SUNDAY OLATUNJI v. THE STATE

(2009) LPELR-8880(CA

In The Court of Appeal of Nigeria

On Thursday, the 18th day of June, 2009

CA/I/3/2005

Before Their Lordships

ISTIFANUS THOMAS Justice of The Court of Appeal of Nigeria

SIDI DAUDA BAGE Justice of The Court of Appeal of Nigeria

MODUPE FASANMI Justice of The Court of Appeal of Nigeria

Between

SUNDAY OLATUNJI Appellant(s)

AND

THE STATE Respondent(s)

RATIO DECIDENDI

1. CRIMINAL LAW AND PROCEDURE - ALIBI: Whether every failure of the Police to investigate an alibi raised by an accused person is fatal to the case of the prosecution

"It is settled principle of law that it is not every failure of the Police to investigate an alibi raised by an accused person that is fatal to the case of the prosecution. See PATRICK NJOVENS 8r. ORS V. THE STATE (1975) 5 S.C page 12 at 47 where the Supreme Court held "There is nothing extraordinary or exoteric in a plea of alibi. Such a plea postulates that the accused person could not have been at the scene of crime and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disprove the alibi or attempt to do so, there is inflexible and for invariable way of doing this. If the prosecution adduces sufficient and acceptable evidence to fix the person at the scene of crime at the material time, surely his alibi is thereby logically and physically demolished." Per FASANMI, J.C.A. (P. 23, paras. C-G) (...read in context)

2. CRIMINAL LAW AND PROCEDURE - CHARGE OF MURDER: Ingredients that must be proved by prosecutor to secure a conviction on a charge of murder

"From plethora of judicial authorities, it is now well settled that to secure a conviction on a charge of murder, the prosecution must prove (1) That the deceased had died (2) That the death of the deceased had resulted from the act of the Appellant and (3) That the act or omission of the accused which caused the death of the deceased was intentional with the full knowledge that death or grievous bodily harm was its probable consequences. See the cases of ONAH V. THE STATE (1985) 2 N.S.C.C 361 at 1369 per Oputa J.S.C., NWAEZE V. THE STATE (1996) 2 N.W.L.R part 428 at page 1, YAKI V. THE STATE(2008) All F.W.L.R page 618 at 632 paras B-D. These three ingredients must co-exist and where one of them is absent or tainted with some doubt, the charge cannot be said to have been proved. See OBUDU V. THE STATE (19991) 6 N.W.LR part 198 at 433 and OGBA V. THE STATE (1992) 2 N.W.L.R part 222 at 164." Per FASANMI, J.C.A. (Pp. 14-15, paras. G-D) (...read in context)

3. CRIMINAL LAW AND PROCEDURE - CONTRADICTION IN WITNESS EVIDENCE: Whether a court of law is enjoined to consider the total package of the defence and not to go to the minutest details

"The Court is unable to find any contradiction in the evidence of P.W2 and P.W4 as alleged by the Appellant's Counsel as a court of law is enjoined to consider the total package of the defence and not to go to the minutest details. If every contradiction however trivial to the overwhelming evidence before the trial, will vitiate a trial, all prosecution cases will fail. Human faculty may miss details due to lapse of time and error in narration in order of sequence. A contradiction to be fatal to the prosecution's case must go to the substance of the case and not be of minor nature. " Per FASANMI, J.C.A. (P. 21, paras. D-G) (...read in context)

4. EVIDENCE - EVIDENCE OF A CHILD: Whether where a child comprehends the essence of an oath and the Court is satisfied, such can form the opinion of the Court

"The opinion about a child witness is as the section clearly shows, "the opinion of the Court" so that when a Judge sits alone, he is undoubtedly the person whose opinion is relevant. See ONYEGBU V. THE STATE (1995) 14 S.C.N.J page 275 at 288. Where the child comprehends the essence of an oath and the Court is satisfied, the first question is also impliedly satisfied see PETER VS. THE STATE (1997) 12 S.C.N.J page 53 at 66 where the Supreme Court held: "Where in the opinion of the Court, a child understands the nature of an oath, it is not necessary for the Court to carry out further preliminary investigation for the purpose of ascertaining whether the child has sufficient intelligence to satisfy his giving evidence and understands the duty of speaking the truth as prescribed by Section 183 of the Evidence Act". The Court was satisfied that P.w3 understood the meaning of giving evidence on oath." Per FASANMI, J.C.A. (P. 25, paras. B-G) (...read in context)

