

SUPREME COURT OF NIGERIA
9TH MAY, 1997. SC. 124/1996
CORAM:- A. B. WALI, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.

THE STATE APPELLANT
V.
MUSA DANJUMA RESPONDENT

CRIMINAL PROCEDURE - *Conviction for a lesser offence - Where accused was charged with culpable homicide punishable with death - Whether the lower court properly convicted for a lesser offence.*

CRIMINAL PROCEDURE - *Proof - Contradictions in prosecution's evidence - That raise reasonable doubt - Should not ground conviction.*

EVIDENCE - *Contradictions - In evidence of the prosecution - Whether material.*

EVIDENCE - *Proof beyond reasonable doubt - Where the prosecution fails to discharge this burden - Accused is entitled to an acquittal.*

FACTS

The respondent was charged with the offence of culpable homicide punishable with death before the Kaduna High Court. He was alleged to have stabbed one Abubakar Danladi (deceased) to death. The prosecution called a total of six witness. There were some contradictions in the evidence of the prosecution. The respondent maintained that it was the deceased who attacked him with a knife. That in course of the fight that broke out, the deceased fell on top of the knife and died thereafter.

The trial court held that there was a doubt as to the guilt of the accused and found him not guilty. The appellant appealed to the Court of Appeal which allowed the appeal in convicting the respondent for a lesser offence of culpable homicide not punishable with death. The appellant has further appealed to the Supreme Court raising 2 issues.

ISSUES FOR DETERMINATION

"1. Whether the learned justices of the Court of Appeal, Kaduna division rightly exercised its (sic) discretion when it (sic) convicted and sentenced the Respondent under Sections 222 (4) and 224 of the Penal Code respectively, when its (sic) findings support section 221 of the Penal Code?"

Etc., see p. 971

HELD (Dismissing the appeal per lead judgment of **MOHAMMED JSC**, Wali & Onu JJSC dissenting)

Evidence - Contradictions

1. The contradictions in the testimonies of PW4, PW5 and Pw6 are very material to the just decision of this case particularly since the accused had not made any statement supporting any of the versions given by PW4 and PW5 on how the incident happened. (p. 974 G)

Contradictions that raise reasonable doubt

2. The vital issue is whether the inconsistencies in the witnesses testimonies as a whole were sufficient to cast doubt on the general story that the accused on seeing the deceased and without being provoked brought out a knife and stabbed him. Conversely, is the accused to be believed that the deceased sustained the fatal injury during the fight at Bayajidda Street? Where there are such contradictions and inconsistencies in the evidence before a criminal court, such as to cast reasonable doubt upon the guilt of the accused person, such accused person should be given the benefit of the doubt, and should not be convicted on the basis of such unreliable evidence. (p. 976 C)

Proof beyond reasonable doubt

3. A cardinal principle of law is that the *new commission of a crime by a party must be proved beyond reasonable doubt. The burden of proving that any person is *guilty of a crime rests on the prosecution. This is the law laid down in section 137 of the Evidence Act. The burden never shifts, and if on the whole of the evidence the court is left in a state of doubt, the prosecution would have failed to discharge the onus of proof which the law lays upon it and the prisoner is entitled to an acquittal. The learned trial judge considered all these aspects of the law and quite correctly concluded that he entertained doubt as to whether death of the deceased was caused by the act of the accused. He thereafter resolved the doubt in favour of the accused.(p. 976 F)

Conviction for a lesser offence

4. The judgement of the Court of Appeal left a lot to be desired. I cannot see where that court found evidence to support a conviction for a lesser offence in the case in hand. How could the court hold that the wounds seen on the body of the deceased were homicidal which no one else could be answerable but the accused and still convict him for a lesser offence? There was nothing shown by the Court of Appeal whether the injuries were caused by the

accused in self defence or provocation. It is a pity that the accused had not filed a cross-appeal against the judgment of the Court of Appeal, I would have allowed the appeal, discharged and acquitted him. (p. 976 H)

NOTABLE POINTS OF INTEREST

WALI JSC (Dissenting)

1. Respondent stabbed the deceased

If a knife falls to the ground it will fall flat and a person falling on it can hardly sustain any injury. The reasonable conclusion to be drawn from the evidence adduced in this case is that it was the respondent that stabbed the deceased. The respondent took Exhibit 2 to the police in an attempt to give semblance of truth to his story. P.W. 4 and P.W.5 are eye witnesses to the incident and they gave credible evidence which was neither contradicted nor faulted. (p. 986 F)

2. No place for compassion where sentence is fixed by law

The respondent alone had the opportunity of committing the crime and he did it. This is a clear case of culpable homicide under section 221(b) of the Penal Code. The Court of Appeal did not give any logical and lawful reason for reducing the offence from one punishable under section 221 of the Penal Code to that punishable under section 224 of the same Code. Compassion or sentiment has no place where the sentence is fixed by law. The multiple stab wounds found on the deceased showed that the respondent intended to cause his death. (p. 987 C)

REPRESENTATION

Morris Odeh Esq. For the Appellant

Rotimi Oguneso, Esq. With Ahmed T. Uwais, Esq. For the Respondent

CASES REFERRED TO

Nasamu v. The State (1979) All NLR 193

Anehia v. The State (1982) NSCC 85

Onubogu v. The Queen (1974) 9 S. C. 1

Aloge v. Inspector General of Police (1959) 4 FSC 203

Fatoyinbo v. A.G. Western Nigeria (1966) W.N.L.R. 4

Odutola v. Inspector Kayode (1994) 2 SCNJ 21

Grace v. The State (1988) 3 NWLR (pt. 85) 729 at 744 - 5

Ifenado v. The State (1967) NWLR 200 at 203

The Queen v. Ijoma (1962) All NLR 399

Adele v. The State (1995) 2 NWLR (pt. 377) 272

Amako v. The State (1995) 6 SCNJ 23 at 32

Effiom v. The State (1995) 1 NWLR (Part 373) 507 at 620

R. v. Abengowe 3 W.A.C.A

Adamu v. Kano N. A. (1955) 1 F.S.C. 25

STATUTES REFERRED TO

Penal Code ss. 221 (b), 222 (4), 224

Evidence Act s. 137

LEAD JUDGMENT BY MOHAMMED JSC

The Respondent, Musa Danjuma, was arraigned before Ja'afaru J. of Kaduna High Court for the offence of culpable homicide punishable with death, contrary to section 221 (b) of the Penal Code. At the end of the trial the learned trial judge found that the prosecution had failed to prove the essential ingredients of the offence charged and also that he entertained doubt as to whether death was caused by act of the accused, now respondent in this appeal. He found the accused not guilty and discharged and acquitted him.

The State appealed against the decision of the High Court to the Court of Appeal, Kaduna. After considering all the submissions made before it the Court of Appeal, per the lead judgment of Ibrahim Tanko Muhammad, JCA., allowed the appeal and convicted the respondent of the offence of culpable homicide not punishable with death, contrary to section 224 of the Penal Code. The court sentenced him to a fine of N5,000.00 or two years imprisonment. The state, armed with two grounds of appeal, further appealed to this court against both the conviction and sentence passed by the Court of Appeal. The following issues have been raised by the appellant's counsel for the determination of the appeal :

"1. Whether the learned justices of the Court of Appeal, Kaduna division rightly exercised its (sic) discretion when it (sic) convicted and sentenced the Respondent under Sections 222 (4) and 224 of the Penal Code respectively, when its (sic) findings support section 221 of the Penal Code?"

2. Whether the learned justices of the Court of Appeal, Kaduna Division exercised their discretion judicially and judiciously when it (sic) sentenced the Respondent to only N5,000.00 (five thousand naira) or two years imprisonment in default for an offence punishable under Section 224 of the Penal Code?"

Learned Counsel for Respondent, Chief Ajala, SAN, in the respondent's brief, argued that only one issue will encompass the two grounds of appeal. The issue was couched thus :

"Whether the learned justices of the Court of Appeal were not in error by convicting the respondent for a lesser offence under section 222(4) of the Penal Code and in the exercise of their discretion wrongly sentenced

the respondent to a fine of N5,000.00 (Five Thousand Naira) or two years imprisonment in the alternative".

The facts of this case and the conclusions of the two lower courts call for re-evaluation of the evidence adduced by both sides before the trial court. I will set out facts so far as they are material to the issues raised in this B appeal. For ease of identification and appraisal of the evidence I will refer to the respondent as the accused in this judgment.

