IN THE SUPREME COURT OF NIGERIA

Suit No: SC253/2003

Petitioner: Bassey Akpan Archibong
And
Respondent: The State

Date Delivered: 2006-05-12

Judge(s): Sylvester Umaru Onu , Akintola Olufemi Ejiwunmi , Dahiru Musdapher , Walter Samuel Nkanu Onnoghen , Ikechi F

Judgment Delivered

In the High Court of Justice of Akwa Ibom State, in the Uyo Judicial Division, the Appellant was arraigned and tried and convicted on an information containing one count charge to wit: murder, contrary to section 319(1) of the Criminal Code Cap 31 Vol. 11 Laws of Cross River State applicable to Akwa Ibom State, the particulars of which were that on the 5th day of July 1988, at Babara Inn, No 22 Uko Eshiat Street, Uyo in the Uyo Judicial Division, the Appellant murdered Bernadette Edem Essien. The Appellant pleaded not guilty to the charge and at the ensuing trial the Prosecution called four witnesses and closed its case, after which the Appellant whose 'no case submission' was overruled testified on his own behalf and called no other witness.

The case of the Prosecution as narrated by the witnesses was that on the 5th day of July 1988, Bernadette Edem Essien (the deceased) and the Appellant went to Babara Inn at about 3.00 p.m. After ordering and taking some drinks, the Appellant booked for a room at the inn. The rate they charge was N2.00 per hour. The Appellant and the deceased were checked into the room by one of the waiters or attendants called Peter Paulinus (P.W.3). The Appellant and the deceased moved into the room and locked themselves by about 6.00 p.m. At about 7.00 p.m, P.W.3 knocked at the door of the chalet to ask for the money due for the hiring of the chalet and for the drinks taken by the deceased and the Appellant. The Appellant responded and stated that he would pay when he came out. He asked for a little extra time. At about 8.00 p.m, P.W. 3 knocked at the door of the chalet again and there being no response, he opened the door, switched on the lights and noticed that the Appellant was no longer in the room, he had somehow mysteriously disappeared. He observed the woman lying naked, motionless and dead on the floor and observed foams from her mouth and nose. The clothes the woman wore were thrown on a table in the room. P.W. 3 drew the attention of P.W.2, Margaret Otu Udo who was a waitress or attendant at the Babara Inn. Early on the following morning the 6th of July 1988, the proprietor of Babara Inn, Paulinus Bassey Etim (P.W.1) was alerted about what had happened in his Inn. He promptly went into the chalet and after observing the deceased still lying naked on the floor with her clothes on the table, asked P.W.1 and P.W. 2 to lodge a complaint with the police. P.W.1 and P.W.2 were detained by the police until the Appellant was arrested. Both P.W.1 and P.W.2 knew the Appellant as a customer at the Inn. That occasion of the 5/7/1988 was not the first time the Appellant came and hired a room with the deceased. The Appellant and the deceased were regular customers, coming to the Inn and renting chalets.

In fact P.W.3 thought the deceased was the wife of the Appellant. It was apparently based on the description of the Appellant made by P.W.2 and P.W.3 that the police were able to arrest the Appellant. And in the midst of policemen in uniform and others, P.W.1 and P.W.2 picked out the Appellant in an identification parade. Subsequent medical examination of the deceased by P.W. 4, Dr. Udeme Daniel Akpan, revealed that the deceased died due to suffocation either by strangulation or by some other means and that the bruises on her body and the act of strangulation could not be self inflicted. In both his statement to the police Exhibit A and in his evidence before the trial Court, the Appellant admitted knowing the deceased to be the wife of his half brother or sometimes wife of his cousin and therefore well known to him. He however denied having anything to do with her death. He however admitted that he saw her in the vicinity of the Inn at one time. He sought to put up a defence of alibi but that only explained his whereabouts from morning up to about 3.00 p.m on that fateful day. According to him his son was ill on that day and he had taken him to a native doctor, who was also his brother, Effiong Archibong, and had only returned home with the son at about 3.00 p.m on that date and had not gone out any where from that time. In a considered judgment delivered on the 1/8/1991, the

learned trial Judge, Umoren, J., (as he then was) reviewed the evidence and rejected the alibi set up by the Appellant. He convicted the Appellant for the murder of the said Bernedette Edem Essien and sentenced him to death. The Appellant appealed to the Court of Appeal where two issues were submitted to that Court for the determination of the appeal.

The issues were: -

'(1) Whether the identity of the Appellant as the perpetrator of the crime charged was proved beyond reasonable doubt.
(2) Whether the circumstantial evidence was direct, positive, cogent and compelling to warrant the conviction of the Appellant.'

After the consideration of the submissions of Counsel in the briefs and oral arguments, the Court of Appeal resolved the issues against the Appellant and affirmed the conviction of the Appellant for the murder of Bernedette Edem Essien and also confirmed the sentence of death imposed. This now, is a further appeal to this Court.

In his Brief for the Appellant, the learned Counsel has identified formulated and submitted to this Court, 3 issues arising for the determination of the appeal. The issues read: -

'1. Was the lower appellate Court right to have affirmed the finding of the trial Court to the effect that the two Prosecution witnesses sufficiently knew the deceased person before the date of the incident and correctly identified him as the person who brought the deceased woman to the hotel on that fateful day.

2. In all the circumstances of this case, was the lower appellate Court right to affirm the conviction of the Appellant for murder when the case of the Prosecution is not free from doubt.'

3. Was Exhibit A properly received in Evidence' And if the answer is in the negative did the wrongful admission of Exhibit A lead to a miscarriage of justice.'

The learned Counsel for the Respondent on the other hand has submitted the following two issues arising for the determination of the appeal: -

'1. Was the Court of Appeal right in affirming the conviction of the accused person by the trial Court.

2. Whether the admissibility of 'Exhibit A in evidence occasions any miscarriage of justice.'

I shall, however treat this appeal on the basis of the issues as discussed by the learned Counsel for the Appellant in the Appellant's Brief.

Issue No 1

This is concerned with whether the identity of the Appellant as the perpetrator of the crime was established beyond reasonable doubt, it is argued that both P.W. 2 and P.W. 3 who claimed familiarity with the Appellant did not in actual fact know him well enough. It is conceded that this issue is concerned with the concurrent findings of fact by two Courts and this Court will only up turn concurrent findings of fact where such finding is perverse or when it will result in a miscarriage of justice. It is submitted that this is a proper case in which this Court should interfere and reverse the findings of fact. It is submitted that the law is settled that the identity of an accused will not be in doubt if there is evidence before the Court showing the opportunity the witnesses had to identify the accused as the assailant vide Olalekan vs. State [2001] 18 NWLR (Pt. 746), Ajibade vs. State [1987] 1 NWLR (Pt. 48) 205. But such evidence should be received with caution and it must be weighed against other available evidence. See Abudu vs. State [1985] 1 NWLR (Pt. 1) 1.

In the instant case, although it is evident that the Appellant was known to and was identified by both P.W. 2 and P.W. 3,

yet the witnesses did not identify him by name. Learned Counsel submitted, doubt exists, even though P.W.3 described the Appellant to the police which description enabled the police to arrest the Appellant. Further to the above, P.W. 2 and P.W. 3 identified the Appellant because he was chained. It is argued that the chains proded P.W. 2 and P.W. 3 to identify the Appellant, it is argued that without the chains, the witnesses would find it impossible to identify the Appellant. It is again added, that if it was true that the Appellant was a frequent user of the chalets in the Hotel room why was it necessary for him to ask P.W. 3 what the rate of hire was' It is argued that a combination of these facts will reveal that the identity of the Appellant did not measure up to the standard required. The evidence was not properly evaluated by the trial Court. See Oje vs. State [1972] SC 23.

The learned Counsel for the Respondent on the other hand argued that the identification of the Appellant by P.W. 2 and P.W. 3 was a concurrent finding of fact by the lower Courts and can only be reversed upon exceptional circumstances by a further appellate Court. See Olokotintin vs. Sarumi [2002] 13 NWLR (Pt 784) 307. Jonason Triangles Ltd vs. CM&P Ltd. [2002] 15 NWLR (Pt. 789) 194, Akaluka vs. Yongo [2002] 5 NWLR (Pt. 759) 135.