5. CRIMINAL LAW AND PROCEDURE - MURDER: Whether or not in case of murder a man is taken to have intended the natural consequences of his act

"Let me however quickly say that in our jurisprudence, a man is taken to have intended the natural consequences of his act. I will also add that the Appellant shooting the deceased with a gun knew to his knowledge that it would cause death and it is heavier in retaliation for slapping and hitting one with a plate. I hold that the act of the Appellant which caused the death of the deceased was intentional with the full knowledge that death or grievous bodily harm was its probable consequences." Per FASANMI, J.C.A. (P. 17, paras. D-F) (...read in context)

6. CRIMINAL LAW AND PROCEDURE - MURDER CASES: Whether the failure to tender in evidence the instrument used for committing the offence of murder is not fatal to the case of the prosecution

"Let me say also that in murder cases, the failure to tender in evidence the instrument used for committing the offence of murder i.e. the gun in this instance or failure to take the exhibit for forensic analysis is not fatal to the case of the prosecution or sufficient to dislodge the case of the prosecution that there was no proof beyond reasonable doubt. " Per FASANMI, J.C.A. (Pp. 19-20, paras. G-A) (...read in context)

7. INTERPRETATION OF STATUTE - ORDER 15 OF THE HIGH COURT OF APPEAL ACT: Provisions of Order 15 of the Court of Appeal Act

"Order 15 of the Court of Appeal Act empowers this Court to make an order on such terms as the Court thinks just, to ensure the determination of the merits of the real question in controversy between the parties. The omission of the trial Judge to conduct trial within trial with a view to determining the voluntariness of Exhibits B does not vitiate the conviction as contended by the Appellant's Counsel. The Court of Appeal even though cannot hold a trial within trial as the trial court could have done, yet where there are sufficient materials before the Court of Appeal, it can determine the voluntariness or otherwise of a confessional statement based on the evidence on record. See the case of GEORGE V. THE STATE (2009) 1 N.W.L.R Part 1122 page 325 at 350 paras G-H. Exhibit B had been tested under the (6) six questions that a Judge should ask himself and consider before deciding on the voluntariness and I am satisfied that the confessional statement was voluntary and therefore admissible." Per FASANMI, J.C.A. (Pp. 20-21, paras. G-D) (...read in context)

8. CRIMINAL LAW AND PROCEDURE - RETRACTION OF A CONFESSIONAL STATEMENT: Whether a retraction from a confessional statement by an accused does not ipso facto render it inadmissible in evidence

"Retraction from a confessional state by an accused person of having made such a statement does not ipso facto render it inadmissible in evidence and in this respect a confession contained in a statement made to the Policies not to be treated differently from any other confession. See BATURE V. THE STATE (1994) 1 N.W.L.R part 320 at 267; SHITTU V. THE STATE (1990) 1 ALL N.L.R at 228; EGHOGHONOMEVS

THE STATE (1993) 7 N.W.L.R Part 306 at 383 and AYO V. THE STATE (2009) VOL. 8 W.R.N page 134 at pages 152-153 lines 35-5." Per FASANMI, J.C.A. (P. 18, paras. A-C) (...read in context)

9. CONSTITUTIONAL LAW - RIGHT OF AN ACCUSED TO AN INTERPRETER: Whether an accused has a right to an interpreter and such right must therefore be claimed at the time of his trial not after

"The law has for long been settled that the Constitutional right granted to an accused to have an interpreter could not be invoked on appeal by an Appellant who had been represented by Counsel at the trial as a ground for setting aside a conviction unless he claimed that right at the proper time and was denied of it. An accused must therefore claim his right to an interpreter at the time of his trial not after, for the first time an appeal. See ONYIA VS. THE STATE (2008) 36 N.S.C.Q.R page 1090 at 1125 per I.T Muhammad J.S.C. Appellant was represented by Counsel at the trial Court throughout the proceedings. It is for the Appellant or his Counsel to take the initiative of bringing this fact to the notice of the Court at the earliest opportunity or as soon as the situation has arisen. If he does not claim the right at the proper time, he may not be able to have a valid complaint afterwards for example an appeal. See DURWODE V. THE STATE (2000) 12 S.C Part 1 page 1 at 18 lines 10-20." Per FASANMI, J.C.A. (Pp. 25-26, paras. G-D) (...read in context)