The prosecution's case was presented through six witnesses. The first prosecution's witness is police officer, Michael Ochekwu, who, after the police authorities received a petition from the father of the deceased, was detailed C to re-investigate the case. He told the trial court that he arrested the accused and recorded his statement under caution. The police officer brought to court some pieces of clothes which were tendered as exhibit 3. The exhibit was of no value to the prosecution's case because they were not sent to forensic science laboratory for analysis even though some stains looking like blood were seen on it. The police investigator also received what was alleged to be D a blood stained knife and it's scabbard and passed it over to an exhibit keeper. The knife was tendered as exhibit 2. The cautioned statement made by the accused is the same as his evidence-in-chief. Therefore the evidence of this police witness has not materially improved the case of the prosecution.

PW2, P.C. Ishaku Mayor, was the constable who, on the day of the E incident, 8th December, 1993, received a complaint from one Sani Ibrahim that the accused had stabbed the deceased to death. Sani Ibrahim was never called by the prosecution to confirm this story. PW. 2 took the corpse to ABU Teaching Hospital for post mortem examination. One piece of evidence which came from PW.2 and which supported the defence was that it was the accused F who brought a knife and it's scabbard to the police station. He alleged that it was the knife used by the deceased during the fight.

The next witness was the father of the deceased who narrated how Garba Adamu, PW4, and one Sani Ibrahim brought his son after the incident to him and he directed them to take him to the hospital. The deceased had not died by then. In his testimony the father agrees that PW. 4 and Sani Ibrahim G were deceased's friends and that they used to move together.

The evidence given by two witnesses, P.W.4 and PW5 is most vital for the case of the prosecution. They are both butchers and were at the scene during the incident. PW4 said that he was on a motorcycle together with the deceased when they came to Bayajidda Street, in Kaduna and they saw the accused. He continued in his testimony thus :

H *"He saw the accused. He waived him. Abubakar asked Musa "should I come and collect my money?" Musa said "Yes". I alighted from the motor-cycle : I saw by the side close to the man selling oranges. I saw the accused*

(Musa) rushed towards Abubakar's place. On reaching there, Abubakar was to lock the machine. I saw Musa stabbing Abubakar with a knife. Abubakar was shouting and heading towards a hospital by name Alheri, he fell down. People were running. Musa took a different direction. We followed Abubakar where he fell down. We carried him on a motorcycle. We took him to their house. i.e. His father's house. We saw the father (PW3) with some people B sitting. We narrated to him what happened and he said we should take him to the Hospital".

During cross-examination, PW4 admitted that there were many people at the scene, But Sani Mohammed was standing alone on another machine. There was no street light but he saw the accused stabbing the deceased. He C however disputed the allegation that he, the deceased and Sani Mohammed belonged to a criminal gang.

PW5, Muhammadu Aminu, who was on the spot when the incident happened, gave a different description of the happening at the scene. He said; "I was at Bayajidda street close to a club. That was between 8 -9 on D that day, there was one by name Wawu. He came with a motorcycle. They were two. He parked the motorcycle. One of them alighted from the motorcycle. Wawu kneeled down to lock the machine. Then I saw the accused heading towards Wawu. I saw him stabbed Wawu with a knife. Wawu shouted. Wawu E run towards a clinic Alheri Clinic by Jos Road. He fell down. Two people came on a motorcycle. They picked him and took him in the motorcycle. They went away. I decided to move back where I was standing before. Few minutes later, the accused came back to the scene with some policemen they inspected the scene and left. That's all I know. Wawu is also known as Abu- F bakar Danladi.

I am a Muslim. People go to Bayajidda street to while away the time. It is also close to my house. I only saw the accused stabbing the deceased. Nothing happened before the stabbing. The distance between where I stood and the place which the deceased parked his motorcycle before he was stabbed is about 3 meters I did not hear them utter anything". G

It is quite clear that the two leading prosecution witnesses have contradicted each other in describing the way the incident happened. PW4 mentioned that the deceased saw the accused and waived him. The deceased then asked him "should I come and collect my money?" The accused said, "Yes". PW5 however in his testimony said, "Nothing happened before the H stabbing. The distance between where I stood and place which the deceased parked his motorcycle before he was stabbed is about 3 meters. I did not hear them utter anything". It should be observed that both PW4 and PW5 knew both the accused and the deceased before the incident. The only point

they agreed was the act of stabbing. They both said that the accused stabbed "Wawu", the deceased. However, by their description it was one stab. PW5 confirmed the story given by the accused that soon after the incident the accused went and reported the matter to the police. The police came together with the accused while PW5 was still standing near the area, and inspected B the scene.

PW6 was the doctor who performed postmortem examination on the body of the deceased. His evidence was at variance with the evidence of PW4 and PW5 on the number of stab wounds seen on the body of the deceased. While PW4 and PW5 had said that they saw the accused stabbing C the deceased once the doctor who examined the body 5 days after the corpse had been deposited in the mortuary testified thus:

"Exhibit 5 is the report I wrote. In my opinion there were multiple penetrating stab wounds through the back and shoulder into the chest of the deceased. They couldn't have been self inflicted. They are the caused of death. After the post mortem I wrote Exhibit 5. That's all".

D Now, what is the court to believe from these contradictions? I know that it is not every contradiction, however minute, that would be sufficient to damnify a witness. The contradiction that would make a court disbelieve a witness has to be on a material point in the case. See Nathaniel Nasamu v. The State (1979) All NLR 193. This court held in the case of Christopher E Anehia & Anor. v. The State (1982) NSCC 85 per Uwais, JSC., (as he then was) inter alia:

"Now the principle laid down in the case of Onubogu & Anor. is that where there are contradictions in the testimonies of the prosecution witnesses on a material fact and the contradictions are not explained by the prosecution F through any of its witnesses, the trial court should not speculate on or proffer the explanation for such contradictions and thereby pick and choose from the evidence of the prosecution witnesses that which it will believe; see Boy Muka & Ors. v. The State, (1976) 9 & 10 S.C. 305 at p. 325."

The contradictions in the testimonies of PW4, PW5 and Pw6 are very material to the just decision of this case particularly since the G accused had not made any statement supporting any of the versions given by PW4 and PW5 on how the incident happened.

The accused on his part gave a detailed account of his involvement with the deceased before the two fought resulting in the deceased losing his life. He told the trial court that before this incident the deceased came to his family's house at night together with his gang. From the testimony of DW2, H Police Constable Bala Hassan, the date was 5/10/93. This puts it just two months before the incident in which the deceased lost his life. The accused testified that the deceased and his gang entered his room and stole N8,500.00.

The gang wanted to run away with his standing fan when he held it and shouted for help. His father came to the rescue and saw the deceased holding a knife. In trying to save his son the father was stabbed with the knife on the hand. The deceased and his gang ran away. The father, who gave evidence in this case as DW4, went and reported to the police. DW2 was the police constable who received the complaint and after some investigation two members of the gang were arrested and arraigned before the court. The deceased escaped to Kano. The accused was given some policemen to assist him in getting the deceased arrested in Kano. They failed to find him.

Before the incident, the deceased visited the accused in his house and warned him that before the police find him and arrest him he would kill him (the accused). On the fateful day the accused told the trial court that he stopped to buy oranges when the deceased and his gang came. They surrounded him. The deceased then pulled out a gun and said he would shoot the accused. The accused left his motorcycle and ran. When he realized that the deceased had no bullet in the gun he stopped. The deceased then brought out a knife. The accused picked a stick and the two began to fight. In the process the deceased was wrestled down and fell on his knife. This was what caused his death. The evidence of the deceased carrying a knife has been corroborated by the incident in the house of the father of the accused when the deceased stabbed the father with a knife. The most vital witness for the defence on what happened on the fateful day is DW3, one Lawal Adamu, a trader, who was standing by when the incident happened. He narrated to the trial court what he saw thus:

"On 10/12/93 at about 8 - 9 P.M.. I was at Bayajida Street. I can tell the court what happened on that date. I was standing by an orange seller. I saw one man by name Wawu with his gang. He met the accused. I heard Wawu telling Musa so you asked Police to shoot me.

Since they did not shoot me, today I will shoot you. Wawu told me not to interfere into their affairs. I was trying to pacify them. Wawu said I should give them chance. I give them chance. Wawu removed a gun and chased the accused. The accused ran away. Wawu came back and stood by Musa's Motorcycle (Motorcycle of the accused). The accused came back and tried to start his motorcycle. Wawu and his gang surrounded Musa. Wawu removed his knife and threatened to stab the accused. So many people gathered. The people were talking to them so I left the scene. I did not see Musa stab Wawu with a knife".

