Cause of action – Nature and meaning.*

*ACTION:- Cause of action – When statute barred – How determined.*

*ELECTION PETITION:- Substitution of candidate – Where a party alleges wrongful substitution after an election – Whether it is the date of the alleged substitution rather than the date of the primary election that will determine whether action is statute barred.*

*LEGISLATION:- Rules of Federal High Court – Powers of the Chief Judge of the Federal High Court thereto – Whether derived from the constitution.*

*PRACTICE AND PROCEDURE:- Affidavit evidence – Conflicts therein – Where there is a conflict in affidavit, evidence court can be resolved by calling oral evidence looking at document before the court.*

*SERVICE:- Federal High Court Rules – Services outside jurisdiction – Or.6 r. 31 federal High Court Rules – Whether means service outside Nigeria which does not require endorsement under Section 97 of the Sheriffs and Civil Process Act.*

*STATUTE:- CFRN 1999 (as amended) – Section 285(9) thereof – Nature and purport thereof – Time within which to file election petitions.*

### **Facts of the Matter**

The plaintiff appellant sued the defendant respondents at the Feral High Court Makurdi Judicial Division by means of an originating summons claiming some declaratory and injunctive reliefs against the respondents who were the defendants in respect of primary election of social democratic party.

The claimed that he scored the highest number of votes, but that the name of the 3<sup>rd</sup> defendant was sent as the winner of the election.

The trial Federal High Court entered judgment against the defendants. The 1<sup>st</sup> defendant appealed against the said judgment to the Court of Appeal which was allowed in part.

The present appellant on record has now appealed to the Supreme Court.

**Held:** *(Unanimously allowing the appeal)*

1. *How to determine whether an action is statute barred in an action for wrongful substitution*

In order to determine whether originating summons taken out by the plaintiff/appellant is statute barred as envisaged in Section 285(9) of the Constitution, the date of occurrence of the event, decision or action complained of, in this case the date of discovery, as there is no evidence that the decision was communicated to the appellant prior to 6/11/2018 even though he got wind that the substitution was on 3/11/2018. Even if it is considered that the cause of action accrued on 3/11/2018, the appellant took out the originating summons on 8/11/2018. The 14 days stipulated in Section 285 (9) had not lapsed when the action was commenced. It is not the date the results of the primaries were announced that ignited the cause of action but the substitution of the appellant's name with that of the 3<sup>rd</sup> respondent as the person duly nominated by the party to contest the Gubernatorial Election of 2019 in Benue State. By the act of substitution the result of the primaries were tampered with. Having participated in the primaries, the appellant had a vested right to sue if he was wrongly substituted. The action commenced by the appellant is therefore not statute barred. *(P... ..para... ..)*

2. *How to resolve conflicts in affidavit*

The law is well settled that when a court is faced with affidavits which are irreconcilably in conflict, the judge hearing the case in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call See: *Falobi Vs. Falobi* (1976) 9-10 SC 1 at p. 9. This court in *Alfa Vs. Attai* (2018) 5 NWLR (Pt. 1611) 59 endorsed the caution given by the Court of Appeal that the procedure of originating summons ought not to be used where the facts are or are likely to be in dispute. It was stressed in the contributory judgement of my Lord, Rhodes-Vivour JSC supra at page 92 that where there are material contradictions on facts that can only be resolved by calling evidence no court would resolve such conflicts in affidavits without calling oral evidence. However, where there are documents before the court from which the conflicts in the affidavit evidence can be resolved, there would be no need to call oral evidence. See: Section 123 of the Evidence Act, 2011. See also *Ezechukwu Vs. Onwuka* (2016) 5 NWLR (Pt. 1506) 529. There were no substantial disputes as to facts in this case. The only divergence is that while the appellant claimed to have emerged the winner of the primaries in which he and two other candidates namely, Barrister Innocent Daagba and Mr. Matthew Asemanyian Dubu, the cross-appellant and 3<sup>rd</sup> respondent maintained that the 3<sup>rd</sup> respondent was the fourth candidate who also contested the primaries and won: hence his name was forwarded to the 2<sup>nd</sup> respondent as the Gubernatorial candidate of the Social Democratic Party(SDP) for the 2019 General Election. In order to justify his emergence as the candidate of the Party, he was issued the Certificate of Return (Exhibit 9) dated 10<sup>th</sup> October, 2018. (P.....para.....)

3. *Power of the Chief Judge of Federal High Court to make rules.*

The submissions of learned counsel for the appellant are well founded. Section 19(1) of the Federal High Court Act provides that the Court shall have and exercise jurisdiction throughout the Federation, and for that purpose the whole area of the Federation shall be divided into Judicial Divisions. This is for administrative convenience and for dispatch of business as the Chief Judge may direct any of the judges to sit in any Judicial Division in the country. This is unlike the State High Court where the Chief Judge of the State can exercise a similar power only within the state. The power vested in the Chief Judge of the federal High Court to make rules of court are not derived from the Sheriffs and Civil Process act but from Sections 254 of the Constitution and 44 of the Federal High Court Act.

Section 254 of the Constitution of the Federal Republic of Nigeria states:-

**"Subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court".**

**The Federal High Court Act which is deemed to have been enacted by the National assembly stipulates in Section 14(1)(s) that -**

**“The Chief Judge may with the approval of the President, make Rules of Court for carrying this Act into effect, and in particular and without prejudice to the generality of the foregoing, for all or any of the following purposes and matters –**

- (s) for providing for the service or execution of any writ, warrant, order or other process issuing out of the court, the payment of mileage allowance before or after service or execution, the conditions precedent before any such process or process of certain classes will be served or executed and the procedure to be followed after the service or execution of such process", See: Boko Vs. Nungwa (2019) 1 NWLR (Pt. 1654) 395. (P.....para.....)**

4. *The principle in Odua Investment Co. Ltd Vs. Talabi (1997) 10 NWLR (Pt. 523) 1*  
**The decision in Odua Investment Co. Ltd Vs. Talabi supra upon which the lower court based its decision to nullify the writ is distinguishable from this case. In that case the respondent instituted an action against the appellant and one other person in the High Court of Lagos State claiming certain declaratory reliefs and in the writ of summons, the appellant's address for service was put as "Cocoa House Complex Ibadan". The appellant was served in Ibadan, Oyo State, a place outside the territorial jurisdiction of Lagos State High Court. There was no endorsement on the writ as required by Section 97 of the Sheriffs and Civil Process Act, to the effect that the writ was to be served out of the jurisdiction of the court. The period within which to enter appearance was also stated to be eight days and no leave of court or judge was obtained to serve the writ out of jurisdiction. The full court decided by a majority of 6-1 that non-compliance with Section 97 and/or Section 99 of the Sheriffs and Civil Process Act and the rule of court requiring leave of the court or a judge for a writ to be served out of jurisdiction renders the writ and/or service of it voidable and the defendant who complains of such non-compliance is entitled *ex debito justitiae* to have same set aside. (P.....para.....)**

5. *Service outside jurisdiction under Federal High Court Rules means service outside Nigeria*

**The submission by learned counsel for the 1<sup>st</sup> respondent/cross-appellant that the principal legislation that deals with the service of court processes of any court in Nigeria is the Sheriffs and Civil Process Act is therefore not correct as it relates to the Federal High Court. It is only true of the State High Courts and the FCT High Court because their jurisdiction is circumscribed by the territory each State occupies and the Federal Capital Territory. The service of any process issued by the Federal High Court can be carried under the Sheriffs and Civil Process Act, if such service is to be executed outside the territory of Nigeria. Order 6 Rule 31 of the Federal High Court Rules interprets outside jurisdiction to mean outside the Federal Republic of Nigeria. Thus to hold that an originating summons which was issued out of the registry of the Federal High Court, Warri which was addressed for service at Abuja outside Delta State where the originating summons was issued from should be nullified because it did not comply with Section 97 of the Sheriffs and Civil Process Act as this court did in *Izeze Vs. INEC (2018) 11 NWLR (Pt. 1629) 110 at 132* did not take cognisance of Section 19 of the Act and Order 6 Rule 31. I am of the considered view that the originating summons issued by the Federal High Court, Makurdi which is to be served in Abuja cannot be considered to be service outside jurisdiction and therefore does not require to be endorsed as a concurrent writ. (P.....para.....)**

6. *The Nature and purport of Section 285(9) of CFRN*

**Section 285 (9) of the Constitution (fourth alternation No. 21) Act 2017 provides that:**

- (9) Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit.”**

**It has been said in a plethora of cases that provisions of the Constitution should be read and interpreted without embellishments. Where the words used are clear and free from ambiguity they should be given their ordinary meaning. See *AG Anambra State Vs. A.G Federation (1993) 6 NWLR (pt.302) p.692*.**

*(P.....para.....)*

7. *The meaning and nature of cause of action*

**This facts briefly are that the appellant contested the primary election of his party, the SDP (1<sup>st</sup> respondent) on 3<sup>rd</sup> October 2018. He contested the**

**A** gubernatorial primaries. He was declared the winner, but instead of the 1<sup>st</sup> respondent sending his name to the 2<sup>nd</sup> respondent, (INEC) as its candidate for the gubernatorial elections, it sent the name of the 3<sup>rd</sup> respondent, and this was done on 6<sup>th</sup> November 2018.

**B** Cause of action is the entire set of circumstances that give rise to an enforceable claim and consists of two elements namely:

- (a) the "wrongful act of the defendant which gives rise to the cause of complaint, and
- (b) the consequential damage. See A.G Rivers State Vs. A.G Bayelsa State (2012) 7 SC (Pt. II) p. 110.

**C** The act of the 1<sup>st</sup> respondent forwarding the name of the 3<sup>rd</sup> respondent to INEC instead of the appellant's name gives the appellant his cause of action; and that occurred on 6<sup>th</sup> November 2018. The appellant filed his action by an originating summons on 8<sup>th</sup> November, 2018. (*P.....para.....*)

**D**

8. *How to determine whether an action is statute barred*

**E** To determine if the suit is statute barred, the court examines the originating process to know when the plaintiffs cause of action, or wrong complained off occurred and comparing that date with the date the suit was filed. If the suit is brought outside the time prescribed by the section of the Constitution or applicable legislation it is statute barred. See *Asaboro Vs. Pan Ocean Oil Corp Nig Ltd (2017) 7 NWLR (Pt.1563)p.42; Obiefuna Vs. Okoye (1961)ALLNLR p.351.*

**F** A suit filed outside the prescribed period offends the provision of the section. The plaintiff would have a cause of action but one that cannot be enforced.

**G** The appellant's action was not statute barred as it was filed well within 14 days after he had a cause of action on 6<sup>th</sup> November 2018. His suit was filed on 8<sup>th</sup> November 2018. (*P.....para.....*)

**Representations:**

**H** T. D. Pepe (Esq.), with T. Azoom for appellant/cross-respondent  
S. Aruwa (Esq.), (with him Messrs P. T. Soje, E. E. Mmeni, M. I. Balogun and A. I. Idris) for 1<sup>st</sup> respondent/cross-appellant.  
Ayoola Ajayi (Esq.) for 2<sup>nd</sup> respondent  
O. Ogundiran (Esq.), for 3<sup>rd</sup> respondent.

**I** **KUMAI BAYANG AKAHHS, JSC (Delivered the lead judgment):** This is an appeal against the judgement of the Court of Appeal, Makurdi Judicial Division,

**A** delivered on 6<sup>th</sup> March, 2019 in Appeal No CA/MK/11/2019 allowing the appeal in part and setting aside the decision of the Federal High Court, Makurdi in Suit No. FHC/MKD/CS/62/2018. The court below set aside the originating summons of the appellant for want of jurisdiction of the Federal High Court.