10. CRIMINAL LAW AND PROCEDURE - TRUTH AND VOLUNTARINESS OF AN ACCUSED PERSON: What must be considered by the court in determining the truth or voluntariness of an accused person

"To determine the truth or voluntariness of an accused person, the Court would have to consider the following: (1) Is there anything outside the confession to show that it is true? P.w1 Dr. Adeneken who performed the postmortem examination stated that he found an entry point of a gunshot on the right side of the abdomen of the deceased. When he opened up the abdomen, he recovered a few pellets and he concluded that the cause of death was as a result of gun shot wound. See page 13 lines 11-15 of the record. (2) Is it corroborated? The statement made by the deceased to her father in law (P.W2) that the Appellant had shot her which is admissible under Section 7 of the Evidence Act as to how the deceased got the injury found on her has corroborated the confessional statement i.e. Exhibit B. See page 14 lines 6-7 of the record. (3) Are the relevant statements made in it of facts true as far as they can be tested? The fact of the appellant quarrelling with the deceased in the said statement Exhibit B was also corroborated or confirmed by P.w3 in his evidence that the Appellant and the deceased were quarrelling

See page 15 lines 10-12 of the record. The Police could not have manufactured the facts contained in Exhibit B. (4) Whether the Appellant had the opportunity of committing the crime. The Appellant's alibi was raised for the first time in court when he was giving evidence and P.w3 in his evidence stated at page 15 lines 14-15 thus "On that date myself, my junior brother Olaolu, the accused and late Fausat were the people at home". The statement had fixed the Appellant at the scene of crime. The Appellant said he escaped after firing in Exhibit B. See page 9 line 17. (5) Is his confession possible? It is possible for young couple to quarrel over feeding allowance of their child when faced with financial problem see Exhibit B. (6) Is it consistent with other facts, which have been ascertained and have been proved? It is consistent with the evidence of P.W1, P.W2 and P.W3 on the record of proceedings." Per FASANMI, J.C.A. (Pp. 18-19, paras. C-F) (...read in context)

11. CRIMINAL LAW AND PROCEDURE - VOLUNTARINESS OF A CONFESSIONAL STATEMENT: When is the appropriate stage to raise an objection to a confessional statement

"On the issue of the voluntariness of the confessional statement i.e. exhibit B Appellant's Counsel did not object at the stage of tendering the statement. The appropriate stage to raise an objection to a confessional statement is when it is about to be tendered in evidence especially where the accused person is represented by Counsel and it is assumed that he ought to know what to do at each stage of proceeding. The retraction was made when the Appellant was testifying at the trial Court. Any belated denial of the voluntariness of a confessional statement or its retraction is a mere after thought. See: NWACHUKWU V. STATE (2004) 17 N.W.L.R Part 902 at 262; USUANG V. STATE (2009) 1 ALL F.W.L.R pg 1203 paras C-D " Per FASANMI, J.C.A. (P. 20, paras. C-G) (...read in context)

MODUPE FASANMI, J.C.A. (Delivering the Leading Judgment): This is an appeal against the decision of Ogun State High Court of Justice Holden at Abeokuta in Abeokuta Judicial Division which was delivered on the 17th of July 2003.

The Appellant was charged at the trial Court with the murder of his wife Fausat Sunday at Owode Egba on 29th September, 1999. The Appellant shot the wife with a gun during a quarrel which resulted from the wife's demand for money with which to feed their child. The case proceeded to trial and after concluding evidence on both sides and sequel to taking the final addresses, the trial Judge convicted the Appellant of the offence of murder and consequently sentenced him to death. Dissatisfied with the

judgment of the trial court the Appellant filed a notice of appeal on the 8th of October 2003 and appealed to this Court.