Comparing the two versions of what happened on the 10th of December, 1993 at Bayajidda Street Kaduna, the accused and his witnesses appeared more consistent and reliable in their testimonies. The witnesses for the prosecution contradicted themselves and although the learned trial judge

found the contradictions not material, in my view, they were very material to the fact in issue. PW 4 and PW5 were alleged to be members of the gang who entered the room of the accused and stole his money. The accused identified PW4 as one of those who entered his room. Their presence at the time of the incident on 10/12/93 at Bayajidda Street could not be coincidental. DW3 B identified them as Wawu's (deceased) gang. Their evidence must be considered with extreme caution. **The vital issue is whether the inconsistencies in the witnesses testimonies as a whole were sufficient to cast doubt on the general story that the accused on seeing the deceased and without being provoked brought out a knife and stabbed him. Conversely, is the C accused to be believed that the deceased sustained the fatal injury during the fight at Bayajidda Street? Where there are such contradictions and inconsistencies in the evidence before a criminal court, such as to cast reasonable doubt upon the guilt of the accused person, such accused person should be given the benefit of the doubt, and should not be convicted on the basis of such unreliable evidence - Onubogu v. The Queen (1974) 9 D S.C. 1. See also Arehia v. The State (supra)**

Looking at the evidence as a whole, can one say that the prosecution had proved an offence of culpable homicide punishable with death contrary to section 221 of the Penal Code as the learned counsel for the appellant submitted in issue 1 in the appellant's brief? **A cardinal principle of law E is that the commission of a crime by a party must be proved beyond reasonable doubt. The burden of proving that any person is guilty of a crime rests on the prosecution. This is the law laid down in section 137 of the Evidence Act. The burden never shifts, and if on the whole of the evidence the court is left in a state of doubt, the prosecution would have F failed to discharge the onus of proof which the law lays upon it and the prisoner is entitled to an acquittal - Alonge v. Inspector General of Police (1959) 4 FSC 203; Fatoyinbo v. A.G. Western Nigeria W.N.L.R. 4.**

The learned trial judge considered all these aspects of the law and quite correctly concluded that he entertained doubt as to whether death of the deceased was caused by the act of the accused. He thereafter G resolved the doubt in favour of the accused.

The judgement of the Court of Appeal left a lot to be desired. I cannot see where that court found evidence to support a conviction for a lesser offence in the case in hand. How could the court hold that the wounds seen on the body of the deceased were homicidal which no one else could be answerable but the accused and still convict him for a lesser H offence? There was nothing shown by the Court of Appeal whether the injuries were caused by the accused in self defence or provocation. It is

a pity that the accused had not filed a cross-appeal against the judgment of the Court of Appeal, I would have allowed the appeal, discharged and acquitted him.

Be that as it may, this appeal has failed. The learned trial judge found that the prosecution had failed to prove the essential ingredients of the offence charged and that the defence of the accused was very consistent. I have no reason to disagree with this finding. I agree that the accused should be given the benefit of the doubt. The appeal is dismissed.

WALI JSC (DISSENTING)

C

The accused person Musa Danjuma, was arraigned before the Kaduna High Court on the following charge:

"That you Musa Danjuma on or about the 8th of December, 1993 at Bayyajida Street Kaduna committed culpable homicide punishable with death by causing the death of Abubakar Danladi by doing an act to wit stabbing him several times on his body with a knife with the knowledge that his death will be the probable consequence of your act. You thereby committed an offence punishable under section 221(B) of the Penal Code."

The accused pleaded not guilty to the charge and the trial proceeded in the course of which the prosecution called six witnesses and tendered some exhibits to prove the charge; while the defence called 4 witnesses, the accused inclusive.

At the conclusion of the evidence taken learned counsel on both sides addressed the court and judgment was reserved to 20th April, 1995.

In a considered judgment delivered by Ja'afaru J on 19th May, 1995, he concluded as follows:-

"In the final analysis I find the defence of the accused consistent, while the prosecution has failed to prove the essential ingredients of the offence. There is no point in considering the issue of section 224 of the penal code. This is so because there is already a doubt as to whether death was caused by act of the accused. He is accordingly found not guilty. He is hereby discharged and acquitted."

Dissatisfied with the judgment of the trial court the prosecution appealed against it to the Court of Appeal, Kaduna Division. In its considered judgment, the Court of Appeal allowed the appeal. In the lead judgment of that court delivered by Tanko Muhammadu JCA with which Abdullahi and Ogebe JJCA agreed, the learned Justice concluded as follows:-

"The lower court did not convict the respondent on neither of the sections (i.e. 221 and 224) of the Penal Code, I hold the view that the decision

is perverse and I think I have reason to alter the decision. Accordingly the decision of the lower court is hereby set aside. I hereby allow the appeal. A conviction for a lesser offence under section 222(4) of the Penal Code punishable under s. 224 of the same is hereby substituted. The respondent is accordingly convicted for the offence of culpable homicide not punishable with death pursuant to section 224 of the Penal Code and is sentenced hereby to a fine of N5,000.00 (five thousand Naira) or two years imprisonment."

Aggrieved by the decision of the Court of Appeal, the prosecution has now appealed to this court against it.

The appeal is against both conviction and sentence.

C Two grounds of appeal have been filed by the persecution from which the following two issues are formulated in the brief it filed-

1. Whether the learned justice of the Court of Appeal, Kaduna Division rightly exercised its discretion when it convicted and sentenced the Respondent under sections 222(4) and 224 of the Penal Code respectively, when its findings support section 221 of the Penal Code.

D 2. Whether the learned justices of the Court of Appeal, Kaduna Division exercised their discretion judiciously when it sentenced the Respondent to only N5,000.00 (five thousand naira) or two years imprisonment in default for an offence punishable under section 224 of the Penal Code?"

Also in the brief filed by the defendant, the following single issue was formulated:

Whether the learned justices of the Court of Appeal were not in error by conviction the respondent for a lesser offence under section 222(4) of the Penal Code and in the exercise of their discretion wrongly sentenced the respondent to a fine of N5,000.00 (five thousand naira) or two years imprisonment in the alternative."

Henceforth both prosecution and the accused will be referred to in this judgment as the appellant and the respondent respectively.

The brief facts of the case as put forward by the prosecution are as follows:-

G On 8/12/93, between the hours of 8 - 9 p.m, at Bayyajida Road, Kaduna the deceased and the appellant were engaged in a combat in the course of which the respondent inflicted on the deceased multiple stab wounds with a knife which caused the death of the deceased. A charge under s.221 (b) of Penal Code was filed against the respondent. The case proceeded to trial at the end of which the learned trial judge discharged and acquitted the respondent.

H On appeal to the Court of Appeal, Kaduna, Division by the prosecution the verdict of acquittal and discharge of the respondent was set aside and substituted with a conviction under section 222(4) of the Penal Code

and a sentence of a fine N5,000.00 or two years imprisonment in default was imposed.

The two issues formulated in the appellant's brief seem to cover the solitary issue raised in the respondent's brief. I shall therefore deal with the two issues together.

It was the submission of learned counsel for the appellant that the Court of Appeal, having considered and rejected the contradictions in the evidence and on which the learned trial judge relied to discharge and acquit the appellant, the court was wrong in finding the appellant guilty under section 222(4) of the Penal Code. Learned counsel referred to various findings of the Court of Appeal and submitted that the court had no alternative in the given circumstance but to convict the appellant as charged and impose the appropriate sentence. The following authorities were cited and relied upon - Torhamba v. Police (1956) NRNLR 96; Agumadu v. The Queen (1962) 1 All NLR 203; R v. Adokwu 20 NLR 103 and S. 218(1) of the Criminal Procedure Code (CPC).

Learned counsel submitted that even if it were to be correct that the respondent was rightly convicted by the Court of Appeal under section 222(4) of the Penal Code, the punishment passed on him by the said court under section 224 of the same Code, is very minimal, insufficient and ridiculous when the gravity of the offence committed is taken into consideration. Learned counsel further argued that the Court of Appeal was wrong to hold that the Respondent being a young man, it would give him another chance in life; as such a consideration was irrelevant and resulted in a wrongful exercise of discretion by it. Reference was made to Onyeso v. Nnebedum & 3 ors. (1992) 3 SCNJ 12 and Odutola v. Inspector Kayode (1994) 2 SCNJ 21. He urged the court to allow the appeal and to impose appropriate sentence as established by the evidence.

In answer to the submissions above, Chief Ajala SAN, for the respondent, submitted that the Court of Appeal was not in error when after reviewing the evidence it convicted the appellant under section 222(4) of the Penal Code and sentenced him to a fine of N5,000.00 or in default, two years imprisonment under 224 of the same Code. Learned Senior advocate contended that for the prosecution to succeed under section 221(b) of the Penal, it must prove the case beyond reasonable doubt. He referred to the evidence of the 6 witnesses called by the prosecution and submitted that the sum total of their evidence is that the respondent probably committed the offence, thus failing to discharge the onus imposed on it by law. Learned Senior Advocate also Adverted to the evidence of respondent viva voce, that of D.W. 3 and Exhibit 4 and submitted the respondent had no intention of causing death or

that he knew that death would be a probable consequence of his act. Learned Senior Advocate finally submitted thus:-

"It is submitted most resourcefully, that the learned justices of the Court of Appeal were not in error in these conclusion (sic) to which they arrived."