The facts leading to this appeal may be briefly stated as follows:

**B** The appellant who was the plaintiff in the Federal High Court, Makurdi Judicial Division commenced action by originating summons filed on 8<sup>th</sup> November, 2018 in which he sought declaratory and injunctive reliefs against the respondents who were the defendants before the Federal High Court. The plaintiff was an aspirant in the Benue State Gubernatorial Primary Election of the 1<sup>st</sup> defendant, the Social Democratic Party (SDP). According to the plaintiff the said primaries were conducted on 1<sup>st</sup> October, 2018 but the 1<sup>st</sup> defendant said the said primary was held on 3<sup>rd</sup> October, 2018. The plaintiff alleged that he scored the highest number of votes cast in the said primary election. It was also alleged by the plaintiff that the name of the 3<sup>rd</sup> defendant who did not participate in the primaries was sent by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant as the Benue State Gubernatorial candidate of the Social Democratic Party for the 2019 General Election. The 1<sup>st</sup> defendant disputed the allegation of the plaintiff and produced the result of its Benue State Gubernatorial primary election showing that the 3<sup>rd</sup> defendant participated in the primary election and won the highest number of votes cast; hence the 1<sup>st</sup> defendant forwarded his name to the 2<sup>nd</sup> defendant as its Benue State Gubernatorial candidate in the 2019 General Election. The 1<sup>st</sup> defendant also denied issuing the result upon which the plaintiff anchored his claim.

**E** The trial Federal High Court entered judgement against the defendants. The 1<sup>st</sup> defendant appealed against the said judgment to the Court of Appeal. In its judgment which was delivered on 6<sup>th</sup> March 2019 in appeal No. CA/MK/11/2019, the lower court in allowing the appeal in part held that the appellant who had filed a memorandum of conditional appearance and later followed it up with a counter-affidavit in opposition to the originating summons was entitled ex debito justitiae to have the originating summons set aside for non-compliance with Section 98 of the Sheriffs and Civil Process Act.

**F** The appeal was dismissed on the use of affidavit evidence to resolve the issues in the originating summons and that the trial court properly and adequately evaluated all the evidence in the suit. Both the plaintiff who was 1<sup>st</sup> respondent and the appellant in appeal No. CA/MK/11/2019 were dissatisfied. The plaintiff/1<sup>st</sup> respondent and appellant appealed and cross-appealed respectively. The appeal and cross appeal was given appeal No. SC. 341/2019 while the other appeal was numbered SC. 342/2019.

**G** The appellant formulated two Issues for determination namely:-

- H**
- I** 1. **Whether or not the Sheriffs and Civil Process Act is applicable to the Federal High Court distilled from Grounds 1, 2 and 3 of the appeal.**
  2. **Whether the failure to mark the originating summons as**

**A** "concurrent" by the registrar of court was capable of voiding the originating process. Distilled from Ground 4 of the appeal.

**B** The 1<sup>st</sup> respondent/cross-appellant formulated a lone issue in the appeal and two issues in the cross-appeal. The lone issue in the appeal is the same as appellant's issue No.1 and the two issues in the cross-appeal are:-

**C** 2.2 Whether having regard to the facts in this suit and the provision of Section 285(9) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) by Fourth Alteration No. 21 Act 2017, the appellant's suit commenced in the Federal High Court on the 8<sup>th</sup> November, 2018 was not statute barred. Distilled from Ground 1 of the notice of cross- appeal.

**D** 2.3 Whether having regard to the conflicts in the affidavits and documents filed by the parties in this suit, this suit was properly heard and determined based on the originating summons filed by the appellant. Distilled from Ground 2 of the notice of cross-appeal.

**E** The 2<sup>nd</sup> respondent who formulated the issue:-

**"Whether or not the legal position of the 2<sup>nd</sup> respondent in this suit is that of an umpire in this proceedings"-**

**F** had to withdraw the issue since it was not distilled from any ground of appeal. As the issue was not related to any ground of appeal, it was struck out as well as the brief. Consequently the 2<sup>nd</sup> respondent did not proffer any argument in the appeal.

The 3<sup>rd</sup> respondent also formulated a lone issue which is:-

**G** **"Whether the provisions of the Sheriffs and the Civil Process act are not binding on the Federal High Court".**

**H** The appellant filed a reply brief in answer to the argument in the appeal and cross-appeal. I intend to start with the cross-appeal because of the challenge that the action is statute barred.

#### **THE CROSS-APPEAL**

**I** According to the cross-appellant the cause of action in this suit is the Benue State Gubernatorial Primary election of the 1<sup>st</sup> respondent/cross-appellant which held on 3<sup>rd</sup> October, 2018 and the appellant commenced the suit by originating summons on 8<sup>th</sup> November 2018. Learned counsel then referred to Section 285(9) of the Constitution

- A** of the Federal Republic of Nigeria 1999 (as amended) by Fourth Alteration No, 21 Act 2017 and drew attention to paragraph 9 of the affidavit in support of the originating summons which confirmed that the election was held on 3<sup>rd</sup> October, 2018 and argued that the court below erred when it held that the cause of action arose on 6<sup>th</sup> November, 2018. He submitted that in the determination of a statute barred claim or action, the court should consider the writ of summons and the statement of claim of the plaintiff.
- B** He submitted that paragraphs 21, 22 and 23 of the appellant's affidavit in support of the originating summons violate the provisions of Section 115(3) Evidence Act, 2011 and were liable to be struck out by the court below. Also citing the case of **Zakirai Vs. Muhammad (2017) 17 NWLR (Pt. 1594) 243**, learned counsel submitted that in the absence of paragraphs 21, 22 and 23 of the said affidavit, only paragraph 9 of the affidavit in support acts as a pointer to the accrual of the appellant's cause of action. He argued that this suit which was instituted on 8<sup>th</sup> November, 2018 was outside the fourteen days as required by Section 285(9) of the Constitution of Nigeria 1999 Fourth Alteration No. 21 Act 2017 and is therefore statute barred. Section 285(9) of the Federal Republic of Nigeria 1999 Fourth Alteration No. 21 Act 2017 provides:-

**“Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than fourteen (14) days from the date of the occurrence of the event, decision or action complained of in the suit”.**

**E**

In paragraph 9,10,18, 21, 22, and 23 of the affidavit in support of the originating summons, the plaintiff/appellant in the originating summons deposed to the following facts:-

**F**

**“9. That direct primaries were conducted under the supervision of the Dr. Salihu Mohammed led electoral panel in the 22 out of the 23 Local Government Areas in Benue State on 1/10/2018 except in Gboko Local Government Area and result announced on 3/10/2018 with the following scores by the 3 aspirants –**

**G**

- (a) John Hingah Biem 94,530**
- (b) Barr. Innocent Baagba 2,342**
- (c) Mathew Asemayian Dubu 3,506**

**H**

A copy of the result sheet given to me and signed by Dr Salisu Mohammed and my agent, Hon. Anta Igbaata is exhibited hereto as Exhibit JHB 7.

**I**

**10. That after the primary election, the 1<sup>st</sup> defendant published the names of her successful candidates for all government position in the forthcoming General Election, 2019 on a**

- A** State by State basis in all the States and copies were widely circulated, signed by the 1<sup>st</sup> defendant's National Secretary. A copy of the final results of the Social Democratic party primaries result for Benue State approved and published by the 1<sup>st</sup> defendant is exhibited hereto as Exhibit JHB 8.
- B** 18. That by weekend of 3/11/2018 my running mate discovered that the 1<sup>st</sup> defendant did not submit our forms to the 2<sup>nd</sup> defendant and news started making rounds in the social media that my name has been substituted with that of the 3<sup>rd</sup> defendant Dr. Stephen Terungwa Hwande.
- C** 21. That on 6/11/2018 I went to the National Headquarters of the 1<sup>st</sup> defendant in the company of the following persons who were also baffled to hear that my name was substituted with that of Dr. Stephen Terungwa Hwande the 3<sup>rd</sup> defendant.
- D**
- E**
- F**
- (a) Engr. John Enemari (The State chairman of the 1<sup>st</sup> defendant).
- (b) Arc. David Umah (the North Central Zonal chairman of the 1<sup>st</sup> defendant)
- (c) Hon. Daniel Alpha Otache (My running mate)
- (d) Citizen Richard Asema (one of my nominators)
- (e) Hon. Anta Igbaato (my agent during the primary election)
- F**
- (f) Mr. Vandefan Gemade; and
- (g) Mr. Vanger Achioko
- G** 22. That at the National Secretariat, we met with the following persons who met with us-
- (a) Prof. Tunde Adeniran (National deputy Chairman/South of the 1<sup>st</sup> defendant)
- (b) Alhaji Shehu Gabam (National Secretary of the 1<sup>st</sup> defendant).
- H**
- (c) Rt. Hon. Emeka Atuma (National Organisaing Secretary of the 1<sup>st</sup> defendant).
- (d) Hajiya Mariam Maggi Batubo (National Women Leader/Women Speaker).
- I** 23. That the meeting was chaired by Prof. Tunde Adeniran who confirmed to us that indeed my name has been substituted with that of the 3<sup>rd</sup> defendant, Dr. Stephen

**A Terungwa Hwande”.**

The 3<sup>rd</sup> respondent deposed to a counter-affidavit in opposition to the originating summons in which he stated the following facts in paragraphs 10, 11 and 12 of the counter-affidavit:-

**B “10. The I know as of fact that, at the close of nominations and screening as well as during the conduct of the said primaries, the plaintiff, Barr. Innocent Daagba, Mr. Matthew Asermanyian Dubu and my humble self were to participate in the Governorship Primaries of the 1<sup>st</sup> defendant to determine who among the four (4) of us would emerge as the candidate of the 1<sup>st</sup> defendant vide Direct Primaries using Open Secret Ballot System.**

**C 11. That I know as of fact that even though the Governorship primaries of the 1<sup>st</sup> defendant was conducted, same was inconclusive owing to cases of violence, irregularities including the snatching of the primary election materials among others and that petitions were lodged by various aspirants to the 1<sup>st</sup> defendant's Electoral Committee after which all the aspirants including my humble self were told by the Electoral Committee to wait for the outcome of Governorship primaries from the national executive Committee of the 1<sup>st</sup> defendant as stated in paragraph 9 of the report of the Electoral Committee of the 1<sup>st</sup> defendant signed by the Chairman and all the other members. A copy of same is hereto attached and marked as Exhibit “8”.**

**D 12. That I know as of fact that, upon the receipt of the report of the Electoral Committee by the National Executive Committee of the 1<sup>st</sup> defendant, I came out victorious as a nominated candidate and was issued with a Certificate of return to enable me contest in 2019 General Elections as the Governorship candidate of the 1<sup>st</sup> defendant. A copy of the said Certificate of Return is attached and marked as Exhibit “9”.**

Although Exhibit “9” shows that the Certificate of Return was issued to the 3<sup>rd</sup> respondent on 10<sup>th</sup> October, 2018, he did not controvert the claim by the appellant that the results of the primaries were released on 3<sup>rd</sup> October, 2018.