Appellant's brief was dated and filed on the 26th of January 2005 but was deemed properly filed and served on the 15th of September 2005. The Respondent did not file the Respondent's brief even though the statutory period allowed for the Respondent to do so have lapsed. Appellant subsequently filed an application on the 21st of November, 2005Â Â to hear the appeal on the Appellant's brief alone in default of the Respondent's brief. Application was granted on the 8th of April 2009.

At the hearing of the appeal, learned Counsel for the Appellant adopted his brief and relied on the arguments contained therein.Â Â Respondent's Counsel was served with the hearing notice. Appellant's Counsel distilled four issues for determination from the five amended grounds of appeal as follows:

(1) Whether the learned trial Judge was right in law to convict the Appellant of the offence of murder without first taking all the evidence before the Court into consideration.

(2) Whether the learned trial Judge was right in law to convict the Appellant of the offence of murder even though the prosecution did not investigate, at all, the defence of alibi made by the Appellant to the police ever before the Appellant was arraigned in court.

(3) Whether the learned trial Judge was right in law to:

(i) receive the sworn testimony of a child in evidence without first determining whether the child was sufficiently intelligent to understand questions put to him and

(ii) Conduct part of the trial of the Appellant in a language neither understood by nor interpreted to the Appellant.

(4) Whether the learned trial Judge was right, in law, to convict the Appellant of murder when the prosecution did not prove its case against the Appellant beyond reasonable doubt.

A cursory look at the issues formulated by learned counsel for the Appellant reveal that Issues 1 & 4 are fragmented and split to the extent that they can be said to be proliferated as far as the primary complaint of the Appellant against the decision of the lower court is concerned. The point dealt with in the two issues by learned Counsel for the Appellant is that the prosecution did not adduce material and sufficient evidence to prove the guilt of the Appellant beyond reasonable doubt as required by law.

To avoid repetition issues 1 & 4 will be dealt with together in this judgment. Learned Counsel for the Appellant submits that the learned trial Judge believed and accepted Exhibit B as the confessional statement of the Appellant without considering and evaluating the contradictory testimonies of P.W2 & P.w4. He argued that the failure of the learned trial Judge to consider the testimonies of P.W2 and P.W4 made it impossible for the trial court to resolve the contradictions between these testimonies on one

hand and exhibit B on the other hand as to whether the Appellant voluntarily confessed to the crime. He referred to the case of IKEMSON V. THE STATE (1989) 3 N.W.L.R Part 110 page 455 at 467 para H. He further submitted that proper foundation was not laid before admitting exhibit B. It (i.e. exhibit B) was a secondary evidence, the original thereof having been lost with the case file. He urged the court to expunge exhibit B from the record and no reliance whatsoever should be placed on it. He submitted that the learned trial Judge ought to have evaluated all the evidence adduced by both sides before believing exhibit B assuming it was admissible. He referred to the cases of AWOPEJO VS. THE STATE (2002) 6 W.R.N 1 S.C pages 11-12 and OZIGBE V. AIGBE (1977) 7 S.C at page 1. He urged the court to resolve the doubt in P.W2's testimony in favour of the Appellant.

He canvassed further that there was no eye witness account of the Appellant shooting the deceased. The nearest the prosecution came to an eye witness evidence was the evidence of P.W3 who testified that the deceased and the Appellant were quarrelling and he later heard the deceased shouted for help. He submitted that in the absence of an eye witness, the prosecution should at least tender both the gun used by the Appellant to shoot the deceased and the forensic laboratory report to show that the gun was fired, that the pellets retrieved from the body of the deceased matched those fired by the gun and that the finger prints of the Appellant were on the gun.

From plethora of judicial authorities, it is now well settled that to secure a conviction on a charge of murder, the prosecution must prove

(1) That the deceased had died

(2) That the death of the deceased had resulted from the act of the Appellant and

(3) That the act or omission of the accused which caused the death of the deceased was intentional with the full knowledge that death or grievous bodily harm was its probable consequences.See the cases of ONAH V. THE STATE (1985) 2 N.S.C.C 361 at 1369 per Oputa J.S.C., NWAEZE V. THE STATE (1996) 2 N.W.L.R part 428 at page 1, YAKI V. THE STATE(2008) All F.W.L.R page 618 at 632 paras B-D. These three ingredients must co-exist and where one of them is absent or tainted with some doubt, the charge cannot be said to have been proved. See OBUDU V. THE STATE (19991) 6 N.W.LR part 198 at 433 and OGBA V. THE STATE (1992) 2 N.W.L.R part 222 at 164.