B In support of the submissions reference was made to a number of decided cases and statutory provisions amongst of which are Grace v. The State (1988) 3 NWLR (Pt. 85) 729 at 744 - 5; Mufutau Bakare v. The State (1987) 1 NWLR (Pt.52) 579 at 587/588; s.19 of the Penal code and Lamba Kumbin v. Bauchi N.A. (1963) NNLR 49

C In a charge under section 221(b) of the Penal Code the prosecution has to prove the following in order to secure a conviction -

1. death of a human being was actually occurred;
2. that it was caused by the act or acts of the accused;
3. that the act or acts were done with the intention of causing death;

and

D 4. that the accused knew that death would be the probable consequence of his act or acts.

In the present case there was no dispute that the deceased, Abubakar Danladi alias "Wawu" is dead.

E From the submissions of learned Senior Advocate in this appeal that the learned justices of the Court of Appeal were not in error when they concluded that the respondent was guilty of an offence under section 222(4) and punishable under section 224 of the Penal Code, it is accepted by the defence that ingredients 2 and 3 (supra) have also been prove. I shall here again quote part of the respondent's brief were it was submitted:-

F *"It is submitted, most resourcefully, that the learned justices of the Court of Appeal were not in error, in these conclusion (sic) to which they arrived at."*

So only ingredient 4 is now in contention, it reads:

"That the accused knew that death would be the probable consequence of his act or acts."

G In considering this point, I have to look at and examine the evidence as a whole.

The star witnesses for the prosecution in this case and particularly on this point are P.W. 4 -

Garba Adamu and P.W. 5 - Muhammadu Aminu.

P.W. 4 testified in chief as follows:-

H *"I know one Danladi Abubakar I also know Abubakar Danladi. He is the same person. He is dead. His father is Danladi. I know the accused*

very well. He stays at Katagun Road while I stay at Shettima Road. There is no any relationship except friendship on 8/12/93. We were at Bayyajida inside town. I and Abubakar went on a motorcycle.

He saw the accused. He waived him. Abubakar asked Musa "should I come and collect my money?" Musa said "Yes". I alighted from the motorcycle. I sat by the side close to the man selling oranges. I saw the accused B (Musa) rushed towards Abubakar's place. On reaching there, Abubakar was to lock the machine. I saw Musa stabbing Abubakar with a knife. Abubakar was shouting and heading towards a hospital by name Alheri, he fell down. People were running. Musa took a different direction. We followed Abubakar where he fell down. We carried him on a motorcycle. We took him to their C house. i.e.. His father's house. We saw the father (P.W.3) with some people sitting. We narrated to him what happened and he said we should take him to the Hospital. We took him to Niima Hospital at K/barchi. The Doctor came. He was about preventing us entry in to the Hospital. We explained to him and he allowed us. He confirm to us that he has died. We took the dead D body back to their house and inform the father. We took him to the Magajin gari Police Station in a Vehicle. At the Station we were asked to take the dead body to Hospital and from there to Mortuary. From the mortuary no light and we moved to 44 Military Hospital from there no light. The dead body was taken back to Magajin Gari Police station. At the Police station, I left them E there and went home. That's all I did."

When cross-examined by the Defence, P.W. 4 said:-

"We arrived the scene where the incidence happened at 8 - 9 i.e on 8th December, 1993. It was in the night. It wasn't at the junction of Bayyajida by Kano Road. It was at Bayyajida Street by Jos Road. Apart from the F orange seller, there are other people selling other items. There are a lot of people. We just passing. Sani Moh'd was on a machine but not on our own machine. He was alone there standing I was standing when I saw the accused stab the deceased. I don't Know the amount of money. I did not ask him. There were a lot of people not but at the particular spot. There G was no street light at the scene. I don't know that myself, the deceased and Sani moh'd belonged to a gang I don't know the work of the deceased He doesn't borrow knife from me."

P.W. 5 also testified in-chief thus:-

"On 8/12/93, I was at Bayyajida street close to a club. That was between H 8 - 9 on that day, there was one boy by name Wawu. He came with a motorcycle. They were two. He parked the motorcycle. One of them alighted from the motorcycle. Wawu kneeled down to lock the machine. Then I saw the accused heading toward Wawu. I saw him stabbed Wawu with a knife.

Wawu shouted. Wawu run towards a clinic Alheri clinic by Jos Road. He felled down. Two people came on a motorcycle. They picked him and took him on the motorcycle. They went away. I decided to move back where I was standing before. Few minutes later, the accused came back to the scene with some policeman they inspected the scene and left. That's all I know. Wawu B is also known as Abubakar Danladi."

When P.W. 5 was cross-examined, he further said:-

"I only saw the accused stabbing the deceased. Nothing Happened before the stabbing. The distance between where I stood and the place which the deceased parked his motorcycle before he was stabbed is about 3 metres. C I did not hear them utter anything."

In his defence, the respondent proffered the following evidence:-

"..... at Bayyajida Street there is a place where meat and oranges are being sold. The same Wawu came with his gang. I stopped to buy orange, they attacked me and stopped me. They surrounded me. Wawu said I asked the Police to shoot him. He said before they kill him, I will see D what he will do to me. He removed a small gun from his body. He wanted to shoot me. When I saw the gun I run away. He followed me. He did not shoot. I therefore realized that there was no bullet in the gun otherwise he would have shot me. I then stopped motorcycle was there. Wawu then removed a knife from (sic) his body. I then picked a stick. He tried to stab me but I hit E his hand with the stick. The knife fell then we started the struggle. I was able to pin him down. He fell on his knife. The members of his gang came to his aid. I picked the knife and reported the matter at Sabon Gari Police Station. At the station I reported, 5 policemen were given to me. We went to the scene they were not there."

F The evidence of D.W. 3 Lawal Adamu is thus:-

"On 10/12/93 at about 8 - 9 p.m. I was at Bayyajida Street. I can tell the court what happened on that date. I was standing by an orange seller. I saw one man by name Wawu with his gang. He met the accused. I heard Wawu telling Musa so you asked Police to shoot me.

Since they did not shoot me, today I will shoot you. Wawu told me G not interfere into their affairs. I was trying to pacify them.

Wawu said I should give them chance. I gave them chance. Wawu removed a gun and chased the accused. The accused run away. Wawu came back and stood by Musa. Motorcycle (Motorcycle of the accused). The accused came back and tried to start his motorcycle. Wawu and his gang surrounded Musa.

H Wawu removed his knife and threatened to stab the accused. So many people gathered. The people were talking to them so I left the scene. I did not see Musa stab Wawu with a knife."

D.W. 4 Alhaji Danjumai Musa gave evidence of what happened previously between the deceased and the respondent in P.W. 4's house between October - November 1993. He said nothing as regards the incidence leading to the deceased's death.

In the course of the trial, the cautionary statement of the respondent was tendered and admitted in evidence as Exhibit 4. It was in line with his B testimony in court.

The learned trial judge made a finding that Abubakar Danladi is dead. After that he went on to state as follows:-

"Now coming to the second ingredient of the offence that is whether it was the accused that caused the death of Abubakar Daniladi. The evidence C of the prosecution witnesses P.W. 4 and P.W. 5 is that they saw the accused stabbed the deceased with a knife. The alleged offence was committed at night. P.W. 4 stated under cross examination that there were no street light at the material time. The other witness who are not eyewitnesses made no mention of the visibility situation of the material time. P.W. 5 who is an eye- D witness did not say anything about visibility. By Exhibit 5 and the testimony of P.W.6, the deceased sustained multiple Homicidal stab wounds. The prosecution evidence Exhibit 4 showed that the deceased fell on his own knife. That aspect was not investigated. The Police investigators that visited the scene on that date were never called to testify. P.W. 2 only received Exhibit E 2. He did not visit the scene. The P.W. 1 that testified visited the scene only 16 days after the alleged offence was committed and yet he recovered Exhibit 3. Both Exhibits 2 and 5 have not been sent to the forensic lab for analysis. Yet they are blood stained. Exhibit 2 has not been identified by P.W. 4 and P.W. 5 as the knife used by the accused in stabbing the deceased. It is indeed F very strange for the Police to ask the accused to go home the very night he reported the incidence and handed over Exhibit 2. All the above have to be taken into consideration in line with the evidence of the accused in Court and Exhibit 4. The accused in this Court denied stabbing the deceased. He also stated that the deceased only fell on his own knife. The P.W. 5 also stated that G the accused did not stab the deceased. The accused in his evidence in Court testified that he was surrounded by members of the gang of the deceased. By Exhibit 5 the deceased received homicidal wounds. It is my duty to resolve doubt in favour of the accused."

