

SUPREME COURT OF NIGERIA
15TH JULY, 1994. SC. 220/1991.
CORAM:- S. M. A. BELGORE, A. B. WALI, I. L. KUTIGI,
M. E. OGUNDARE, U. MOHAMMED, JJSC.

JOHN MAMUDA BUBA APPELLANT
V.
THE STATE RESPONDENT

COURTS - Speculation - Culpable homicide - Court's questioning of motive behind having unsheathed weapon - Whether speculative.

CRIMINAL LAW - Culpable homicide - Where appellant was armed for a fight - Whether a clear manifestation of intent to injure grievously.

CRIMINAL PROCEDURE - Statement voluntarily made to the Police - Not resiled from - Whether properly admitted.

CRIMINAL PROCEDURE - Defence of accident - Culpable homicide - Whether the defence was made out.

EVIDENCE - Contradictions - Whether material enough - To vitiate prosecution's case.

EVIDENCE - Circumstantial evidence - Culpable homicide - Where circumstantial evidence is unequivocal - When appellant is held responsible.

EVIDENCE - Witnesses - Where the prosecution has proved its case - Whether obliged to call all witnesses.

JUDGMENTS - Culpable homicide - Court of Appeal's decision in upholding conviction - Whether based on speculation - Or clear evidence at the trial court.

FACTS

The Appellant is the husband of the deceased, a nurse. They had a separation that made the deceased to be living at Katsina-Ala, Benue State while Appellant lived at Jos. Various past attempts at reconciliation failed. In 1993, Appellant visited the deceased in the Company of two men one of whom

was a policeman. Appellant saw a man he suspected was living with his estranged wife. The Appellant and his team later went to police station and the deceased was there also. The grouse of the Appellant at that point seemed to be about his two children the deceased took away on their separation. At a point, Appellant had sharp misunderstanding with the Policeman on duty. He then drew out his dagger (knife) from the scabbard and kept it in the pocket of his jacket. The deceased eventually agreed to release the children provided they discussed first with her parents.

They went back to the deceased's residence. As she came out of her taxi, the Appellant pursued and stabbed her. PW2, PW6 and PW8 rushed to the scene and saw the deceased in a pool of blood on the Appellant's laps. She died before any medical treatment could be administered. The Appellant gave no evidence at the trial but made a pre-trial voluntary statement to the Police that the deceased accidentally fell on the knife. The trial court found the Appellant guilty of culpable homicide punishable with death. Appellant's appeal to the Court of Appeal was dismissed. Appellant has further appealed to the Supreme Court to determine inter alia, whether the Court of Appeal entered the realm of speculation in sustaining his conviction and whether the defence of accident availed the Appellant.

HELD (*Unanimously dismissing the appeal*)

1. Court of Appeal's questioning of motive for having unsheathed weapon.

The Court of Appeal in advertent to this judgment and argument before them asked the motive behind having the weapon in the first place and keeping it unsheathed by removing it from its scabbard. This is not speculation but question a reasonable tribunal would ask in the circumstance of this case. (P.60L13).

Whether Court of Appeal's decision was based on speculation

2. There is no reason advanced in the issue that the Court of Appeal based its decision on speculation, the Court's decision was based on clear evidence at the trial court which was accepted by that court and the Court of Appeal upheld those findings of fact. (P.60 L.31)

Not all contradictions will vitiate prosecution's case

3. Contradictions in evidence for the prosecution must be material and substantial enough to create doubt, the benefit of which must be given to the accused person. In criminal matters therefore, not all conflicts and contradic

tions in evidence will vitiate the case for the prosecution.
(P.60 L.37)

Murder - Unequivocal circumstantial evidence

4. The circumstantial evidence in this case is that nobody else but the appellant could be held responsible for the injury leading to the death of the deceased. In *Gabriel vs. The State* (1989) 5 NWLR (pt 122) 457, this Court held that circumstantial evidence, to support conviction, must be unequivocal and positive and irresistibly point at the guilt of the accused person and there must be no other co-existing evidence or circumstances throwing doubt on the inference that the accused and no other person is the guilty party.
(P.61 L.11)

Manifestation of intent to injure grievously

5. This case is clear as to where the guilt lies; the appellant was armed for a fight and holding unsheathed and dangerous weapon like knife or dagger and using it is a clear manifestation of intent to injure grievously. (P.61 L19).