In the instant case, it admits of no argument that Fausat the wife of the Appellant died of gunshot. The evidence of the doctor who performed the post mortem examination (PW. 1) and Exhibit A are explicit on this fact. PW2 testified that he was on his farm when his son came to call him and when he got home, Fausat held on to him and told him that the Appellant had shot her. PW3 who happened to be the junior brother of the Appellant and a minor who gave evidence on oath after the court was satisfied

that he understood the meaning of giving evidence on oath stated that the Appellant and his wife i.e. the deceased were quarrelling on 29/9/99. Suddenly he heard Fausat (the deceased) shouted for help. He saw Fausat soaked in her blood before he went to call P.W2 who was away in the farm so that he could come and take Fausat to the hospital. The statement of the Appellant exhibit B though a photocopy which is confessional showed that the Appellant was the one who shot his wife.

These are the evidence on record to link the Appellant with the offence.

From the evidence on record, the evidence of Dr. Adenekan P.W1 was that he found an entry point of a gun shot injury on the right side of the abdomen of the deceased. He opened up the abdomen and found that the liver was ruptured and he recovered a few pellets. There was internal bleedings. In his opinion, the cause of death was due to ruptured liver as a result of gunshot wound.

Coupled with the statement made by the deceased to her father in law (P.W2) that the Appellant had shot her is admissible under Section 7 of the Evidence Act. The statement formed part of the relevant fact which throws light into how the deceased got her injury. It forms part of the res gestae of the fact in issue as it explained the injury which P.W2 and P.W3 found on the deceased. The said statement was contemporaneous enough with the act of shooting and the wounds found on the deceased by the P.W2 & P.W3. The statement is admissible in proof of what happened to the deceased and even proved the caused of death. See the case of AKPAN V. THE STATE (1994) 8 N.W.L.R page 226 at 246. From the evidence of P.W1, P.W2 and P.W3 it is clearly established that the gunshot wound inflicted on Fausat by the Appellant caused her death and I so hold.

Whether the death was brought about by the intentional act of the Appellant which to his knowledge would reasonably cause the death of the deceased is what I shall now examine anon. Exhibit B is the photocopy of the statement made by the Appellant to the Police during investigation. In the statement, Appellant narrated how he had a misunderstanding with his wife about money for food for their child and how the deceased slapped him, hit him with a plate and he took a gun of a relation on the corridor and fired the deceased who was facing him. Exhibit B is confessional and corroborates the statement made by the deceased to P.W2 and showed how the deceased got the injury that eventually killed her.

Let me however quickly say that in our jurisprudence, a man is taken to have intended the natural consequences of his act. I will also add that the Appellant shooting the deceased with a gun knew to his knowledge that it would cause death and it is heavier in retaliation for slapping and hitting one with a plate. I hold that the act of the Appellant which caused the death of the deceased was intentional with the full knowledge that death or grievous bodily harm was its probable consequences. See the cases of OMINI V. THE STATE (1999) 12 N.W.L.R Part 630 at 168; NWAEZE V. THE STATE (1996) 2 N.W.L.R part

428 at 11; GIFA V. THE STATE (1996) 4 N.W.L.R Part 443 at 375 and THE STATE V. AZEEZ (2008) Vol. 43 W.R.N page 1 at pages 36-37 lines 20- 20 per Mohammad J.S.C.

At the trial, the Appellant denied or retracted his confessional statement i.e. Exhibit B. Retraction from a confessional state by an accused person of having made such a statement does not ipso facto render it inadmissible in evidence and in this respect a confession contained in a statement made to the Policies not to be treated differently from any other confession. See BATURE V. THE STATE (1994) 1 N.W.L.R part 320 at 267; SHITTU V. THE STATE (1990) 1 ALL N.L.R at 228; EGHOGHONOME VS THE STATE (1993) 7 N.W.L.R Part 306 at 383 and AYO V. THE STATE (2009) VOL. 8 W.R.N page 134 at pages 152-153 lines 35-5.