After the observation quoted (supra) the learned trial judge then H concluded:-

"The post mortem report Exhibit 5 showed the infliction of some defence wounds on the body of the deceased. The P.W. 1 stabbed (sic) the defence wounds are wounds the victim sustained in trying to disentangle himself. He further stated that the side notes of Exhibit 5 forms part and parcel

of his findings. I am unable to infer knowledge on the part of the accused. The accused was not even cross examined on the issue that members of the gang of the deceased surrounded him. All along the accused in his evidence has been very consistent so also Exhibit 4. Exhibits 6,7 and 7A on the other hand have shown how violent the deceased has been. Yet the prosecution
 B said nothing about the gun mentioned in Exhibit 4. The defence put up by the accused, has not been dislodged. I agree with counsel that there are contradictions in the testimony of P.W. 4 and P.W. 5 on the issue of whether there was conversation between the accused and deceased at the scene. I do not consider them material I also do not consider it material where the P.W.
 C 6 said the post mortem was performed 5 days after the corpse was deposited at the Mortuary. In the final analysis I find the defence of the accused very consistent while the prosecution has failed to prove the essential ingredients of the offence. There is no point in considering the issue of section 224 of the penal Code. This is so because there is already a doubt as to whether death was caused by act of the accused. He is accordingly found not guilty. He is
 D hereby discharged and acquitted."

In the Court of Appeal, Tanko Muhammed JCA in his lead judgment, with which Abdullahi and Ogebe JJCA agreed, made the crucial unimpeachable findings on the evidence in the printed record and Exhibits tendered as follows:-

E *"The crucial question is whether the evidence of one credible witness, on a particular point, is believed and accepted. If the answer, is in the affirmative, then it is sufficient to justify a conviction. I do not think along the same line with the learned trial judge. It is not necessary for the prosecution to call all his witnesses if by calling few among them can sufficiently establish*
 F *the offence with which the accused is charged. See: Ali v. The State (1988) 1 NWLR (Pt 68) 1; Mohammed v. The State (1991) 5 NWLR (Pt. 1962) 438; Akpan v. The State (1991) 3 NWLR (Pt. 182) 646. The next point is whether failure by the appellant to send exhibits 2 and 3 for Forensic Laboratory Analysis is detrimental to the prosecution's case. Exhibit '2' was the lethal weapon said to have been used by the respondent in committing the crime.*
 G *Exhibits 3 was a white, blood stained cloth alleged to be the cloth worn by the deceased, recovered from the scene of crime by P.W.1. I think the whole mark of a forensic laboratory test is to enable a court of law, through its analysis, to arrive at a proper conclusion on a contested question which affects the life or property of a person. A report from Forensic Laboratory, in my view, is akin to medical report. I will agree with learned counsel for the appellant*
 H *that even if these exhibits were not tendered before the court, no difference would be as the evidence of P.Ws 4 and 5 was so strong and direct to warrant a conviction. The result from the Forensic Laboratory, even if had, could in*

The accused told half hearted truth in his evidence and Exhibit 4. It was his evidence that he hit the deceased's hand in which he was holding the knife and it fell to the ground. It was in the course of the struggle that the respondent subdued the deceased by felling him to the ground and that he (the deceased) fell on his knife as sustained the multiple injuries that caused his death soon thereafter. P.W. 6 the Doctor that examined the body of the deceased said in his evidence in court as follows:-

"In my opinion these were multiple penetrating stab wounds in the back and shoulder into the chest of the deceased. They could not have been self inflicted."

With P.W. 6 evidence viva voce, Exhibit 5 is no longer necessary or relevant as he was not cross examined on it to discredit his evidence. See Ifenado v. The State (1967) NMLR 200 at 203 and Agbeyin v. The State (1967) NNLR 129. Exhibit 2 is no longer necessary to prove the cause of death in the circumstances of this case. See Adamu Kumo v. The State (1968) NMLR 277 and Tonara Bakuri v. The State (1965) NMLR 163.

If a knife falls to the ground it will fall flat and a person falling on it can hardly sustain any injury. The reasonable conclusion to be drawn from the evidence adduced in this case is that it was the respondent that stabbed the deceased. The respondent took Exhibit 2 to the police in an attempt to give semblance of truth to his story. P.W. 4 and P.W.5 are eye witnesses to the incident and they gave credible evidence which was neither contradicted nor faulted. See The Queen v. Ijoma (1962) All NLR 399. The question that Exhibit 2 was not examined is immaterial to the proof of the prosecution's case since it was the respondent who took it to the police as the weapon that caused the mortal wounds. If there is any necessary link to fill the gap, this piece of evidence did so.

I think it is pertinent to comment on the issue of visibility at the scene of the crime. Both P.W. 4 and P.W. 5 admitted that there was no street light at the scene, but P.W. 5 put the estimated distance from the scene of the incidence to where he was at about 3 metres, roughly a little over a yard. The proximity was close enough for the witnesses to observe and see what was happening between the respondent and the deceased.

This and the issue of Exhibit 2 are not evidence capable of throwing any doubt in the prosecution's case and the trial judge was palpably wrong in his conclusion that there was such a doubt.

The evidence of P.W. 4 and P.W. 5 was that the respondent stabbed the deceased with a knife. The evidence fixed the respondent at the scene of the crime. There was no evidence that apart from the respondent, any other person had an altercation with deceased at the scene. There was also no evidence that the respondent received any injury from the deceased or any of

the alleged gang. The respondent alone had the opportunity of committing the crime and he did it. See Adele v. The State (1995) 2 NWLR (Pt. 377) 272 and Umaru Buyu v. The State (1973) 1NMLR 108. This is a clear case of culpable homicide under section 221(b) of the Penal Code. The Court of Appeal did not give any logical and lawful reason for reducing the offence from one punishable under section 221 of the Penal Code to that punishable under section 224 of the same Code. Compassion or sentiment has no place where the sentence is fixed by law. The multiple stab wounds found on the deceased showed that the respondent intended to cause his death. The deceased's death was the probable and not the likely consequence of the respondent's act. See Abubakar v. The State (1969) All NLR 136 and Oworo v. The Queen (1961) C ALL NLR 36.

It is for these reasons and the further elaborate reasons contained in the judgment of my learned brother Onu, JSC which I have had the privilege of seeing in advance, that I also find myself unable to agree with the judgment of my learned brother Uthman Mohammed, JSC which I also have had a preview before now.

I shall allow the appeal and it is hereby allowed. The conviction and sentence imposed by the Court of Appeal is set aside and is substituted by a conviction and sentence of death of the respondent under section 221(b) of the Penal Code.

KUTIGI JSC

The accused/respondent was arraigned before the Kaduna High Court on a one count charge of the offence of culpable homicide punishable with death under section 221(b) of the Penal Code.

At the trial, the prosecution called six witnesses and tendered some exhibits. The respondent gave evidence in his own defence. He also called three other witnesses.

In a considered judgment, the learned trial judge found that the charge against the respondent was not proved beyond reasonable doubt and consequently discharged and acquitted the respondent.

Dissatisfied with the judgment of the trial High Court, the State/Appellant appealed to the Court of Appeal, Kaduna Division. Three issues were formulated for determination as follows:-

"1. Whether the prosecution did not prove beyond reasonable doubt the offence of culpable homicide under section 221 of the Penal Code against the respondent.

2. Whether there existed material contradictions in the testimonies of the prosecution to warrant resolving them in favour of the respondent.

3. *Whether having regard to the defence of the respondent the trial judge was right to discharge and acquit the respondent of the offence charged and without convicting him for a lesser offence under section 224 of the Penal Code."*

The Court of Appeal in a reserved judgment unanimously allowed the appeal and the decision of the learned trial judge was set aside. In substitution for the offence of culpable homicide punishable with death charged under section 221(b) Penal Code, the respondent was convicted of a lesser offence under section 224 Penal Code. A sentence of two (2) years imprisonment or a fine of five thousand naira (N5,000.00) was imposed on the respondent accordingly.

Still aggrieved by the decision of the Court of Appeal the appellant has further appealed to this Court. The issues for determination are stated to be-

"1. *Whether the learned justices of the Court of Appeal, Kaduna Division rightly exercised its (sic) discretion when it (sic) convicted and sentenced the Respondent under Sections 222(4) and 224 of the Penal Code respectively, when its (sic) findings supports (sic) section 221 of the Penal Code?*

2. *Whether the learned justices of the Court of Appeal, Kaduna Division exercised their discretion judicially and judiciously when it (sic) sentenced the Respondent to only N5,000.00 (five thousand naira) or two years imprisonment in default for an offence punishable under Section 224 of the Penal Code?"*

Issue (2) in my view is clearly dependent on the success of issue (1). If as the appellant contends that the offence charged was proved then a death sentence should have been imposed and the Court of Appeal would be found to be wrong. But if the conviction under section 222(4) of the Penal Code stands, then issue (2) would not arise as the sentence imposed was in accordance with the law.