Prosecution not obliged to call all witnesses

6. The evidence of a vital witness mentioned and not called may in many cases lead to a presumption that if called his evidence may be unfavourable to the prosecution by virtue of s. 148 (d) Evidence Act. But the prosecution is not obliged to call all witnesses so far their case can be prove. On the evidence before the trial court the case for the prosecution had been made beyond reasonable doubt. The defence never requested for the evidence of Augustine Ukeji and nothing has been pointed out in his likely evidence which could contradict what is on record. (P.61 L.23)

Defence of accident not made – Statement properly admitted

7. As for the statement voluntarily made to the police, the appellant never resiled from it. The Court believed he was at the scene of crime armed with a dangerous weapon but refused to accept the claim of an accidental fall on the knife by the deceased. The statement was properly admitted in evidence and the defence of accident was not made out. (P.61 L.31).

NOTABLE POINTS OF INTEREST

OGUNDARE.JSC

1. Erroneous reference to appellant's statement as confessional

All that the Appellant did in exhibit 4 is to state how, according to him, the deceased met her death; nowhere in the statement did he admit that he killed the deceased. The learned justice of the Court of Appeal who delivered the lead judgment of that Court was clearly in error when she referred to exhibit 4 as “*the confessional statement of the accused*”. (P.62 L.32)

2. Statement erroneously referred to as confessional must not be expunged

It is clearly not the law that where a statement is erroneously regarded as a confessional statement, which it is not, this must, ipso facto result in its being expunged from the record. The learned trial Judge rightly admitted exhibit 4 as an ordinary statement and made use of it as part of the basis for conviction, and this rightly, too. (P.63 L.I7)

REPRESENTATION

Mrs. M. Osoata for the Appellant

M. A. Agber Ag. Asst. Director of Public Prosecution (Benue) for the Respondent.

CASES REFERRED TO

Nwosu v. the State (1986) 4 NWLR (Pt.35) 348

Ojo v. State (1989) 1 NWLR (Pt. 95) 1

Ali v. State (1988) 1 NWLR (Pt 68) 1,

Okonji v. State (1987) 1 NWLR (Pt. 52) 659

Sugh v. State (1988) 2 NWLR (Pt. 77) 475

Opaymeni v. State (1985) 2 NWLR (pt. 5) 1011

R. v. Wilcox (1961) 1 63 All NLR

Adekanwa v. The State (1972) NSCC 591 at 594

Atono v. Attorney - General of Bendel State (1988) 2 NWLR (pt. 75) 201

Gabriel v. The State (1989) 5 NWLR (pt. 122) 457

Adio v. The State (1980) 1-2 S.C. 116

Ukorah v. State (1980) 8 - 11 S.C. 81, 86

Gbadamosi v. The State (1992) 9 NWLR 465

STATUTE REFERRED TO

Penal Code s. 221

LEAD JUDGMENT BY BELGORE.JSC

The appellant was the husband of the deceased. The appellant, who

lived at Jos, plateau State, had been separated from the deceased since 1978. The deceased, Lucy Agbange, left with the two children of the marriage and finally settled at Katsina-Ala, Benue State. Several efforts at reconciliation failed and what seemed to be a further attempt turned sour.

5 On 14th July 1983, the appellant, in what seemed to be a final desperate move, decided to visit the deceased in company of a policeman from Jos-Inspector Idris Umaru (P.W.8) and one Joseph Abdul (P.W.2). They got to Katsina-Ala on 15th July, 1983 and at a house saw a man the appellant suspected to be living with his estranged wife. In the night the appellant and his
10 party of policemen were at the Police Station, Katsina-Ala, the deceased who was a nurse at a local hospital was there with them. The grouse of the appellant, it seemed at that point, was about his two children that the deceased took away with her on separation.