**I** The learned trial judge made a finding concerning the certificate of return which the 3<sup>rd</sup> respondent claimed was issued to him on 10<sup>th</sup> October, 2018 when he

**A** stated in his judgement at page 592 of the record:-

**"Also unbelievable is the deposition by the 3<sup>rd</sup> defendant that he was given a certificate of return dated 10<sup>th</sup> October, 2018 after the primary election, when he only completed the process of filling the form for his clearance for the same primary election on the 1<sup>st</sup> of November, 2018. Again the issuance of the certificate of return predates the date of completion of nomination forms which ought to have been used for his clearance before the primary elections".**

**C** There was no appeal against these findings.

The deposition in paragraph 10 of the 3<sup>rd</sup> respondent counter-affidavit that four of them were screened and cleared to participate in the primaries and when the nomination was declared inconclusive the Electoral Committee informed the aspirants to await the outcome of the primaries but the Committee Report Exhibit "8" which was annexed to paragraph 11 of the counter-affidavit gave the number of the Governorship aspirants as three and not four as he claimed.

**D**

In order to determine whether originating summons taken out by the plaintiff/appellant is statute barred as envisaged in Section 285(9) of the Constitution, the date of occurrence of the event, decision or action complained of, in this case the date of discovery, as there is no evidence that the decision was communicated to the appellant prior to 6/11/2018 even though he got wind that the substitution was on 3/11/2018. Even if it is considered that the cause of action accrued on 3/11/2018, the appellant took out the originating summons on 8/11/2018. The 14 days stipulated in Section 285 (9) had not lapsed when the action was commenced. It is not the date the results of the primaries were announced that ignited the cause of action but the substitution of the appellant's name with that of the 3<sup>rd</sup> respondent as the person duly nominated by the party to contest the Gubernatorial Election of 2019 in Benue State. By the act of substitution the result of the primaries were tampered with. Having participated in the primaries, the appellant had a vested right to sue if he was wrongly substituted. The action commenced by the appellant is therefore not statute barred. The issue is resolved against the cross-appellant.

**E**

The second issue in the cross-appeal has to do with the conflicts in the affidavits and documents filed by the parties. Learned counsel for the 1<sup>st</sup> respondent/cross-appellant referred to the counter-affidavit said to have been filed by the 1<sup>st</sup> respondent/cross-appellant on 12<sup>th</sup> December, 2018, the 2<sup>nd</sup> respondent's preliminary objection and the 3<sup>rd</sup> respondent's counter-affidavit and written address wherein issues were joined with the appellant on the facts and documents in support of the originating summons. He argued that the relevant facts and documents presented were hotly contested and disputed by the parties but in spite of this the court below held that whatever conflicts there are in the matter could be resolved by reference to the documents without the need to call oral evidence. He submitted that the court below

**H**

**I**

**A** was in error and misapplied the applicable laws having regard to the conflict of facts and the documents which could be resolved only by calling of oral evidence and reliance on this submission was placed on **Alfa Vs. Attai (2018) 5 NWLR (Pt. 1611)59**.

**B** The law is well settled that when a court is faced with affidavits which are irreconcilably in conflict, the judge hearing the case in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call See: **Falobi Vs. Falobi (1976) 9-10 SC 1 at p. 9**. This court in **Alfa Vs. Attai (2018) 5 NWLR (Pt. 1611) 59** endorsed the caution given by the Court of Appeal that the procedure of originating summons ought not to be used where the facts are or are likely to be in dispute. It was stressed in the contributory judgement of my Lord, Rhodes-Vivour JSC supra at page 92 that where there are material contradictions on facts that can only be resolved by calling evidence no court would resolve such conflicts in affidavits without calling oral evidence. However, where there are documents before the court from which the conflicts in the affidavit evidence can be resolved, there would be no need to call oral evidence. See: Section 123 of the Evidence Act, 2011. See also **Ezechukwu Vs. Onwuka (2016) 5 NWLR (Pt. 1506) 529**. There were no substantial disputes as to facts in this case. The only divergence is that while the appellant claimed to have emerged the winner of the primaries in which he and two other candidates namely, Barrister Innocent Daagba and Mr. Matthew Asemanyian Dubu, the cross-appellant and 3<sup>rd</sup> respondent maintained that the 3<sup>rd</sup> respondent was the fourth candidate who also contested the primaries and won: hence his name was forwarded to the 2<sup>nd</sup> respondent as the Gubernatorial candidate of the Social Democratic Party(SDP) for the 2019 General Election. In order to justify his emergence as the candidate of the Party, he was issued the Certificate of Return (Exhibit 9) dated 10<sup>th</sup> October, 2018.

**F** It was discovered by the trial judge that the clearance Certificate and Certificate of Return attached to the counter-affidavit of the 3<sup>rd</sup> defendant/respondent predated the procurement, filling, swearing and submission of the nomination forms of the 3<sup>rd</sup> defendant. In considering whether the 3<sup>rd</sup> defendant/respondent was one of the aspirants at the primary election conducted, the learned trial judge said at pages 591-592 of the record:-

**H** **"The affidavit evidence of the 3<sup>rd</sup> defendant that he was screened one cleared on the 28<sup>th</sup> of September, 2018 cannot be reconciled with the evidence of the date when his form for the same screening and clearance was ready which is the 1<sup>st</sup> November, 2018. This will constitute conflicting evidence by a party or contradictions in the evidence of a party. The clearance predates the form used for the same clearance. It is settled law that the consequence of a party presenting such materially conflicting or contradicting evidences (sic) is that the case of the party is destroyed and cannot**

- A** be believed. It is trite law that where a party is shown to have presented on oath two pieces of evidence which are materially inconsistent, such party will be regarded as unreliable and the totality of his evidence will be rejected by the court. See: *Zakirai Vs. Muhammad & Ors.* (2017) 17 NWLR (Pt. 1594) 181. The valid date of the party nomination form of the 3<sup>rd</sup> defendant which is 1<sup>st</sup> November, 2018 also came along after the primary election results were said to have been announced according to the plaintiff and the 2<sup>nd</sup> defendant. .... Also unbelievable is the deposition by the 3<sup>rd</sup> defendant that he was given a certificate of return dated 10<sup>th</sup> October 2018 after the primary election, when he only completed the process of filling the form for his clearance for the same primary election on the 1<sup>st</sup> of November, 2018. Again the issuance of the certificate of return predates the date of completion of his nomination forms which ought to have been used for his clearance before the primary election".
- B**
- C**
- D**

The 3<sup>rd</sup> respondent did not appeal against these findings. It was the 1<sup>st</sup> respondent/cross-appellant that appealed to the Court of Appeal. The 3<sup>rd</sup> respondent is the primary beneficiary of the nomination and ought to have appealed against these adverse findings notwithstanding the fact that the 1<sup>st</sup> respondent felt aggrieved and appealed against the decision of the trial judge.

**E**

At the Court of Appeal the issue whether the trial court was right to have heard and determined the suit solely on affidavit evidence and if the suit was properly commenced by originating summons was resolved in favour of the plaintiff/respondent on the ground that the documents annexed to the affidavits of the parties were effectively used to resolve the seeming conflicts in the affidavits without the need to call oral evidence.

**F**

The position taken by the trial Judge regarding the counter-affidavit filed by the 1<sup>st</sup> defendant/cross-appellant is that Dr. Salihu Muhammad apart from denying making the result sheet which the plaintiff attached to the affidavit in support of the originating summons, there was nothing to contradict some material dispositions in the affidavit of the plaintiff. The bottom was knocked out of his claim that the primaries were held and the 3<sup>rd</sup> respondent emerged victorious as the certificate of return predated the date 3<sup>rd</sup> respondent completed the process of filling the form for his clearance to contest the primary election. Earlier the 3<sup>rd</sup> respondent had claimed he resigned his membership of the PDP on 4<sup>th</sup> September, 2018 whereas Exhibit 1 which is the membership card issued to him by the 1<sup>st</sup> defendant/cross-appellant showed the payment of N5,000.00 in August, 2018. The credibility deficit suffered by the 3<sup>rd</sup> respondent rubbed off on the 1<sup>st</sup> defendant since the plaintiff/appellant was able to show that the officials of the party were acting in cahoots with the 3<sup>rd</sup> respondent. The plaintiff/appellant stated that he and others met Prof. Adeniran on 6/11/2018 at the National headquarters of the party, where

**I**

**A** he confirmed that the plaintiff/ appellant had been substituted with the 3<sup>rd</sup> respondent. The claim therefore by Dr. Salihu Muhammad that the 3<sup>rd</sup> respondent contested in the primary for the gubernatorial nomination where he obtained 50,475 votes as against the 29,214 votes credited to the plaintiff/appellant was nothing but falsehood.

**B** The learned trial judge stated the law that specific depositions of facts in an affidavit cannot be controverted by sweeping or general denials in a counter-affidavit. To be worthy of weighty consideration the denial must be facts which must be credible and capable of being believed and if so believed, it will sway the mind of the court from accepting the facts in the main affidavit it is opposing or countering. Learned trial judge stated in respect of the 1<sup>st</sup> defendant/cross-appellant:-

**C** **"In the instant case the 1<sup>st</sup> defendant was under the obligation to make specific denials of some depositions in the affidavit of the plaintiff.....and not make general traverse that the deposition were false".**

**D** The learned judge enumerated nine deposition in the affidavit in support which were directly linked to the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant had the obligation to deny them specifically if indeed it never happened but the 1<sup>st</sup> defendant failed to deny them.

**E** The lower court reviewed the evidence adduced before the trial court and specifically referred to the claim by the plaintiff/1<sup>st</sup> respondent that the 3<sup>rd</sup> respondent was not screened and analysed the evidence thus:-

**F** **"It was the case of the 1<sup>st</sup> respondent that as at 1/10/2018 when the primary election of the appellant was conducted, the 3<sup>rd</sup> respondent was not screened and cleared to participate in the said election and that his name was not among the candidates nor did he participate in the primary election. The 3<sup>rd</sup> respondent contended that he bought and submitted the expression of interest forms for the said primary election. In the affidavit of 1<sup>st</sup> respondent, it is deposed that the primary election was held on 1/10/2018 and the result was announced on 3/10/2018. (See page 9 of the supporting evidence at page 7 of the record). In paragraph 8 of the counter-affidavit of the appellant, it is deposed that the election took place on 3/10/2018 (See page 517 of the vol. 2 of the record). The nomination form of the 3<sup>rd</sup> respondent, Exhibit 6 attached to the counter-affidavit at pages 377-392 of vol. 1 of the record) was paid for and sworn to on 1/11/2018 at the Federal High Court. His certificate of clearance (to contest the primary election) was issued on 28/9/2018 Exhibit 7 at page 394 of vol. 1 of the record).**

**A**

The implication of the narrative above is that the primary election was conducted on 1/10/2018 or 3/10/2018 long before the 3<sup>rd</sup> respondent swore to the nomination form of that election.

**B**

In Exhibit 8 attached to 3<sup>rd</sup> respondent's counter-affidavit, viz; Benue State Electoral Committee report signed by the deponent of the appellant's counter-affidavit among others, it is stated

**C**

that the primary election took place on 30/9/2018 and the collation of result for the governorship candidates started from 5 pm on 30/9/2018 and by 1 am of 1/10/2018 some results were collated. See pages 395-397 of Vol. 1 of the record.

Most revealing is that in paragraph 6 of the report it is stated that,

**D**

"Before the meeting we spoke with one governorship aspirant who was unavoidably present and letter (sic) had a meeting with all 3 aspirants present....." (Underlining mine for emphasis.)

**E**

The clear meaning of the above is that there were only three aspirants for the governorship primary election. This confirms the position of the first respondent that there were only three candidates and the 3<sup>rd</sup> respondent was not one of them as shown on his Exhibit JHB 7 at page 55 of the record. (the state governorship collation result sheet). How then did three aspirants metamorphose to four aspirants including the 3<sup>rd</sup>

**F**

respondent in the collation result sheet attached as Exhibit "SDP1" to the counter-affidavit of the appellant at page 519 of Vol. 2 of the record?