It is submitted that the issue of identification is in the exclusive preserve of the trial Court. See Orimoloye vs. State (1984) NSCC 654 at 657. The evidence led by both P.W. 2 and P.W 3 is beyond any doubt that they knew the Appellant well before the fateful day. Not only that, the Appellant himself conceded that he knew both P.W. 2 and P.W. 3 at the Inn. The fact that it was common ground that the Appellant and the witnesses knew each other makes it unnecessary for the identification parade. See Igbi vs. State [2000] 3 NWLR (Pt 645) 169, Ibrahim vs. State [1991] 4 NWLR (Pt. 186) 399, Adeyemi vs. State [1991] 1 NWLR (Pt. 170) 679.

It is further submitted that the credibility of both P.W. 2 and P.W. 3 in relation to the identification of the Appellant was beyond doubt when the Appellant himself admitted both in his evidence and in his statement to the police that he knew both P.W 2 and P.W. 3 to be staff in the Babara Inn. It is further argued that it is not a necessary condition for the identification of a person by another that the name of the identified person must be known see Ibrahim vs. State [1991] 4 NWLR (Pt. 186) 399; Adeyemi vs. The State (1991) 1 NWLR (Pt. 170) 679.

Now, whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused, which the defence alleges to be mistaken, the Court must closely examine and receive with caution, the evidence alleged before convicting the accused on the correctness of the identification. See Eyesi vs. The State [2000] 15 NWLR (Pt. 691) 555 at 557. Identification in this connection means a whole series of facts and circumstances for which a witness or witnesses associate an accused person with the commission of the offences charged. It may consist of or include evidence in the form of finger prints, hand writing, voice, identification parade, photographs, identikit, or the recollection of the features of the culprit by a witness who saw him in the act of commission of a crime or a combination of two or more of these. See State vs. Aigbanbee [1988] 3 NWLR (Pt 84) 548. Anyanwu vs. State [1985] 5 NWLR (Pt. 43) 612. The question whether an accused person was properly identified or not is a question of fact to be considered by the trial Judge see Orimoloye vs. State (supra).

In a criminal trial where it is suggested that a piece of evidence casts save doubt in the Prosecution's case, it is necessary to show, unless such is manifest or evident from the records, what aspect of the case becomes doubtful by reason of the evidence. In the instant case therefore, it is plainly illogical to attack the credibility of P.W 2 and P.W 3 on the identification of the Appellant, when the Appellant himself concedes that both P.W. 2 and P.W. 3 were known to him before the date of the incident in question. In my view, considering the whole circumstances of this case, it was otiose to hold an identification parade. It is not in every case that an identification parade becomes necessary. See Adeyemi vs. The State (supra). In the present case, rather than be a case of mistaken identity, it was one of recognition and knowledge of the Appellant who was already known to the witnesses prior to the date of the incident in question. The Appellant who by his statement to the police and his evidence admitted the knowledge of him by both P.W. 2 and P.W. 3 can hardly complain of any mistaken identity.

In my view, the identification of the Appellant as the person who went into that room with the deceased on that fateful day by P.W. 2 and P.W. 3 was a concurrent and consistent finding of fact both by the trial Court and Court of Appeal, I have myself examined the evidence and I am also of the view that the finding is supported by the evidence led. Nothing has been shown to convince me that the finding is perverse or that it has occasioned any miscarriage of justice. I

accordingly resolve the issue against the Appellant.

Issue No 2

The complaint under this issue is whether the Court of Appeal was right to affirm the conviction of the Appellant for murder when the case of the Prosecution is not free from doubt. It is submitted that the Prosecution relied on circumstantial evidence to prove the guilt of the Appellant, however to ground a conviction on circumstantial evidence, such evidence must be unequivocal, positive and point irresistibly to the guilt of the accused person. See Oladejo vs. The State (1987) 2 NSCC 1025, Lori vs. The State (1980) 8-11 SC 81. It is submitted that where circumstantial evidence is relied upon, it must be narrowly examined to be sure that there are no co-existing circumstances, which would weaken or destroy the inference. See Ebre vs. The State [2001] 12 NWLR (Pt. 728) 617; Teper vs. R. [1953] AC 480, Ukorah vs. The State [1980] 1 - 2 SC. 116. It is submitted in the instant case, that there are existing, a lot of circumstances which weaken and destroy the inference of the Appellant's guilt.

There are:

(1) The identification of the Appellant as discussed in Issue No 1 above.

(2) P.W.2 and P.W.3 were initially detained and no reason was given for identification parade. The Investigating Police officer did not testify at the trial and no reason was also offered by the Prosecution. The Investigating Police Officer is a vital witness vide Idowu vs. The state [2000] 12 NWLR (Pt. 680) 48.

(3) That there were inconsistencies and contradictions in the evidence of the Prosecution witnesses. It is argued that the fact that the issue of contradiction were not raised at the trial Court, there was nothing in law that would debar from raising them in the Court of Appeal vide Adewosi vs. Popoola [1998] 12 NWLR (Pt. 579) 579 at 585. It is submitted that the contradictions weaken the inferences that were drawn.

(4) There was no evidence as to the identity of the woman who was said to have died. The onus was on the Prosecution vide Oladimeji vs. The State (supra). The Doctor who performed the post mortem examination in his evidence claimed that the corpse was identified to him by Comfort Essien, Comfort Essien did not testify. The trial Judge acted erroneously when he held that under the circumstances of this case, there was no need for Medical Report as to the cause of death and consequently there was no need to identify the body. It is finally submitted that the circumstantial evidence is full of holes and it is not safe to convict the Appellant on such evidence.

The learned Counsel for the Respondent on the other hand argued that, the arrest of P.W. 2 and P.W. 3 by the Police or the failure of the Investigating Police officer to testify and or tender the statement of P.W. 3 (describing the Appellant) was not material to the case of the Prosecution. It is submitted that these matters are not germane howsoever in the determination of the core issues before the trial Court. The fundamental and crucial issues are whether PW2 and PW3 knew the Appellant and could identify him as a regular customer to the hotel and the involvement of the Appellant with the murder of the deceased. The Court could not be compelled to use the identification parade. See Ogbodu vs. The State (1987) 2 NWLR (Pt 54) 20. It is added that the absence of the IPO and PW3's statement to the Police did not weaken howsoever the credibility of the evidence adduced. It is further argued that the alleged contradiction and the inconsistence cited are not material and did not affect or weaken the evidence adduced. It is submitted that the circumstantial evidence in this case is 'direct, positive, unequivocal, cogent and compelling.' See Ebre vs. State supra Oladejo vs. State (supra) Lori vs. State (1980) 8 - 11 SC 8.

It is further submitted that for contradictions to be material and damaging to the Prosecution's case, it must be substantial and fundamental to the main issue in question so as to affect the credibility of the evidence. See Theophilus vs. State [1996] 1 NWLR (Pt. 423) 139. Igbi vs. State (supra) Khaleel vs. the State [1997) 8 NWLR (Pt. 516) 237; Iko vs. State [2000] 9 NWLR (Pt. 671) 54. It is further submitted that the issues of contradictions in the evidence, is a fresh issue as it did not arise for determination in the trial Court, and that although the Court of Appeal held that the issue was a fresh issue and no leave was sought and obtained to raise it, yet went a head to discuss it and rightly held that the so called contradiction are not material.

It is further submitted that the identity of the deceased was also raised for the first time in the Court of Appeal without leave and no leave was also sought to raise it in this Court. See Ikpo vs. State [1995] 9 NWLR (Pt. 421) 540. It is further

submitted that requirement of identification evidence is not always necessary since P.W.2 and P.W.3 who knew both the Appellant and the deceased before, identified the deceased as the woman the Appellant used to bring to the hotel and they saw her dead in circumstances that only the Appellant have killed her and no one else.

Now, under our criminal jurisprudence where doubt exists in the mind of the Court on the guilt of an accused person, the Court should acquit and discharge the accused. See Shande vs. State [2005] 22 NSCQR 756. Insufficiency of evidence or lacking in credibility of evidence cannot ground a conviction of a criminal offence. But a conviction of murder may be secured upon circumstantial evidence that is the evidence, which unequivocally points to one direction only that the accused person was the one who killed the deceased. It must be evidence, that is cogent, complete, unequivocal, compelling and must lead to the irresistible conclusion that the accused and no one else is the murderer see Lori vs. State (supra), Ashipe vs. State (1971) 1 ALL NLR 50; Ugwu vs. State [1972] 1 SC. 128. In the case of Nwokoronkwo vs. The State [1972] 1 SC 135, it was held that a Court may convict an accused person of murder even though the dead body cannot be found, provided that there is sufficient compelling circumstantial evidence to lead to the inference that the man had been killed. See also Ayinde vs. The State [1972] 3 SC 153 at 158 -159 where this Court per Coker J.S.C. said:

On this point the learned trial Judge directed himself thus: -

'The law as regards the absence of a corpus delicti is that a Court may still convict an accused person of murder even though the dead body cannot be found, provided that there is sufficient compelling circumstantial evidence to lead to the inference that the man has been killed.'

