

SUPREME COURT OF NIGERIA
15TH JULY, 1994 SC.96/1993
CORAM: S. M. A. BELGORE, A. B. WALI,
I. L. KUTIGI, Y. O. ADIO, A. I. IGU, JJSC

GRACE ABRAHAM AKPABIO APPELLANTS
& 2 OTHERS
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Doubts - A trial court is entitled to entertain some doubt - Benefit of which is usually given to the accused - Doubts based on speculations are no doubts.

CRIMINAL PROCEDURE - Written statement made by prosecution witness - The defence is entitled to see it - For purpose of cross examination - Without first alleging a discrepancy - And may tender it solely to impeach credit of the witness.

CRIMINAL PROCEDURE - Written statement of prosecution witness - Distinction between an application for its production - And one to tender it by the defence - If sought to be tendered for purpose of establishing the truth - Or for no reason - Court is to reject such application.

CRIMINAL LAW - Murder - Excessive beating of the deceased by the appellants - When intention to kill is found lacking - Conviction for murder cannot be sustained.

CRIMINAL LAW - Manslaughter - Flogging the deceased to death - No intention to kill or do grievous bodily harm - Manslaughter conviction substituted for murder.

CRIMINAL PROCEDURE - Statement of a witness to the police - Where no reason was given for seeking to tender it - Whether the application was rightly rejected.

EVIDENCE - Conflict in evidence - Between previously written statements and testimony under oath - Evidence of such witness should not have much weight - Save satisfactory account is given.

EVIDENCE - Contradiction - In evidence of prosecution - To be fatal - Must go to the root of the issue.

EVIDENCE - Conflict in written and oral evidence of a witness - Disregard of the evidence on that issue - Trial judge's subsequent consideration of the truth of that issue - Whether a serious error.

EVIDENCE - Speculation by trial judge - On subsequent beating of deceased by a crowd - In total absence of any legal evidence - Is a gross error.

FACTS

The 1st Appellant returned to her residence at about 9.30 pm on the date of the incident. She met the deceased, one Anthony Michael Asukwo along with PW 1 (who is the 1st Appellant's half sister) and the 1st Appellants children watching the television. She then reminded the deceased who was her nephew that she had warned him not to visit her residence any longer. She asked PW3, her servant to accompany her to somewhere where she went and collected the 2nd and 3rd Appellants. The 1st Appellant ordered all the other members of her household in the parlour to get locked up into other rooms thereby leaving only the deceased person behind. She then gave an instruction to the 2nd and 3rd Appellants to treat the deceased as they used to treat thieves. They got the deceased severely flogged and beaten up. PW2 the grand mother of the deceased was later invited to the scene by the 1st Appellant who asked her to take him away. The deceased was lying down face downwards with his two hands and legs tied together backwards. PW2 was afraid when she saw the deceased's condition but only wept and went away. The deceased died later and his corpse was seen at the backyard of the first Appellant, in the morning.

The Appellants were arraigned before the Uyo High Court and charged with the offence of murder contrary to section 319 of the Criminal Code. Each of them pleaded not guilty. The prosecution called 7 witnesses. The 1st Appellant gave evidence and called one witness. The 2nd and 3rd Appellants gave no evidence but rested their defence on the case for the prosecution. The 1st Appellant and her said witness sought to establish that the deceased was a victim of a prior mob action before the incident at the 1st Appellants parlour. The trial court rejected this story in its entirety. But surprisingly the same trial court acquitted and discharged the Appellants relying on the rejected evidence. The State appealed to the Court of Appeal which found the 3 Appellants guilty of murder and sentenced them to death. The Appellants being dissatisfied have now appealed to the Supreme Court to

determine whether the charge of murder was established against each of them. And in the alternative whether the proper verdict ought to have been one of manslaughter rather than that of murder.

HELD (Unanimously allowing the appeal in part)

Contradiction in evidence that goes not to the root

1. Whether the deceased “*moved*” or “*staggered*” to the store is a matter of semantics in the context of this case and does not go to the root of the issues in question before the court. The matter cannot therefore be one of any great moment in the determination of this case. In this connection it must be borne in mind that for any conflict or contradiction in the evidence of a prosecution witness to be fatal in the case for the prosecution, such conflict or contradiction must be substantial and fundamental to the main issues in question before the court. (P. 161 L. 13)

Defence entitled to see written statement of prosecution witness

2. In a criminal trial, the defence is entitled to see any written statement in the possession of the prosecution which was made by a witness called by the prosecution and which relates to any matter on which the witness has given evidence, and to cross-examine the witness on it and then tender it solely to impeach his credit. It must be emphasized in this connection that it is not the law that the defence must allege or establish a discrepancy between the statement to the Police and the sworn testimony before the court can order the prosecution to produce the said statement. (P. 162 L.9)

Application for production and one to tender statement distinguished

3. A distinction must however be drawn between an application by the defence in a criminal trial for the production of the statement of a prosecution witness to the Police as against an application to tender such a statement in evidence. If, therefore, the basis of the application by the defence to tender such a statement is solely for the purpose of establishing the truth of the facts contained therein, the court is entitled on grounds of law to reject such an application as misconceived. (P. 162 L. 19)

When application to tender statement is deemed rightly rejected

4. In the present case, learned defence counsel applied to tender two statements of P.W.1. The first statement was sought to be tendered for the purpose of impeaching the credibility of the witness on certain areas identified to the court. This application was naturally granted and the statement was tendered in evidence as Exhibit A. No reason was however given as to why it was

sought to tender the second statement which is now in issue. The learned trial Judge was right to reject the application in respect of this second statement as no basis whatsoever was disclosed as to why it was sought to be tendered. (P. 162 L.35)

Conflict in written statement and testimony under oath

5. Where a witness had previously said or written the contrary of what he later swore in evidence, his evidence should not have much weight with a jury unless of course the reason for his having done so is satisfactorily accounted for. P.W.3 in the present case explained why Exhibit C is inconsistent with his testimony in court. The trial court accepted his explanation as satisfactory and believed his evidence. I find no reason to reverse this finding. (P. 165 L.38)

Whether trial judge can consider the truth of a disregarded evidence

6. On the authorities as they now stand, the evidence of p.W.2, on the point must not only be disregarded as unreliable, the previous statement of the witness, exhibit B, on the same issue did not constitute evidence upon which the trial court could have acted. The learned trial Judge appeared to have appreciated this position of the law in the earlier portion of his judgment. Regrettably however he slipped into a serious error of law when he proceeded to engage in the exercise of whether an issue of fact which was already discredited, unreliable and did not infact constitute legal evidence was true or not. A piece of evidence which is disregarded as or declared unreliable by a trial court is naturally rejected as not being of any evidential value and evidence which, as in the instant case, is properly rejected cannot ground or form the basis of a defence. (P. 170 L.36)

Doubts based on speculations are no doubts

7. A trial court in an appropriate case is certainly entitled to entertain some doubt, the benefit of which is usually given to an accused person, but such doubt must not only be genuine but reasonable and must naturally flow from the trend of the legal evidence adduced before the trial court. Doubts based on speculations or possibilities are themselves speculative and are not doubts known to our criminal law. (P. 173 L.I3)

Speculation of trial Judge

8. The learned trial Judge, with due respect to him, was grossly in error when he speculated on the possibility of a subsequent beating of the deceased by

a crowd and on what the crowd might have or might not have done in the total absence of any legal evidence in this regard. (P. 173 L.37)

Lack of intention to kill

5 9. Given the most anxious consideration to the facts of this case and although
the deceased received rather excessive beating from the appellants, from the
evidence, they did not intend to kill him as the whips or sticks used were not
established to be of extra-ordinary sizes. Besides, it is preposterous that the
1st appellant should have invited the deceased’s grandmother to her house
10 that night to see her grandson being killed. No doubt, the punishment in-
flicted on the deceased by the appellants was barbarous, senseless and enor-
mous. It cannot be held that they had the foresight that the death of the
deceased would be the result of their near murderous acts and that it was such
a consequence that induced them to flog the deceased. A conviction for mur-
15 der under section 316(1) of the Criminal Code cannot therefore be sustained.
(P. 174 L.39)

When manslaughter conviction is substituted for murder

10. On the whole, the acts of the appellants, on the peculiar circumstances of
20 this case, were not of a nature likely to endanger life nor did it appear there was
an intent to kill or do grievous bodily harm to the deceased, and, therefore, the
appellant’s acts cannot border within the ambit of section 316 of the Criminal
Code. It was nevertheless an unlawful killing and by virtue of section 317 of
the Criminal Code, unlawful killing in circumstances which do not constitute
25 murder is manslaughter. The killing, though unlawful, does not amount to
murder, and a verdict of manslaughter should have been returned by the trial
court and the court below. (P. 176 L.10)

NOTABLE POINTS OF INTEREST

30 **IGUHJSC**

Appellate Court is generally not to allow fresh point

1. It is well to bear in mind in this connection that an appellate court will not
generally allow a fresh point to be taken before it if such a point was not raised
35 and pronounced upon by the court below unless of course, the question
involves substantial points of law and no further evidence needs be adduced
to determine the matter and such a course of action is necessary to prevent an
obvious miscarriage of justice. (P. 163 L.27)

Exclusion of statement - When not a valid ground for reversal of judgment

2. "It seems to me crystal clear that the statement in issue is fully consistent with the evidence on oath of P. W. 1 and could not in any way have affected the decision of the lower court were it to have been admitted in evidence. In these circumstances, I entertain no doubt that the exclusion of the statement in issue, even if wrongful, and I do not so hold, is not a valid ground for the reversal of the judgment of the lower court under consideration. (P. 164 L. 19) 5

Role of a trial court

3. The role of a trial court is to hear evidence, to evaluate the evidence, to believe or disbelieve witnesses, to make findings of fact based on the credibility of the witnesses who testified and to decide the merits of the case based on the findings. (P. 166 L.7) 10

A single credible witness can establish a case beyond reasonable doubt 15

4. A single credible witness can establish a case beyond reasonable doubt unless where the law required corroboration. In other words, the evidence of one credible witness, accepted and believed by the court, is sufficient to justify conviction unless, of course, such a witness is an accomplice in which case his testimony would require corroboration. (P. 166 L.25) 20

Previous conflicting written statement is no evidence

5. The law is long settled that where a witness is shown to have made a previous statement, though unsworn, in distinct conflict with his evidence on oath at the trial; the jury should not merely be directed that his evidence at the trial should be disregarded as unreliable, but also that the previous statement, whether sworn or unsworn, do not constitute evidence upon which they can act; and, in a non-jury case, the court should direct itself accordingly. (P. 167 L.32) 25