Now, specifically dealing with the charge against the accused/respondent, the learned trial judge in his judgment sold on page 68 of the record thus:- *"It is the duty of the prosecution to prove the following ingredients for the purpose of section 221(b) of the Penal Code:-*

- (i) *Death of a human being has actually taken place.*
- (ii) *That such death has been caused by the accused.*
- (iii) *That the accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended to cause.*

In the case under consideration, I had earlier found that Abubakar

Danladi alias Wawu is dead. That finding is drawn from the evidence of PW3, PW4, PW5, PW6, Exhibits 4,5 and the evidence of the accused. I therefore hold that the first ingredient of the offence has been proved.

Now, coming to the second ingredient of the offence, that is whether it was the accused that caused the death of Abubakar Danladi. The evidence of the prosecution witnesses PW4 and PW5 is that they saw the accused stabbed the deceased with a knife. The alleged offence was committed at night. PW4 stated under cross examination that there were no street lights at the material time. The other witness who are not eye witnesses made no mention of the visibility situation at the material time. PW5 who is an eyewitness did not say anything about visibility. By Exhibit 5 and the testimony of PW6, the deceased sustained multiple homicidal stab wounds. The prosecution evidence Exhibit 4 showed that the deceased fell on his own knife. That aspect was not investigated. The Police investigators that visited the scene on that date were never called to testify. PW2 only received Exhibit 2. He did not visit the scene Exhibit 2 has not been identified by PW4 and PW5 as the knife used by the accused in stabbing the deceased The accused in this Court denied stabbing the deceased. He also stated that the deceased only fell on his own knife. The DW3 also stated that the accused did not stab the deceased. The accused in his evidence in court testified that he was surrounded by members of the gang of the deceased. By Exhibit 5 the deceased received homicidal wounds. It is my duty to resolve doubt in favour of the accused The accused was not even cross-examined on the issue that members of the gang of the deceased surrounded him. All along the accused in his evidence has been very consistent so also Exhibit 4. Exhibits 6, 7 and 7A on the other hand have shown how violent the deceased had been. Yet the prosecution said nothing about the gun mentioned in Exhibit 4. The defence put up by the accused has not been dislodged. I agree with counsel that there are contradictions in the testimony of PW4 and PW5 on the issue of whether there was conversation between the accused and the deceased at the scene. I do not consider them material I also do not consider it material where PW6 said the post mortem was performed 5 days after the corpse was deposited at the mortuary. In the final analysis I find the defence of the accused very consistent while the prosecution has failed to prove the essential ingredients of the offence. There is no point in considering the issue of section 224 of the Penal Code. This is so because there is already a doubt as to whether death was caused by act of the accused. He is accordingly found not guilty. He is discharged and acquitted."

What the learned trial judge, quite rightly in my view appeared to have done was to set out clearly the facts and circumstances surrounding

those facts as supplied by the witnesses on both sides above, and came to the conclusion that on those facts and circumstances there existed a doubt that the death of the deceased was caused by the accused. It is a cardinal principle of criminal justice that such a doubt, a reasonable doubt, ought to be resolved in favour of an accused person. I think he was right.

B It is also clear from the judgment above that the learned trial judge only found contradictions:-

(1) in the evidence of PW4 and PW5 on whether there was a conversation between the accused and the deceased at the scene; and (2) in the evidence of PW6 as when he exactly performed the post mortem examination.

C And quite rightly too, the learned trial judge did not consider the contradictions material. The Court of Appeal, per Ibrahim Tanko Muhammadu, JCA., who read the lead judgment, was therefore totally wrong when he stated on page 137 of the record as follows:-

"The learned trial judge regarded the following instances as contradictory:

D *(a) that the offence was committed in the night. But PW4 and PW5 did not mention the visibility condition of the scene of crime.*

(b) by exhibit 5 (post mortem report) and the testimony of PW6 (the medical practitioner), the deceased sustained multiple homicide stab wounds whereas the prosecution evidence exhibit 4 showed that the deceased fell on his own knife. That aspect was not investigated.

E *(c) that the Police investigators that visited the scene on that date were never called to testify and that PW2 only received exhibit 2. He did not visit the scene. The PW1 that testified visited the scene 16 days after the commission of the offence yet, he recovered Exhibit 3.*

F *(d) Both exhibits 2 and 3 were never sent to the forensic laboratory for analysis.*

(e) Exhibit 2 was not identified by PW4 and 5 as the knife used by the respondent in stabbing the deceased.

G *What the Court of Appeal in fact did was to consider each of its "newly" found contradictions above and concluded that because they were not material in any way the learned trial judge was wrong to have treated them as such when he did not actually do so. Comments by a judge are not the same thing as making findings on issues. It said:-*

H *"Thus, what the learned trial judge considered as contradictions in the prosecution's evidence, could at best, only be discrepancies which do not go to the root of the prosecution's evidence. Generally, it should be noted that it is not every discrepancy between what a witness says and what another says, or between what a witness says at one time or what he says at another,*

that is sufficient to destroy the credibility of a witness altogether.

GIRA v. STATE (supra)."

It then concluded thus:-

"The multiple wounds inflicted on the deceased by the respondent, which the medical report established to be the cause of death of the deceased are clear manifestation that the respondent intended the natural consequence of his act The multiple piercing of the knife on the body of the deceased, as shown by the evidence, leaves no doubt that the knife was put into an improper use by the respondent in the scuffle, causing such grievous bodily hurt which led to the death of the deceased"

It is obvious therefore that the Court of Appeal set aside the judgment of the learned trial judge because of what it perceived on its own part as contradictions in the case of the prosecution and resolved same in favour of the prosecution. The learned trial judge did not base his decision on such contradictions but rather after a review of the evidence adduced before him, he came to the conclusion that there was a doubt as to whether the death of the deceased was caused by the act of the respondent. I think considering the circumstances of the case as a whole, the learned trial judge was right. We must not lose sight of the fact that it was the accused himself who reported the incident to the Police, and it was he who gave the knife, Exhibit 2 to the Police telling them that the knife belonged to the deceased. Also quite significant is the fact that none of the prosecution witnesses said he saw the accused with any knife before, during or after the incident.

I cannot escape the conclusion that the Court of Appeal was wrong to have set aside the judgment of the trial High Court when it relied on findings purportedly made by trial court, when in fact there were no such findings. There being no cross-appeal by the respondent, the only order I can validly make is the one dismissing the appeal of the State/Appellant herein.

It is for the above reasons and others contained in the lead judgment of my learned brother, Mohammed, JSC., which I read before now that I too dismiss the appeal.

OGWUEGBU JSC

I have had a preview of judgment of my learned brother Mohammed, J.S.C. just delivered. I agree with his reasoning and conclusion in dismissing the appeal.

I am of the view that this is a case where the Court of Appeal should have dismissed the appeal of the State and affirmed the decision of the learned trial judge. The extra-judicial statement of the accused (Exhibit 4) is consistent with his evidence on oath as D.W.1 and the evidence of D.W.3 (Lawal

Adamu). When the evidence of the prosecution is placed side by side with that of the defence, there is doubt as to whether death was caused by the act of the accused as rightly found by the learned trial judge.

Under the Penal Code, three essential ingredients of the offence of culpable homicide punishable with death are:

- B 1. the death of the deceased;
 2. that death was as a result of the act of the accused; and
 3. that the accused knew that his act will result in death or did not
care whether the death of the deceased will result in his act.

In this case only the first ingredient was established. The court below should not have convicted the accused of culpable homicide not punishable with death pursuant to section 224 of the Penal Code. The evidence adduced by the prosecution was insufficient to establish the guilt of the accused under section 224 of the Penal Code. See Bakare v. The State (1987) 1 N.W.L.R. (Pt. 52) 579 at 594 and 595.

I also agree with my learned brother Mohammed, J.S.C. that if the D accused had cross-appealed against the judgment of the Court of Appeal, I too would have allowed the same. However, the appeal of the State fails and I hereby dismiss it.

E	ONU JSC (Dissenting)
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The Respondent in his case was arraigned before the High Court of Kaduna State holden in kaduna (Coram: Ja'afaru. J.) charged with the offence of culpable homicide punishable with death in that on or about the 8th December, 1993 at Bayyajida Street, Kaduna he caused the death of Abubakar Danladi by stabbing the said Abubakar Danladi with a knife with knowledge that his death will be the probable consequence of his act punishable under Section 221(b) of the Penal Code.

The facts giving rise to the case have been fully and clearly stated in the judgment of my learned brother Mohammed, JSC to need further recapitulation here. I, however, find myself unable, most respectfully, to agree with the conclusion arrived at therein. I shall hereinafter set out my reasons for taking the stand I have adopted.