See Michael Onufrejezyk vs. R. [1955] 39 C.A.R. 1 in the case of Ogundipe vs. Queen 14 WACA 485, one Apalara, a Moslem preacher was attacked by a group of persons and carried into a house at Tapa Street. Thereafter, he was not seen again. But on investigation human blood was found leading from this house into the Lagoon. The men were convicted of murder, on an appeal, the West African Court of Appeal held that there was sufficient circumstantial evidence to show that Apalara died from the injuries inflicted on him.

'We thought ourselves that the learned trial Judge properly directed himself on the law concerning the corpus delicti, that direction postulated that there must be sufficient and compelling evidence pointing to the death of the deceased.'

In this connection, see also State vs. Edobor [1975] 9 - 11 SC 69; Edim vs. The State. [1972] 4 SC. 160.

Now, there is no dispute whatever, that the Appellant was seen sitting down drinking and talking with a woman, they were seen and indeed directed to a room hired by the Appellant by P.W. 3 on that fateful day.

About one hour later, after the Appellant and the woman locked themselves into the room, P.W.3 came to collect the rental and money for the drinks earlier ordered by the Appellant. In response to a knock on the door, the Appellant requested P.W. 3 to allow him a little more time. When next P.W. 3 went to check on the Appellant and the woman, there was no response from the room. When P.W. 3 gained entry into the room, he found the woman naked and dead, and the Appellant nowhere to be found. There was evidence accepted by the trial Judge that no one else had access to the room after the Appellant and the deceased woman entered and locked themselves in. It was also evident that the woman died of strangulation, which could not be self-inflicted. The inference that the Appellant killed the woman is cogent, compelling and irresistible.

But, it is also the law that circumstantial evidence should be used and applied sparingly because of the possibility of fabrication, which may cause suspicion on innocent person. See Udedibia vs. State [1976] 11 SC 133. Fatoyinbo vs. Attorney-General W.R [1966] WRNLR 4. In using circumstantial evidence to determine the guilt of a accused person it must be shown by credible evidence that there are a number of circumstances co-existing and which are accepted by credible evidence so as to make a complete and unbroken chain of evidence and these constitute sufficient and cogent proof that the accused committed the offence. See Ukorah vs. State [1977] 4 SC 167. The standard of proof required is very high, the evidence required must be reliable and credible and must be consistent with no other rational hypothesis except the guilt of the accused, it must be clear that no other co-existing circumstances arise which, would weaken the

inference. Omogodo vs. State [1981] 5 SC 5. Even though circumstantial evidence is often described as the best evidence, the Prosecution must still prove its case beyond reasonable doubt. See Nasamu vs. State [1979] 6 - 9 SC 153.

In our criminal jurisprudence if there is any doubt as to the guilt of an accused person, arising from the contradictions in the Prosecution's evidence, it must be resolved in favour of the accused. But the contradictions and inconsistencies must relate to fundamental and core issues. See Ankwa vs. State [1969] 1 ALL NLR 133. Contradictions in the evidence of witnesses may not be necessarily fatal to a case especially when they are minor and did not materially affect the fundamental and crucial issues. See Queen vs. Ekanem [1960] 5 FSC 14, Queen vs. Iyanda [1960] 5 FSC 263,Omisade vs. Queen [1964] 1 ALL NLR 233.

I have myself examined the evidence of the Prosecution's witnesses in the instant case and I find that the contradictions are minor and did not affect the credibility of the evidence of the witnesses. I also find no merit in the complaint under this head, I accordingly resolve the second issue against the Appellant.

Issue No 3

This issue is concerned with the admission in evidence of the statement made to the Police by the Appellant and its reliance by the lower Courts, which was alleged to have prejudiced the Appellant. The document was tendered by the Prosecution during the cross examination of the Appellant and was admitted by the trial Judge despite the objections raised by the Appellant's Counsel. It is submitted that the document Exhibit A was irrelevant and that the provisions of section 198 [now 199] of the Evidence Act were not satisfied. It is argued that the trial Judge was in error to have received the statement in evidence at the stage the document was admitted when it was not admitted to contradict the evidence of the Appellant, nor was it tendered as a confessional statement. It was merely tendered by the learned trial Judge because \"It is not canvassed that this statement was obtained by force, duress, promise of hope made by a person in authority. There is nothing therefore to render the statement which the prisoner has admitted as his from being admitted.' It is submitted that the improper use to which the lower Courts put on the said exhibit has prejudiced the case of the Appellant and thereby led to a miscarriage of justice.

The learned Counsel for the Respondent on the other hand submitted that the cardinal principle guiding the admissibility of documents is its relevance. See Kuruma vs. R. [1955] AC. 192. It is further argued that the Appellant himself sought to adopt it, as part of his defence and the statement in Exhibit 'A' is clearly not inconsistent with his evidence in Court. See Oladejo vs. State (supra). It is again added that the admissibility of Exhibit A did not occasion any miscarriage of justice, even if the content of Exhibit A are expunged from the records, there remains sufficient evidence to enable the Court convict the Appellant. See State vs. Ogbubunjo [2001] 2 NWLR (Pt 698] 576.

Now in any trial where evidence has been improperly received by the trial Court, even when no objection is raised, it is the duty of the appellate Court to reject such evidence and decide the case on the available legal evidence. In the case of Queen vs. Haske [1961] 1 ALL NLR 330, it was held that an appeal Court will only reverse the decision of the trial Court where the conviction of the accused was based on improperly admitted evidence and the appeal Court is not certain that the trial Court would have come to a different conclusion if the evidence had not been admitted. In every case, whether civil or criminal objection to the admissibility of a document must be made when the document is offered in evidence. Where no objection is raised when offered, the document will be admitted and the opposing party cannot later complain on its admissibility unless the document is by law inadmissible. Where the law declares a document inadmissible for non-compliance with its provisions the document cannot be admitted in evidence not even by consent of the parties. See Agbeyin vs. The State [1967] NMLR 129.

Thus there is a distinction between wrongful admission of inadmissible evidence and the wrongful use of otherwise admissible evidence may not necessarily affect the eventual verdict of the trial Court. It is also trite, that a person who complains that a piece of evidence was wrongly admitted, must not only prove that it was wrongly admitted but also prove that such wrongful admission has adversely affected the due consideration of his case. So, where it is possible to exclude the wrongfully admitted evidence and yet have enough material to sustain a conviction, the wrongful reception of such evidence would not affect the decision.

Applying the above principles, it is my considered view, that even if the statement of the Appellant in Exhibit A is excluded, the learned trial Judge would have come to the same conclusion that it was the Appellant who killed the deceased. In his appraisal and evaluation of the evidence, the learned trial Judge had accepted as the truth, the evidence P.W. 1, P.W 2 and P.W 3, the learned trial Judge held at page 49, of the record of proceedings thus: -

'P.W 2's and P.W. 3's evidence appear unshaken that the accused and the deceased came to Barbara Inn on 5/7/88 by 3.00 p.m though one after the other, but together hired a chalet and went in there. So that the deceased was last seen alive in company of the accused. There is no evidence that some one else had access to or went into the chalet when the deceased and the accused were there. When P.W.3 knocked at the door of the chalet, the accused offered to pay for the extra time but that P.W 3 should wait. Thereafter, the accused never came out to meet P.W. 3 to pay for the chalet or the drinks they took. There is no evidence of how the accused left the Chalet, he was not seen when he left the chalet, in other words he sneaked away. When P.W. 3 opened the door he saw the deceased, naked and dead. Circumstantial evidence is after all evidence of surrounding circumstances which makes the facts in issue more or less probable by reason of their connection or relation to them. Despite the accused's denial, all evidence point conclusively to the fact that the accused went into the chalet with the deceased who never came out alive again.