Findings of fact are to be based on evidence 30

6. The point must be stressed that it is a fundamental principle of law that findings of fact and conclusions from facts of a trial court should be based on evidence adduced before the court and not on speculation or possibilities. It is not the function of a Court of law to speculate on possibilities which are not supported by any evidence. (P. 172 L.26) 35

Conclusions of facts without evidence are perverse

7. No trial court is entitled to draw conclusion of fact outside the available legal evidence before it. When a trial court veers off course and acts on speculation and possibilities rather than on the concrete evidence before it, it obviously has abandoned its proper role and such facts or conclusions of fact
5 found without appropriate evidence in support thereof will be regarded as perverse by an appellate court. (P. 172 L.34)

Court is to deal with any view of the fact arising reasonably out of evidence

8. The law is settled that it is the duty of a trial court to consider all defences
10 raised by the evidence whether or not the accused person specifically put up such defences or relied on them and to deal adequately with any other view of the facts which might reasonably arise out of the evidence given and which would reduce the offence murder to manslaughter. (P 174 L. 10)

15 **KUTIGLJSC**

Court's error in not convicting for a separate offence it found proved

9. There is no doubt that the learned trial judge was perfectly in order to have discharged and acquitted the appellants of the offence of murder since according to him cause of death was not proved. But as shown above he was
20 certainly wrong to have failed to convict them of the offence of "*beating the deceased in the parlour of the 1st accused*" which he had accepted as proved. (P. 177 L.30)

REPRESENTATION

25 Mr. Kehinde Sofala SAN, with A Idris Esq for the Appellants.
Mrs. Atim E. Ekpo D.D.P.P Akwa Ibom State for the Respondent

CASES REFERRED TO

Agwu & Others v. The State (1965) NMLR 18 at 20
30 Christopher Onubogu and Another v. The State (1974)9 S.C.1
Inspector General of Police v. Hillary Ewekay (1957)L.L.R 11
Woolmington v. D.P.P (1935) A.C. 426 at 481
R v. Basil Ranger Lawrence (1932)11 N.L.R. 6 at 7
Mamman Ibrahim v. The State (1993)2 N.W.L.R. 735
35 Obogo v. The State (1977) S.C. 29
Sunday Kala Alagba & Ors. Vs R (1950)19 NLR 128
Nwogbaga Idika & Ors Vs R (1959)SCNLR 241
Patrick Nwafor Muonwem & Ors. Vs R (1963)1 All NLR 95, (1963)1 SCNLR
Yakubu Mohammed & Anor. v. The State (1980)12 NSCC 152 at 160

Ugwumba v. The State (1993)5 NWLR (Pt. 296) 660 at 671	
Osayeme v. The State (1966) NMLR 388	
Sanyaolu v. The State (1976)6 S.C. 37	
Wankey v. The State (1993)5 NWLR (Pt 245 (Pt 295) 542 at 552	
Okoniji vs. The State (1987)1 NWLR (Pt 52) 659	5
The State v. Aibangbese & Another (1988)3 NWLR (Pt 84)548	
Nasamu v. The State (1979) 6-9 SC 153	
Enahoro v. The Queen (1965) 1 All NLR 125	
Ibe v. The State (1992)5 NWLR (Pt 244)642 at 649	
Azu v. The State (1993)6 NWLR (Pt 299)303 at 316	10
Kami v. The State (1988)4 NWLR (Pt 90)503	
Layonu and Others v. the State (1967)1 All NLR 198 at 201	
and R.V.Adebanjo 1 (1935)2 WACA 315.	
Gwontu v. The State (1983)1 SCNLR 142 at 152	
Onajobi v. Olanipekun (1985)4 SC (Part 2) 156 at 163	15
Oje v. Babalola (1991)4 NWLR (Pt 185) 267 at 282	
Azuetonma Ike v. Ugboaja (1993)6 NWLR (Pt 301) 539 at 556	
Anyanwu v. Mbara (1992)5 NWLR (Pt 242) 386 at 400	
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STATUTES REFERRED TO

Criminal Code ss.319, 7, 8, 9, 316, 317 Evidence Act s.226(2)

LEAD JUDGMENT BY IGUH, JSC

The appellants, Grace Abraham Akpabio, Effiong Udo Ekong and Edet Jonathan Nte, were on the 29th day of February, 1988 arraigned before the High Court of Akwa Ibom State, holden at Uyo, charged with the offence of murder contrary to Section 319 of the Criminal Code. The particulars of the offence charged are as follows:-

“Grace Abraham Akpabio, Effiong Udo Ekong and Edet Jonathan Nte on 22nd September, 1987 at No.2 Morris Eka Lane, Uyo in Uyo Judicial Division murdered one Anthony Michael Asuquo.”

Each of the three appellants pleaded not guilty to the charge and the trial proceeded.

The prosecution called seven witnesses at the trial. The 1st appellant gave evidence and called one witness. The 2nd and 3rd appellants called no evidence but rested their defence on the case of the prosecution.

The substance of the case as presented by the prosecution is that on the 22nd day of September, 1987, the 1st appellant after the day’s business,

returned to her residence at between 9.00 p.m. and 9.30 p.m. In her parlour, she met the deceased, one Anthony Michael Asuquo, along with P.W.1 who is the 1st appellant's half sister and the 1st appellant's children watching the television. There and then she reminded the deceased who was her nephew that she had warned him not to visit her residence any more. She then went into her
 5 bed room, changed into another dress and asked P.W.3, her servant, to accompany her somewhere. The 1st appellant then went out with P.W.3 and collected the 2nd and 3rd appellants.

Upon returning to her residence with the 2nd and 3rd appellants, the 1st appellant ordered P.W.3 into his room adjacent to her parlour and instructed
 10 him to lock the door. This directive was obeyed. The 1st appellant next ordered P.W.1 and her three children who were watching the television to be locked into another room close to the parlour, leaving the deceased person behind in the said parlour.

What followed was given in evidence by P.W.1 thus -

15 *"As I was in the house, I heard when the 1st accused said that the Anthony should be treated as they use to treat thieves. Anthony had completed his secondary Class Five. The 1st accused issued the instructions to people who were in the parlour but I did not know them as I was in the room. The people to whom she issued the instructions were not in the parlour at the*
 20 *time we were watching the television. They came in after we were locked into the room. As we were in there, I heard when Anthony was crying and begging that he should no longer be beaten or else he would die. I was in the room when I heard all these. We were in the room for long but I had no watch on so I did not know the exact time. Finally we left the room - the four of us."*

25 When they eventually came out of the room, they saw the deceased lying down face downwards in the parlour with his two hands and legs tied together backwards. The 1st appellant and other people including the 2nd and 3rd appellants were there. The 2nd and 3rd appellants, in parlour, had whips of whistling pine in their hands. There were other sticks in the parlour. The
 30 deceased had been severely flogged and beaten up. P.W.2 the grandmother of the deceased was later invited to the scene by the 1st appellant who asked her to take him away. She was afraid when she saw the deceased's condition but only wept and went away. P.W.1 concluded her evidence in chief as follows:-

35 *"It was Grace Akpabio who loosened the said Anthony and asked him to get up and go away. Anthony got up and walked to the Store which is near to our house. As he arrived at the Store, the owner of the store chased him away and told him to return to the compound of the 1st accused. From the store to Grace Akpabio's house is about twenty metres. The deceased was staggering as he got up and moved towards the store. When the store-man*

asked him to return to the 1st accused's compound, Anthony went back. He was still staggering as he went back. When Anthony staggered back to the compound, we went to bed and slept. When we woke up the following morning, I saw the corpse of Anthony at the back-yard of Grace Akpabio. I had seen the body of the deceased. There were whip lashes all over the body of the deceased. Before I went to sleep, I had seen the body of the deceased. There were whip lashes all over his body before he died. At the time we were watching the television, there was nothing wrong with the body of the deceased at all"

As was observed by the Court of Appeal, and this is fully borne out by the record of proceedings, P.W.1 was subjected to very long and rigorous cross-examination by two learned counsel but she remained firm and unshaken in her testimony.

The evidence of P.W.4, Dr. Etop Sampson Akpan who performed post mortem examination on the body of the deceased is relevant.

He said -

"I performed the post-mortem. I examined the body. I did not find any satisfactory evidence as to what could have been responsible for the death. I therefore had to open up the body. The corpse was still fresh with multiple bruises all over the body, on the face, on the trunk, on the upper and lower limbs. On opening up, the essential finding was on the skull. There I found that the suture line, that is a line where the two halves of the skull meet, had been completely separated from each other. There was a lot of bleeding from the blood vessel of the brain which was collected between the skin and the skull because there was no open wound on the head for it, the blood to come out. Such injuries can be sustained through various means by the use of various instruments. The instrument used must have been a blunt one. A knock with a hard fist could cause it. A club or piece of stick could cause it. A piece of iron could cause it. The instruments must have been applied by someone with some force on the person. The bruises resemble those which could have been caused by a teacher who uses cane on his pupil. My conclusion was that the deceased have died as a result of neurogenic shock that is a shock that results from injury to the nervous tissues of which the brain is the major one."

Under cross-examination, P.W.4 explained as follows -

"The bruises I saw on the deceased could kill the deceased if the internal injuries are traumatized. The bruises I saw on the body of deceased could lead to the separation of the suture line on the deceased. Because of the hair, it was not really very easy to notice bruises on the head, that is, part

of the head covered with hair, but the consistency of the skin on that part, that is, the back part of the head was softer than on the rest of the head. Explanation for this is this, it was the bleeding that caused the spot to be softer. I did notice the softness of the spot on the head and that raised my suspicion to open up of all the bruises, the likely one to cause death was the
 5 *one on the head. I have practised medicine for four years as a Doctor, including my housemanship. As to the time, that the deceased could have lived after the injury he could have lived for more than five minutes. Again, it all depends on the injury - that is the extent of the injury or severity of the injury. With the state of things I saw inside, the deceased could not have*
 10 *lasted beyond twenty four hours, that is, he could have died within (24) twenty-four hours. This could have affected the speech of the deceased before he died."*

The 1st appellant in her own defence admitted going with P.W.3 to invite the 2nd and 3rd appellants on the material night. She however claimed
 15 that she did so as she wanted them to listen to certain frightening confessions by the deceased in connection with the "Sixth and Seventh Books of Moses", his having been charmed to take to stealing and his power to cause rain to fall and put people to sleep when he went on stealing operations. She admitted causing the deceased's hands and legs to be tied up and ordering her children
 20 out of the parlour into the adjoining room. She did this so that the deceased could feel free to confess where he had been to. She called a witness, one Dennis Okon Etim, who claimed that there was an incident at a certain Mathson supermarket that evening in which it was alleged that a certain boy was mobbed. The obvious suggestion was that the deceased must have been the victim of
 25 the alleged mob attack from which he died. According to the 1st appellant, the name of the victim of the mob attack was not mentioned but his description fitted the deceased. She denied bringing anyone to her residence to beat up the deceased to death. She did not see anybody beat up the deceased in her house or in her presence. She however admitted under cross-examination that
 30 when she went to call the 3rd appellant, she told him that there was a thief in her house. She also admitted that the person she referred to as a thief was the deceased.'

