

SUPREME COURT OF NIGERIA
10TH JULY 1998, SC. 3/1998
CORAM: A. B. WALI, M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC

IDRISU AHMED	2ND ACCUSED/APPELLANT
V.		
THE STATE	APPLICANT/RESPONDENT

APPEALS - *Concurrent findings of fact - The Supreme Court has no duty in interfering with concurrent findings of fact - Unless they are shown to be perverse.*

APPEALS - *Findings of fact - Where there was nothing on the record to show that such findings were erroneous - The Appeal Court would dismiss the appeal*

MURDER - *Common Intention - There is plethora of evidence that both the appellant and the 1st accused had the common intention - Of terminating the life of the deceased.*

MURDER - *Premeditated Killing - From the circumstances of the case the two courts below were right in coming to the conclusion - That the deceased died as a result of the concerted criminal act of the 1st accused and the appellant.*

FACTS

With leave granted by the High Court of Justice, Kogi State and under the hand of the Chief judge a charge of committing culpable homicide punishable with death by causing the death of one Anda Ali punishable under section 221(a) of the Penal Code read along with section 79 of the same code was preferred against Musa Yusufu and Idrisu Ahmed, the 1st accused and 2nd accused/appellant respectively. On the evening of 12th December, 1993, between the hours of 7.30 pm - 8.00pm at Obehira in

Okene Local Government Area of Kogi State the 1st and 2nd accused after raising an alarm of "thief! thief!" against one Anda Ali, now deceased, the latter ran into the compound of James Averehi (P.W.I) and hid himself in a room and locked the door. The 1st and 2nd accused pursued Anda Ali into the compound of James Averehi, broke the door open of the room where he was hiding and dragged him out. After beating him with a horse whip, P.W. 1 and his wife pleaded with them to leave the deceased.

They both ignored the plea. The accused pinned down their victim to the ground and the 1st accused holding a locally made pistol shot the deceased in the neck resulting in his instantaneous death on the spot. After committing the offence, the accused persons ran away. P.W. 1 reported the incident to the police on the same day. The two accused persons were later arrested, interrogated and charged to court.

At the conclusion of trial, the learned trial Chief judge found the two accused persons guilty as charged, convicted and sentenced them to death accordingly. Dissatisfied, the 2nd accused appealed against his conviction and sentence to the Court of Appeal, Abuja Division. His appeal was dismissed and the conviction and sentence passed on him were affirmed. Aggrieved by the dismissal of his appeal he has further appealed to the Supreme Court raising three issues but issue 1 was abandoned and struck out leaving two issues.

ISSUES FOR DETERMINATION

"2. Whether the courts below were right in basing their decision on the evidence of p.w. 1 in spite of apparent contradictions and twists in the course of the trial.

3. Whether it was proper for courts below to prefer the case of the prosecution to that of the defence when each of the cases stood parallel and uncontradicted by cross-examinations."

HELD (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)

Murder - Common intention

1. There is plethora of evidence with no iota of doubt that both the appel-

lant and the 1st accused had the common intention¹ of terminating the life of the deceased by inflicting such grievous body injury on the mortal part of the body to wit: neck with such a lethal weapon as Exhibit 7. See The State v. Nwali & Ors. (1971) NMLR 78. (p. 1849 E)

Murder - Premeditated killing

2. The learned trial chief judge (Umoru Eri) as well as Ayo Salami JCA, after having meticulously considered and evaluated the evidence both came to the inevitable conclusion that the deceased, Anda Ali died as a result of the concerted criminal act against him perpetrated by the 1st accused and the appellant. From the words uttered by the appellant to the 1st p.w. that unless the latter stopped from pleading on behalf of the appellant and left the scene, he would be splashed with blood, coupled with jointly holding the deceased by the 1st accused and the appellant when the 1st accused shot him with the gun (Exhibit 7) on the neck, the two courts below were in my view right in separately coming to the conclusion that the deceased died from the gun shot on the neck. The killing of the deceased was premeditated. See R.V. Hasan Owary 5 WACA 66 and Egbe Nkanu v. The State (1980) 3 -4 SC .1. (p. 1850 C)