A lot of argument followed at the police station whereby the appel-
15 lant threatened or challenged to a duel one Sgt. Dennis Iyokever, P.W.1, who was then on duty. The appellant thereat drew out his dagger (knife) from its scabbard and kept it in the pocket of his jacket. However, the deceased agreed to release the children provided they discussed first with her parents at Mkar, Gboko. They first went back to the deceased's residence and as she got off
20 her taxi, the appellant rushed at her and pursued and stabbed her. P.W.2, P.W.6 and P.W.8 rushed to the scene and saw her in a pool of blood on the appellant's laps. She died before she could receive any medical attention. The appellant gave no evidence at the trial court but made a pre-trial voluntary statement to the police that the deceased accidentally fell on the knife. The trial court, on
25 the whole evidence before it, found the appellant guilty of culpable homicide punishable with death under s.221 of Penal Code and sentenced him to death. The Court of Appeal dismissed his appeal and upheld the conviction and sentence of the trial court.

In the appeal to this court the following issues for determination
30 were canvassed in respect of the grounds of appeal.

ISSUES FOR DETERMINATION

1. *Whether the Court of Appeal entered into the realm of speculations in sustaining the conviction of the appellant for the offence of culpable homicide by the trial court.*

35 2. *Whether there were fundamental contradictions in the evidence of the prosecution witnesses that vitiated the conviction of the appellant for the offence of culpable homicide.*

3. *Whether there were irresistible circumstantial evidence to sus*

tain the offence of culpable homicide found against the appellant.

4. *Whether the failure of the prosecution to call one Ukeji, the taxi driver, who was present at the scene of crime was fatal to the prosecution's case.*

5. *Whether in the circumstances of this case, Exhibit 4, the extra judicial statement of appellant was a confessional statement or an exculpat-ing defence for the offence of culpable homicide for which he was charged, convicted and sentenced by the court.*

6. *Whether the defence of accident was available to the appellant in the circumstances of this case.* 10

As against these issues the respondent raised the following issues for determination:

"ISSUES FOR DETERMINATION:

It is respectfully submitted that the issues that fall for determination are as follows: 15

3.1 *Whether the prosecution proved the case against the appellant beyond reasonable doubt as required by law.*

3.2 *Whether Exhibit 4, the extra-judicial statement of the appellant made to the police was a confessional one upon which alone, the appellant could be convicted.* 20

3.3 *Whether the Court of Appeal and the trial high Court were right in holding that the defence of accident did not avail the appellant."*

The appellant made a voluntary statement and his stand in that state-ment was that the deceased fell on him while pursuing her, and that dagger, unsheathed in his breast pocket, injured the deceased and that this led to her death. By the evidence before the court, there is clearly shown that the de-ceased died of a stab wound from a sharp object that penetrated deeply into her thorasic cavity on the left, whereby the left ventricle was punctured, re-sulting in colossal haemorrhage into her body. Was this an accident or a 25 deliberate act? There was evidence of how the appellant pursued his wife in a clearly aggressive manner; there was evidence of a struggle between the appellant and the deceased, and there was evidence of an unsheathed dagger that the appellant had earlier threatened to use against a police officer. All these were reviewed by the trial Judge, who believed the appellant actually stabbed the deceased and that the injury leading to her death was not acci- 30 dental. The Court of Appeal never interfered with these findings of fact by the trial court and from the statement made voluntarily under caution the appel-lant told the police inter alia as follows:

"..... Then we all followed them to my wife's house. On reaching the house,

I came out of our own vehicle and I ran after my wife and met her between the house and the car. Before this time, myself, the Sgt. and the Corporal on duty challenged my presence at the corridor of the police station. I replied him why should he ask why I was standing there. They are all Tiv by tribe. They had earlier said my wife is more clever than myself and the Sgt. on duty
5 *threatened to beat me up if I fail (sic) to leave the place. The Sgt. removed his shoe in order to beat me but Sgt. Idris intervened and prevented him from beating me. At this juncture I remove (sic) my knife (dagger) from the scabbard and hid it in my pocket."*