The learned trial Judge, Nkop, J, as he then was, after an exhaustive review of the evidence on the 27th September, 1988 held that the prosecution
 35 had failed to prove the charge against each of the appellants beyond reasonable doubt. He therefore acquitted and discharged them.

Dissatisfied with this judgment of the trial court, the respondent appealed to the Court of Appeal, Enugu Division against the said acquittal and discharge of the appellants. On the 18th day of March, 1993, the Court of

Appeal in a reserved judgment unanimously allowed the appeal and all three appellants were found guilty of murder as charged and were sentenced to death. It is against this judgment of the court below that the appellants have now appealed to this court.

At the hearing of the appeal before us on the 21st April, 1994, learned 5 counsel for the appellants, Kehinde Sofola Esq., S.A.N. adopted the appellants' brief dated the 19th October, 1993 but filed on the 20th October, 1993 together with their reply brief filed on the 12th April, 1994 and made oral submissions in amplification thereof. In the appellants joint brief, the issue identified for determination in this appeal is as follows:- 10

"Whether The Court of Appeal was not in error when it held upon the totality of the evidence adduced at the court of trial that the charge of murder had been established against each of the accused persons beyond reasonable doubt.

However, in the alternative, the following issue also arises:- 15

Whether on all the established facts in this case, the proper verdict which ought to have been returned by the Court below against each of the accused persons is not one of manslaughter rather than one of murder."

The respondent for its own part, also formulated one issue for the determination of this court. This issue goes as follows - 20

"Whether from the totality of the evidence adduced at the trial of this case, the prosecution had proved its case beyond reasonable doubt."

The above issue is sufficiently encompassed by the first arm of the issues raised by the appellants in their joint brief of argument. Accordingly I shall in this judgment confine myself to the issues raised in the appellants' 25 brief of argument.

Arguing the appeal, learned Senior Advocate of Nigeria conceded that it is not in doubt that the deceased died. He however submitted as regards the facts of the case that there were so many contradictions and inconsistencies in the statements to the police made by the witnesses and their viva 30 voice evidence in court that no reasonable Jury would have returned a verdict of murder against the appellants. He reminded the court that apart from P.W.4 the Doctor who performed post mortem examination on the body of the deceased, the three witnesses who gave evidence for the prosecution relevant to the charge were P.W.1, P.W.2 and P.W.3. He pointed out that it appeared the 35 respondent concedes that the evidence of P.W.2 is worthless. He submitted that the same ought to be the case with regard to the evidence of P.W.1 and P.W.3 as he argued that they are full of inconsistencies and contradictions. He identified these inconsistencies as follows:-

(i) P.W.1 in her statement to the police Exh. A, stated that the 1st appellant after she had gone out returned with four men whose names she did not know, but could identify them. But in her evidence before the court, P.W.1 claimed that the 1st appellant with the men came in after she had been locked
5 in the room.

(ii) P.W.1 in Exh. A, stated that before she went to sleep, she saw the 1st appellant loosen the ropes from the deceased's legs and ask him to go. The deceased "moved" to a nearby store but the owner of the store ordered him to go back to the 1st appellant's compound and he walked back to the said
10 compound. In court however P.W.1 testified under cross-examination that she did not use the word "staggered" because she was still afraid when she made Exh. A, but that the deceased was infact staggering when he walked back from the store to the house.

(iii) P.W.1 in Exh. A, did not mention whips whereas in her testimony
15 before the court she talked about whips.

Learned Counsel also submitted that it was wrong for the court to have excluded the second statement of P.W.1 in evidence. He argued that had this statement been admitted in evidence, it would have affected the mind of the Court of Appeal.

20 Learned Senior Advocate next referred to the statement of P.W.2, Exhibit B, D and contended that the contents materially differed from the evidence of the witness before the court. On the state of the law, he submitted that the evidence of P.W.2 ought to have been discountenanced in its entirety and ought to have created some doubt in the mind of the court as to all the
25 evidence implicating the accused persons with the offence charged. He contended that the Court of Appeal in the exercise of its powers to rehear the case ought not to have placed any weight whatsoever on the evidence of P.W.1, P.W.2 and P.W.3 as the credit of each of them was sufficiently impeached by the proof of their former statements. He submitted that P.W.3
30 whom he described as a "self confessed liar", made four contradictory statements to the Police and that it was erroneous for both courts below to have accepted his testimony as true. In this connection, learned counsel cited the decisions in *Agwu & ors v. State* (1965) NMLR 18 at 20; *Christopher Onubogu and anor v. State* (1974) 9 S.C.1; *Inspector General of Police v. Hilary Ewekay* (1957) LLR 11 and a host of other cases. He invited this court to
35 consider whether in view of all the evidence led by the prosecution, the case against each of the appellants can be said to have been proved beyond reasonable doubt. He reminded the court that the onus of proving the guilt of an accused lies on the prosecution whilst the applicable principle of common law

is that if at the end of the whole case, there is a reasonable doubt created by the evidence given, the accused will be entitled to an acquittal and discharge. In this regard, he cited the decisions in *Woolmington v. DPP*. (1935) A.C. 426 at 481; *R. v. Basil Ranger Lawrence* (1932) 11 NLR 6 at 7 and *Mamman Ibrahim v. State* (1993) 2 NWLR (Pt.278) 735. He argued that the evidence led by the prosecution in this case is generally unsatisfactory in nature because of the conflicts, contradictions and inconsistencies therein and submitted that the Court of Appeal erred seriously when it made an order of conviction for murder against the appellants and sentenced each of them to death. 10

Learned counsel argued in the alternative that the Court of Appeal failed to consider the lesser offence of manslaughter against the appellants. He stressed that there was no evidence that the appellants intended to cause grievous harm to the deceased, or that a reasonable person in the circumstances of this case would have foreseen that the blows which the appellants inflicted 15 on the deceased could have caused him grievous harm. He concluded by submitting that the Court of Appeal having put itself in the position of the trial court was obliged to have considered the alternative verdict of manslaughter. Not having done so and there being some evidence upon which such verdict could have been returned, learned counsel invited this court to substitute a 20 verdict of manslaughter for that of murder.

For her own part, learned counsel for the respondent, A.E. Ekpo (Mrs.) Deputy Director of Public Prosecutions, Akwa Ibom State submitted that the evidence of P.W.1 and P.W.3 was unimpeachable. She argued that based on the evidence adduced at the trial and the findings of the trial court, 25 the one and only verdict which was open to the learned trial Judge was that of murder against each of the appellants. She pointed out that the trial court accepted the testimony of P.W.1 and P.W.3 as true. Learned counsel contended that the alleged contradictions and inconsistencies pointed out by learned appellants' counsel were neither raised in the court below nor are they material 30 to the main issues that arise in the case and must accordingly be discountenanced. She recounted that the learned trial Judge found as a fact that the appellants gave the deceased a thorough beating in the 1st appellant's parlour. He however qualified this by adding that but for the possibility of a subsequent attack by a crowd on the person of the deceased, he would have 35 found the appellants guilty of any offence that squares with the facts proved. She pointed out that the trial court was able to speculate on the possibility of a subsequent attack by a crowd against the deceased from Exhibit B, an alleged statement of P.W.2 to the Police. Exhibit B is at variance with the testimony of

P.W.2 before the court on this issue of a mob action. Whereas P.W.2 claimed in Exhibit B that there was a subsequent mob attack of the deceased on the material date, her evidence before the court is a total denial of this allegation. Learned counsel then submitted that having rightly declared the evidence of P.W.2 as unreliable and the contents of Exhibit B as not constituting evidence upon which the court could act, the learned trial Judge misdirected himself by relying on the same Exhibit B to entertain any doubt as to the guilt of the appellants. She stressed that there was no basis whatsoever upon which the learned trial Judge wandered into the realm of conjecture when it held, relying on Exhibit B, that it was possible some other people beat up the deceased after the appellants had dealt with him. The trial court by so doing created some doubt in his mind in the absence of any evidence as to whether there was a subsequent attack against the deceased which caused his death. Learned counsel argued that the purported doubt in all the circumstances of the case was unreal, non-existent, unreasonable and unjustifiable.

On the alternative issue, learned counsel submitted that this is a case of premeditated murder and that the severity of the attack makes a conviction for murder imperative. She contended that the 1st appellant could have reprimanded or indeed, given the deceased reasonable corrective punishment herself if she did not intend to kill or cause him grievous bodily harm. This is a situation where she procured the second and third appellants to deal ruthlessly with the deceased. The severity of the attack was such that inspite of the passionate dying pleas of the deceased, the appellants made sure he was beaten to a state of near unconsciousness. Learned counsel submitted that where an accused causes the death of another person by inflicting wounds of such severity, that death must have been anticipated as the only natural outcome of that act, he is guilty of murder and relied on the case of *Obogo v. State* (1972) 2 S.C. 39 in support of her contention. She urged this court to dismiss this appeal as lacking in substance and to affirm the conviction and death sentence passed on the appellants.

Turning now to the main issue that arises in this appeal for consideration, it must be observed that the key witnesses that testified for the prosecution in the case are P.W.1, P.W.3 and P.W.4. The summary of the prosecution's case which I have already fully set out above represents the kernel of their testimony before the trial court. It must also be pointed out at this stage that the learned trial Judge meticulously evaluated the evidence of these witnesses and commented on each and everyone of them. He considered them to be truthful and reliable witnesses and believed their respective evidence. Of the evidence of P.W.1, the learned trial Judge said as follows:-

"I took time and observed P.W.I's demeanour when she was testifying. As far as humanly possible, she cut a perfect figure of a confident and truthful witness."