In spite of the very positive and unchallenged evidence of P.W. 2 and P.W. 3, all the accused said was mere denial which is not supported at all and which I do not believe.'

Thus on the substantial evidence forming the circumstances upon which the trial Court held that the Appellant was the one who killed the deceased, the evidence as contained in Exhibit A did not feature at all. It is clear from what I have shown above, the statement Exhibit A even if expunged from the records, there are sufficient materials upon which to convict the Appellant. The Court of Appeal affirmed the finding of the trial Judge reproduced above. I accordingly find no merit in the complaint on the third issue. I resolve it against the Appellant.

In the result, all the three issues are resolved against the Appellant, this appeal therefore fails and is dismissed by me. I affirm the decisions of the Courts below in convicting the Appellant for the offence of murder and for sentencing him to death.

Judgment delivered by
Sylvester Umaru Onu, J.S.C.

I have had the privilege to read before now the judgment just delivered by my learned brother Musdapher, J.S.C. I am in entire agreement with him that the appeal is unmeritorious and must therefore fail. A word or two would, in my view, do in expatiation thereof as follows: -

The facts of this case have been meticulously set out in the leading judgment to need any repetition. Suffice it to say that in my consideration of the appeal, I adopt and express a preference for the Appellant's three issues as opposed to the Respondent's two. The Appellant's three issues complain as follows: -

1. Was the Lower Appellate Court right to have affirmed the finding of the Trial Court to the effect that two of the Prosecution witnesses sufficiently know the accused person before the date of the incident and correctly identified him as the person who brought the deceased woman to the hotel on the fateful day. (Grounds 1, 2 & 6).

2. In all the circumstances of this case, was the lower Appellate Court right to affirm the conviction of the Appellant for murder when the case of the Prosecution is not free from doubt' (Ground 3 & 4 & 5).

3. Was Exh. 'A' properly received in evidence' And if the answer is in the negative, did wrongful admission of Exh. 'A' lead to a miscarriage of justice' (Ground 7).

I propose to consider all three issues together as follows: -

Issues 1, 2 & 3:

Appellants' conviction.

The learned trial Judge after a most careful and painstaking evaluation of the evidence adduced before him at the trial and the parties respective final addresses found for the Prosecution and consequently convicted the Appellant.

On the Appellant's appeal to the Court of Appeal (hereinafter referred to as the Court below), the latter, after a review of the trial Court's proceedings unanimously affirmed the judgment. Hence, the further appeal to this Court where we are being asked to upturn the concurrent findings of the two Courts below.

As conceded by the Appellant in his Brief of Argument, this Court will ordinarily not interfere with concurrent findings of fact made by both the trial and the Appeal Courts unless in exceptional circumstances. See my observation in the case of Olokotinti v. Sarumi (2002) 13 NWLR (Pt. 784) 307 at 317 para. C - D, to wit:

'.....as can be seen, these are concurrent findings of fact of the two Courts below, which this Court sitting over the appeal will be loath to interfere with unless shown to have been arrived at resulting in miscarriage of justice or a violation of some principles of law or indeed the same is shown to be perverse.'

See also the case of Jonason Triangles Ltd v. CM&P Ltd. (2002) 15 NWLR (Pt. 789) 176 at 194 Para C - E) where the basis for the above principle was eloquently put by Ejiwunmi, J.S.C. in Akaluka v. Yongo (2002) 5 NWLR (Pt. 759) 135 at 161 pp. H - C thus:

'A Court of Appeal which has not had the same advantage which the trial Judge has enjoyed of seeing the witnesses and watching their demeanour would only disturb the findings of fact of such a Court where it is satisfied that the trial Judge has made no use of such an advantage.
If the trial Court has unquestionably evaluated the evidence before him, it is not for the Court of Appeal to re-evaluate the same evidence and come to its own decision. See A. M. Akinloye v. Bello Eyiyola & Ors. (1968) NMLR 92 at 95; Fatoyinbo & Ors v. Williams (1956) SCNLR 274; (1956) FSC 87; Lawal v. Dawodu & Ors (1972) 1 All NLR (Pt. 2) 270; Agedegudu v. Ajenifuja & Ors. (1963) 1SCNLR, 205.'

Identity Of The Accused And The Police Identification Process.

The Appellant laid undue emphasis on the issue of identification of himself by the Prosecution witnesses and argued that 'there is doubt if the two Prosecution witnesses who claimed some familiarity with the Appellant actually know him well enough.' He thereafter proceeded to evaluate the evidence before the lower Court to support his contention. Much of Appellant's contention in my view basically stemmed from the alleged irregularities in the identification parade conducted by the Police, as he sought to impeach the credibility of the evidence adduced by PWs 2 & 3. With respect, I am in no doubt however, having regards to the facts and circumstances of this case that the Prosecution witnesses, especially PWs 1, 2 and 3 knew the Appellant well enough.

Besides, the whole issue of identification of the Appellant is the exclusive preserve of the trial Court vide Orimoloye v. State (1988) NSCC 654 at 657. Not only that, the Appellant himself under cross-examination and his statement to the Police conceded that he knew the PWs 2 and 3. During his cross -examination, the Appellant stated:

'I know Barbara Inn because I pass it to Akwa Ibom Transport Corporation to pick up transport.....I only called there when I saw the owner of the Inn sat there. He had an accident. I consoled him. He gave me a bottle of coke. I took it and went away. It was given to me by one very small primary school boy. On that day, only three of us were at the Inn, that is, PW3, the little boy and I.'

As indeed transpired, the Appellant's statement to the Police (Exhibit A) corroborated the testimony of PW1 and PW2 when he said inter alia:

'I know the owner of the hotel in which the deceased died very well. He knows very well too that I am from the Archibong's family. And I use to pass through his hotel to Akwa Ibom Transport to look for a job.....'

In view of the foregoing, I agree with the Respondent's submission that the lower Appellate Court was right to have affirmed the findings of the trial Court as regards the Prosecution witnesses' recognition of the Appellant before the date of the incident. The Prosecution witnesses indeed correctly identified him as the person who brought the deceased woman to the Hotel on that fateful day. It is palpably obvious from the foregoing that the evidence of PW2 and PW3 before the trial Court clearly revealed that they knew the Appellant. Moreover, the Appellant himself acknowledged this much both under his cross-examination and his statement to the police (Exhibit A).

The trial Court having thoroughly reviewed the evidence before it found that the identification parade conducted by Police was totally unnecessary and indeed that the holding of one was superfluous. See the case of Igbi v. State (2000) 3 NWLR (Pt. 648) 169 at 189 following Orimoloye v. The State (supra). See also Ibrahim v. State (1991) 4 NWLR (Pt. 186) 399 at 414 - 415 and 419; Adeyemi v. State (1991) 1 NWLR (Pt. 170) 679 at 694. Appellant sought to highlight other specific areas of discrepancies in the cases put forward through the Prosecution witnesses with a view to challenge the credibility of same and these are:

(i) That PW3 earlier denied and later accepted making statement to the Police.

(ii) That the chains on Appellant's legs assisted PWs 2 and 3 in identifying the Appellant at the Police Station.

(iii) That since the PW3 claimed that Appellant was a regular customer, he should not have asked for the chalet rate in view of his assertion that only new and non - regular customers asked for chalet rate.

I am satisfied from the evidence led that with regard to (i) above, the issue was not raised at the trial Court and the Court below was right to have struck it out owing to Appellant's failure to obtain leave of Court to raise same. Also (ii) and (iii) relates to identification processes which have been concurrently affirmed to be unnecessary. The poser raised in the Appellant's argument as to what would have happened if the Appellant had no chains on his legs is nothing but mere speculation, which no Court would indulge in. See Ahmed v. State (1999) 7 NWLR (Pt. 612) 612 at 641; Ogunye v. State (1999) 5 NWLR (Pt. 604) 548 and Okoko v. State (1964) 1 All NLR 423. As to the inference drawn in (ii) that Appellant, as a regular customer need not have asked for the rate of the chalet, I hold the view that there is nothing unusual about this. After all rates can change any time without prior notice to regular customers. On the third inference, Appellant submits that inference (C) is not borne out by the evidence. I am of the view that the submission is unfounded because as hereinbefore pointed out, it was Appellant himself who told the Police while making Exhibit A that PWs 2 and 3 who described him to the Police before he was arrested.