To determine the truth or voluntariness of an accused person, the Court would have to consider the following:

(1) Is there anything outside the confession to show that it is true? P.w1 Dr. Adeneken who performed the postmortem examination stated that he found an entry point of a gunshot on the right side of the abdomen of the deceased. When he opened up the abdomen, he recovered a few pellets and he concluded that the cause of death was as a result of gun shot wound. See page 13 lines 11-15 of the record.

(2) Is it corroborated? The statement made by the deceased to her father in law (P.W2) that the Appellant had shot her which is admissible under Section 7 of the Evidence Act as to how the deceased got the injury found on her has corroborated the confessional statement i.e. Exhibit B. See page 14 lines 6-7 of the record.

(3) Are the relevant statements made in it of facts true as far as they can be tested? The fact of the appellant quarrelling with the deceased in the said statement Exhibit B was also corroborated or confirmed by P.w3 in his evidence that the Appellant and the deceased were quarrelling See page 15 lines 10-12 of the record. The Police could not have manufactured the facts contained in Exhibit B.

(4) Whether the Appellant had the opportunity of committing the crime. The Appellant's alibi was raised for the first time in court when he was giving evidence and P.w3 in his evidence stated at page 15 lines 14-15 thus "On that date myself, my junior brother Olaolu, the accused and late Fausat were the people at home". The statement had fixed the Appellant at the scene of crime. The Appellant said he escaped after firing in Exhibit B. See page 9 line 17.

(5) Is his confession possible? It is possible for young couple to quarrel over feeding allowance of their child when faced with financial problem see Exhibit B.

(6) Is it consistent with other facts, which have been ascertained and have been proved? It is consistent with the evidence of P.W1, P.W2 and P.W3 on the record of proceedings.

Let me say also that in murder cases, the failure to tender in evidence the instrument used for committing the offence of murder i.e. the gun in this instance or failure to take the exhibit for forensic analysis is not fatal to the case of the prosecution or sufficient to dislodge the case of the prosecution that there was no proof beyond reasonable doubt. P.W4, I.P.O in this case at page 18 lines 2-4 gave an explanation as to why he did not produce the gun. He said 'The scene of crime was visited by me led by Inspector Kolawole and a dane gun was recovered which the accused used in firing the deceased. The dane gun is still in the exhibit room as I do not know the registration number since the original case file is missing."

I see him as a credible witness for speaking the truth and this explains why the gun was not tendered in Court.

On the issue of the voluntariness of the confessional statement i.e. exhibit B Appellant's Counsel did not object at the stage of tendering the statement. The appropriate stage to raise an objection to a confessional statement is when it is about to be tendered in evidence especially where the accused person is represented by Counsel and it is assumed that he ought to know what to do at each stage of proceeding. The retraction was made when the Appellant was testifying at the trial Court. Any belated denial of the voluntariness of a confessional statement or its retraction is a mere after thought. See: NWACHUKWU V. STATE (2004) 17 N.W.L.R Part 902 at 262; USUANG V. STATE (2009) 1 ALL F.W.L.R pg 1203 paras C-D

Order 15 of the Court of Appeal Act empowers this Court to make an order on such terms as the Court thinks just, to ensure the determination of the merits of the real question in controversy between the parties. The omission of the trial Judge to conduct trial within trial with a view to determining the voluntariness of Exhibits B does not vitiate the conviction as contended by the Appellant's Counsel. The Court of Appeal even though cannot hold a trial within trial as the trial court could have done, yet where there are sufficient materials before the Court of Appeal, it can determine the voluntariness or otherwise of a confessional statement based on the evidence on record. See the case of GEORGE V. THE STATE (2009) 1 N.W.L.R Part 1122 page 325 at 350 paras G-H. Exhibit B had been tested under the (6) six questions that a Judge should ask himself and consider before deciding on the voluntariness and I am satisfied that the confessional statement was voluntary and therefore admissible.