The learned trial Judge continued as follows:-

"I therefore reject the evidence of the D.W.II as irrelevant and untrue. I therefore accept the evidence of the P.W.I that the deceased was at home 5 with them since about 4 p.m. on 22/9/87 watching T.V. in the parlour of the 1st accused. It is not in dispute that the 1st accused had gone to the house of the 2nd and 3rd accused persons and invited them to her house. I believe the evidence of the P.W.I and that of the P.W.III, that the 1st accused had ordered the P.W.I and her children, and the P.W.III into their respective rooms when 10 the 2nd and 3rd accused persons arrived at her house. The number of people in the parlour of the 1st accused therefore was four, namely the deceased, the 1st, 2nd and 3rd accused persons. The P.W.III and the other children could hear what was said in the parlour from their rooms. There is no dispute about this. The P.W.I said:- 15

"I heard when Anthony was crying and begging that he should no longer be beaten or else he would die."

The P.W.III said:-

"I heard Anthony crying and begging that Mama should tell them 20 not to beat him again. Mama was the 1st accused."

There is evidence that when the P. W.I and P. W.III came out of their rooms, they each saw the deceased with his hands and legs tied. The P.W.III swore that he could hear the sound of beating from where he was in the room".

I accept these evidence. I believe that the deceased was beaten in that 25 parlour."

With regard to P.W.4 the learned trial Judge observed thus-

"I saw him as a young intelligent and truthful Medical Officer whose evidence I accept as true I n these circumstances, there can be no question of mistaken identity. The corpse 30 (upon which P.WA performed post mortem examination) was therefore that of the late Anthony Michael Asuquo." (Words in brackets supplied).

There was next the question of which persons that gave the deceased the vicious beating described by P.W.I and P.W.3 which, on the evidence, reduced him to a state of semi-unconsciousness. The learned trial Judge had 35 this to say-

"As to who beat the deceased in the parlour, the answer is simple. It was either the first accused or the 2nd accused or 3rd accused or all of them in concert with each other. It will be recalled that it was three of them versus

the deceased. The effect of the beating is later to be discussed in this judgment.....I have no doubt in my mind that the three accused persons gave the deceased a beating in the parlour of the 1st accused."

5 Justifying the finding of the learned trial Judge on the issue of the persons that brutalised the deceased in the parlour of the 1st appellant, the Court of Appeal per the lead judgment of Uwaifo, J.C.A. had this to say -

"Sections 7, 8 and 9 of the Criminal Code are relevant to the facts of this case as already set out above. They provide as follows:-

10 *"7 When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say:-*

(a) every person who actually does the act or makes the omission which constitutes the offence;

15 *(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;*

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

20 *In the fourth case he may be charged either with himself committing the offence or with counselling or procuring its commission.*

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

25 *Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged With*
 30 *himself doing the act or making the omission.*

8. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the
 35 *offence.*

9. When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the

way counselled or in a different way, provided in either case that the facts constituting the offence actually are a probable consequence of carrying out the counsel.

In either case, the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him."

The 2nd and 3rd accused persons were procured by the 1st accused from their respective houses that night. On reaching the house of the 1st accused, she told them to treat the deceased as a thief is treated. In the context of what followed by a prolonged assault on the deceased in the presence of the 1st accused by whipping and/or hitting, that would appear to mean that the 2nd and 3rd accused were counselled by her to severely beat up the deceased. The 2nd and 3rd accused acted in concert in that regard. In that situation it is not necessary to show which of them acted in carrying out the counsel of the 1st accused as long as it is proved that it was carried out, all of them being present. In another words, it does not matter which of the 2nd and 3rd accused did what.

This was laid down in the Privy Council decision in Sunday Kala Alagba & Ors v. R. (1950) 19 NLR 129. The evidence of P.W.1 is that she saw whips in the hands of the 2nd and 3rd accused persons after the deceased had been severely beaten, and there were whip lashes all over his body. Her evidence is that it was the 1st accused who gave instructions for the deceased to be treated as thieves. The evidence of P.W.3 confirms that the deceased continued to cry, and he begged the 1st accused to "tell them" not to beat him again. She heard the sound of caning several times. She later saw a piece of stick of considerable thickness and length cut from a whistling pine.

What the 1st accused did amount to no doubt, to procuring and counselling: See Nwogbaga Idika & Ors v. R. (1959) SCNLR 537. There can be no doubt also that the moment the 2nd and 3rd accused accepted the counsel, and from the prolonged and violent assault on the deceased after his legs had been tied and the hands tied also behind him so that he remained completely defenceless, a common intention under section 8 of the Criminal Code at least to do grievous harm to him was present. The deceased was like an animal prepared for slaughter, except that the method by which he met his death was different. His throat was not slashed. But he was subjected to brute and senseless assault to which his unprotected head was particularly vulnerable. Hence the separation of the suture line of his skull. The medical evidence supports this. It was obviously a sad and painful death.

In Patrick Nwafor Mounwem & ors v. R (1963) 1 All NLR 95; (1963) 1 SCNLR 172 it was held that where a number of persons join in an unlawful assault it is a question of fact in every case whether the death of the person assaulted was a probable consequence. The facts of the present case justify an inference of that probability. See also Yakubu Mohammed & anor. v. State (1980) 3-4 S.C. 84; (1980) NCR 14; (1980) 12 NSCC 152 at 160. The probable consequence of carrying out the counsel given by the 1st accused to the 2nd and 3rd accused persons by which they assaulted the deceased in the manner a thief would be beaten, and in the way they did it, was the death that resulted. The assault was unlawful. All three accused persons would by virtue of sections 7,8 and 9 of the Criminal Code be held liable for murder.

I have given the above observations of the Court of Appeal a close study and confess that I entirely endorse them.

The position, therefore, as found by the learned trial Judge and affirmed by the Court of Appeal is that at about 9.00 p.m. of the 22nd September, 1987, the 1st appellant returned to her residence at No.2 Morris Eka Lane, Uyo and found the deceased, P.W.1, P.W.3 and others watching Television in her parlour. She queried the deceased as to whether she had not warned him not to visit her home. Thereupon she changed her dress and invited P.W.3 to accompany her to somewhere. The 1st appellant then went and invited the 2nd and 3rd appellants. On their return to the 1st appellant's home, she ordered everyone else except the deceased to be locked inside the two rooms adjacent to her parlour. She then ordered the 2nd and 3rd appellants to deal with the deceased "as they treat thieves". Thereupon the hands and legs of the deceased were tied backwards, his choir robes which he wore were pulled up and tied to his chest and the appellants launched an unprovoked and vicious violent attack on the deceased. The attack lasted for such a long time that the deceased kept crying and begging the 1st appellant to please tell the 2nd and 3rd appellants not to beat him again or else he would die. This plea fell on deaf ears.

The result is that at the end of this barbarous exercise, the deceased was left in the parlour with both his hands and legs tied and lying face downwards. His body was full of whip lashes or cane marks. When he was untied and ordered by the 1st appellant to go away, the deceased got up and was staggering towards a nearby store next to the 1st appellant's compounds. He would walk for a short distance and fall, would get up again, walk and fall. He managed to get up to the nearby store but was ordered back by the owner of the store to the compound of the 1st appellant. He staggered back to the back-yard of the 1st appellant's compound where he died the same night. P.W.1 in particular testified that the deceased came to the 1st appellant's home

at 4 p.m on the date but did not go out again. He remained in the home of the 1st appellant from about 4.p.m watching television in the parlour until the incident in issue occurred at about 9.00-9.30 p.m. The corpse of the deceased was discovered the following morning at the same very backyard of the 1st appellant's compound. Post mortem examination revealed that the suture line of the skull had been separated from each other. There were bruises on his 5 body which resembled those caused by a teacher who used cane on his pupil. The bruises he saw could lead to the separation of the suture line on the deceased. Death was as a result of neurogenic shock- that is, a shock that results from injury to the nervous tissues of which the brain is the major one. I should observe that the above findings are fully supported by evidence 10 before the court.

On the defence case, the learned trial Judge rejected the evidence of the 1st appellant in all areas where this contradicted the testimony of P.W.1 and P.W.3. He also rejected the evidence of the 1st appellant to the effect that they did not beat up the deceased in her parlour. He further rejected her 15 evidence of motive as to why she invited the 2nd and 3rd appellants into her home on the material time. The learned trial Judge went on as follows:-

"The P.W.1, Amanam Asuquo Udo swore that as from 4 p.m that day, the deceased was with them watching television in the parlour of the 1st accused. The 1st accused on the other hand swore that when she returned 20 from work on 22/9/87 at about 9 a.m., the deceased was not in the parlour but that she saw only her children who were then watching T.V. She said that a few days after this incident, she heard that a young man who resembled the deceased was beaten up at the Mathson Super Market for stealing. She said the deceased returned to the house that evening with some items which she 25 suspected were stolen from that supermarket. In order to sustain this story, she invited one Dennis Okon Etim, the D.W.2 who swore that in the evening of the incident he had seen a crowd at the Mathson Super-Market. He did not know what happened. After he had gone some distance away from the place, he gave a lift to a young man who was standing by the road side and who said he was going to the house of the 1st accused. He said he came subsequently to realise that the young man he gave lift to was the one who died and who is the subject matter of this trial. The impression that the 1st accused wanted to create was that the deceased was beaten up that 35 evening at the Mathson Super-Market and that he died as a result of the beating. I have rejected this story in its entirety. I had carefully observed that witness in this court when he was giving his evidence. It surely did not require the expertise of a trained psychologist to know that no incident ever took place and that

the 1st accused merely suborned him to come and lie to this court. He merely saw a crowd. He did not know for what purpose the crowd gathered there. He did not know whether the deceased was from that crowd. How then could he positively link the deceased with whatever happened in the Super-Market? Two policemen took part in the investigation of this case. Such Super-market story was never mentioned to any of them for investigation. The D.W.II, the 1st accused's witness said he picked the deceased at home at 8 p.m on 22/9/87. The 1st accused said she went back home at about 9. p.m. Surely, if this was not a cooked up story, the deceased ought to have been at home before the 1st accused returned to the house."

The trial court therefore rejected the evidence of the 1stappellant and held that she suborned D.W.2 she had called to testify on her behalf. The Court of Appeal affirmed this finding of the trial court.

It has to be pointed out that both the trial court and the Court of Appeal appear so far to be ad idem in their findings of fact as above set out. I myself, have closely scrutinised these concurrent findings of facts and feel completely satisfied that they are fully supported by evidence before the court. It is neither established that they are perverse or were reached as a result of a wrong approach to the evidence nor were they arrived at as a result of any wrong application of the principles of substantive law or procedure. In the circumstances, this court will not interfere with them. See Ugwumba v. state (1993) 5 NWLR (Pt.296) 660 at 671 : Osaveme v. State (1966) NMLR 388; Sanyaolu v. State (1976) 5 S.C. 37; and Wankey v. State (1993) 5 NWLR (Pt.295) 542 at 552.