**G**

It is clear that the 3<sup>rd</sup> respondent did not contest the primary election of the appellant and did not therefore win it. His certificate of return dated 10/10/2018 pre-dates his expression of interest form to contest the primary election.

**H**

Another curious fact in the case of the appellant and 3<sup>rd</sup> respondent is that Exhibit 10 attached to the counter-affidavit of 3<sup>rd</sup> respondent (INEC's affidavit in support of personal particulars of person seeking election to office) at pages 399-403 Vol. 1 of the record) is sworn on 1/11/2018. In other words it is sworn to on same date on which 3<sup>rd</sup> respondent swore to his nomination for the primary election which took place on an earlier date. The counter-affidavit of the appellant end Exhibit

**I**

**A** SPD1 attached to it are completely unreliable and must be discountenanced. The case of the 1<sup>st</sup> respondent therefore is unassailable.

**B** Both the trial court and the court below properly and adequately evaluated the evidence in this suit and made concurrent findings of fact which are faultless.

There is nothing perverse in the findings made and the law was properly espoused by the trial court as well as the court below and the two courts arrived at the right decision that the plaintiff/cross-respondent' s case is unassailable. The cross-appeal totally lacks merit and it is hereby dismissed.

**C** **THE MAIN APPEAL**

The issue in the main appeal is whether the failure to mark the originating summons as "concurrent" by the registrar of court was capable of voiding the originating process. Sections 96,97 and 98 of the Sheriffs and Civil Process Act deal with service of writ of

**D** summons in any part of the Federation, endorsement to be made on writ for service outside a State and the marking of concurrent writs. The sections provide as follows:-

**E** “96(1) A writ of summons issued out of or requiring the defendant to appear at any court of State or the Capital Territory may be served on the defendant in any other State or the Capital Territory.

**F** (2) Such service may, subject to any rules which may be made under this Act, be effected in the same manner as if the writ was served on the defendant in the State or the Capital Territory in which the writ was issued.

**G** 97. Every writ of summons for service under this Part out of the State or the Capitol Territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such State or the capital territory, have endorsed thereon a notice to the following effect (that is to say)-

**H** "This summons (or as the case may be) is to be served out of the.....State (or as the case may be).....and in the.....State (or as the case may be)"

**I** 98. A writ of summons for service out of the State or the Capital Territory in which it was issued may be issued as a concurrent writ with one for service within such State or the Capital Territory and shall in that case be marked as concurrent".

**A**

The lower court relying on **Odu'a Investment Co. Ltd Vs. Talabi (1997) 10 NWLR (Pt. 523) 1** set aside the originating summons because it was not marked as a concurrent writ. Learned counsel for the 1<sup>st</sup> respondent had argued that the Sheriffs and Civil Process Act is a legislation made in furtherance to the exercise of power conferred on the Federal Government of Nigeria in Item No. 57 of the Exclusive Legislative List provided in Schedule 2 Part 1 of the Constitution of the Federal Republic of Nigeria 1999 which states that-

**B****C**

**"Service and execution in a state of the civil and criminal processes, judgement, decrees, orders and other decisions of any court of law outside Nigeria other than a court of law established by the House of Assembly of that State".**

**D**

His further argument is that this court clarified the confusion that has tended to characterize its views regarding the provisions of sections 97, 98 and 99 of the Sheriffs and Civil Process Act and the Federal High Court (Civil Procedure) Rules 2009 in the case of **Izeze Vs. INEC (2018) 11 NWLR (Pt. 1629) at 110 and Arabella Vs. NAIC (2008) 11 NWLR (Pt, 1097) 182.**

**E**

Learned counsel for the respondent referred to the preamble to the Sheriffs and Civil Process Act where it would appear that the Act is applicable to all the courts in Nigeria but argued that a preamble is not part of the operative part of the statute and will only be resorted to in cases of ambiguity in the substantive provision of a statute. He relied on the dictum of **Karibi- Whyte JSC in Ogbonna Vs. A-G Imo State (1992) 1 NWLR (Pt. 220) 647** where he stated at page 606:-

**F****G**

**"It is well settled that the preamble to a statute or written document is merely an introductory part of it, it is therefore not a part of the statute or the written document. The purpose of the preamble in a statute or written document is to clarify any ambiguity in the words used in the enacting part. It does not control the plain words of the statute or document".**

**H****I**

Learned counsel argued that in this case there is no ambiguity in the operative part of the Sheriffs and Civil Process Act to warrant any resort to the preamble. He however pointed out that there has been some debate and difference of opinion in this regard which was engendered by the decision of the Supreme Court in the case of **Owners of the MV Arabella Vs. NAIC (2008) 5 SCNJ 109; (2008) 11 NWLR (Pt. 1097) 182** where this court extended the meaning of "High Court" to include the Federal High Court by relying on the preamble to the Sheriffs and Civil Process Act. Learned counsel urged this court not only to distinguish the said authority as well as other decided cases based on it but depart from its position on the applicability of the

**A** Sheriffs and Civil Process Act to the Federal High Court because of the following:-

**1. The court did not examine the relationship between the Civil Procedure Rules of the Federal High Court and the Sheriffs and Civil Process Act. If it had done so, it would have come to the conclusion that the Federal High Court was not one of the courts contemplated by the Act.**

**B**

**2. The Federal High Court was not in existence in 1945 when the Act was enacted but the High Courts of the Regions were the courts in existence at the time. These courts had limited territorial jurisdiction as opposed to the Federal High Court whose territorial jurisdiction is the entire Federation.**

**C**

**D**

**3. The decision was based on the Federal High Court (Civil Procedure) Rules, 1976 which have been repealed.**

**E**

**4. This court in Boko Vs. Nungwa (2019) 1 NWLR (Pt. 1654) 398 seems to have overruled the decision in Arabella's case.**

Learned counsel referred to Sections 94 and 96(2) of the Sheriffs and Civil Process Act which have made provisions for rules of court to be made pursuant to the provisions of the Act and argued that portion of the Federal High Court (Civil Procedure) Rules 2009 which deal with service and execution of process do not derive their force from Sections 94 and 96(2) of the Sheriffs and Civil Process Act but the power of the Chief Judge of the Federal High Court of make rules of court is derived from Sections 9 and 44 of the Federal High Court Act and Sections 252 and 254 of the Constitution.

**F**

**G**

The submissions of learned counsel for the appellant are well founded. Section 19(1) of the Federal High Court Act provides that the Court shall have and exercise jurisdiction throughout the Federation, and for that purpose the whole area of the Federation shall be divided into Judicial Divisions. This is for administrative convenience and for dispatch of business as the Chief Judge may direct any of the judges to sit in any Judicial Division in the country. This is unlike the State High Court where the Chief Judge of the State can exercise a similar power only within the state. The power vested in the Chief Judge of the federal High Court to make rules of court are not derived from the Sheriffs and Civil Process act but from Sections 254 of the Constitution and 44 of the Federal High Court Act.

**H**

**I**

**A** Section 254 of the Constitution of the Federal Republic of Nigeria states:-  
**"Subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court".**

**B**

The Federal High Court Act which is deemed to have been enacted by the National assembly stipulates in Section 14(1)(s) that -

**C**

**"The Chief Judge may with the approval of the President, make Rules of Court for carrying this Act into effect, and in particular and without prejudice to the generality of the foregoing, for all or any of the following purposes and matters –**

**D**

**(s) for providing for the service or execution of any writ, warrant, order or other process issuing out of the court, the payment of mileage allowance before or after service or execution, the conditions precedent before any such process or process of certain classes will be served or executed and the procedure to be followed after the service or execution of such process", See: Boko Vs. Nungwa (2019) 1 NWLR (Pt. 1654) 395.**

**E**

**F**

The decision in **Odua Investment Co. Ltd Vs. Talabi** supra upon which the lower court based its decision to nullify the writ is distinguishable from this case. In that case the respondent instituted an action against the appellant and one other person in the High Court of Lagos State claiming certain declaratory reliefs and in the writ of summons, the appellant's address for service was put as "Cocoa House Complex Ibadan". The appellant was served in Ibadan, Oyo State, a place outside the territorial jurisdiction of Lagos State High Court. There was no endorsement on the writ as required by Section 97 of the Sheriffs and Civil Process Act, to the effect that the writ was to be served out of the jurisdiction of the court. The period within which to enter appearance was also stated to be eight days and no leave of court or judge was obtained to serve the writ out of jurisdiction. The full court decided by a majority of 6-1 that non-compliance with Section 97 and/or Section 99 of the Sheriffs and Civil Process Act and the rule of court requiring leave of the court or a judge for a writ to be served out of jurisdiction renders the writ and/or service of it voidable and the defendant who complains of such non-compliance is entitled *ex debito justitiae* to have same set aside.

**G**

**H**

**I**

The submission by learned counsel for the 1<sup>st</sup> respondent/cross-appellant that the principal legislation that deals with the service of court processes of any

**A** court in Nigeria is the Sheriffs and Civil Process Act is therefore not correct as it relates to the Federal High Court. It is only true of the State High Courts and the FCT High Court because their jurisdiction is circumscribed by the territory each State occupies and the Federal Capital Territory. The service of any process issued by the Federal High Court can be carried under the Sheriffs and Civil Process Act, if such service is to be executed outside the territory of Nigeria. Order 6 Rule 31 of the Federal High Court Rules interprets outside jurisdiction to mean outside the Federal Republic of Nigeria. Thus to hold that an originating summons which was issued out of the registry of the Federal High Court, Warri which was addressed for service at Abuja outside Delta State where the originating summons was issued from should be nullified because it did not comply with Section 97 of the Sheriffs and Civil Process Act as this court did in **Izeze Vs. INEC (2018) 11 NWLR (Pt. 1629) 110 at 132** did not take cognisance of Section 19 of the Act and Order 6 Rule 31. I am of the considered view that the originating summons issued by the Federal High Court, Makurdi which is to be served in Abuja cannot be considered to be service outside jurisdiction and therefore does not require to be endorsed as a concurrent writ.

**D** I therefore allow the appeal and set aside the judgement of the lower court. The judgement of the trial court is hereby restored. The cross-appeal fails and it is hereby dismissed.

**E**

**K. B. Akaahs**  
*Justice, Supreme Court*

**F** **OLABODE RHODES- VIVOUR (JSC):** I had the advantage of reading a draft copy of the leading judgment delivered by my learned brother, Akaahs JSC. I am in complete agreement with His Lordship that the appeal should be allowed and the judgement of the trial court restored. I am further in agreement with his lordship that the cross appeal should be dismissed. In view of the issue of jurisdiction raised in the cross appeal I shall add a few words of mine.

**G**

The 1<sup>st</sup> respondent cross appellant challenged the jurisdiction of the Court of Appeal to have heard and determined the suit of the appellant on the ground that the appellant instituted this suit outside the 14 days from the date of the Benue State Gubernatorial Primary Election hence the suit is statute barred.

**H**

Section 285 (9) of the Constitution (fourth alternation No. 21) Act 2017 provides that:

**I**

**(9) Notwithstanding anything to the contrary in this Constitution, every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event, decision or action complained of in the suit.”**

**A**

It has been said in a plethora of cases that provisions of the Constitution should be read and interpreted without embellishments. Where the words used are clear and free from ambiguity they should be given their ordinary meaning. See **AG Anambra State Vs. A.G Federation (1993) 6 NWLR (pt.302) p.692.**

**B**

By the provisions of Section 285 (9) supra an aggrieved person in a pre-election matter has 14 days from the day his cause of action arose to file his suit in court.