The Court is unable to find any contradiction in the evidence of P.W2 and P.W4 as alleged by the Appellant's Counsel as a court of law is enjoined to consider the total package of the defence and not to

go to the minutest details. If every contradiction however trivial to the overwhelming evidence before the trial, will vitiate a trial, all prosecution cases will fail. Human faculty may miss details due to lapse of time and error in narration in order of sequence. A contradiction to be fatal to the prosecution's case must go to the substance of the case and not be of minor nature. See SELE V. THE STATE (1993) 1 S.CN.J part 1 at page 15; YAKI V. STATE (2008) ALL F.W.L.R part 440 page 618 at 644 paras B-C. P.w2's evidence under cross examination that the Appellant told the Police that he never knew how the incident happened is self serving being the father of the Appellant. I am inclined to believe that he gave this answer to save the life of his son who is the Appellant. Justice is not to the Appellant alone, the deceased in her lonely grave is crying for justice and there must be justice for the society at large too.

The Court holds from the evidence on record that Fausat Sunday died, that her death was as a result of the gunshot which resulted from the Appellant's act and taking into account the nature of the weapon used and the part of the body affected on the deceased by the act of the Appellant, the Court is not left in any doubt that the Appellant knew or had reason to believe that death would be the likely consequence of his action. The prosecution has proved the charge beyond reasonable doubt.

P.W4 laid proper foundation for tendering the photocopy of Exhibit B.

He told the Court thus:

"I was later transferred and I handed the case file to Inspector Johnson who later transferred to Lagos and the case file was transferred to late Corporal Warri and since then the case file could not be traced. The case file was earlier duplicated and sent to D.P.P."

See page 17 lines 21-24 of the record of proceedings. The learned trial Judge gave adequate evaluation of the evidence for the prosecution and the defence. He also considered possible defences that were not even raised by the Appellant before arriving at his decision. Issues 1 & 4 are hereby resolved against the Appellant.

On issue 2 Learned Counsel to the Appellant submits that the failure of the prosecution to investigate and disprove the alibi of the Appellant raises a reasonable doubt against the testimony of P.w2 which placed the Appellant at the scene of the crime. He submitted that the testimony of P.W2 was one of the major pieces of evidence upon which the Appellant was convicted. He urged the Court to resolve the doubt created by the failure of the Police to cross check the Appellant's alibi in favour of the Appellant.

It is settled principle of law that it is not every failure of the Police to investigate an alibi raised by an accused person that is fatal to the case of the prosecution. See PATRICK NJOVENS & ORS V. THE STATE (1975) 5 S.C page 12 at 47 where the Supreme Court held "There is nothing extraordinary or exoteric in a plea of alibi. Such a plea postulates that the accused person could not have been at the scene of crime

and only inferentially that he was not there. Even if it is the duty of the prosecution to check on a statement of alibi by an accused person and disprove the alibi or attempt to do so, there is inflexible and for invariable way of doing this. If the prosecution adduces sufficient and acceptable evidence to fix the person at the scene of crime at the material time, surely his alibi is thereby logically and physically demolished."

In the instant case, the alibi was raised in the Court by the Appellant when he was giving evidence. The answer of P.w2 in Court to cross examination that "The accused in my presence told the Police that he never knew how the incident happened" should not be taken as an alibi but a denial of the Appellant committing the crime. The Court has made its findings on the denial. Assuming it is, the evidence of the alibi in Court raised for the first time will be like engaging the Police in a worthless exercise of investigating a bottom less defence. See STATE V. AZEEZ (2008) 43 W.R.N page 1 at 57 per Oguntade J.S.C and ONYEGBE V. THE STATE (1995) 5 S.C.N.J at 275-277. It will be a Herculean task for the Police to investigate the alibi raised when Appellant was testifying in his own defence in court. The trial Court's rejection of the plea in view of the res gestae made by the deceased to P.W2was proper. The defence of alibi will not avail the Appellant. Issue two is hereby resolved against the Appellant.

Learned Counsel for the Appellant on issue 3 submitted that the Appellant is an illiterate who can neither read, write nor understand English. He argued that the trial was conducted in breach of Section 36 (6) (c) of the 1999 Constitution of the Federal Republic of Nigeria and in breach of the Appellant's right to fair hearing. He argued further that P.w3 who is a child was tested by the Court whether he understood the nature of an oath but did not determine whether the child was sufficiently intelligent to understand questions put to him as provided by Section 155 (1) of the Evidence Act. It is only after a Court has satisfied itself that the child is sufficiently intelligent that it is required to determine if the child understands the nature of an oath and how the Court came to be satisfied was not recorded. He referred to the case of SAMBO V. THE STATE (1993) 6 N.W.L.R at 399. He urged the Court to resolve the issue in favour of the Appellant.