Learned counsel for the appellants has strenuously argued that as regards the material facts, there were so many contradictions and inconsistencies in the statement made by the witnesses to the police and their evidence in court that no reasonable jury would have returned a verdict of guilt in a murder charge such as this.

The three areas of alleged inconsistencies indicated by learned Senior Advocate against P.W.1 have already been set out earlier on in this judgment. With regard to the first inconsistency, it seems to me that what is of material importance is whether the 1st appellant procured the services of the 2nd and 3rd appellants to deal with the deceased in the 1st appellant's parlour and not whether it was before or after P.W.1 was locked in the room that the appellants came into the parlour. After all, it is not in dispute that the 1st appellant invited the 2nd and 3rd appellants and that they all went into the 1st appellant's parlour to meet the deceased.

What appeared to be in dispute is whether or not the appellants dealt with the

deceased as testified to by P.W.1 and P.W.3. In this regard, it must be stressed that it is not in all cases where there are discrepancies or contradictions in the prosecution's case that these are fatal to its case. It is only when the discrepancies or contradictions are on a material issue or issues in the prosecution's case which create some doubt in the mind of the trial Judge that the accused is entitled to benefit therefrom. See *Okonji v. State* (1987) 1 NWLR (Pt.52) 659; 5 *State v. Aibangbee & anor* (1988) 3 NWLR (Pt.84) 548; *Onubogu v. State* (1974)9 S.C. 1; and *Wankey v. State* (1993) 5 NWLR (Pt.295) 542 at 552.

The second alleged inconsistency is said by learned counsel to be that whereas in Exhibit A, P.W.1 stated that the deceased "moved" to a nearby 10 store when he was untied and ordered out of the 1st appellant's parlour, in her evidence in court, she testified that the deceased "staggered" to the store. It is my view that whether the deceased "moved" or "staggered" to the store is a matter of semantic in the context of this case and does not go to the root of 15 the issues in question before the court. The matter cannot therefore be one of any great moment in the determination of this case. In this connection, it must be borne in mind that for any conflict or contradiction in the evidence of a prosecution witness to be fatal in the case for the prosecution, such conflict or contradiction must be substantial and fundamental to the main issues in question before the court. See *Nasamu v. State* (1979) 6-9 S.C. 153; *Enahoro v. Queen* (1965) 1 All NLR 125; *Ibe v. State* (1992) 5 NWLR (Pt.244) 642 at 649; *Aliu v. State* (1993)6 NWLR (Pt.299) 303 at 316; and [1994] 7 NWLR Akpabio v. State (Iguh, J.S.C.) 661 v. *Kalu v. State* (1988) 4 NWLR (Pt.90) 503. 20

The third inconsistency is said to be that whereas P.W.1 in Exhibit A 25 did not mention whips, she did this in her testimony before the court. This again appears to me entirely inconsequential as P.W.1 in Exhibit A clearly stated that the 1st appellant ordered the men she brought to treat the deceased as thieves are dealt with. As she was locked in the room, she could not see what was happening in the parlour but she heard the deceased's voice "crying 30 and begging that he should not be beaten again", Indeed in her examination in chief, she said nothing about whips either. It was under cross-examination that she stated as follows-

"I had seen the 2nd and 3rd accused with whips in their hands. The whip was cut from a whistling pine. I did not know or see who cut it, but I saw them holding the whips. I did not testify as to the whips in my evidence in chief because nobody asked me about it. I did not tell the police this because they did not ask me."

(Italics supplied for emphasis)

P.W.1 gave cogent and satisfactory reason as to why she did not mention whips in Exhibit A and it is my view that her explanation completely answers the alleged confliction complained of.

Learned counsel for the appellants further argued that it was wrong for the learned trial Judge to have upheld the objection of the prosecuting state counsel to the tendering in evidence of the second statement of P.W.1 to the police. The trial Judge had held in his ruling that there was no basis whatsoever for the application.

It seems to me well established that in a criminal trial, the defence is entitled to see any written statement in the possession of the prosecution which was made by a witness called by the prosecution and which relates to any matter on which the witness has given evidence, and to cross-examine the witness on it and then tender it solely to impeach his credit. It must be emphasised in this connection that it is not the law that the defence must allege or establish a discrepancy between the statement to the police and the sworn testimony before the court can order prosecution to produce the said statement. See *Layonu and ors v. State* (1967) 1 All NLR 198 at 201; (1967) NMLR 411 and *R. v. Adebajo* (1935) 2 WACA 315.

A distinction must however be drawn between an application by the defence in criminal trial for the production of the statement of a prosecution witness to the police as against an application to tender such a statement in evidence. In the former case, as I have observed, the defence is entitled to see any such statement and to cross-examine the witness on it and then, if it is intended to impeach his credit, to tender the statement in evidence for that sole purpose. In the latter case, however, it seems to me that the basis for which it is sought in evidence ought to be laid before the court. This will enable the court to take an appropriate decision as to its admissibility. This is because such an extrajudicial statement is certainly not evidence of the fact therein contained and the only use to which the defence can put it, as I have observed, is to cross-examine the witness on it and then tender it solely for the purpose of impeaching the credibility of the witness. If, therefore, the basis of the application by the defence to tender such a statement is solely for the purpose of establishing the truth of the facts contained therein, the court is entitled on grounds of law to reject such an application as misconceived.

In the present case, learned defence counsel applied to tender two statements of P.W.1. The first statement was sought to be tendered for the purpose of impeaching the credibility of the witness on certain areas identified to the court. This application was naturally granted and the statement was tendered in evidence as Exhibit A. No reason was however given as to why it

was sought to tender the second statement which is now in issue. I think the learned trial Judge was right to reject the application in respect of this second statement as no basis whatsoever was disclosed as to why it was sought to be tendered. Nonetheless it was put in evidence but marked rejected.

Be this as it may, there is the provision of section 226(2) of Evidence Act which provides as follows-

“(2) The wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the court on appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same”.

In the present case, no details whatsoever have been given in support of the allegation that had the said statement been tendered and received in evidence, the decision of the Court of Appeal would have been otherwise. The issue is one of considerable importance as it is not every mistake or error in a judgment that will result in the reversal of the judgment of the court below. It is only when such a mistake or error is substantial in that it has occasioned a miscarriage of justice that this court is bound to interfere. See *Gwonto v. State* (1983) 1 SCNLR 1; *Onajobi v. Olanipekun* (1985) 4 S.c. (Pt.2) 156 at 163, *Oje v. Babalola* (1991) 4 NWLR (Pt.185) 267 at 282, *Azuetonmalke v. Ugboaja* (1993) 6 NWLR (Pt.301) 539 at 556 and *Anyanwu v. Mbara* (1992) 5 NWLR (Pt.242) 386 at 400. In the absence of any evidence in the present case, to the effect that the alleged error complained of did in fact occasion a miscarriage of justice, I must hold that it is of no consequence in this appeal and ought to be discountenanced.

In the second place, the question as to the exclusion of the statement in issue was neither raised before nor pronounced upon by the court below. It was in fact neither made a ground of appeal in that court nor before us. It is well to bear in mind in this connection that an appellate court will not generally allow a fresh point to be taken before it if such a point was not raised and pronounced upon by the court below unless of course, the question involves substantial points of law and no further evidence needs be adduced to determine the matter and such a course of action is necessary to prevent an obvious miscarriage of justice. See *Kabaka's Government v. A.-G. of Uganda & anor* (1966) A.C. 1; *A.-G., Oyo State v. Fairlakes Hotel Ltd. (No.1)* (1988) 5 NWLR (Pt.92) 1 at 29 and *John Bankole & ors v. Mojidi Pelu & ors* (1991) 8 NWLR (Pt.211) 523. It has not been suggested that the non admission in evidence of the said statement in fact occasioned any miscarriage of justice. I have, myself, in the interest of justice and to prevent its possible miscarriage examined the rejected statement which along with the record of proceedings was trans-

ted to this court. I think I am perfectly entitled to do this on the decision of this court in Layonu and ors v. State (supra), at page 201. The document in issue is only a nine line statement in which P.W.I merely confirmed that the two men
5 she saw at the Police Station on the 19th October 1987 on which date she made the statement were those who, along with the 1st appellant, were concerned with the incident of the night of the 22nd September, 1987 in the parlour of the 1st appellant. She said she did not know their names. This tallies with her evidence in court when she testified as follows-

10 *"It is only two out of those four people that I knew. I knew them because they used to come to our compound. The two people are the 2nd and 3rd accused persons whom I have touched in this court. At the time I came out the accused persons were no longer beating Anthony but they were talking to Anthony's grand mother."*

15 Under cross-examination, she answered as follows-

"The police had asked me to confirm that the 2nd and 3rd accused were those I saw that night. I said they were the ones because I had seen them that night. The 2nd and 3rd accused were brought before me by the police....."

20 It seems to me crystal clear that the statement in issue is fully consistent with the evidence on oath of P.W.I and could not in any way have affected the decision of the lower court were it to have been admitted in evidence. In these circumstances, I entertain no doubt that the exclusion of the statement in issue, even if wrongful, and I do not so hold, is not a valid ground
25 for the reversal of the judgment of the lower court under consideration.

Turning now to P.W.3, it was contended that there are contradictions and conflictions in his various statements to the police as against his evidence before the court that no reasonable tribunal would treat him as reliable. I have myself examined carefully the three statements made by P.W.3 to the police
30 which were all tendered before the trial court. It is necessary to bear in mind that P.W.3 was at all material times in the employment of the 1st appellant as a Hotel attendant. His statements are Exhibits C, D and E. Exhibit C is his first statement to the police. He made it a day after the incident on the 23rd September, 1987. According to Exhibit C, he returned to the 1st appellant's
35 home at about 10 p.m. on the material date to see the deceased with his hands tied with wire. He met the 1st appellant talking in a high tone and the deceased was crying. He was told that the deceased stole the 1st appellant's two clothes. He did not know who tied the deceased's hands. He later went to bed woke up the following morning to see the deceased half dead. The 1st appellant went

to get a vehicle to take him home but he died before she returned. It is clear from this statement that P.W.3 gave maximum protection to the 1st appellant and her accomplices as the impression was given that he did not witness the event. Exhibit C, it must be noted, did not say there was no event on the material night. All that happened was that the persons connected with the offence were not disclosed as P.W. 3 claimed he was absent when the crime was committed. It must however be remembered that the 1st appellant herself admitted that she invited P.W.3 to accompany her to call the 2nd and 3rd appellants. It was on their return that the incident led to the death of the deceased happened. P.W.3 was therefore present at all times material to the commission of this offence.