Appellant relied on the authority of Oladejo v. State (1987) 2 NSCC 1025 to the effect that the Court below was wrong to have relied on 'Exhibit A' as constituting evidence. I take the view that the case of Oladejo v. State (supra) is not relevant to this case. The principle laid down in that case is that the Court cannot make use of the statement to the Police if it is inconsistent with the testimony of the accused in Court. The said statement was used by the trial Court to corroborate the Appellant's testimonies, having agreed to adopt same as part of his defence, rather than contradict or discredit him.

Allegations of Discrepancies and Contradictions in Prosecution's case.

Appellant further contends that the failure of the investigating Police officer (I.P.O) to testify and/or tender the Statement to the Police made by PWs is damaging to the Prosecution's case. I am in agreement with the Respondent that the absence of the I.P.O, the non-production of the PWs statement to the Police and PWs earlier denial that she made the said statement go to no issue. This is the more so that the Court cannot be compelled as to what use to make of the parade. See Ogbodu v. State (1987) 2 NWLR (Pt. 54) 20 at 31 - 32. See also Samuel Adaje v. The State (1979) 6- 9 S.C. 18 at 28-29 where Karibi - Whyte, J.S.C. made the following additional contribution -

'It is our law that unless expressly so provided, no particular number of witnesses is required for the proof of any fact.

See s. 178 (1) Evidence Act Cap. 62.....where the defence desires to call a particular Prosecution witness not called by the Prosecution, it perfectly free to do so.'

Thus, the absence of evidence of the IPO and the PWS's Statement to the Police did not in my view, weaken howsoever, the credibility of the evidence adduced by the Prosecution witnesses. The Appellant attacks the circumstantial evidence adduced at the trial Court and argues that 'there is a lot in this case which weakens or even destroys the inference of guilt on the part of the Appellant'. It is my view that contrary to the Appellant's contention that circumstantial evidence at the trial Court was direct, positive, unequivocal, cogent and compelling enough to convict the Appellant. See Ebre v. State (2001) 12 NWLR (Pt. 728) 617 at p. 640. See also Oladejo v. State (supra). Lori v. State (1980) 8 - 11 SC 81. Appellant's reliance on the case of Abudu v. The State (1983) 1 NWLR (Pt. l) 55 on the non-identification of the Appellant as the perpetrator of the crime is of no avail. In the instant case, the evidence before the trial Court unequivocally points to the Appellant as the murderer, and to no one else.

The Appellant referred to instances of alleged contradictions, discrepancies and inconsistencies which damage the Prosecution's cases but helpful to the defence. The Prosecution's reply to these is that these must be substantial and fundamental and not trifling vide Theophilus v. State (1996) 1 NMLR (Pt. 423) 139 at 155. See also Igbi v. State (supra); Kaleel v. State (1997) 8 NWLR (Pt. 516) 237 at 250 -251; Iko v. State (2000) 9 NWLR (Pt. 671) 54 at 61. True it is that Appellant did not raise or make reference to these contradictions and inconsistencies but for the first time on appeal before the Court below they were raised without leave first sought and obtained. They are:

(a) The PW3 denying and later admitting that he made a statement to the Police.

(b) The unsatisfactory way PW2 and PW3 identified the Appellant at the Police Station.

(c) The contradiction between the evidence of PW2 and PW3 as to whether the deceased asked for any drink.

(d) The claim by PW3 that the Appellant was a regular caller at the Inn, and yet contrary to practice, he asked for the room rate.

(e) The PW3 had admitted that only new customers asked for the chalet rate.

The Court of Appeal case of Adewusi v. Popoola (1998) 12 NWLR (Pt. 597) at 585 was cited to buttress the above propositions. I entirely agree with the Respondent\'s submission to the effect that:

'The discrepancies affect in no way whatever, the positive identification of the Appellant by the witnesses for the Prosecution, neither did they detract from the acknowledgment by the Appellant that he was well known to the witnesses to the incident. It is therefore, my view that the discrepancies that the Appellant is trying to capitalize on were so trifling that they did not affect the fundamental and central question before the Court.'

It only remains that the Appellant did not appeal against the preceding findings of the Court below and therefore, same is unchallenged and remains valid. Consequently, the complaint as to whether or not the various 'contradiction' etc. were fresh issues raised in that Court for the first time becomes academic, and pales into insignificance.

Appellant also considered as damaging to the Prosecution's case, some ancillary issues in regard to the identity of the deceased:

I am of the view that it was rather the Appellant who misconstrued what the two Courts below said with regard to his defence of alibi. The record of proceedings, quoted in extensio, read thus:

'The accused person swore in Court that on the 5th July 1988, the date of the incident, he took his sick child to a native doctor for treatment for enlarged spleen. The child was treated and he returned home by about 3p.m. He said he did not go to any other place that day. He did not go to any other place that day. He did not mention the person with whom he was at home. PWs 2 and 3 testified that the deceased came to Barbara Inn at about 3p.m., so there is nothing to

investigate.'

The alibi thus raised having been logically and physically demolished is of no avail to the Appellant. See Patrick Njovens v. State (1973) NNLR 76 at page 93.

The Court below agreed with the trial Court's evaluation and consequently made the following findings:

'He (Appellant) however denied having anything to do with her (deceased's) death and sought to set up an alibi that explained his whereabouts up to 3:00 pm on the fateful day. According to him, his child was quite ill on that day and he had visited his native doctor brother, Effiong Archibong with the child and only returned to his house at about 3:00pm on the said date. I am in complete agreement with the two Courts below for justifiably using 3:00pm as benchmark for the Appellant's defence of alibi. This is the more so particularly because (i) the two lower Courts used the phrase 'at about 3:00p.m. which, in the circumstances of this case, would literally mean, a little after 3:00pm', and (ii) the alleged crime with which the Appellant was charged was committed in fact between 7:00pm and 8:00pm

(i) Evidence on the identity of the deceased,

(ii) Explanation on the difference in the name of the deceased as between Bernadette Edem and Bernadette Edem Essien.

(iii) Failure to call one Comfort Essien (who identified the corpse to the medical expert) as a witness.

In support thereof, the Appellant called in aid, the case of Oladimeji v. State (1998) 11 NWLR (Pt. 573) 189 at 196. With due respect, the above-cited case is distinguishable from the instant case as this Court took its time to spurn out and in the later case Ikpo v. The State (1995) 9 NWLR (Pt. 421) 450 at 451 - 452 reiterated the position of the law and making reference to a host of similarly decided cases vide Shitta-Bey v. Federal Public Service Commission (1981) 1 SC. 40; Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387.....Chief Ebba v. Chief Ogodo & Anor. (1984) 1 SCNLR 372.....Olusanya v. Unosi (1965) NMLR 321 at 323 etc.

See also Oforlete v. State (2000) 2 NWLR (Pt. 680) 415 at 428.

The issue as to the identity of the deceased as transpired, was thoroughly looked into by the trial Court, which thereupon arrived at a decision that remains unimpeachable, unshaken and valid.

Defence of Alibi

Appellant further alludes to the defence of alibi earlier raised before the trial Court and argues that both the trial Court and the Court below misconstrued his evidence in this regard. See State v. Ogbubanjo (2001) 2 NWLR (Pt. 698) 576 at 606.

For the reasons given by me and the fuller ones contained in the lead judgment of my brother, Dahiru Musdapher, J.S.C. with which I entirely agree, I too dismiss the appeal and confirm the decision of the two Courts below.

Judgment delivered by
Akintola Olufemi Ejiwunmi, J.S.C.

The judgment just delivered by my learned brother, Dahiru Musdapher J.S.C., was read earlier by me in its draft form. There can be no doubt in my mind that the appeal was properly dismissed for the reasons given in the said judgment. In my humble view, the case against the Appellant was proved beyond reasonable doubt. The various arguments raised on behalf of the Appellant to establish the contrary position have simply failed to establish that the Appellant was wrongly convicted for the murder of Bernadette Edem Essien. In the result, the appeal is dismissed and I affirm the judgment of

the Court below.

Judgment Delivered by
Walter Samuel Nkanu Onnoghen, J.S.C.

I have had the benefit of reading in draft, the lead judgment of my learned brother Musdapher, J.S.C. just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

The facts of the case have been fully stated in the lead judgment and I do not intend to repeat them here except as may be needed for the point(s) being made.