Appeals - Findings of fact

3. To succeed against findings of fact, it must be shown that the court, in the performance of its primary duty to appraise the evidence and ascribe probative values to it, it made imperfect or improper case of hearing and seeing the witnesses, or has drawn wrong conclusions from the accepted or proved facts which those facts do not support, or it has approached the determination of these facts in a manner which these facts cannot and do not support. See Fashanu v. Adekoya (1974)1 All NLR 282. Okolo v. Uzoka (1978)4 SC 77. There is no such error or misdirection in the findings of the learned trial judge which were rightly affirmed by

¹ In Kwagshir v. The State (1995) 4 KLR 777 the Supreme Court on the issue of common intention of the appellants in that case construed s. 79 of the Penal Code and held that when 1st appellant is not guilty 2nd appellant cannot be found guilty

the Court of Appeal. Where the entire appeal revolved around issues of fact and there was nothing on the record of the lower courts to show that such findings were erroneous, the Appeal Court would dismiss the appeal. See Fatoyinbo & Ors .v. Williams & Ors (1956) 1 FSC 87.

B (p. 1850 G)

Concurrent findings of fact

4. This court has no duty in interfering with concurrent findings of fact by the two lower courts unless they are shown to be perverse. See American Cyanamid Co. v. Vitarity Pharm. Ltd.(1991)2 NWLR (pt.171)15; Sunday Baridan v. The State (1994)1 SCNJ 1 at 12; Onuoha v. The State (1988)3 NWLR(pt.83) 360 and Ugwumba v. The State(1993)5 NWLR (pt. 296) 660 at 671. (p. 1851 C)

D

NOTABLE POINT OF INTEREST

IGUHJSC

1. Inference of common intention

E It has, however, to be stressed that common intention may be inferred from circumstances by evidence and need not only be by express agreement between the perpetrators of an offence although such a presumption of a common intention should not be too readily applied without very clear evidence in support thereof. See Ogu Ofor and Another v. The Queen (1955) 15 W.A.C.A. 4. (p. 1857 H)

F

REPRESENTATION

G Dr. M. E. Ajogwu, with C. V. U. Ezeugwufor for the appellant
Isa Jami, Senior Legal Officer, Ministry of Justice, Kogi State for the respondent

CASES REFERRED TO

H Oje v. The State (1972) 1 SC 23 and
Ogboodu v. The State (1987)2 NWLR (pt. 54) 20 at 27
Onubogu v. The State (1974) 9 SC 1
Sugh v. The (1988) NSCC (pt. 1) 852 at 962.

Nwuzoke v. The State (1988) 2 SCNJ 344

Mohammed v. The State (1991) 5 NWLR (pt. 92) 438

Peter v. The State (19 77) NNLR 81 89

Modupe v. State (1988) 9 SCNJ 1

Oladimeji v. The State (1964) 1 All NLR 131

B

The State v. Nwali (1971) NMLR 78

STATUTES REFERRED TO

Penal Code, ss. 79 and 221 (a)

C

Court of Appeal Act, 1976, s. 16

LEAD JUDGMENT BY WALI JSC

With the leave granted by the High Court of Justice, Kogi State and under the hand of Umoru Eri, Chief Judge, the following charge was preferred against Musa Yusufu and Idrisu Ahmed:- D

"That you Musa Yusufu and Idrisu Ahmed on or about the 7th day of December, 1993 at Obehira in Okene Local Government Area within the Kogi State Judicial Division committed culpable homicide punishable with death by causing the death of Anda Ali by doing an act to wit: you shot the said Anda Ali in the neck with a locally made gun with the intention of causing his death and you thereby committed an offence punishable under section 221(a) of the penal Code read along with section 79 of the same Code." F

The two accused persons being referred to as 1st and 2nd accused were arraigned before Umoru Eri, the learned Chief Judge, and each pleaded not guilty to the charge. The trial proceeded with the prosecution calling four witnesses and putting in evidence a number of Exhibits in proof of their case while both the 1st and the 2nd accused gave evidence in defence with 1st accused calling one witnesses. G

At the conclusion of the trial the learned trial Chief Judge made a thorough consideration and evaluation of the evidence adduced before him and found the two accused persons guilty as charged, convicted and sentenced them to death accordingly. H

Dissatisfied with the decision of the trial court the 2nd accused,

Idrisu Ahmed appealed against his conviction and sentence to the Court of Appeal, Abuja Division. His appeal was dismissed and the conviction and sentence passed on him were affirmed.