There are next Exhibits D and E which are clearly consistent in all material particulars with the viva voce evidence of the witness before the trial Court. Exhibit E is a mere addition to Exhibit D. In Exhibit D which is P.W.3's second statement, he explained as follows-

"What made me not to tell the first police-man investigating this case all the facts when he took statements from me on the 23/9/87 was because Grace seriously warned me not to say any other thing than what she told me to tell the police. What I am saying now is the actual thing that happened during the incident."

In court, P.W.3 testified as follows-

"I made my second statement because my first statement was not true. I was forced by the 1st accused to make the first statement that way. In the third statement, I was asked to mention the names of the people who were in the room when the deceased was beaten up. The fourth statement was made on 24/10/87. I was detained in a cell. Later, I was removed from cell and tear-gassed by the police. They asked me questions and when I answered the questions, they wrote the answer. My second statement is the only true statement I made to the police."

It is therefore crystal clear that P.W.3 gave very clear reason to account for why he covered his madam with the 2nd and 3rd appellants in his first statement. What he said in Exhibit C was what his madam warned him to say and he complied. He explained that his true statement is Exhibit D and not Exhibit C.

The learned trial Judge who listened to and assessed P.W.3 accepted his testimony which is fully consistent with Exhibits D and E as true. It appears to me that it was within his rights so to do as the principle is firmly established that in a criminal trial, the onus is on a witness who gives testimony in court which is inconsistent with an earlier statement made by him to offer an explanation for the inconsistency. This is because where a witness had

previously said or written the contrary of what he later swore in evidence, his

evidence should not have much weight with a jury unless of course the reason for his having done so is satisfactorily accounted for. See Raphael Nwahueze v. State (supra) and Agwu and ors v. State (1965) NMLR 18 at 20.

5 P.W.3 in the present case explained why Exhibit C is inconsistent with his testimony in court. The trial court accepted his explanation as satisfactory and believed his evidence. I find no reason to reverse this finding.

The role of a trial court is to hear evidence, to evaluate the evidence, to believe or disbelieve witnesses, to make findings of fact based on the
10 credibility of the witness who testified and to decide the merits of the case based on the findings. See State v. Aibanghee and anor (1988) 2 NSCC 192; (1988) 3 NWLR (Pt.84) 548. In the present case, the learned trial Judge had the privilege of listening to the witnesses in this case and watching their demeanour and came to the conclusion that P.W.1 and P.W.3 amongst others
15 were witnesses of truth. This finding of fact was affirmed by the court below and I can find no reason to reverse the same.

I should perhaps add that apart from the evidence of P.W.3, there is the testimony of P.W.1 which, on the finding of the trial court as affirmed by the court below, is unimpeachable and true. Having carefully studied her entire
20 evidence, it seems to me plain that the findings of fact of the two courts below are so far fully and amply supported by the same. Her evidence was in no way discredited nor were the contents of her statements to the police at variance or inconsistent with her testimony before the court. I make these observations as a court can act on the evidence of one single witness if the witness can be
25 believed given all the surrounding circumstances of the case. A single credible witness can establish a case beyond reasonable doubt unless where the law requires corroboration. In other words, the evidence of one credible witness, accepted and believed by the court, is sufficient to justify conviction unless, of course, such a witness is an accomplice in which case his testimony
30 would require corroboration. See Ogoala v. State (1991) 2 NWLR (Pt.175) at 509, Onafowokan v. State (1987) 3 NWLR (Pt.61) 538, Ugwumba v. State (1993) 5 NWLR (Pt.296) 660 at 679, Alii and anor v. State (1988) 1 SCNJ. 18 at 30; (1988) 1 NWLR (Pt.68) 1; and Igbo v. State (1975) 9-11 S.C. 129 at 136; (1975) 1 All NLR (Pt.2) 70. I entertain no doubt that both the trial court and the court below were
35 on firm grounds in their findings up to this stage.

On the above facts, it is the view of the court below that all three appellants would by virtue of the provisions of sections 7, 8 and 9 of the Criminal Code be held for murder. The Court of Appeal per the lead judgment of Uwaifo, JCA continued as follows-

“The learned trial Judge invariably arrived at that conclusion but

for an avoidable error amounting to a miscarriage of justice when he said:

“I have no doubt in my mind that the three accused persons gave the deceased a beating in the parlour of the 1st accused. But for the possibility of a beating by the crowd, I would have found them guilty of any offence that 5 squares with the proved facts.”

I will now examine whether this charge of “avoidable error amounting to a miscarriage of justice” levelled against the judgment of the trial court by the Court of Appeal is well founded or otherwise unjustifiable. This also brings me to a consideration of the evidence of P.W.2 as it is from Exhibit B. one of his statements to the police, that the learned trial Judge was able to hold that there was the possibility of the deceased having been subsequently beaten by a crowd of people in a mob action. Consequently he found himself in a position where some doubt was created in his mind as to the guilt of the appellants whom he proceeded to acquit and discharge of the offence charged. 15

There can be no doubt that the testimony of P.W.2 before the trial court was materially at variance with her earlier statement to the police, Exhibit B. The relevant part of Exhibit B reads as follows-

“On that 22/9/87, when we arrived the compound of Mrs Grace Akpabio, my grandson asked me to loosed him from the ropes he was tied 20 with. That is Anthony the deceased. I replied him that was he not the person who wanted to hit me with the door on the previous day when I asked him why he steal money meant for his school fees at the mother to the father’s place at Anua Obio. On hearing this, some people in the crowd asked if what I was saying was true and Anthony said yes. This annoyed them and started 25 beating him again in the presence of Grace Mfon Akpabio. It is only herself, Grace who knows how she brought or knew this people.”

In her evidence before the court, however, she denied telling the police that the deceased ever hit her because she reprimanded him for stealing. She said she did not know the deceased to be a thief since he had never stolen 30 any of her property. She also denied that anyone whatsoever beat the deceased in her presence.

The law is long settled that where a witness is shown to have made a previous statement, though unsworn, in distinct conflict with his evidence on oath at the trial, the jury should not merely be directed that his evidence at 35 the trial should be disregarded as unreliable, but also that the previous statement, whether sworn or unsworn, do not constitute evidence upon which they can act; and, in a non-jury case, the court should direct itself accordingly. See Regina v. Golder (1960) 1 WLR 1169 at 1172 and Queen v. Asuquo Akpan

Ukpong (1961) 1 All NLR 25; (1961) 1 SCNLR 53. See too R v. Hariss 20 Cr. Ap.

R. at 147. So too in Christopher Onuhogu and anor v. State (1974) 9 S.C.1, Rapheal Nwahueze v. State (1988) 4 NWLR (Pt.86) 16 at 32; State v. Macauley Uzo (1972) 1 NMLR 208, Christopher Arechia v. State (1982) 4 S.C. 78., Iwone
 5 Ohade v. State (1991) 6 NWLR (Pt.198) 435; and Augustine Duru v. State (1993)
 3 NWLR (Pt.281) 283. The learned trial Judge was clearly not oblivious of this
 state of the law for in his judgment he stated, and quite rightly in my view, as
 follows-

10 *“By reason of the above authorities, this court cannot place any
 reliance on the oral evidence given on oath in this court by the P.W.I. As for
 Exhibit ‘B’, it is not evidence. It is only proof of evidence which can in no
 way be used to replace the legal and sworn evidence. The reason is that it
 has not been subjected to cross-examination. See the case of Amusa v. State
 15 (Unreported) Suit No. FCA/J/49/80 and Alli v. State (1988) 1 NWLR (Pt.68)
 1 p.19. I cannot therefore rely on her sworn evidence, neither can I act on
 Exhibit ‘B’.*

*It is indisputable that the trial court arrived at the right conclusion
 in its statement of the law in so far as this concerns Exhibit B and the evidence
 20 of P.W.2 before the court. It seems to me correct to say that up to this stage of
 his judgment, the learned trial Judge was obviously right in his evaluation
 of the facts of the case and the application of the law thereto. Thereafter,
 however, he would appear, if I may say with profound respect, to have com-
 pletely derailed and in the process veered completely off course in total
 25 contradiction of the same sound principles of the law he had admirably
 enunciated in his judgment. He went on-*

*“I now take a second look at the evidence of the P.W.II. The crucial
 issue is whether it is true that other people from the crowd also beat the
 deceased before his death. She admitted she made the statement on 24/10/
 30 87. No acceptable reason has been given to explain the discrepancies between
 her sworn evidence in court and her statement to the police. As I earlier said,
 I have declared her evidence unreliable according to law. This does not
 however mean that the sworn evidence is either rejected or expunged from
 the record.”*

35 A little later in his judgment, the learned trial Judge cited the unre-
 ported case of Amusa v. State (Unreported) FCA/J/49/80 where the Court of
 Appeal inter alia observed that a trial court has no business to go outside the
 evidence before it and proceed to examine the proofs of evidence in order to
 see whether or not there is anything favourable or unfavourable to the ac-

cused person. In spite of the above statement of the law which in my view is as clear as crystal, the learned trial Judge had the following to say-

"It does not say that when such statement is tendered in evidence to contradict oral evidence which is not consistent with such previous statement, it should also be disregarded. That would be unfair to the accused person. Surely, when such statement is tendered for the purpose of contradictions, it assumes a new status and has an important role to play. That role is that of discrediting the witness against whom it is tendered, and of weakening the prosecution's case. The court cannot therefore disregard Exhibit 'B' as urged by Mr Effanga."

Finally, the learned trial Judge, with great respect to him, then waded into the arena of speculation and reasoned as follows:-

"Now returning to the unreliable evidence of the P.W.II, the weakness in that evidence is this. It is possible that some other people beat up the deceased after the three accused persons had beaten him in the parlour of the 1st accused. It is also possible that nobody else apart from three accused persons, beat him before his death. This court therefore is not in a position to say that the crowd beat him or that they did not beat him....."

..... If it is not true that the crowd suggested by the defence beat up the deceased after the beating he received from the three accused persons, then it means it was the three accused persons who inflicted the fatal injury on the deceased and caused his death. If on the other hand, it is true that the deceased received additional beatings from the angry crowd in the circumstances alleged by the defence, the difficulty will be how to know at which of the beatings the fatal injury was inflicted on the deceased. Was it when the three accused persons beat him or was it when the crowd beat him? There lies the big doubt.

..... I have no doubt in my mind that the three accused persons gave the deceased a beating in the parlour of the 1st accused. But for the possibility of a beating by the crowd, I would have found them guilty of any offence that squares with proved facts. As I have said, there is a doubt in my mind."