Learned Counsel for the Appellant, in the Appellant's Brief of argument deemed filed on 28/5/05 submitted three issues for determination. The issues are as follows: -

'3.01 Was the Lower Appellate Court right to have affirmed the finding of the trial Court to the effect that two of the Prosecution witnesses sufficiently knew the accused person before the date of the incident and correctly identified him as the person who brought the deceased woman to the hotel on the fateful day' (Grounds 1, 2 & 6).

3.02 In the circumstances of this case, was the lower appellate Court right to affirm the conviction of the Appellant for murder when the case of the Prosecution is not free from doubt. (Grounds 3, 4 & 5).

3.03 Was exhibit 'A' properly received in evidence' And if the answer is in the negative, did wrongful admission of Exh. 'A' lead to a miscarriage of justice' (Ground 7).'

On the other hand, learned Counsel for the Respondent submitted two issues for determination in the Respondent's Brief deemed filed on 9/3/06. These are:

'2.1 Was the Court of Appeal right in affirming the conviction of the accused person by the trial Court'

2.2 Whether the admissibility of Exhibit 'A' in evidence occasions any miscarriage of justice''

I hold the view that the issues formulated by learned Counsel for the Respondent better reflects the issues for determination in the appeal.

It must be noted that this appeal is on the concurrent findings of fact by the trial and the lower Court and nothing more. The gravamen of the Appellant's contention in this appeal lies on the issue of identification of the Appellant by PW2 and PW3, which this Court has always held to be a question of fact. In Igbi vs. State (2000) 3 NWLR (Pt. 648) 169 at 189 it is stated thus:

'The question whether Appellant was properly identified or not is a question of fact to be considered by the trial Court ..... It is trite law, now, that it is not in every case that an identification parade becomes necessary ....'. The present case, rather than be a case of 'mistaken identity' was one of recognition of persons already known to the witness prior to the incident.'

The question then is, what did the trial Court find as regards identification of the Appellant' At page 62, the learned trial Judge found as follows: -

'From the above findings of fact, there is no doubt that the accused in spite of all efforts by him to deny, was well known to Barbara Inn. In my view, there was no necessity for identification parade whatever. Any identification that was conducted was superfluous. The witnesses, in fact PWs 1, 2 and 3 all know the accused and recognized him whenever they saw him, in the inn, or at the Police Station.'

The above finding was confirmed by the Court of Appeal. It is settled law that the concurrent findings of fact will not be interfered with unless it is shown to have been arrived at resulting in miscarriage of justice or a violation of some principles of law or the same is demonstrated to be perverse - see Jonason Triangles Ltd vs. CM & P Ltd (2002) 15 NWLR (Pt. 789) 176 at 1945; Akaluka vs. Yongo (2002) 5 NWLR (Pt. 759) 135 at 161 -162.

Appellant admits knowing Barbara Inn and its proprietor, PW1. Appellant was therefore not a total stranger to the relevant witnesses for the Prosecution so he could not have been mistaken for another person neither could the fact that he was in chains at the so called identification parade have influenced his recognition by PW2, and PW3, who had known him long before seeing him at the Police Station on that date.
That apart, since the issue of identification is that of fact and the trial Court believed the evidence of the Prosecution witnesses on the matter at the expense of the Appellant's denial, that, in my view is the end of the matter since it involves matters within the exclusive preserve of the trial Judge who heard and observed the witnesses. It has nothing to do with improper evaluation of evidence or appropriation of probative value thereto.

When one looks at the defence of the Appellant at the trial Court, it becomes very clear that it was based on outright denial of the charge and possibly alibi. However, his alleged alibi ended at 3 pm while the offence was allegedly committed at night of the same day. That totally destroyed the defence of alibi. In addition, once Appellant is fixed at the scene of crime by the evidence of PW2 and PW3, which the trial Court believed, the denial of the Appellant becomes of no moment. That being the case, I hold the view that all the beautiful arguments of learned Counsel for the Appellant become exercise in futility having regards to the facts found by the trial Court and confirmed by the Court of Appeal particularly as Appellant's Counsel has not successfully demonstrated to this Court that the said material findings are perverse or have occasioned a miscarriage of justice.

On the issue of admissibility of exhibit A, it must be noted, Appellant admitted making the statement in exhibit A and also stated that he adopted the said exhibit as part of his defence to the charge. It is not contended by the Appellant that exhibit 'A' is not relevant to the charge, neither has he demonstrated how the admission of the said exhibit 'A' occasioned a miscarriage of justice.

Section 227(1) of the Evidence Act, 1990 provides as follows:

'227(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the Court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.'

In view of the facts, I hold the view that the submission of learned Counsel on this issue is misconceived, having regards to the law - see also State vs. Ogbubunjo (2001) 2 NWLR (Pt. 698) 576 at 606.

In conclusion I too dismiss the appeal for being without merit and affirm the judgment of the Court below.

Judgment delivered by
Ikechi Francis Ogbuagu, J.S.C.

My learned brother, Musdapher, J.S.C., has dealt in some detail, with the facts and the applicable law, which I adopt as mine. I will however, make my own contribution by way of emphasis.

While the Appellant formulated three (3) issues for determination, the Respondent, formulated two (2) issues for determination. My reading of the parties' said issues, shows that Issues 3.02 and 3.03 of the Appellant, are substantially, the same although differently couched in Issues 2.1 and 2.2 of the Respondent. In the circumstance, I will deal, even briefly, first with Issue 3.01 of the Appellant, which deals with the identification of the Appellant by P.Ws 2 and 3.

It is the contention of the Appellant that there is doubt if the said two witnesses 'who claimed some familiarity with the

Appellant, actually knew him well enough'. For the avoidance of doubt, I will reproduce the relevant and material evidence of the two witnesses and that of the Appellant.

P.W. 2 is one Margaret Otu Udo. She swore, inter alia, as follows: -

'.....At the time of the incident, I was a Sales girl or waitress. We were two. The other was Peter (i.e. the P.W.3) ..... . At about 3.00 p.m., a lady met me and asked for a bottle of soft drink and Peter gave it to her. The girl waited for sometime as she took the soft drink. Then came a young man and asked for a bottle of beer. He drank it in the Inn. The young man sat with the lady or girl that had the soft drink. I did not know the name of either of them. After they had their drink, the young man asked Peter for a Chalet. He was shown a Chalet. He did not pay for the drink. He moved into the Chalet with the lady. I see the young man in Court. He is the accused person. They were in the Chalet for about one and a half-hour. Peter went to check on the young man but did not see him. Peter came back and told me something and on the basis of that I went to look for my master in his house.....On the date of incident that Chalet was not hired to any other person after 3.00 p.m.'.

Under cross-examination, she stated inter alia, thus:

'Since we charge on the hour for Chalets, we keep accurate time of the time a guest enters and leaves the Chalet'.

P.W. 3 is Peter Paulinus Okon. He testified inter alia, as follows:

'On 5th July, 1988 (i.e. the date of the incident), I was in the Hotel. On that date, the wife of the accused came to the Hotel. Not long, the husband came. The accused is the husband. The Accused asked for 33 Beer. He asked for mineral for his wife. They were discussing (sic) as they drank. He asked for the Chalet rate and I told him it was N 2.00 per hour. The accused and his wife moved into the Chalet. After the hour, I knocked on the door to collect money. The accused told me to wait for a while and that he would come to give me the money. I waited but after a while, I went and knocked on the door again. There was no answer. I opened the door, put on the light; he was not there. I only saw the wife on the floor lying naked. She was foaming from the nose. I shook her with my leg but there was no response. I went and asked P. W. 2 to come and see what had happened. I called her 'sister' but she did not answer. I know the Deceased to be the wife of the Accused because they had been coming there before the date of the incident and because she came with her that day. .....'

Between the time I gave the Chalet to the Accused and the time I discovered the woman dead, I did not give that Chalet to any one else.....'.

[the underlining mine]

Under cross-examination, he stated inter alia as follows:

'.....I keep or check on the time a person gets into the Chalet and when he is due out. I went and checked in the accused and the deceased at about 7.00 p.m. into the Chalet. I went back to remind them that they had exhausted their time by 8.00 p.m.'.

He denied the suggestion that he was lying when he said that the accused had been coming to the Hotel prior to the date of the incident.