Before embarking on my consideration of the appeal, however, I wish to touch on one or two matters raised at the hearing of the appeal on 20th February, 1997. Learned counsel for the respondent who in the rest of this judgment I shall refer to simply as the accused, while adopting his H brief of argument dated the 4th of December, 1996 in response to appellant's brief dated 18th December, 1996, submitted that the appeal is not

competent because the Notice of Appeal as contained on pages 151-152 of the Record dated 13th August, 1996 is incompetent by reason of an error in mis-stating the date of the judgment of the Court of Appeal (hereinafter called the Court below) as 17th of July, 1996 instead of 16th of July, 1996.

I share the learned Counsel for the appellant's view that the error is not fatal and capable of rendering this appeal incompetent. This is because the error particularly of mis-stating the date of 16th for 17th July, 1996 as the date when judgment was delivered in the court below does not substantially cause any prejudice to the accused; neither does the accused suffer any miscarriage of justice therefrom. It is for this reason that I am satisfied that the objection raised is merely technical and does not go to the merit of the appeal and the same is accordingly disregarded. See Amako v. The State (1995) 6 SCNJ 23 at 32; Akpan v. The State (1992) 6 NWLR (Part 248) 239 and Effiom v. The State (1995) 1 NWLR (Part 373) 507 at 620. Indeed, as this court had the occasion inter alia to state in The State v. Gwonto (1983) 1 SCNLR.. 142 at page 160 per Kayode ESQ, J.S.C:

"..... The Supreme Court has for sometime now laid down as a guiding principle that it is more interested in substance than in form. Justices can only be done if the substance of the matter is examined. Reliance on technicalities leads to injustice."

See also section 138(1) of the Evidence Act, Cap. 112 Laws of the Federation. Accordingly, I regard the error of mis-stating 16th as 17th of July, 1996 as a typographical error only.

Now, coming to the appeal proper, the two issues identified by the appellant as arising for our consideration are:-

1. Whether the learned justices of the Court of Appeal, Kaduna Division rightly exercised its (sic) discretion when it (sic) convicted and sentenced the respondent under Sections 222(4) and 224 of the Penal Code respectively, when it (sic) finding support section 221 of the Penal Code?
2. Whether the learned justices of the Court of Appeal, Kaduna Division exercised their discretion judicially and judiciously when it (sic) sentenced the Respondent to only N5,000.00 (five thousand naira) or two years imprisonment in default for an offence punishable under Section 224 of the Penal Code?

The single issue formulated at the instance of the accused is:

Whether the learned justices of the Court of Appeal were not in error by convicting the respondent for a lesser Offence under Section 222(4) of the Penal Code and in the exercise of their discretion wrongly sentenced the respondent to a fine of N5,000 (five thousand Naira) or two years imprisonment in the alternative.

I intend to stick to the two issues submitted by the appellant as they fully embrace and reflect the two grounds of appeal filed within and in accordance with the statutory period required by the Constitution on 13th August, 1996.

B The first issue I must regrettably answer in the negative for the following reasons:-

It is patent from the record that the court below, rightly in my view, rejected every material submission and all defences put forward in the accused's Brief and having consequently agreed with the appellant on grounds and issues in proof of an offence under section 221(b) of the Penal Code, ought to have convicted and sentenced the accused to death under that section. The section provides as follows:-

"221. Except in the circumstances mentioned in section 222 culpable homicide shall be punishable with death.

(b) If the doer of the act knew or had had reason to know that death would be the probable and not a likely consequence of the act or of any bodily injury which the act was intended to cause."

D For a conviction to be sustained under this section all the ingredients thereof must be proved by the prosecution beyond reasonable doubt. Once the prosecution failed to prove one of these ingredients of the offence, such doubt ought naturally to be resolved in favour of the accused. See Grace Akinfe v. The State (1988) 3 NWLR (Part 85) 729 at 744-745; Hycienth Egbe v. The king (1950) 13 W.A.C.A. 105 at 106; Philip Omogodo v. The State (1981) 5 S.C.5 at pages 25-27, R. v. Samuel Abengowe 3 W.A.C.A.; Raymond Ozo v. The State (1971) All N.L.R. 111 at 115 and Frank Onyenakeya v. The State (1964) 1 All N.L.R.151 at 153 to mention but a few.

F The question therefore is: had the appellant proved its case beyond reasonable doubt or was doubt created to be resolved in the accused's favour? My answer to these questions, in my respectful view, is in the negative.

The crucial point in this appeal, in my respectful view, is and should not be on whether or not the court below erroneously considered or emphasized the non-existence of contradictions made out in the judgment of the trial court and/or whether the accused and the deceased engaged in a conversation before the accused dealt on him (the deceased) lethal blows with Exhibit 2, but rather whether the prosecution established or proved its case beyond reasonable doubt; namely, that the irresistible conclusion that only the accused had opportunity and did indeed wield Exhibit 2, that caused the stab wound from which the deceased died, leaving no room for circumstantial but rather direct evidence. In this regard, it is immaterial that P.W.4 and PW5 did not identify Exhibit 2 when it was accused himself

who handed it to PW2 who did not visit the scene of crime when he and other police officers investigated the case. The non-mention of the visibility condition by P.W.4 and P.W.5 on the night the crime was perpetrated, would appear in my opinion, to be of no moment since on the accused's assertion, there was no other person between him and the deceased before the stab wound or wounds were delivered. That accused himself went to report the incident to the Police cannot be said to be symptomatic of innocence but rather display of Dutch courage after the deed, the accused having been seen and fixed at the scene of crime by no less personalities than PW4 and PW5 leaving him with no option of an escape route as testified by these two witnesses hereunder. PW4, Garba Adamu, testified inter alia as follows:-

"I and Abubakar went on a motorcycle. He saw the accused. He waived (sic) him. Abubakar asked Musa "Should I come and collect my money?" Musa said "Yes" I alighted from the motorcycle. I sat by the side close to the man selling oranges. I saw the accused (Musa) rushed towards Abubakar's place. On reaching there, Abubakar was to lock the machine. I saw Musa stabbing Abubakar with a knife. Abubakar was shouting and heading towards a hospital by name Alheri, he fell down. People were running. Musa took a different direction. We followed Abubakar where he fell down. We carried him on a motorcycle. We took him to their house i.e. his father's house. We saw the father (PW3) with some people sitting. We narrated to him what happened and he said we should take him to the hospital. We took him to Niima Hospital at M/barchi"

PW5, Muhammadu Aminu, said when examined-in-chief inter alia as follows:-

"..... On 8/12/93, I was at Bayajidda street, close to a club. Time was between 8-9 on that day, there was one boy by name Wawu. He came with a motorcycle. They were two. He parked the motorcycle. One of them alighted from the motorcycle. Wawu kneeled down to lock the machine. Then I saw the accused heading towards Wawu. I saw him stabbed Wawu with a knife. Wawu shouted. Wawu ran towards a Clinic Alheri clinic by Jos Road, he felled (sic) down"

Upon the plain, unequivocal, clear and direct eye-witness accounts by P.W.4 and P.W. 5 set out above, coupled with the testimonies of P.W.3, P.W. 6, Exhibits 1 and 5 as well as the evidence of the accused, the trial court held as proved the first ingredient of the offence of culpable homicide punishable with death vide Section 221(b) of the Penal code to wit: that the death of a human being had actually taken place. See page 69 of the Record. Regarding the second ingredient of the offence under Section 221

(b) of the Penal Code, to wit: that such death had been caused by the accused, the learned trial Judge in what in my opinion amounted to less than an articulate reasoning held, inter alia, at pages 69 and 70 of the Record as follows:-

- "Now coming to the second ingredient of the offence that is whether it was the accused that caused the death of Abubakar Danladi. The evidence of the prosecution witnesses P.W.4 and P.W.5 is that they saw the accused stabbed the deceased with a knife. The alleged offence was committed at night. P.W.4 stated under cross-examination that there were no street lights at the material time. The other witness (sic) who are not eye-witnesses made no mention of the visibility situation at the material time. PW5 who is an eye witness did not say anything about visibility. By Exhibit 5 and the testimony of PW6, the deceased sustained multiple homicidal stab wounds. The prosecution evidence Exhibit 4 showed that the deceased fell on his own knife. That aspect was not investigated. The Police investigators that visited the scene on that date were never called to testify. PW2 only received Exhibit 2. He did not visit the scene. The PW1 that testified he visited the scene only 16 days after the alleged offence was committed and yet received Exhibit 3"*

- The court below while re-evaluating the above findings of facts which did not border on the credibility of the witnesses and being conscious of the fact that there is no rule of law which imposes an obligation on the prosecution to call a host of witnesses or the requirement to call a number of them to establish, in the instant case, the act of stabbing or the number of stab wounds needed to cause the deceased's death (See Ali v. The State (1988) 1 NWLR (Part 68) 1 at 20; Oteki v. A-G, Bendel State (1986) 2 NWLR (Part 24) 648 and R. v. George Kuree 7 WACA, 75) where, the deceased died almost instantaneously from the stab wounds there was no need to have called PW6, (Dr. Dayo Adeleke - the medical doctor) either to establish the case of death by tendering the knife - (Exhibit 2) or the Medical Practitioner's Report (Exhibit 4). See Essien v. The State (1984) 3 S.C. 14 at 18; Kato Dan Adamu v. Kano N.A. (1955) 1 F.S.C.25 and Albert Osayeme (1977) NMLR. 388. Indeed, the law is supported by a long line of authorities that the evidence of one credible witness accepted and believed by the trial court is sufficient to justify a conviction. See Ali v. State (supra) and Adelumola v. State (1988) 1 NMLR. (pt. 73) 683 at 691. Thus, the court below was, in my view, justified in upholding the appellant's submission of the respondent's ill-motive when it held as follows:-

- "But the multiple piercing of the knife on the body of the deceased, as shown by the evidence, leaves no doubt that the knife was put into an*

improper use by the respondent, in the scuffle, causing such grievous bodily hurt which led to the death of the deceased."