The court below in a close analysis of these areas of the judgment of the trial court observed as follows-

"The learned trial Judge offended the principle enunciated in Ukpong's case and all other cases decided along that line in every direction. It seems to me he created a whirlwind of judicial reasoning and was blown

asunder by indiscretion and fallacy. How else can one explain the first rea

soning which says that when evidence of a prosecution witness inconsistent with his statement to the police is declared unreliable it does not mean it should be rejected. Or the second reasoning that the said statement should
5 *not be disregarded but that it acquires a new and important status. Or the third reasoning which is based on unfounded possibilities leading the learned trial Judge into a position in which he admitted he could make no finding. Yet, he was able to say:*

“I have no doubt in my mind that the three accused persons gave
10 *the deceased a beating in the parlour of the 1st accused. But for the possibility of a beating by the crowd, I would have found them guilty of any offence that squares with the proved facts.”*

To give a final reason to acquit and discharge the accused persons, the learned trial Judge then said:

15 *“As I have said, there is a doubt in my mind. The law is that once a trial court entertains a doubt, no matter how slight the proper course of action is to resolve such doubt in favour of the accused.” I say emphatically that this conclusion about doubt is again wrong.”*

I have given a most careful consideration to the aforementioned
20 three passages of the judgment of the trial court and wish to state that but for the initial rather strong and uncomplimentary language employed, I entirely agree with the above observations of the Court of Appeal which, in my view, are justified having regard to the legal evidence before the court. The “crucial issue”, according to the learned trial Judge, was whether it is true that the
25 crowd also beat the deceased after the senseless attack on him by the three appellants in the 1st appellant’s parlour. The main defence raised by the appellant before the trial court apart from a total denial that they beat up the deceased was that the said deceased was beaten up the same evening at the Mathson Super-Market and that he died as a result of this subsequent attack.
30 This story was however rejected by the trial court which found that no such incident ever took place and that the 1st appellant merely suborned D.W.2 to come and lie to the court on the point. It is clear that the “crucial issue” alluded to by the learned trial Judge arose directly from the discredited statement of P.W.2, Exhibit B, in which she appeared to suggest that the deceased received
35 additional beatings from an angry crowd after the appellants had dealt with him. This allegation is in clear conflict with and inconsistent with the viva voce evidence of the witness before the court. On the authorities as they now stand, the evidence of P.W.2 on the point must not only be disregarded as unreliable, the previous statement of the witness, exhibit B, on the same issue

did not constitute evidence upon which trial court could have acted. The

learned trial Judge appeared to have appreciated this position of the law in the earlier portion of his judgment. Regrettably however he slipped into a serious error of law when he proceeded to engage in the exercise of whether an issue of fact which was already discredited, unreliable and did not infact constitute legal evidence was true or not. It also seems to me that this grave error of law into which the learned trial Judge fell, became even more complex and unsupportable when he went further to hold that when the evidence of a prosecution witness inconsistent with his previous statement to the police is declared unreliable, it does not mean that such evidence should be rejected. With profound respect, I am unable to accept this proposition of law as correct. In my view, a piece of evidence which is disregarded as or declared unreliable by a trial court is naturally rejected as not being of any evidential value and evidence which, as in the instant case, is properly rejected cannot ground or form the basis of a defence. See *Bakare v. State* (1987) 1 NWLR (Pt.52) 579 and *Sunday Baridam v. The State* (1994) 1 NWLR (Pt.320) 250. Whether or not a given defence is available to an accused person must be decided against the background of accepted facts or evidence and not otherwise. As I had abuse to observe in the *Sunday Baridam* case, (*supra*)

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“Evidence that has been properly considered and rejected is of no value or consequence and must accordingly be discountenanced.

Once, as in the instant case, the evidence upon which the defence of self defence in issue was founded was sufficiently considered by the trial court and rightly rejected upon good and cogent reasons, such rejected evidence cannot form the basis of the defence.”

This seems to me to represent the position of the law on the issue.

There is a further reasoning by the learned trial Judge that the previous statement of a prosecution witness to the police tendered in proof of its inconsistency and contradiction with the viva voce evidence of witness before the court should not be disregarded as it assumes a new and important status. Again, I cannot, with due respect, accept this view as a correct proposition of law. My understanding of the law has already been set out earlier on in this judgment and I am unable to appreciate what new and important status a discredited statement, such as Exhibit C, can assume other than that already well defined by a string of authorities above referred to. In my view, it was wrong for the learned trial Judge not to have disregarded Exhibit B as the law enjoined him.

It does appear that following the new and important status attached to

Exhibit as indicated by the learned trial Judge, he waded into the realm of speculation without any legal evidence in support thereof. In the process, he based his final decision on unfounded possibilities which appeared to have compelled him to entertain some doubt in the guilt of the appellants as charged. He stated thus-

5 *"I have no doubt in my mind that the three accused persons gave the deceased a beating in the parlour of the 1st accused. But for the possibility of a beating by the crowd, I would have found them guilty of any offence that squares with the proved facts."*

And he added:-

10 *"As I have said, there is a doubt in my mind. The law is that once a trial court entertains a doubt, no matter how slight the proper course of action is to resolve such doubt in favour of the accused."*

The learned trial Judge therefore found himself in a position where on the basis of speculation and possibilities he was able to entertain some
15 doubt as to the guilt of the appellants without a scintilla of evidence in support of his reasoning. I confess that I am in agreement with the court below when it held that the above conclusion of the trial court about doubt is clearly wrong. The learned trial Judge having appreciated as he initially did, that the evidence of P.W.2 on the alleged second beating is totally unreliable and that
20 her statement, Exhibit B, did not constitute evidence upon which he could act misdirected himself by relying on the discredited passage in the said Exhibit B which referred to the deceased as having been beaten subsequently by a crowd. On this basis, the trial Judge held that he did not know which of the attacks that killed the deceased and proceeded to resolve the doubt in favour
25 of the appellants. It was this speculation that gave rise to the "doubt" he entertained which on the evidence is baseless and cannot be sustained.

The point must be stressed that it is a fundamental principle of law that findings of fact and conclusions from facts of a trial court should be based on evidence adduced before the court and not on speculation or
30 possibilities. See *State v. Aibangbee & anor* (1988) 2 NSCC 192; (1988) 3 NWLR (Pt.84) 548. It is not the function of a court of law to speculate on possibilities which are not supported by any evidence. See *State v. Ibong Udo & anor* (1964) 1 All NLR 243, *Queen v. Gabriel Adaoju Wilcox* (1961) All NLR 631 and *Iteshi Onwe v. State* (1975) 9-11 S.C. 23 at 31. No trial court is entitled to draw
35 conclusion of fact outside the available legal evidence before it. When a trial court veers off course and acts on speculation and possibilities rather than on the concrete evidence before it, it obviously has abandoned its proper role and such facts or conclusions of fact found without appropriate evidence in support thereof will be regarded as perverse by an appellate court.

In the case of State v. Aibanghee & anor (supra) at 587. Oputa, J.S.C.

in considering this aspect of the law succinctly put the matter as follows:-

“The trial Judge believed the P.W.3’s evidence all along as these related to fact but’ doubted’ him when he (the learned trial Judge), with respect, moved from the realm of fact to fantasy and speculation. It is trite law that if on the totality of the evidence there is doubt, genuine doubt, the benefit of that doubt is usually given to the accused person. But no court is authorised to manufacture a doubt and then turn round and rely on his manufactured doubt for an acquittal. Genuine doubt is that arising from the facts and circumstances established by evidence. Doubts based on speculations are also speculative. Such are not the doubt known to our criminal law.”

I must say that I agree entirely with the above observations. A trial court in an appropriate case is certainly entitled to entertain some doubt, the benefit of which is usually given to an accused person, but such doubt must not only be genuine but reasonable and must naturally flow from the trend of the legal evidence adduced before the trial court. I also endorse the proposition that doubts based on speculations or possibilities are themselves speculative and are not doubts known to our criminal law.

The court below in examining this doubt into which the learned trial Judge fell had this to say:-

“A court can only base its findings on the evidence before it and not on speculation or mere fancy or fantasy. For an accused person to be entitled to the benefit of doubt, the doubt must be genuine or reasonable one arising from some concrete evidence or lack of material evidence.....”

With this frame of mind, which was self imposed..... the learned trial Judge found that he had a doubt in his mind. He decided that the ‘doubt’ must in the interest of justice be resolved in favour of the accused persons. By this process, he neutralised all his earlier findings that pointed to the guilt of the accused persons, particularly the one which says “I have no doubt in my mind that the three accused persons gave the deceased a beating in the parlour of the 1st accused” I say, with due respect, that that “possibility of beating by the crowd” is the mere fancy created by the learned trial Judge.....”

I must once more agree with this observation of the court below which in my view is thoroughly sound. It is therefore my firm view that the learned trial Judge, with due respect to him, was grossly in error when he

speculated on the possibility of a subsequent beating of the deceased by a crowd and on what the crowd might have or might not have done in the total absence of any legal evidence in this regard.

On the alternative issue for determination in this appeal, learned Senior Advocate has submitted that the Court of Appeal was in error not to
 5 have considered the alternative verdict of manslaughter in this case. He contended that the Court of Appeal having put itself in the position of the trial court ought to have considered the alternative verdict of manslaughter. He argued that the lower court having failed to do this and there being some evidence upon which such verdict would have been returned, this court is
 10 entitled to substitute a verdict of manslaughter for that of murder.

The law is settled that it is the duty of a trial court to consider all defences raised by the evidence whether or not the accused person specifically put up such defences or relied on them and to deal adequately with any other view of the facts which might reasonably arise out of the evidence given
 15 and which would reduce the offence from murder to manslaughter. See Mancini v. D.P.P. (1942) A.C.1; Musa Sokoto v. State (1976) 2 S.C 133; R. v. Nina Vassilevo (1911) 6 Cr App 288; R. v. Kwahena Bio (1945) 11 WACA 46 and State v. Ojo (1973) 11 S.C. 331. There can be no doubt that the Court of Appeal, like the trial court, before entering a verdict of murder had a duty on its own to consider all
 20 possible defences open to the appellants. This it failed to do. It seems to me under the circumstance that if there is some evidence in this appeal upon which the alternative verdict of manslaughter would have been returned, this court is entitled to substitute a verdict of manslaughter for that of murder.