**C**

This facts briefly are that the appellant contested the primary election of his party, the SDP (1<sup>st</sup> respondent) on 3<sup>rd</sup> October 2018. He contested the gubernatorial primaries. He was declared the winner, but instead of the 1<sup>st</sup> respondent sending his name to the 2<sup>nd</sup> respondent, (INEC) as its candidate for the gubernatorial elections, it sent the name of the 3<sup>rd</sup> respondent, and this was done on 6<sup>th</sup> November 2018.

**D**

Cause of action is the entire set of circumstances that give rise to an enforceable claim and consists of two elements namely:

- (a) **the "wrongful act of the defendant which gives rise to the cause of complaint, and**
- (b) **the consequential damage. See A.G Rivers State Vs. A.G Bayelsa State (2012) 7 SC (Pt. II) p. 110.**

**E**

The act of the 1<sup>st</sup> respondent forwarding the name of the 3<sup>rd</sup> respondent to INEC instead of the appellant's name gives the appellant his cause of action; and that occurred on 6<sup>th</sup> November 2018. The appellant filed his action by an originating summons on 8<sup>th</sup> November, 2018. To determine if the suit is statute barred, the court examines the originating process to know when the plaintiffs cause of action, or wrong complained off occurred and comparing that date with the date the suit was filed. If the suit is brought outside the time prescribed by the section of the Constitution or applicable legislation it is statute barred. See **Asaboro Vs. Pan Ocean Oil Corp Nig Ltd (2017) 7 NWLR (Pt.1563)p.42; Obiefuna Vs. Okoye (1961) ALLNLR p.351.**

**F**

A suit filed outside the prescribed period offends the provision of the section. The plaintiff would have a cause of action but one that cannot be enforced.

**H**

The appellant's action was not statute barred as it was filed well within 14 days after he had a cause of action on 6<sup>th</sup> November 2018. His suit was filed on 8<sup>th</sup> November 2018.

The cross appeal is also dismissed by me for these brief reasons.

**Olabode Rhodes-Vivour**  
*Justice, Supreme Court*

**I**

**AMINA ADAMU AUGIE, (JSC):** I had a preview of the lead judgment delivered by my learned brother, Akaahs, JSC, and I agree with his reasoning and conclusion regarding the main appeal and the cross-appeal. He dealt with the issues raised therein

**A** meticulously and decisively, and I have nothing useful to add.

Thus, I adopt his reasoning as mine; I also allow the main appeal, which is meritorious; and dismiss the cross appeal; which lacks merit.

**Amina Adamu Augie,**  
*Justice, Supreme Court*

**B**

**C**

**D**

**E**

**F**

**G**

**H**

**I**

**WAHAB ALAO  
VS  
THE STATE**

**SC.973/2015**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**FRIDAY, 31<sup>ST</sup> MAY, 2019**

**BEFORE THEIR LORDSHIPS**

**MUSADATTIJO MUHAMMAD  
KUMAI BAYANGAKAAHS  
JOHN INYANG OKORO  
EJEMBI EKO  
UWANI MUSA ABBAJI**

**JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT  
JUSTICE, SUPREME COURT**

*COURT: Administration of justice – Approach thereto – Whether Courts have shifted away from narrow technical approach to justice.*

*CRIMINAL LAW AND PROCEDURE: Armed robbery – Elements thereof – What prosecution must prove.*

*CRIMINAL LAW AND PROCEDURE: Confessional Statement – Denial thereof – Whether mere denial does not make a confessional statement inadmissible especially where there are other corroborating evidence.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Objection thereto – Where accused objects to the involuntariness of a confessional statement – Whether objection must be done at the point statement is sought to be tendered.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction thereof – Whether court will determine weight to be ascribed thereto – Relevant conditions thereof.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Retraction thereof – Approach of court thereto.*

*CRIMINAL LAW AND PROCEDURE: Confessional statement – Validity thereof – How determined.*

*CRIMINAL LAW AND PROCEDURE: Criminal cases – Standard of proof thereof – Whether proof beyond reasonable doubt does not mean proof beyond all shadows of doubt.*

*CRIMINAL LAW AND PROCEDURE: Guilt – Proof thereof – Whether a free and voluntary confession is a sufficient proof of guilt.*

*CRIMINAL LAW AND PROCEDURE: Guilt of an accused – Proof thereof – Methods thereto.*

*CRIMINAL LAW AND PROCEDURE: Identification – Where the confessional statement of the accused fixes him to the scene of crime – Whether the issue of identification parade is no longer relevant.*

*EVIDENCE: Confessional statement – Relevancy thereof – Whether it is the best evidence which can be relied upon to convict the accused.*

*EVIDENCE: Confessional statement – Where a confessional statement is obtained in an oppressive or any illegal manner – Whether such confessional statement is inadmissible in law Section 29 of Evidence Act 2011 Considered.*

*STATUTE: Evidence Act – Section 29 thereof – Nature and purport – Principles relating to confessional statement.*

*STATUTE: Evidence Act 2011 – Section 135 thereof – Nature and purport – Nature of proof required in criminal cases.*

### **Issue for Determination**

**Whether court below was wrong in upholding the decision of the trial court to the effect that the prosecution had proved its case of conspiracy and armed robbery against the appellant beyond reasonable doubt.**

### **Facts of the Matter**

This appeal arose from the judgment of the Court of Appeal, Ibadan Division delivered on 6<sup>th</sup> December, 2013. In its judgement, the court below upheld the decision of the learned trial judge, Adeniran J. which had convicted and sentenced the appellant for the charge of armed

robbery on 12<sup>th</sup> July 2012.

Being dissatisfied with the decision of the lower court, the appellant filed the instant appeal vide a notice of appeal dated 16<sup>th</sup> June, 2014 and filed 20<sup>th</sup> December, 2013 wherein he raised three (3) grounds of appeal.

The appellant was charged together with Fatai Busari, OsuolaleTijani, Mumini Adisa and Sunday Okafor at the High Court of Oyo State with offences of conspiracy to commit armed robbery and armed robbery contrary to Section 5(b) of the Robbery and Firearms (Special Offences) Act Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1999 and the offence of Armed Robbery contrary to Section 1(2)(a) and (b) of the Robbery and Firearms (Special Offences) Act. Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1990.

The offence was alleged to have been committed at Mobil Petrol Station, Challenge, Ibadan, Oyo State on November 18<sup>th</sup> 1994 by robbing one Alhaji Nurudeen Kolawole ('the deceased') of the sum of N150,000.00 (One Hundred and Fifty Thousand Naira) and in the process killed the deceased. At trial, the appellant Fatai Busari and Mumini Adisa were found guilty and convicted for the offences and sentenced to death by hanging or execution by firing squad as contained in the judgement of the trial court.

The appellant was dissatisfied with the said judgement and filed an appeal at the court below. The court below delivered its judgement on 6<sup>th</sup> December, 2013 and dismissed the appellant's appeal and confirmed the conviction and sentence of the trial court. Still being dissatisfied, the appellant sought to explore right of further, final appeal to the Supreme Court.

**Held:** *(Unanimously dismissing the appeal)*

1. *The nature and purport of section 135 of Evidence Act 2011*

**The point that must be made, and clearly made, is that the appeal before us borders on conspiracy to commit the offence of armed robbery and the actual act of armed robbery. The offence of conspiracy to commit armed robbery is charged pursuant to Section 5 (b) of the *Robbery and Firearms (Special Offences) Act* Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1999 and while the actual act of Armed Robbery is charged pursuant to Section 1(2)(a) of the of the *Robbery and Firearms (Special Offences) Act* Laws of the Federation of Nigeria.**

**The offence for which the appellant is charged is a very serious one, and by virtue of Section 135(1) of the Evidence Act 2011, the offence must be strictly proved by cogent and convincing evidence that leaves no iota or doubts or scepticism in the minds of the parties and members of the public, and I dare say this court. The section provides:**

- "135. Standard of proof where commission of crime in issue; and burden where guilt of crime etc. asserted.**  
**(1) If the commission of a crime by a party to any**

**proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.**

- (2) **The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action." (P.....Paras.....).**

2. *Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt*  
**It is now well settled that in our criminal jurisprudence, in order for the prosecution to succeed whenever the commission of a crime is in issue against an accused person, he is under a duty to establish its case beyond reasonable doubt. It must however be noted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt.**

**It is settled law that in criminal proceedings, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt and this would be achieved by ensuring that all the necessary and vital ingredients of the charge or charges are proved by evidence. See *Yongo vs. Commissioner of Police* (1992) LPELR - 3528 (SC), (1992) 4 SCNJ 113, *Ogundiyan vs. The State* (1991) LPELR - 2333 (SC), (1991) 3 NWLR (Pt.181) 519, *Akigbe vs. Iog* (1959) 4 FSC 203, *Onubogu vs. The State* (1974) 9 SC 1 at 20, *Babuga vs. The State* (1996) LPELR - 701 (SC), (1996) 7 NWLR (Pt.460) 279. (P.....Paras.....).**

3. *The nature and purport of section 29 of Evidence Act 2011*  
**Section 29 states conditions for making confession relevant.**

- "(1) **In any proceedings a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.**
- (2) **If, in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained -**
- (a) **by oppression of the person who made it; or**
- (b) **in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the**

**prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.**

- (3) In any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either paragraph (a) or (b) of subsection (2) of this section.**
- (5) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture." (P.....Paras.....).**

- 4. *Confessional statement obtained by duress is inadmissible*  
**What is the essence of the above provisions? There is no ambiguity in the law. Clearly, the law intends that any confessional statement obtained in an oppressive or any illegal manner is liable to be vitiated for not being voluntary, and is thus inadmissible in law. That was the decision of this court in State vs. Salawu (2011) 18 NWLR (Pt.1279) Pages 580 at 605, Para C-F. (P....Paras.....).**
- 5. *Mere denial does not make confessional statement inadmissible*  
**The appellant contention seems compelling; to the extent that he did not make the confessional statement (Exhibit "P"). However, denial does make confessional statement inadmissible particularly where there are other forms of evidence before the court, like in the instant appeal. (P.....Paras.....).**
- 6. *Methods of proving guilt of an accused*  
**The guilt of the appellant is not premised solely on Exhibit "P" assuming, but without conceding that it was wrongly evaluated. In Nigeria, the law provisions give the prosecution the choice or options for proving its case beyond reasonable doubt. A prosecutor may deploy all three options or a combination of options. The offence of an accused may be proved by:**
  - "(i) a confessional statement of the accused;**
  - (ii) Evidence of an eye witness; or**
  - (iii) Circumstantial evidence."**

**See Igri vs. The State (2012) 16 NWLR (Pt.1327) 522; Oguno vs. The State (2013) 15 NWLR (Pt.1376) at 1; Ibrahim vs. The State (2014) 3 NWLR**

**(Pt.1394) 305; Ogedengbe vs. The State (2014) 12 NWLR (Pt.1421) 338 and Umar vs. The State (2014) 13 NWLR (Pt.1425) at 497. (P.....Paras.....).**

7. *Confessional statement is the best evidence and can be relied upon to convict an accused.*

**The law is that, by virtue of the provisions of Sections 28 of the Evidence Act, confessional statement is tenable and admissible. Confessional statement is the best evidence to ground conviction and, as held in a number of cases, it can be relied upon solely where voluntary. The criminal guilt of an accused person could be established by confessional statement, circumstantial evidence and evidence of an eye witness. A confessional statement does not become inadmissible even if the accused person denied having made it. See for example Partick Ikemson & 2 Ors vs. The State (1989) 3 NWLR (Pt.110) 455 at 476 Para D; Joseph Idowu vs. The State (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt.680) 48, Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.438) 530 at 537 Para D-E; Samuel Theophilus vs. The State (1996) 1 NWLR (Pt.423) Page 139 at 155 Para A-B; and Awopeju vs. The State (2002) 3 MJSC 141 at 151. (P.....Paras.....).**

8. *The six way test of a true confession*

**It is admitted that a court may rely solely on confessional statement, particularly where such is denied. In this case, Exhibit "P" would appear to satisfy the six way test of a true confession namely:**

- "i) Whether the confession is the truth;**
- ii) Whether the confession was corroborated;**
- iii) Whether the confession was free as can be tested;**
- iv) Whether the appellant had opportunity to commit the crime;**
- v) Whether the confession was possible; and**
- vi) Whether the confession was consistent with other proved or ascertained facts."**

**See Kanu vs. The State (1952) 14 WACA 30; Mbenu vs. The State (1988) 3 NWLR (Pt.84) 615; Stephen vs. The State (1986) 5 NWLR (Pt.46) 978; and Udo vs. The State (1976) 8-9 S.C. 234; Ogudo vs. The State (2011) 12 S.C. (Pt.1) 71 at 79. (P....Paras.....).**

9. *Elements of robbery*

**The essential ingredients of robbery as constituted under Section 2(1) of the Robbery and Firearms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria, 2004 are that: (i) there was robbery or series of**

robberies; (ii) that each robbery was an armed robbery; (iii) that the accused person was one of those who took part in the robbery.