It was in this state of mind that the appellant kept the weapon unsheathed and despite effort by P.W.8 to separate the struggling appellant and his wife, the appellant stabbed the deceased. The medical report, Exhibit 1, is very informative and the trial Judge copiously adverted to it in coming to his decision. The Court of Appeal in adverting to this judgment and argument before them, asked the motive behind having the weapon in the first place and
15 keeping it unsheathed by removing it from its scabbard. This to my mind is not speculation but question a reasonable tribunal would ask in the circumstance of this case. In Exhibit 4, the statement made voluntarily to police by the appellant quoted partly earlier above, he stated:

"When I realised that the Knife had injured my wife I put it inside
20 *the scabbard (sic "scapbord") and threw it away."*

There is no doubt it was that same weapon that killed the deceased and the appellant never for a moment denied this. His story of an accidental fall, however, carried no weight with the trial Judge and the Court of Appeal entirely agreed with these findings of fact. This is the right approach for unless find-
25 ings of fact are not supported by evidence, or based on inadmissible evidence, or perverse, the appellate court will not interfere with them. See Nwosu v. State (1986) 4 NWLR (Pt. 35) 348; Ojo v. Gov. of Oyo State (1989) 1 NWLR (Pt. 95) 1; Ali v. State (1988) 1 NWLR (Pt.68) 1 Okonji v. State (1987) 1 NWLR (Pt.52) 659; Sugh v. State (1988) 2 NWLR (Pt.77) 475; Opayemi v. State (1985)
30 2 NWLR (Pt.5) 101.

There is no reason advanced in the issue that the Court of Appeal based its decision on speculation, the court's decision was based on clear evidence at the trial court which was accepted by that court and the Court of Appeal upheld those findings of fact. The facts in R. v. Wilcox (1961) 1 All NLR 63;
35 Adelenwa v. State (1972) NSCC 591 at 594 are not on all fours with the facts in this case.

Contradictions in evidence for the prosecution must be material and substantial enough to create doubt, the benefit of which must be given to the accused person. In criminal matters therefore, not all conflicts and contradic

tions in evidence will vitiate the case for the prosecution. *Atano v. A.-G. of Bendel State* (1988) 2 NWLR (Pt.75) 201; *Kalu v. State* (1988) 4 NWLR (Pt.90) 503. The statement of the appellant made voluntarily after he was cautioned by the investigating officer admitted the deceased was killed as a result of the wound inflicted by the dagger. The fact that nobody saw the actual stabbing should not be regarded as conflicting evidence; there were witnesses as to how the appellant pursued the deceased and how a struggle between them ensued. The evidence of stabbing in the circumstances of this case is clear and unambiguous and learned trial court's findings have been amply reviewed by the Court of Appeal which affirmed the conviction and sentence.

The circumstantial evidence in this case is that nobody else but the appellant could be held responsible for the injury leading to the death of the deceased. In *Gabriel v. State* (1989) 5 NWLR (Pt.122) 457, this court held that circumstantial evidence, to support conviction, must be unequivocal and positive and irresistibly point at the guilt of the accused person and there must be no other co-existing evidence or circumstances throwing doubt on the inference that the accused and no other person is the guilty party. See also *Adie v. State* (1980) 1-2 S.C. 116; *Ukorah v. State* (1977) 4 S.C. 167; *Lori v. State* (1980) 8-11 S.C. 81,861. This case is clear as to where the guilt lies; the appellant was armed for a fight and holding unsheathed and dangerous weapon like a knife or dagger and using it is a clear manifestation of intent to injure grievously.