25 Now section 315 of the Criminal Code provides as follows-
"Any person who unlawfully kills another is guilty of an offence which is called murder or manslaughter according to the circumstances of the case"

Section 316 of the Criminal Code defines the circumstances under which an unlawful killing will amount to murder, and these are-

- 30 (1) if the offender intends to cause the death of the person killed or that of some other person;
 (2) if the offender intends to do the person killed or to some other person some grievous harm;
 (3) if death is caused by means of an act done in the prosecution of
 35 an unlawful purpose, which act is of such nature as to be likely to endanger human life;
 (4) if the offender intends to do grievous harm to some person for the purpose of facilitating the commission of an offence; and
 (5) and (6) have no point of reference to the case in hand.

I have given the most anxious consideration to the facts of this case and

although it seems to me clear that the deceased received rather excessive beating from the appellants, I am far from satisfied from evidence that they intended to kill him as the whips or sticks used were not established to be of extraordinary sizes. Besides, it is preposterous that the 1st appellant should have invited the deceased's grandmother to her house that night to see her grandson being killed. No doubt, the punishment inflicted on the deceased by the appellants was barbarous, senseless and enormous, I am unable to hold that they had the foresight that the death of the deceased would be the result of their near murderous acts and that it was such a consequence that induced them to flog the deceased. A conviction for murder under section 316(1) of the Criminal Code cannot therefore be sustained.

On sections 316(2) and 316(3) of the Criminal Code, it must be pointed out that what the prosecution must establish is not merely the result of the appellants' action although such a result must be of considerable importance in determining whether the appellants intended to do the deceased some grievous bodily harm. I confess in this connection that I entertained very grave doubt on the issue and must give the benefit therefore to the appellants. From the entire evidence before the court, I find it difficult to arrive at the conclusion that a reasonable man, in the circumstances of this case, could have foreseen that the lashes and violence to which the deceased was subjected to could have caused him grievous bodily harm or that the appellants' acts were of such a nature as to be likely to endanger human life. Neither section 316(4) nor sections 316(5) and (6) are relevant to the facts of this case and need not receive any consideration in this appeal.

In *R. v. Friday Ntah* (1961) All NLR 590; (1961) 2 SCNLR 250, the appellant was seen struggling with the deceased over the possession of a basket of palm fruits. During the struggle, the appellant pushed the deceased who thereupon fell down. He then struck the deceased twice in the stomach with a stick, and the deceased died almost at once. The appellant was convicted for murder under section 316(2) of the Criminal Code. In allowing the appeal on the charge of murder and substituting a verdict of manslaughter, the Federal Supreme Court per Ademola, C.J.F., said-

"We are satisfied from the evidence on record that there was not the intention specified in subsection (1). In fact, the evidence before the court negated this. With regard to subsection (2), namely, whether the appellant intended to do grievous bodily harm to the deceased, we are of the view that there was not enough evidence led in the court below that the appellant intended to do grievous harm to the deceased nor from where evidence can

we arrive at the conclusion that a reasonable man, in the circumstances, could have foreseen that the blows inflicted on the deceased could have caused grievous bodily harm."

So too, in *Rex v. Ihom Dogo & Ors* (1949) 12WACA. 519, the deceased was tied to a post and thereafter given blows with fists and sticks delivered by all four appellants. The appellants were convicted for murder. It was held on appeal that the possibility of the offence of manslaughter should have been considered as the acts of the appellants, on the particular' circumstances of that case, were not of a nature likely to endanger life nor did it appear there was an intent to kill or do grievous harm to the deceased. See too *Rex v. Nameri* (1951) 20NLR 6.

On the whole, I have come to the conclusion that the acts of the appellants, on the perculiar circumstances of this case, were not of a nature likely to endanger life nor did it appear there was an intent to kill or do grievous harm to the deceased, and, therefore, the appellants' acts cannot be brought within the ambit of section 316 of the Criminal Code. It was nevertheless an unlawful killing and by virtue of section 317 of the Criminal Code, unlawful killing in circumstances which do not constitute murder is manslaughter. I am therefore of the view that the killing, though unlawful, does not amount to murder, and that a verdict of manslaughter should have been returned by the trial court and the court below.

This appeal therefore partially succeeds and I hereby set aside the verdicts of murder and sentences of death passed on the appellants and substitute therefore, in regard to each appellant, a verdict of guilty of manslaughter. I further hereby impose in the case of each appellant a sentence of ten years imprisonment with hard labour and this will be the judgment of the court.

BELGORE JSC

I read in advance the judgment of my learned brother, Iguh, J.S.C. and I agree with the very detailed analysis of the facts and law involved as adumbrated therein. I adopt his judgment as mine in partly allowing this appeal.

WALI JSC

I have read before now the lead judgment of my learned brother, Iguh, J.S.C. and I entirely agree and endorse the reasoning and conclusions therein as mine.

For the same reasons given in the lead judgment, I also partially allow the appeal by substituting the sentence of death with a conviction for manslaughter against the appellants. Each of the appellants is accordingly sentenced to 10 years imprisonment with hard labour.

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KUTIGI JSC

The three appellants were charged with the offence of murder contrary to section 319 of the Criminal Code. Each of them pleaded not guilty to the charge at the trial.

The facts of the case have already been stated in the lead judgment of my learned brother Iguh, J.S.C. and I do not need to repeat them here.

At the end of the trial, the learned trial Judge in a reserved judgment found on page 119 of the record as follows-

"I have no doubt in my mind that the three accused persons gave the deceased a beating in the parlour of the 1st accused. But for the possibility of a beating by the crowd, I would have found them guilty of any offence that squares with the proved facts." 15

But instead of finding them guilty of offence that squares with the proved facts "of beating the deceased in the parlour of the accused" which he accepted as shown above, the learned trial Judge continued, erroneously in my view, on page 120 of the record thus- 20

"Death in the instant case could have been caused by the three accused persons or by the angry crowd. It is often said that it is better for a guilty person to be set free where doubt exists, than to send an innocent person to the gallows. Consequently I am resolving this doubt in favour of the accused persons. The prosecution has failed to prove this case beyond all reasonable doubt. In the result, I find each of the accused persons not guilty. Each of them is accordingly acquitted and discharged." 25

Dissatisfied with the judgment, the state appealed to the Court of Appeal, Enugu Division. 30

There is no doubt that the learned trial Judge was perfectly in order to have discharged and acquitted the appellants of the offence of murder since according to him cause of death was not proved. But as shown he was certainly wrong to have failed to convict them of the offence of "beating the deceased in the parlour of the 1st accused" which he had accepted as proved. 35 Another problem with the judgment is that the learned trial Judge in the passages above talked of the "possibility of beating by the crowd" and "death being caused by the angry crowd". On this issues as was rightly pointed out

in the lead judgment of Uwaifo JCA the learned trial Judge was relying on the evidence of P.W.2, the grand mother of the deceased, who gave evidence in court inconsistent with her statement to the police (Exhibit B) wherein she had stated that the deceased was beaten by a crowd of people. The learned trial Judge had rightly come to the conclusion in the judgment that in view of the material contradictions he could not place any reliance on the oral evidence given on oath by P.W.2 or on her statement Exhibit B. See R. v. Ukpong (1961) 1 NLR 25; (1961) 1 SCNLR 53; R. v. Golder (1960) 1 WLR 1169 Onubogu & ors v. State (1974) 9 S.c. 1; Nwabueze v. State (1988) 4 NWLR (Pt.86) 16.

10

The learned trial Judge was therefore wrong to have proceeded to use the evidence of P.W.2 which he had earlier on properly rejected as unreliable, to find for the appellants as he did.

Commenting further the Court of Appeal (per Uwaifo J.C.A.) said on page 203 of the records thus-

"I say, with due respect, that the possibility of beating by the crowd is the mere fancy created by the learned trial Judge. The only offence that 'squares with the proved facts' is murder. The learned trial Judge ought to have found each of the accused persons guilty of that. To have set the accused persons free by acquitting and discharging them amounted to a grave miscarriage of justice. By virtue of section 20(4) of the Court of Appeal Act 1976, I shall do what the learned trial Judge was bound to do in the circumstances."

He then proceeded to find each of the appellants guilty of murder and sentenced each of them to death. The appellants have now appealed to this court against the judgment.

The single most important issue to my mind is whether the Court of Appeal was right when it stated that "the only offence which squares with the proved facts is murder".

The learned trial Judge himself had accepted that "the appellants gave the deceased a beating in the parlour of the 1st accused". The evidence of eye witnesses was that the deceased was beaten or whipped, with branches cut from whispering plant or pine. The evidence of the medical doctor (P.W.4) who performed post mortem examination on the body of the deceased is also relevant. He said in part-

"I did not find any satisfactory evidence as to what could have been responsible for the death, I therefore had to open up the body.....On opening up, the essential finding was on the skull. There I found that the suture line, that is a line where the

other.....
..... Such injuries can be sustained through various means by the use
of various instruments. The instrument used must have been a blunt one. A
knock with a hard fist could cause it. A club or piece of stick could cause it. 5
A piece of iron could cause it. The instrument must have been applied by
someone with some force on the person. The bruises resemble those which
could have been caused by a teacher who uses cane on his pupil. My conclu-
sion was that the deceased must have died as a result of neurogenic shock-
that is a shock that results from injury to the nervous tissues of which the 10
brain is the major one.”

So that having ruled out the “possibility of beating by a crowd”, the
Court of Appeal was perfectly right to have proceeded from where the learned
trial judge had stopped to consider other legal evidence. The medical evi-
dence of P.W.4 supports the conclusion arrived at by the Court of Appeal that 15
the deceased died as the result of the beating he received from the appellants.

However, what the Court of Appeal failed to consider was whether or
not the appellants intended to kill or cause grievous bodily harm or that their
action was of such a nature as to be likely to endanger the life of the deceased.
The eye witnesses stated before the court that whispering pines or sticks 20
were used in beating the deceased. The medical doctor (P.W.4) confirmed this
when he testified that the bruises he saw on the body of the deceased re-
semble those which could have been “caused by a teacher who uses cane on
his pupil”. I have no doubt that under the circumstances of the case as a
whole, a verdict of murder would most probably be unsafe to return. A verdict 25
of manslaughter is accordingly substituted.

It is for the above reasons and for the fuller reasons stated in the lead
judgment of my learned brother Iguh, J.S.C. which I read before now, that I
allow this appeal. I also sentence the appellants to ten (10) years imprison-
ment each from the date of their convictions by the Court of Appeal. 30

ADIO JSC

I have had the advantage of reading, in draft, the judgment just read
by my learned brother, Iguh, J.S.C. and I agree with his reasoning and conclu-
sion. The appeal partially succeeds to the extent stated in the lead judgment.
The appellants unlawfully killed the deceased in circumstances which did not
amount to murder. I abide by the consequential orders made by my learned
brother in the lead judgment.