From the evidence of these two material witnesses, it could be seen that assuming that the Appellant was not a regular customer of the Inn/Hotel, on the date of the incident, they both were in a position to know the person who actually hired the Chalet and the deceased from the time the accused came into the place until he was checked into the Chalet. There is evidence that it was the description they gave to the Police of the Appellant that led to his arrest in his home. So, indeed, there was no need for any identification parade to have been conducted. See the cases of Ibrahim v. The State (1991) 4 NWLR (Pt.186) 399 @ 414 - 415; (1991) 5 SCNJ. 129 ' per Belgore, J.S.C., citing the cases of Okasi & Anor. v. The State (1989) 1 NWLR (Pt. 100) 642; (1989) 2 SCNJ. 183 and Ikemson & Ors. v. The State (1989) 3 NWLR (Pt.

110) 455; (1989) 6 SCNJ. 54. The PWs 2 and 3 had the full opportunity of observing the features of the Appellant as their guest or Customer.

In the case of Adeyemi & 3 ors. v. The State (1991) 1 NWLR (Pt. 174) 679 @ 694; (1991) 2 SCNJ. 60, Olatawura, J.S.C., had this to say, inter alia, as follows:

'It is fallacious to think that only identification of an accused person acceptable when an issue of identification is raised is an orchestrated identification parade. Identification depends on natural ability and perceptions of individuals. Where a witness who gave evidence of visual identification was not cross-examined nor shaken under cross-examination, nothing stops a trial Judge from accepting his evidence .....'.

[the underlining mine]

In the case of Otti v. The State (1993) 5 SCNJ. 143 @ 147, it was held that identification parade is not necessary when the accused person is otherwise properly identified as the culprit due to circumstances. That identification evidence is one tendering to show that the person charged with an offence is the same person who committed the offence. The case of Ikemson v. The State (supra) was also referred to. See also, the case of Ugwumba v. The State (1993) 6 SCNJ. (Pt. II) 217 and the lucid Judgment of Onu, J.S.C. in the case of Alabi v. The State (1993) 9 SCNJ. (Pt. l) 109 @ 119-123. See also recently, Ukpabi v. The State (2004) 11 NWLR (Pt. 884) 439 @ 449, 456; (2004) 6 SCNJ. 112; (2004) 6 - 7 S.C. 27 @ 31, 37 - per Uwaifo, JSC. and Edozie, J.S.C. I will add quickly, and this is also settled, that there may be sufficient identification of a person by his voice. See Eugene Ibe v. The State (1992) 6 SCNJ. (Pt. II) 172 @ 178 and R v. John Keating (1909) 2 CAR 61.

Now, let me come to the identification of the Appellant at the Police Station by the P.W.2 and P.W.3.

P.W. 2 testified further at page 5 of the Records, inter alia, as follows:

'.....On the 7th July 1988, I was taken to the Divisional Police Officer's Office. At the Divisional Police Officer's Office, the Accused was put among other people. I was asked if I could identify the person I saw on the date of the incident. I identified the Accused person. The sandals he wore on the date of the incident were the same shoes he wore at the identification exercise. On the date of incident that I stated the 1st July 1988, when I started work in the Inn, the Accused had come with the same lady'.

[the underlining mine]

At page 7 of the Records, the P.W.3, testified, inter alia, as follows:

'I saw the Accused at the Police Station and by then P.W. 2 and I were removed from the goal. I identified the Accused person after I was brought from the Cell. There were many people in that room when I identified the Accused to the Police. At that time he was bearded. I recognized him by the beard and clothes'.

[the underlining mine]

I note that the underlined evidence of both the P.W.2 and P.W.3, were not challenged in cross-examination or controverted by the Appellant in his evidence in Court. The P.W.3, under cross-examination at page 9 line 6 had stated that while making his statement to the Police, he gave to the Police, 'the description of the Accused'. Incidentally, in his evidence under cross-examination at page 25 of the Records, the Appellant admitted that on the date of the incident, he was at the said Inn. Said he inter alia,

'I know Babara Inn because I pass it to Akwa Ibom Transport Corporation to pick up transport. ..... I do not go to Babara Inn. I only called there when I saw the owner of the Inn sat there. He had an accident. I consoled him. He gave me a bottle of Coke.....On that day, only three of us were at the Inn, that is P.W. 3, the little boy and I'.

In other words, not only did the Appellant know the P.W.3, but P.W.3 has seen or known him before the date of the incident. It can be seen clearly even by the learned Counsel for the Appellant, that all the forceful submissions of the Appellant not being identified sufficiently, is not borne out from the Records at least, from the portions of which I have reproduced hereinabove in this Judgment. There was more than sufficient identification of the Appellant not only by the P.W.2 and P.W. 3, but the Appellant admitted on oath that P.W. 3 had in fact seen him before at the said Inn where at least, he took some minutes to drink the Coke offered to him by the owner of the Inn. See the case of Rex v. Adenjimah v. Anor. 8 WACA 193.

I am indeed amused by the assertion about contradictions in the Appellant's Brief. Of course and this is settled, that human faculty may miss some minor details mostly, due to lapse of time and even error in narration in order of sequence. Contradictions, to be fatal to the Prosecution's case, must go to the substance of the case and not be of a minor nature. As held in the case of Sele v. The State (1993) 1 SCNJ. 15 @ 22 - 23, if every contradiction, however trivial to the overwhelming evidence before the Court, will vitiate a trial, then of course, nearly all Prosecutions will fail. If the contradiction, do not touch a material point or substance of the case, as in the instant case, it will not vitiate a conviction once the evidence is clear and it is believed or preferred by the trial Court. There are too many decided authorities by this Court in this regard. Afterwards, material evidence is such evidence, which on account of its logical nexus with the issue, tends to influence decisively, the establishment of the fact in issue. See Ikemson v. The State (supra) at page 67 of the SCNJ. Report.

My answer therefore, to Issue 3.01 of the Appellant is definitely in the Positive/Affirmative.

As regards Issue 3.02 of the Appellant and Issue 2.1 of the Respondent, from the evidence of the P.W.2 and P.W.3 and in all the circumstances, the doctrine of 'Last Seen', comes into play and become very relevant to the determination of this issue. The deceased, was last seen with the Appellant who after the dastardly act of strangulating and/or brutalizing the deceased, took advantage that night had set in, and sneaked out of the Chalet and the Hotel or Inn.

The deceased at least, did not come to that Inn/Hotel on that fateful day, naked with injuries on her body which the P.W.1 - the Medical Doctor testified that were not self-inflicted. Her naked body was found by the P.W.s 2 and 3, on the floor and her dresses were on the table. The Appellant, who checked in with her in the said Chalet, had disappeared even without paying for both the drinks he ordered and for the hiring of the Chalet. The law presumes that the person last seen with the deceased, bears full responsibility for his or her death if it turns out, that the person last seen with him, is dead. See the cases of Gabriel v. The State (1989) 12 SCNJ. 33; (1989) 5 NWLR (Pt. 1& 2) 457; Igho v. The State (1978) 3 S.C. 87 and Nwaeze v. The State (1996) 2 SCNJ, 47 @ 61 - 62.

There is the uncontroverted evidence of the P.W.2 and P.W.3 that between the time the Chalet was hired out to the Appellant and the time the body of the deceased was discovered by them, that said Chalet, was not given out to any other person. In view of the said doctrine, it is settled that it is the duty of the accused person, to give explanation as to how the deceased met his or her death. In the absence of any explanation by the Appellant as to how the deceased met her death, surely and certainly, the trial Court was perfectly justified, in drawing the inference, that the Appellant killed the deceased. See the cases of Obosi v. The State (1965) NMLR 14O; Adeniji v. The State (2OO1) 5 SCNJ. 371 @ 396 and Emeka v. The State (2OO1) 14 NWLR (Pt. 734) 666 @ 683, (2OO1) 6 SCNJ. 259 just to mention but a few.

Any surprise' The learned trial Judge, at page 53 of the Records, had this to say, inter alia, as follows:

'In spite of the very positive and unchallenged evidence of P.W.S 2 and 3, all the accused said was mere denial which is not supported at all and which I do not believe. In fact, it was this denial that was his undoing. It is possible that if he had not chosen to deny, he would have had some explanation that would provide a defence for him. Without necessarily casting any onus on the accused, in the circumstances of this case an explanation was necessary!'