The court below further held, puncturing the accused's defence, thus:

"I find it difficult to think along the same line with the learned trial judge that such injuries could be self-inflicted in such a situation. They are indeed clear homicide wounds which no one else can be answerable for but the Respondent."

Be it noted that the charge for which the accused stood trial was couched in the following terms:-

"That you Musa Danjuma on or about the 8th December, 1993 at Bayyajida Street, Kaduna committed culpable homicide punishable with death by causing the death of Abubakar Danladi by doing an act to wit stabbing him several times on his body with a knife with the knowledge that his death will be the probable consequence of your act. You thereby committed an offence punishable under section 221(b) of the Penal Code."
(Underlining is mine for emphasis).

It is my firm view therefore that all the findings made wholly support culpable homicide punishable with death notwithstanding the fact that the court below was wrong to have proceeded or resorted to convicting and sentencing the accused for a lesser offence when the findings are not in support of such a lesser offence. As a matter of fact, the act of the accused constitutes the epitome of premeditated culpable homicide punishable with death, failing which a verdict of guilty under section 222 of the Penal Code punishable under s. 224 (which is not conceded) would have been the only alternative section upon which to convict the accused. Thus, the court below was palpably wrong, in my firm view, to have held as follows:-

"As the lower court did not convict the Respondent on neither of the section (i.e. 221 or 224) of the Penal Code, I hold the view that the decision is perverse and I think I have reason to alter that decision. Accordingly, the decision of the lower Court is hereby set aside. I hereby allow the appeal. A conviction for a lesser offence under Section 224(4) of same is hereby substituted sentenced hereby to a fine of N5,000.00 (five thousand naira) or two years imprisonment."

The conclusion which in effect the court below had arrived at is that the third ingredient of the offence of culpable homicide punishable under section 221(b) of the Penal code, to wit: "That the accused knew that death would be the probable consequence of his act" had to be satisfied. For that to be so, the accused must have intended to cause such bodily injury as was likely to cause death or that he caused the death by a rash or negligent act.

Be it noted the words "likely" and Probable" are defined in section 19 of

the Penal code as follows:-

"19(1) An act is said to be "likely" to have a certain consequence or to cause certain effect if the occurrence of that consequence or effect would cause no surprise to a reasonable man.

(2) An effect is said to be a probable consequence of an act if the occurrence of that consequence would be considered by a reasonable man to be the natural and normal effect of the act."

See also Lamba Kumbin v. Bauchi N. A. (1963) N.N.L.R. 49 at pages 51 and 52, where Reed Ag. S.P.J. (as he then was) elaborated and explained the distinction between "likely" and "probable" and concluded as follows:-

"The answers to these questions must always be on the facts of the particular case. Whether death is "likely" or "probable" is a question of fact."

It is because the learned trial Judge failed to arrive at a definitive finding not having been guided in his use of the above words, that the Writer of the lead Judgment of the court below, Mohammad, J.C.A. said inter alia as follows:-

"There appears to be, apparently from the record, no finding made by the trial court on the 3rd ingredient of the offence charged i.e. "intention of causing death."

In his self defence the accused admitted inter alia that it was he and the deceased alone (not in company of others) that had a struggle. Of this incident he testified that among other things that

"Wawu then removed a knife from his body. I then picked a stick. He tried to stab (sic) me but I hit his hand with the stick. The knife fell then we started the struggle. I was able to pin him down. He fell down on his knife."

The court below not only found the trial court's acceptance of the above explanation by the accused out of line and the argument of doubtful purport, but rather preposterous and unintelligible. It then went on to observe in that regard as follows:-

"The multiple wounds inflicted on the deceased by the appellant, which the medical report established to be cause of death of the deceased are a clear manifestation that the appellant intended the natural consequence of his act. I really find it unintelligible to agree that the deceased fell on exhibit 2 which caused him such grievous multiple wounds. In a normal situation where a knife falls on the ground from the hand of a human being, it naturally lies flat and horizontal. It can cause no harm to another human being. But the multiple piercing of the knife on the body of the deceased, as shown by the evidence, leaves no doubt that the knife

was put into an improper use by the respondent in the scuffle, causing such grievous bodily hurt which led to the death of the deceased."

The above inference legally drawn by the court below from the accepted facts, is in my view, unimpeachable irrespective of a belated attempt made in this case to becloud the issues by putting the evidence of PW4 and PW5 as that of witnesses or person having interests to serve. I infer from the direct, unequivocal and uncontradicted evidence of these two witnesses unfaulted and unimpeachable evidence. This notwithstanding, I view as injudicious unfair and I venture to add, a wrong exercise of discretion by the court below which Ogebe, J.C.A. in his concurring opinion held as follows:-

"As the Appellant is a young man, I shall give him another chance in life by being lenient. I sentence him to a fine of N5,000.00 or two years imprisonment in default of payment."

There surely ought not to exist such circumstances as would warrant a shift or reason to suggest that an offence committed is lesser than the one charged under the appropriate section. See Torhamba v. Police (1956) NRNLR. 94; Agumadu v. The Queen (1962) 1 All NLR. 203; R. v. Adokuwu 20 NLR. 103 and Magdalene Onogwu v. The State (1995) 6 NWLR (Part 401) 276. See also section 218 (1) of the Criminal Procedure Code (C.P.C). In the instant case, I see no justifiable reason to hold that the offence committed was of a lesser mould than the one charged.

My answer to issue 1 is accordingly in the negative.

The question posed in issue 2 is whether the court below exercised its discretion judicially and judiciously when it sentenced the accused to only N5,000.00 (five thousand naira) or two years imprisonment in default for an offence punishable under section 224 of the Penal Code.

Clearly, much of this issue has been given consideration by me under issue 1 (supra). It will suffice here to add a few words of expatiation by observing that the sentence and punishment imposed by the court below supposedly under section 224 of the Penal Code, is very minimal, insufficient and ridiculous having regard to the gravity of the offence. Section 224 of the Penal Code provides as follow:-

"Whoever, commits culpable homicide not punishable with death, shall be punished with imprisonment for life or for any less term or with fine or with both."

The observation "the Respondent is a young man and I shall give him another chance in life" is, in my opinion, the consideration of an irrelevant matter; indeed it is wrongful exercise of discretion by the court below. See Obidieqwu Onyesho v. Christopher Nnebedum & 3 others (1992) 3 NWLR

(part 229) 315; (1992) 3 SCNJ. 12

Furthermore, the discretion thus exercised in sentencing the accused to only N5,000 or 2 years imprisonment in default of payment in view of the gravity of the offence whose facts and setting were direct and not circumstantial cannot be said to be in accordance with commonsense and the

B dictates of justice. See Alhaji J.A. Odutola v. Inspector (1994) 2 SCNJ .

21. Indeed, it is not in the societal interest of peace and unsullied rectitude to import into punishment for an offence as grave as this an attitude of

laissez-faire as well as sympathy where none avails the accused. This is a case in which the decisions of Akwule v. The Queen (1963) 1 All NLR. 193

C at pages 201-202; Obande v. The State (1972) 10 SC.79 at 86 and Nafiu Rabi v. Kano State (1980) 8-11 S.C. 130 cannot be said to be on all fours but rather clearly distinguishable from the one in hand.

My answer to issue 2 is accordingly rendered in the negative.

In the result, this appeal succeeds and it is allowed by me. In place of a conviction to a fine of N5,000.00 (five thousand naira) or 2 years imprisonment in default, a verdict of guilty as charged is entered against the accused by me. Accused is hereby sentenced to death and shall hang by the neck until he be dead. That shall be the judgment of the two courts below.

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