The unassailable evidence before the trial court was in two folds. Exhibit "P", a confessional statement which though voluntary was denied by the appellant, and the evidence of other witnesses. Leaving aside the retraction of the confessional statement, Exhibit "P", which I doubt was even retracted in this circumstance; the evidence before the court was so overwhelming, as rightly observed by the trial court and affirmed by the court below. (*P....Paras.....*).

10. *Courts have shifted away from technical approach to justice*  
**On identification, the appellant had submitted that an identification parade was necessary in the circumstances of the case because the appellant was never mentioned as one of those who took part in the commission of the offence of robbery. In the instant case, the appellant's attempt at overplaying the issue of identification parade is, in my view, cheap and untenable. It was an attempt at escaping justice by relying on mere irregularity or technicality to avoid the conviction and sentence validly imposed on him for the crime he has committed. See Solola & Anor. vs. The State (2005) All FWLR (Pt.269) 1751. Courts generally have deliberately shifted away from narrow technical approach to justice to now pursue the course of substantial justice. See Makeri Smelting Co. Ltd. vs. Access Bank (Nig.) Plc (2002) 7 NWLR (Pt.766) 447 at 476-477. (*P....Paras.....*).**
11. *Where issue of identification not necessary*  
**Identification parade would have been necessary if the identity of the appellant was in doubt. That is not the case in the instant appeal. Moreso, the confessional statement shows clearly that he jointly participated in committing the offence that led to the death of the deceased person. The appellant mentioned the name of other co-accused persons (Fatai Busari, Osulale Mumuni Adisa and Sunday Okafor and himself) as members of the gang who came from Lagos to Ibadan and carried out the robbery that led to the death of the deceased. How best to identify a self-confessing accused person other than by his self-identification?**  
 Clearly, the trial court and the lower court have reached sound, unassailable decisions on finding of facts which this court will not disturb. Frankly, there is no reason to do otherwise than to uphold the decisions of the trial court and court below. It is in view of the foregoing that I resolve the sole issue I have formulated in this appeal against the appellant. I hold that this appeal lacks merit and is accordingly dismissed. The conviction and sentence of the appellant by the court below is hereby reconfirmed. (*P.....Paras.....*).

12. *How to ascribe weight to a confessional statement*  
**When a confessional statement is admitted in evidence but is later retracted, the trial court should test its truthfulness and veracity by examining the statement in the light of other credible evidence to determine what weight to attach to the statement by considering the following:-**

- (a) Whether there is anything outside the confession to show that it is true.
- (b) Whether it is corroborated.
- (c) Whether the facts contained in the statement are true as far as they can be tested.
- (d) Whether the accused person had the opportunity to commit the offence
- (e) Whether the confession is possible
- (f) Whether it is consistent with other facts ascertained and proved at the trial. See: *Dawa vs. State* (1980) 8-11 SC236; *Osetola vs. State* (2012) 17 NWLR (Pt. 1329) 251.

The trial judge meticulously considered these factors before arriving at the conclusion that the facts contained in the statements of the accused agree substantially in some material particulars with the evidence of PW1, PW2 and PW4 as regards the operation at Mobil Petrol Station, Challenge, Ibadan. The concurrent findings of both the trial court and the Court of Appeal Ibadan have not been shown to be perverse by learned counsel for the appellant. The reasons given by my learned brother, Bage JSC that the appeal is devoid of merit accord with mine and it is accordingly dismissed. (*P.....Paras.....*).

13. *Confessional statement is the best pointer to commission of crime*  
**It is trite law that a confessional statement made by an accused person, which is properly admitted in evidence is, in law, the best pointer to the truth of the role played by such accused person in the commission of the offence. See *Oseni vs. State* (2012) 5 NWLR (Pt. 1293) 351, *FRN vs. Iweka* (2013) (2 ors) 3NWLR (Pt. 1341)285. (*P.....Paras.....*).**
14. *Attitude of court to retracted confessional statement*  
**The retraction of a confessional statement does not render confession inadmissible. The fact that an accused person denies making a confessional statement to the police, does not render such extra judicial statement inadmissible merely because the accused person denies having made it. What the court is expected to do to determine the weight to be attached to a retracted**

**confessional statement is to test its truthfulness and veracity by examining the said statement in the light of other credible available evidence.**

**The court would consider whether:**

- (a) There is anything outside that Confessional statement to show that it is true;**
- (b) It is corroborated;**
- (c) The facts stated in it are true as far as it can be tested;**
- (d) The accused person had the opportunity of committing the offence;**
- (e) The accused person's confession is possible;**
- (f) The Confession is consistent with the other facts ascertained and proved at the trial. See**

**Osetola vs. State (2012) 17 NWLR (Pt. 1329) 251 at page 278; Dawa vs. State (1980) 8-11 SC 236.**

**In the instant appeal, the appellant named the Co-accused persons as members of the gang who took part in the robbery in his Confessional statement. This clearly is a pointer to the fact that he knew something about the robbery. (P....Paras.....).**

15. *An objection to a confessional statement must be done at the point it is sought to be tendered*

**Again, the law is that where an accused person attacks the voluntariness of a confessional statement he must object to the admission of the statement at the point where it sought to be tendered. At this point, the court is expected to conduct an inquiry so as to ascertain that the statement was voluntarily made by the accused. Where a confessional statement is tendered and admitted in evidence without any objection from the accused person, the trial court is relieved from conducting a trial - within - trial to verify the voluntariness of the confessional statement see **Osung vs. State (2012) 18 NWLR (Pt. 1332) 256. (P....Paras.....).****

16. *Concurrent findings are not perverse*

**In this appeal, it is not on record that the accused objected to the admission of Exhibit "p", at the point when it was tendered in evidence, which would have called for or inquiry into its voluntariness.**

**In the final analysis, I find no perversity or a miscarriage of justice in the concurrent judgments of the two lower courts to warrant the interference of this court. This appeal is lacking in merit and is hereby dismissed. The concurrent findings of the two lower courts are hereby affirmed. (P.....Paras.....).**

- A** 17. *A free and voluntary confession is a sufficient proof of guilt*  
**The law is well settled that a free and voluntary confession is sufficient proof of guilt if it direct, positive and unequivocal with reference to the offence charged. See Osung vs. The state (2012) 18 NWLR (Pt. 1332)276-277D-E, The State vs. Jimoh Salawu (2011) 18 NWLR (Pt.1279) 888 920- 921 G; Okoh vs. The State (2014) 2-3 SC 205 lines 15-23.**
- B** **Apart from the voluntary and positive confessional statement of the appellant, the guilt of the appellant was equally established by witnesses who squarely fixed him as one of those who committed the robbery. The contention of identification parade to establish his guilt cannot hold water herein. Similarly, the error in name or nomenclature of the bank and the colour of the car is too flimsy to cast doubt in his favour. (P....Paras.....).**
- C**

### **Representations**

- D** Fred Onuobia, for the appellant.  
 O. Abimbola A.G. Oyo State with S. O. Adeoye DPP Oyo State, O. O. Ogundele, A. D. Onubia, for the respondent.

- E** **SIDI DAUDA BAGE, (JSC) 9DELIVERING THE LEAD JUDGMENT):** This appeal arose from the judgment of the Court of Appeal, Ibadan Division delivered on 6<sup>th</sup> December, 2013 as contained at pages 249 to 251 of the record of appeal. In its judgement, the court below upheld the decision of the learned trial judge, Adeniran J. which had convicted and sentenced the appellant for the charge of armed robbery on 12<sup>th</sup> July 2012.
- F** Being dissatisfied with the decision of the lower court, the appellant filed the instant appeal vide a notice of appeal dated 16<sup>th</sup> June, 2014 and filed 20<sup>th</sup> December, 2013 wherein he raised three (3) grounds of appeal as contained at pages 249 to 251 of the record of appeal.

### **G SUMMARY OF FACTS:**

- The appellant was charged together with Fatai Busari, Osuolale Tijani, Mumini Adisa and Sunday Okafor at the High Court of Oyo State with offences of conspiracy to commit armed robbery and armed robbery contrary to Section 5(b) of the Robbery and Firearms (Special Offences) Act Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1999 and the offence of Armed Robbery contrary to Section 1(2)(a) and (b) of the Robbery and Firearms (Special Offences) Act. Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1990.
- H**

- The offence was alleged to have been committed at Mobil Petrol Station, Challenge, Ibadan, Oyo State on November 18<sup>th</sup> 1994 by robbing one Alhaji Nurudeen Kolawole ('the deceased') of the sum of N150,000.00 (One Hundred and Fifty Thousand Naira) and in the process killed the deceased. At trial, the appellant Fatai
- I**

**A** Busari and Mumini Adisa were found guilty and convicted for the offences and sentenced to death by hanging or execution by firing squad as contained in the judgment of the trial court at pages 121 to 143 of the record.

The appellant was dissatisfied with the said judgment and filed an appeal at the court below. The court below delivered its judgment on 6<sup>th</sup> December, 2013 and dismissed the appellant's appeal and confirmed the conviction and sentence of the trial court. Still being dissatisfied, the appellant sought to explore right of further, final appeal to the Supreme Court and lodged the appeal on December 20<sup>th</sup> 2013.