The evidence of a vital witness mentioned and not called may in many cases lead to a presumption that if called his evidence may be unfavourable to the prosecution by virtue of S.148(d) Evidence Act. But the prosecution is not obliged to call all witnesses so far their case can be proved. On the evidence before the trial court the case for the prosecution had been made beyond reasonable doubt. The defence never requested for the evidence of Augustine Ukeji and nothing has been pointed out in his likely evidence which would contradict what is on record. As for the statement voluntarily made to the police, the appellant never resiled from it. The court believed he was at the scene of crime with a dangerous weapon but refused to accept the claim of an accidental fall on the knife by the deceased. The statement was properly admitted in evidence and the defence of accident was not made out.

I find no substance in this appeal and I accordingly dismiss it and I hereby uphold the decision of the Court of Appeal which affirmed the conviction and sentence of death passed on the appellant.

WALI JSC

I have had a preview of the lead judgment of my learned brother, Belgore J.S.C. I entirely agree with his reasoning and conclusion for dismissing the appeal.

5 For those same reasons which I hereby adopt, I also dismiss the appeal and confirm the sentence of death passed on the appellant by the courts below.

KUTIGI JSC

I have had the privilege of reading before now the judgment just
 10 delivered by my learned brother Belgore J.S.C. I agree with his reasoning and conclusions. On the facts the incident is an unfortunate one. It is a pity that the former couple ended their lives in this way on a dispute over the custody of their four children. The deceased lost her life in the hands of the appellant while the appellant is now to lose his own through the hands of law. Neither
 15 the couple nor their children had benefited in any way whatever. The appellant acted unfairly. The appeal is dismissed. The conviction and sentence are further affirmed.

OGUNDARE JSC

20 I have had the advantage of a preview of the judgment of my learned brother Belgore J.S.C. just delivered. I agree with his reasoning and the conclusion reached by him that this appeal be dismissed. I too find no substance in it and I dismiss it.

I may comment briefly, on Issue (5) raised in the appellant's Brief,
 25 that is, whether exhibit 4 was an extra judicial statement of the appellant or a confessional statement or an exculpating defence for the offence of culpable homicide for which the appellant was charged, convicted and sentenced by the two courts below. In his submission in the appellant's brief learned Senior Advocate Mr. Ohwovoriole contends that exhibit 4 that is, the appellant's
 30 extrajudicial statement to the police is not a confessional statement when read together. I think he is right in the submission.

All that the appellant did in exhibit 4 is to state how, according to him, the deceased met her death; nowhere in the statement did he admit that he killed the deceased. The learned Justice of the Court of Appeal who delivered the
 35 lead judgment of that court was clearly in error when she referred to exhibit 4 as "the confessional statement of the accused".

It is significant to note however, that nowhere in the judgment of the learned trial Judge did he refer to exhibit 4 as a confessional statement but purely as a statement the accused made to the police.

On the weight of the evidence before the trial Judge and on which he made his findings of fact, the error made by the court below in referring to exhibit 4 as a confessional statement is of little comfort to the appellant in this case in that this error has not occasioned any miscarriage of justice. The court below did not act on it as such. I am satisfied that on the evidence on the record the learned trial Judge's findings of fact are amply supported and the court below is right in affirming those findings. It is to be noted that the appellant offered no evidence at the trial. The use made of exhibit 4 by the learned trial Judge accorded with settled principles. It is equally not contended by the appellant before us that exhibit 4 was wrongly admitted as a confession. Even if this had been contended, as it had not been shown that it had other defects that would affect its admissibility, it could be acceptable as an ordinary statement and relied upon as such as a basis for conviction.

It is clearly not the law that where a statement is erroneously regarded as a confessional statement, which it is not, this must, ipso facto result in its being expunged from the record. See *Gbadamosi v. State* (1992) 9 NWLR 465. The learned trial Judge rightly admitted exhibit 4 as an ordinary statement and made use of it as part of the basis for conviction, and this rightly, too.

Finally, I dismiss this appeal and affirm the judgment of the court below.

MOHAMMED JSC

I also agree that this appeal should be dismissed for the reasons given in the lead judgment of my learned brother, Belgore, J.S.C., which I have had the privilege of reading in draft before now.