The opinion about a child witness is as the section clearly shows, "the opinion of the Court" so that when a Judge sits alone, he is undoubtedly the person whose opinion is relevant. See ONYEGBU V. THE STATE (1995) 14 S.C.N.J page 275 at 288. Where the child comprehends the essence of an oath and the Court is satisfied, the first question is also impliedly satisfied see PETER VS. THE STATE (1997) 12 S.C.N.J page 53 at 66 where the Supreme Court held:

"Where in the opinion of the Court, a child understands the nature of an oath, it is not necessary for the Court to carry out further preliminary investigation for the purpose of ascertaining whether the child has

sufficient intelligence to satisfy his giving evidence and understands the duty of speaking the truth as prescribed by Section 183 of the Evidence Act".

The Court was satisfied that P.w3 understood the meaning of giving evidence on oath. See page 32 lines 26-27 of the record.

The law has for long been settled that the Constitutional right granted to an accused to have an interpreter could not be invoked on appeal by an Appellant who had been represented by Counsel at the trial as a ground for setting aside a conviction unless he claimed that right at the proper time and was denied of it. An accused must therefore claim his right to an interpreter at the time of his trial not after, for the first time an appeal. See ONYIA VS. THE STATE (2008) 36 N.S.C.Q.R page 1090 at 1125 per I.T Muhammad J.S.C. Appellant was represented by Counsel at the trial Court throughout the proceedings. It is for the Appellant or his Counsel to take the initiative of bringing this fact to the notice of the Court at the earliest opportunity or as soon as the situation has arisen. If he does not claim the right at the proper time, he may not be able to have a valid complaint afterwards for example an appeal. See DURWODE V. THE STATE (2000) 12 S.C Part 1 page 1 at 18 lines 10-20. In the result I take the view that the Appellant's contention in this regard is a non starter. See also OGBA V. THE STATE (1992) 2 N.W.L.R Part 222 at 164 or (1992) 2 S.C.N.J Part 1 page 106 at 195 paras B-D per Kariby-Whyte J.5.c. The Counsel did not raise any objection. It is too late in the day to now cry wolf. Issue three is hereby resolved against the Appellant.

Having resolved all the issues against the Appellant for the reasons given in this Judgment, I am therefore of the view that the guilt of the Appellant was established beyond reasonable doubt upon the evidence led at his trial.

Accordingly this appeal lacks merit and it is hereby dismissed. The Appellant's conviction is hereby affirmed as well as the sentence imposed.

ISTIFANUS THOMAS, J.C.A.: I had the opportunity of reading in advance the lead judgment of my learned brother Modupe Fasanmi, JCA, just delivered. I entirely agree that the brutal murder of his own wife committed by the appellant was corroborated by the evidence of PW2, a father in-law to whom the deceased clearly informed him that it was the Appellant who shot her with the gun that caused her death. PW3 being a child of tender age was first put to test to ascertain his truthfulness of speaking in evidence and the child passed the test of truthfulness. The evidence of PW3 destroyed the Appellant's false defence of alibi. Based on the corroborative evidence of PWs 1, 2 and 3, it is well established that the gun shot was fired by the appellant and that fire caused the death of the deceased. Based on this

fact, and the more detailed findings and reasons in the lead judgment, I hereby dismiss the appeal and affirm the conviction and sentence passed by the lower High Court.

SIDI DAUDA BAGE, J.C.A.: I agree with the reasons advanced in the lead judgment of my learned brother, M. Fasanmi, J.C.A., to arrive at the conclusion that the Appeal is devoid of merit and should be dismissed.

I have no doubt about it that the Appeal is without any merit. The same is also dismissed by me and I abide by the consequential order made therein.

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Appearances

Mr. Olusegun FowoweFor Appellant

AND

T. S. LaluFor Respondent