[the underlining mine]

However, the Appellant had thought foolishly, I may say, that the defence of Alibi, would conclusively avail him. But the said alibi, was not only watery, but was bogus in the extreme. He pleaded that he was with his sick child who was

treated by a Native Doctor who is his relation or brother ' one Effiong Archibong who he stated under cross-examination, was living at an undisclosed address at Aba. See recently, the case of Odu & Anor. v. The State (2001) 5 SCNJ. 115 @ 12O. He returned with the child to his house by 3.00 p.m. on the same day and did not go to any other place. But this offence was committed by him between the hours of 7.00 and 8.00 p.m. or thereabout. The trial Court rightly in my view rejected the said plea or defence of Alibi.

See pages 58 and 59 of the Records. He did not even call his said brother Native Doctor as a witness. The Court below, rightly too, had no difficulty in dismissing the appeal. This is more so, because, the only irresistible inference from the circumstantial evidence in this case, is that the Appellant killed the deceased. I cannot find no any other reasonable inference from the circumstances of this case. See the cases of Popoola v. Commissioner of Police (1964) NMLR 3 S.C.; Udo Akpan Essien v. The State (1966) NMLR 229 and Lori & Anor. v. The State (1980) 8-11 S.C. 81 @ 86 - 89 and many others.

Surely and certainly and this is also settled, even though 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 no inflexible and or invariable way of doing this. If the Prosecution adduces sufficient and accepted evidence to fix a person or an accused person at the scene of crime, at the material time (as in the instant case leading to this appeal), his alibi, is thereby logically and physically, demolished and that would be enough, to render such plea ineffective as a defence. See the cases of R v. Turner (1957) WRNLR 34; Bello v. Police (1959) WRNLR 124; Yanor v. The State (1965) NMLR 337; Gauchi & Ors. v. The State (I960) NMLR 333 and of course, Patrick Njovens & Ors. v. The State (1973) (1) NMLR 331. So when the Appellant gave an undisclosed address of his said native Doctor brother/relation at Aba, the Police were not expected to go on a wild goose chase in order to disprove the said alibi.

Lastly, in respect of Issue 3.03 of the Appellant and Issue 2.2 of the Respondent, in view of the overwhelming evidence in support of the Prosecution's case with or without Exhibit 'A' - the Statement of the Appellant to the Police, the conviction should have in any case, been sustained. But if I may comment on Exhibit 'A', it is not in dispute, that it was admitted under cross-examination of the Appellant in spite of the objection as to its admissibility by the learned Counsel for the Appellant.

I note that Exhibit 'A' is not a Confessional Statement. Both in the Appellant's Brief and in the oral submissions of Chief Eze Duruiheoma on 9th March 2006 during the hearing of the appeal, it is submitted that Exhibit 'A', was wrongly admitted. He cited and relied on the case of Adekanbi v. Attorney-General of Western Region (not Adenkonobi v. The Attorney-General) (1966) NSCC. Vol. IV at page 46. It was his submission that Exhibit 'A' influenced in no small measure, the two lower Courts as borne out at pages 61 and 63 and pages 137 to 138 of the Records.

I note that the Appellant in his evidence in-chief at page 24 of the Records, stated inter alia, as follows:

'At the Police Station, I made a Statement. The Statement was in connection with a person who died. The deceased was Benedette Akpan Udo..... I had told the same story to the Police. I mentioned the Native Doctor to the Police as Effiong Archibong'.

[the underlining mine]

I also note that at page 13 of the Records, the Appellant on 20th July 1990, deposed to an affidavit in support of the Summons for his Bail. At paragraphs 8, 9, 10 and 11, he swore as follows:

'8. That in my statement to the Police dated 7th July, 1988, I denied ever being at Babara Inn at No. 22 Uko Eshiet Street, Uyo on 5th July, 1988.

9. That in the said statement I told the Police that on 5th July 1988, I was in the house of a native Doctor by name Effiong Archibong to get my child by name Francis Archibong treated of stomach pains.

10. That I also told the Police in the said Statement mentioned in paragraph 8 above that I left the house of the said

Effiong Archibong with my said sick child, Francis Archibong, by 3'0 clock in the afternoon.

11. That I have herewith photocopy of my said Statement mentioned in paragraph (sic) 8, 9 and 10 of this Affidavit above, which statement is also in the proof of evidence, and marked Exhibit 'B'.

[the underlining mine]

From the said evidence in-chief of the Appellant, it could be seen that it is the same Statement to the Police, part of which that is reproduced hereinabove, that the Appellant, gave evidence in line with. In his words in his said evidence in Court (also hereinabove reproduced), the Appellant testified that he had told the same story to the Police. During cross-examination at page 26 of the Records, he answered as follows:

'I made a Statement to the Police in respect of this matter and I am prepared to adopt it as part of my case. This is my statement to the Police'.

In other words, he identified and admitted Exhibit 'A', that it was the very statement he made to the Police of which he referred to in his said averment in his said affidavit of the application for his bail. As could be seen from paragraph 11 of the said affidavit, he had in his custody or possession, a photocopy of this same Exhibit 'A'.

Frankly, I don't understand, what the objection to its admissibility, was all about in the trial Court. The learned trial Judge had no difficulty in admitting the said Statement in evidence as Exhibit 'A'. Said he and I agree with him entirely, as follows:

'..... There is nothing therefore to render the statement, which the prisoner has admitted as his, from being admitted. I hereby admit it and mark (sic) Exhibit 'A'.

[the underlining mine]

A lot of 'fuss', (I refrain from using the word 'noise') has been made about the admission of this Exhibit 'A' both in the Appellant's Brief and in the forceful oral submission of the learned Counsel for the Appellant at the hearing of this appeal as I had noted hereinabove in this Judgment. By no stretch of imagination, can it be said that the said admission, was wrongful, or even irregular. How' If one or I may ask. The Appellant had in his custody or possession, a photocopy of Exhibit 'A'. He had testified in full in his evidence in-chief, about his said statement to the Police. That piece of evidence was in fact, a repetition or an admission of what are contained in Exhibit 'A'. It was not a case of an accused person, just adopting his statement to the Police and saying a little or nothing more or giving further evidence in his defence and the trial Court thereafter, making full use of the contents of the said statement, in its judgment. That was what happened in the case of Otubanjo & Ors. v. Inspector General of Police (1966) 2 All NLR 196. Understandably, on appeal, it was held that the manner in which the statement of that Appellant became evidence against the Appellant, was improper and not a fair one. The conviction was on that ground, set aside. That case is surely distinguishable from the instant case in this appeal. I am aware, that in the case of Rex v. Alli 12 WACA 432 where the accused after just adopting his statement to the Police while in the witness box and thereafter, was cross-examined, was deprecated by that Appellate Court. In the instant case, the Appellant could have even been convicted, without Exhibit 'A'. See the case of Rex v. Ogbuewu 12 WACA 483.

I have demonstrated in this Judgment, that what happened in the instant case leading to this appeal, are totally different from that in the cases of Otubanjo & Ors. y. Police; Rex v. Alli (supra) or in the case of Adekanbi v. Attorney-General of Western Region (supra) ' where the accused denied making the alleged confessional statement. However, assuming that the admission of Exhibit 'A' was wrongful or irregular, (which is not conceded by me having regard to all I have stated in respect of this issue), the Appellant and his learned Counsel have not stated what prejudice, the Appellant has suffered or what miscarriage of justice, that has been occasioned by the reason of such admission. See R. v. Onabanjo 3 WACA 43. I have no doubt in my mind, that the murder of the deceased by the Appellant, was pre-meditated, hence he sneaked out of the Hotel/Inn under cover of the darkness of the night ' about 8.00 p.m., after severely brutalizing her and snuffed out her life for reasons best known to him. Afterwards, the deceased was the wife, according to him, of his

half-brother. I suppose the Latin maxim is -Frustra legis a uxilium quaerit qui in legem committit ' vainly does a person who offends against the law seek the help of the law. In other words, he who offends against the law vainly seeks the help of the law.

In conclusion, there is here again, the concurrent finding's of fact by the two lower Courts and in all the circumstances, this Court, will not interfere as they are not perverse at all. See Wankey v. The State (1993) 5 NWLR (Pt. 295) 542 @ 552; (1993) 6 SCNJ. 152.

It is from the foregoing and the more detailed Judgment of my learned brother, Musdapher, J.S.C., that I too, dismiss the appeal as being hopelessly unmeritorious. I too, hereby and accordingly, affirm the said Judgment of the Court below affirming the decision of the trial Court.