#### **ISSUES FOR DETERMINATION:**

**C** The appellant formulated two issues for determination in this appeal, thus

**"1) Whether the lower court was right when it affirmed the conviction and sentence of the appellant for the offence of armed robbery (Distilled from grounds 2 and 3).**

**D** **2) Whether the lower court rightly affirmed the conviction and sentence of the appellant for the offence of conspiracy to commit the offence of armed robbery (Distilled from grounds 1)."**

On its part, the respondent formulated sole issue for determination, thus:

**E** **"1) Whether appellate court was wrong in upholding the decision of the trial court to the effect that the prosecution proved the case of conspiracy and armed robbery against the appellant beyond reasonable doubt."**

**F** In determining this appeal, I have adopted with slight modification the sole issue formulated by the respondent as being concise and all-embracing of the contention in this appeal, thus:

**G** **"Whether court below was wrong in upholding the decision of the trial court to the effect that the prosecution had proved its case of conspiracy and armed robbery against the appellant beyond reasonable doubt."**

#### **CONSIDERATION AND RESOLUTION OF THE ISSUE:**

**H** The appellant's counsel premised his submission on issue 1 on wrongful admission of Exhibit 'P', the confessional statement in convicting the appellant. The appellant contended that there are three essential ingredients of armed robbery that must be proved by the prosecution, namely: (a) that a robbery took place, (b) that the person who committed the offence of robbery was armed, and (c) that the accused was the person or one of the persons who committed the act of robbery, See **Adekoya vs. The State** (2012) 9 NWLR (Pt.1306) 539; **Tanko vs. The State** (2009) 4 NWLR

**A (Pt.1131) 430 and Adebayo vs. The State (2014) 12 NWLR (Pt.1424) 613.**

While submitting that the above ingredients must be proved beyond reasonable doubt, the appellant contended that the affirmation of the high court's decision on the issue of contradiction on the evidence of the respondent's witnesses is erroneous and at variance with the evidence on the record. The appellant stated that there were clear

**B contradictions in the evidence relied upon in convicting the appellant, particularly evidence of PW.1 and PW.2 by way inscription of "First City Merchant Bank" on the said vehicle and whether it was colour "green" or "brown", and submitted that it was wrong for the High Court and the court below to have relied on such evidence to prove that armed robbery incident took place, see Amala vs. The State (2004) 12 NWLR (Pt.888) 520.****C**

The appellant submitted further that where extra-judicial statement and testimony of a witness are contradictory, the court must discard both and not pick and choose from the evidence, see **Babatunde vs. The State (2014) 2 NWLR (Pt.1391) 298**. The appellant further argued that such doubts ought to have been resolved in favour of the appellant and against the respondent, see **The State vs. Eminie (1992) 7 NWLR (Pt.256) 658** and **Ononuju vs. The State (2014) NWLR (Pt.1409) 345, Musa vs. The State (2009) 15 NWLR (1165) 467 at 501-502, H-A.**

**D**

On identification, the appellant also submitted that an identification parade was necessary in the circumstances of the case because the appellant was never mentioned as one of those who took part in the commission of the offence of robbery, see **Omotola vs. The State (2009) 7 NWLR (Pt.1139) 148; Ikemson vs. The State (1989) 3 NWLR (Pt.110) 455 at 478; and Adeyemi vs. The State (2014) 13 NWLR (Pt.1423) 132 at 162.**

**E**

On Exhibit "P" (the confessional statement), the appellant contended that he was never identified as one of those that committed the robbery and that the trial court wrongly relied on 'Exhibit P' in convicting the appellant despite denying the confessional statement. The appellant contended that for confessional statement to be admitted and relied upon in grounding conviction, the following tests must be satisfied: (1) is there anything outside the confession to show that it is true, (2) is the confessional statement corroborated, (3) are there relevant statements made in it of facts as can be tested, (4) was the prisoner one who has the opportunity of committing the crime, (5) is the confessional statement probable, and (6) is the confessional statement consistent with other facts which has been ascertained and have been proved – See Section 29(2) of the Evidence Act, 2011 and **Adekoya vs. The State (2012) 9 NWLR (1306) 539 AT 561.**

**F**

The appellant also alleged improper evaluation of evidence on the part of the court below on the ground that the appellant was never identified. The appellant further argued that, assuming he was among those that robbed the vehicle that was used in the commission of the offence of robbery, it is not a safe conclusion that he took part in the robbery which was the subject-matter of this appeal. According to the appellant, the fact that he participated in a robbery in the past does not necessarily draw irresistible

**G****H****I**

**A** conclusion that he participated in the robbery incident which is the subject of this appeal. See *Ebeinwe vs. The State* (2011) 7 NWLR (Pt. 1246) 402.

On issue two, the appellant contended that the judgment of the lower court is perverse as the offence of conspiracy to commit armed robbery was not established and proved beyond reasonable doubt, citing Section 138(1) of the Evidence Act 1945 (now Section 135(1) of the Evidence Act, 2011; **Osetola vs. The State (2012) 17 NWLR (Pt.1329) 251; Ani vs. The State (2009) 16 NWLR (Pt. 1168) 443.**

**B** In making further submissions on issue two, the appellant alluded to similar arguments made in respect of issue one on "identification"; Exhibit "P", and other and concluded the respondent failed woefully to establish the essential ingredients of the offences of armed robbery and conspiracy. The appellant then urged this court to allow this appeal and set aside his conviction and sentence and discharge and acquit him (the appellant).

**C** In its opposing submissions, the respondent raised a preliminary objection in paragraph 4.01 of its respondent brief on the appellant's contention on improper evaluation of evidence as contained in paragraphs 4.37 to 4.44 of pages 11 and 12 of the appellant's brief of argument. The respondent contended that issues must be formulated from the grounds of appeal and that any issue which does not arise from or related to a ground of appeal is

**D** incompetent and unarguable and same should be struck-out. See **Kano Textile vs. Gloede & Loft Ltd (2005) 22 NSCQR 346; Patience Omagbemi vs. Guinness Nig. Ltd. (1995) 2 NWLR (Pt.377) page 258 at 266-267; Orji vs. Zarin Industry Ltd (1992) 1 NWLR (Pt.216) 124 at 146.**

**E** On onus and standard of proof, the respondent conceded that since an accused person is presumed innocent until proven guilty by virtue of Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the onus is always on the prosecution to prove its case and establish the offence against the accused person beyond reasonable doubt, See **Olayinka Afolalu vs. The State** (2010) 5-7 SC (Pt.II) 93. The respondent contended that prove beyond reasonable doubt does not mean proof beyond all shadow of doubt.

**F** On proof of armed robbery, the respondent relied on the meaning of "Robbery" as defined in Section 11 of the Robbery and Firearms (Special Provisions) Act, and the cases of **Edet Asuquo vs. The State** (2012) 4-5 SC 199 and **Afolalu vs. The State (supra)** and submitted that the prosecution has proved all the essential ingredients of the offence for which the appellant was charged. The respondent contended that there

**G** were all forms of evidence direct, confessional and circumstantial against the appellant, and that the slight discrepancy as to registration number and colour of the car used for the robbery is not capable of discrediting cogent, compelling evidence against the appellant. The respondent argued further that, as a matter of fact, the confessional statement was enough to prove the entire offence of armed robbery against the appellant.

**H** In its final submission, the respondent argued that the evidence on record in this

**A** case have established the ingredients of conspiracy and armed robbery against the appellant and urged this court to hold that the prosecution had proved the charge beyond reasonable doubt and dismiss the appeal by resolving the sole issue formulated by respondent against the appellant.

**B** The appellant's reply on points of law essentially contended that the preliminary objection raised in its respondent's brief was misconceived. The appellant contended that the objection was not intended to terminate the hearing of the appeal but to invite this honourable court to disregard some of the arguments in the appellants brief. The appellant contended that his arguments as contained in paras 4.37 to 4.44 are predicated on the issue that has been properly raised from Grounds two and three, and thus urged this court to discountenance the objection as same is misconceived.

**C** I have carefully considered the arguments made by the parties in this appeal for the purpose determining the sole issue formulated above for the purpose of determining the appeal. I now return to answer the above question having evaluated the respective submissions of parties.

**D** The point that must be made, and clearly made, is that the appeal before us borders on conspiracy to commit the offence of armed robbery and the actual act of armed robbery. The offence of conspiracy to commit armed robbery is charged pursuant to Section 5 (b) of the *Robbery and Firearms (Special Offences) Act* Cap 398 Vol. XXII, Laws of the Federation of Nigeria 1999 and while the actual act of Armed

**E** Robbery is charged pursuant to Section 1(2)(a) of the of the *Robbery and Firearms (Special Offences) Act Laws of the Federation of Nigeria*.

The offence for which the appellant is charged is a very serious one, and by virtue of Section 135(1) of the Evidence Act 2011, the offence must be strictly proved by cogent and convincing evidence that leaves no iota or doubts or scepticism in the minds of the parties and members of the public, and I dare say this court. The section provides:

**"135. Standard of proof where commission of crime in issue; and burden where guilt of crime etc. asserted.**

**G** (1) **If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.**

**H** (2) **The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action."**

**I** It is now well settled that in our criminal jurisprudence, in order for the prosecution to succeed whenever the commission of a crime is in issue against an

**A** accused person, he is under a duty to establish its case beyond reasonable doubt. It must however be noted that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt.

**B** It is settled law that in criminal proceedings, the onus is on the prosecution to establish the guilt of the accused beyond reasonable doubt and this would be achieved by ensuring that all the necessary and vital ingredients of the charge or charges are proved by evidence. See **Yongo vs. Commissioner of Police (1992) LPELR - 3528 (SC)**, (1992) 4 SCNJ 113, **Ogundiyan vs. The State (1991) LPELR - 2333 (SC)**, (1991) 3 NWLR (Pt.181) 519, **Akigbe vs. Iog (1959) 4 FSC 203**, **Onubogu vs. The State (1974) 9 SC 1 at 20**, **Babuga vs. The State (1996) LPELR - 701 (SC)**, (1996) 7 NWLR (Pt.460) 279.

**C** The next question is, what is or are the quality, nature, context, manner and configuration of the totality of evidence before the trial court on the basis of which the appellant was convicted and sentenced? The appellant's counsel had premised his submission on wrongful admission of Exhibit "P" and lack of identification of the appellant as having taken part in the offence of armed robbery leading to the death of the deceased.

**D** The learned counsel to the appellant planked his submission on the alleged confessional statement (Exhibit 'P') which, according to him, is discredited having been denied by the appellant himself. The appellant's counsel while submitting that the ingredients of the alleged offence must be proved beyond reasonable doubt, also contended that there were clear contradictions in the evidence relied upon in convicting him, particularly evidence of PW.1 and PW.2, he submitted that it was wrong for the High Court and the court below to have relied on such evidence to prove that armed robbery incident took place.

**E** Sections 28 and 29 of the Evidence Act, 2011 became relevant in the context of this appeal. Section 28 defines confession as: A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

**F** Section 29 states conditions for making confession relevant.

**G** "(1) **In any proceedings a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.**

**H** (2) **If, in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained -**

**I** (a) **by oppression of the person who made it; or**  
 (b) **in consequence of anything said or done which was likely, in the circumstances existing at the time, to**

- A** render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that
- B** the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.
- C** (3) In any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either paragraph (a) or (b) of subsection (2) of this section.
- D** (5) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture."

What is the essence of the above provisions? There is no ambiguity in the law. Clearly, the law intends that any confessional statement obtained in an oppressive or any illegal manner is liable to be vitiated for not being voluntary, and is thus inadmissible in law. That was the decision of this court in **State vs. Salawu (2011) 18 NWLR (Pt.1279)** Pages 580 at 605, Para C-F.

**E** The appellant contention seems compelling; to the extent that he did not make the confessional statement (Exhibit "P"). However, denial does make confessional statement inadmissible particularly where there are other forms of evidence before the court, like in the instant appeal.

**F** The guilt of the appellant is not premised solely on Exhibit "P" assuming, but without conceding that is was wrongly evaluated. In Nigeria, the law provisions give the prosecution the choice or options for proving its case beyond reasonable doubt. A prosecutor may deploy all three options or a combination of options. The offence of an accused may be proved by:

- G**
- H** (i) a confessional statement of the accused;  
(ii) Evidence of an eye witness; or  
(iii) Circumstantial evidence."

**I** See **Igri vs. The State** (2012) 16 NWLR (Pt.1327) 522; **Oguno vs. The State** (2013) 15 NWLR (Pt.1376) at 1; **Ibrahim vs. The State** (2014) 3 NWLR (Pt.1394) 305; **Ogedengbe vs. The State** (2014) 12 NWLR (Pt.1421) 338 and **Umar vs. The State** (2014) 13 NWLR (Pt.1425) at 497.

The law is that, by virtue of the provisions of Sections 28 of the Evidence Act,

- A** confessional statement is tenable and admissible. Confessional statement is the best evidence to ground conviction and, as held in a number of cases, it can be relied upon solely where voluntary. The criminal guilt of an accused person could be established by confessional statement, circumstantial evidence and evidence of an eye witness. A confessional statement does not become inadmissible even if the accused person denied having made it. See for example **Partick Ikemson & 2 Ors vs. The State (1989) 3 NWLR (Pt.110) 455 at 476 Para D; Joseph Idowu vs. The State (2000) 7 SC 50 at 62; (2000) 12 NWLR (Pt.680) 48, Nkwuda Edamine vs. The State (1996) 3 NWLR (Pt.438) 530 at 537 Para D-E; Samuel Theophilus vs. The State (1996) 1 NWLR (Pt.423) Page 139 at 155 Para A-B; and Awopeju vs. The State (2002) 3 MJSC 141 at 151.**

**C** It is admitted that a court may rely solely on confessional statement, particularly where such is denied. In this case, Exhibit "P" would appear to satisfy the six way test of a true confession namely:

- D**        **"i) Whether the confession is the truth;  
ii) Whether the confession was corroborated;  
iii) Whether the confession was free as can be tested;  
iv) Whether the appellant had opportunity to commit the crime;**
- E**        **w) Whether the confession was possible; and  
vi) Whether the confession was consistent with other proved or ascertained facts."**

**F** See **Kanu vs. The State (1952) 14 WACA 30; Mbenu vs. The State (1988) 3 NWLR (Pt.84) 615; Stephen vs. The State (1986) 5 NWLR (Pt.46) 978; and Udo vs. The State (1972) 8-9 S.C. 234; Ogudo vs. The State (2011) 12 S.C. (Pt.1) 71 at 79.**

**G** The essential ingredients of robbery as constituted under Section 2(1) of the Robbery and Firearms (Special Provisions) Act, Cap R11, Laws of the Federation of Nigeria, 2004 are that: (i) there was robbery or series of robberies; (ii) that each robbery was an armed robbery; (iii) that the accused person was one of those who took part in the robbery.

**H** The unassailable evidence before the trial court was in two folds. Exhibit "P", a confessional statement which though voluntary was denied by the appellant, and the evidence of other witnesses. Leaving aside the retraction of the confessional statement, Exhibit "P", which I doubt was even retracted in this circumstance; the evidence before the court was so overwhelming, as rightly observed by the trial court and affirmed by the court below.

**I** On identification, the appellant had submitted that an identification parade was necessary in the circumstances of the case because the appellant was never mentioned as one of those who took part in the commission of the offence of robbery. In the instant case, the appellant's attempt at overplaying the issue of identification parade is, in my

- A** view, cheap and untenable. It was an attempt at escaping justice by relying on mere irregularity or technicality to avoid the conviction and sentence validly imposed on him for the crime he has committed. See **Solola & Anor. vs. The State** (2005) All FWLR (Pt.269) 1751. Courts generally have deliberately shifted away from narrow technical approach to justice to now pursue the course of substantial justice. See **Makeri Smelting Co. Ltd. vs. Access Bank (Nig.) Plc** (2002) 7 NWLR (Pt.766) 447 at 476-477.

- B** Identification parade would have been necessary if the identity of the appellant was in doubt. That is not the case in the instant appeal. Moreso, the confessional statement shows clearly that he jointly participated in committing the offence that led to the death of the deceased person. The appellant mentioned the name of other co-accused persons (Fatai Busari, Osuolale Mumuni Adisa and Sunday Okafor and himself) as members of the gang who came from Lagos to Ibadan and carried out the robbery that led to the death of the deceased. How best to identify a self-confessing accused person other than by his self-identification?

- C** Clearly, the trial court and the lower court have reached sound, unassailable decisions on finding of facts which this court will not disturb. Frankly, there is no reason to do otherwise than to uphold the decisions of the trial court and court below. It is in view of the foregoing that I resolve the sole issue I have formulated in this appeal against the appellant. I hold that this appeal lacks merit and is accordingly dismissed.

- D** The conviction and sentence of the appellant by the court below is hereby reconfirmed.

**Sidi Dauda Bage,**  
*Justice, Supreme Court.*

- E** **DATTIJO MUHAMMAD, (JSC):** My learned brother SIDI DAUDA BAGE JSC had obliged me a preview of the lead judgment he prepared in this case before his appointment as the Emir of Lafia. I agree with the reasoning and conclusion therein which I hereby adopt to dismiss the unmeritorious appeal and affirm the lower court's judgment that has endured.

**Musa Dattijo Muhammad,**  
*Justice, Supreme Court.*

- F** **BAYANG AKAAHS, (JSC):** I had a preview of the judgement of my learned brother, Bage JSC affirming the concurrent findings of the two lower courts which found the appellant guilty of conspiracy to commit armed robbery. The appellant made a confessional statement which he retracted during trial. In the said statement, he mentioned the co-accused persons as members of the gang who took part in the robbery. The appellant did not object to the tendering of the confessional statement which was admitted as Exhibit "P". Exhibit N1 which Fatai Busari 1<sup>st</sup> accused made on 31/1/95 corroborated Exhibit 'P'.

- G** The learned trial judge observed that the facts contained in the statements of the accused persons are confessional statements which were voluntarily made. He found

**A** that from the narration of events given by each of the accused persons, they acted in concert and so conspiracy can safely be drawn. This finding was affirmed by the lower court where the court stated at page 236 of the records:-

**B** **"In Exhibit "P" the appellant gave detailed account of his journey with his co-accused from Lagos to Ibadan on the date of the incident and gave a graphic account of the armed robbery at the Mobil Filling Station at Challenge in Ibadan, in company of Mumuni Fatai. Osulale and Sunday Okafor while the appellant and Mumuni stood beside the vehicle, Sunday was behind the steering, while Fatai and Osulale went forward removed the polythene bag containing the money. Fatai who was armed with the gun shot Alhajj N.O.A. Kolawole who later died. The account was precise."**

**D** When a confessional statement is admitted in evidence but is later retracted, the trial court should test its truthfulness and veracity by examining the statement in the light of other credible evidence to determine what weight to attach to the statement by considering the following:-

- E**
- (a) **Whether there is anything outside the confession to show that it is true.**
  - (b) **Whether it is corroborated.**
  - (c) **Whether the facts contained in the statement are true as far as they can be tested.**
  - (d) **Whether the accused person had the opportunity to commit the offence**
  - (e) **Whether the confession is possible**
  - (f) **Whether it is consistent with other facts ascertained and proved at the trial. See: Dawa vs. State (1980) 8-11 SC236; Osetola vs. State (2012) 17 NWLR (Pt. 1329) 251.**

**G** The trial judge meticulously considered these factors before arriving at the conclusion that the facts contained in the statements of the accused agree substantially in some material particulars with the evidence of PW1, PW2 and PW4 as regards the operation at Mobil Petrol Station, Challenge, Ibadan. The concurrent findings of both the trial court and the Court of Appeal Ibadan have not been shown to be perverse by learned counsel for the appellant. The reasons given by my learned brother, Bage JSC that the appeal is devoid of merit accord with mine and it is accordingly dismissed.

**H** **K. B. Akaahs**  
*Justice Supreme Court*

**I**

**A INYANG OKORO, (JSC):** This is an appeal against the judgment of the Court of Appeal, Ibadan Division which affirmed the conviction and sentence of the appellant for offences of conspiracy to commit armed robbery. I had a preview of the lead judgment of my learned brother, Sidi Daudu Bage, J.S.C. just delivered which affirmed the concurrent decision of the two lower courts. I am in agreement with his reasons and conclusion that this appeal has no merit and deserves to be dismissed.

**B** It is trite law that a confessional statement made by an accused person, which is properly admitted in evidence is, in law, the best pointer to the truth of the role played by such accused person in the commission of the offence. See **Oseni vs. State (2012) 5 NWLR (Pt. 1293) 351, FRN vs. Iweka (2013) (2 ors) 3NWLR (Pt. 1341) 285.**

**C** The retraction of a confessional statement does not render confession inadmissible. The fact that an accused person denies making a confessional statement to the police, does not render such extra judicial statement inadmissible merely because the accused person denies having made it. What the court is expected to do to determine the weight to be attached to a retracted confessional statement is to test its truthfulness and veracity by examining the said statement in the light of other credible available evidence.

**D** The court would consider whether:

- E**
- (a) **There is anything outside that Confessional statement to show that it is true;**
  - (b) **It is corroborated;**
  - (c) **The facts stated in it are true as far as it can be tested;**
  - (d) **The accused person had the opportunity of committing the offence;**
- F**
- (e) **The accused person's confession is possible;**
  - (f) **The Confession is consistent with the other facts ascertained and proved at the trial. See**

**G** **Osetola vs. State (2012) 17 NWLR (Pt. 1329) 251 at page 278; Dawa vs. State (1980) 8-11 SC 236**

In the instant appeal, the appellant named the Co-accused persons as members of the gang who took part in the robbery in his Confessional statement. This clearly is a pointer to the fact that he knew something about the robbery.

**H** Again, the law is that where an accused person attacks the voluntariness of a confessional statement he must object to the admission of the statement at the point where it sought to be tendered. At this point, the court is expected to conduct an inquiry so as to ascertain that the statement was voluntarily made by the accused. Where a confessional statement is tendered and admitted in evidence without any objection from the accused person, the trial court is relieved from conducting a trial - within - trial to verify the voluntariness of the confessional statement see **Osung vs. State (2012) 18 NWLR (Pt. 1332) 256.**

**I**

**A** In this appeal, it is not on record that the accused objected to the admission of Exhibit “p”, at the point when it was tendered in evidence, which would have called for or inquiry into its voluntariness.

In the final analysis, I find no perversity or a miscarriage of justice in the concurrent judgments of the two lower courts to warrant the interference of this court.

**B** This appeal is lacking in merit and is hereby dismissed. The concurrent findings of the two lower courts are hereby affirmed.

Appeal dismissed.

**John Inyang Okoro**  
*Justice, Supreme Court*

**C** **MUSA ABBA AJI, (JSC):** I have had the benefit of reading in draft the judgment of my learned brother, **Sidi Bage, JSC**, just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and ought to be dismissed.

**D** This is an appeal against the judgment of the Court of Appeal, Ibadan Division upholding the judgment of the Oyo State High Court convicting the appellant and sentencing him for conspiracy for armed robbery and armed robbery.

**E** The appellant mentioned the names of other co-accused persons (Fatai Busari, Osuolale Mumuni Adisa and Sunday Okafor and himself) as a gang that came from Lagos to Ibadan to rob which led to the death of the deceased. The law is well settled that a free and voluntary confession is sufficient proof of guilt if it direct, positive and unequivocal with reference to the offence charged. See **Osung vs. The state (2012) 18 NWLR (Pt. 1332)276-277D-E, The State vs. Jimoh Salawu (2011) 18 NWLR (Pt.1279) 920- 921 G; Okoh vs. The State (2014) 2-3 SC 205 lines 15-23.**

**F** Apart from the voluntary and positive confessional statement of the appellant, the guilt of the appellant was equally established by witnesses who squarely fixed him as one of those who committed the robbery. The contention of identification parade to establish his guilt cannot hold water herein. Similarly, the error in name or nomenclature of the bank and the colour of the car is too flimsy to cast doubt in his favour.

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

**Uwani Musa Abba Aji**  
*Justice, Supreme Court.*

**I**