Aggrieved by the dismissal of his appeal by the Court of Appeal, B Abuja and 2nd accused has now further appealed to this court.

It appears that the accused did not appeal against the judgment of the trial court to the Court of Appeal, Abuja Division.

The simple facts involved in this case are as follows:

C On the evening of 12th December, 1993, between the hours of 7.30 p.m-8 p.m at Obehira in Okene Local Government Area of Kogi State, the 1st and 2nd accused after raising an alarm of "thief! thief!" against one Anda Ali, now deceased, the latter ran into the compound of James Averehi (p.w.1) and hid himself in a room and locked the door. D The 1st and the 2nd accused pursued Anda Ali into the compound of James Averehi, broke the door open of the room he was hiding and dragged him out. After giving Anda Ali beating with a horse whip, James Averehi and his wife pleaded with them to leave the deceased. They both E ignored the plea. The accused pinned down their victim to the ground and the 1st accused holding a local made pistol shot the deceased in the neck resulting in his instantaneous death on the spot. After committing the offence, the 1st and the 2nd accused ran away. Mr. James Averehi F reported the incident to the police on the same day. The two accused persons were later arrested, interrogated and charged to court.

Henceforth, the 2nd accused who is the appellant in this appeal, shall be referred to simply as the appellant. Parties filed and exchanged G briefs of argument.

In the appellant's brief and of the 3 issues filed therein Issue 1 was abandoned and struck out. The two remaining issues are as follows:

"2. Whether the courts below was right in basing their decision on the evidence of p.w. 1 in spite of apparent contradictions and twists in H the course of the trial.

3. Whether it was proper for courts below to prefer the case of the prosecution to that of the defence when each of the cases stood parallel and uncontradicted by cross-examinations."

In the Respondents' brief the following 3 issues have also been raised:-

"2.1. Whether the Court of Appeal was right in holding that the offence was proved beyond reasonable doubt before the trial Chief Judge. (Ground 1)." B

2.2. Whether the court below was right when it held that there were no contradictions in the case of the prosecution. (Ground 2).

2.3. Whether the cases of the prosecution and the defence stood parallel even after the court below disbelieved the defence. (Ground 3) C

Having carefully examined the two sets of issues identified in the respective briefs of the appellant and the respondent, I am satisfied that the 3 issues raised in the Respondent's brief are adequately covered by the two Issues in the appellant's brief and which I consider comprehensive enough for the determination of this appeal. I shall therefore adopt the two issues raised in the appellant's brief for the purpose of determining this appeal. And since the issues are inter-related and basically deal with facts I shall take and consider them together. D

Issues 2: This covers issues 1 and 2 of the Respondent. Under this issue, it is the contention of learned counsel for the appellant that both the trial court and the Court of Appeal were wrong to have relied on the evidence of p.w.1 to convict the appellant since the evidence is contradictory. Learned counsel referred in particular to the part of p.w.1's evidence where he said- E

"Accused 1 left his slippers while the cap being worn by accused 2 got hung to one of the sticks by the roof of the house." and then submitted:- F

"The above quotation is a clear evidence of identification. If the 1st accused was wearing slippers at the time of the pursuit and the 2nd accused was wearing a cap at the material time, the identification must have been ideal. But accused 2 who was supposed to be the owner of the cap, told the court that on the faithful (sic) day he wore no cap and did not enter into the p.w. 1's compound /house. This claim by the 2nd accused was authenticated by the evidence of the 1st accused at page 34 where he claimed the cap supposedly worn by the 2nd accused person as G H

the cap he was wearing that night."

He argued that a pair of slippers is not the same as a pair of shoes which p.w.3 said he collected from the scene of incident and for that reason, he submitted, the appellant was not properly identified by p.w.1 the only eye witness to the incident called by the prosecution; and that the benefit created by the contradiction in the prosecution's evidence ought to have been given to the appellant. He cited and relied on the decisions in Oje v. The State (1972) 1 SC 23 and Njoku v. The State (1966) 7 SCNJ 36.

On issue 3 learned counsel for the appellant contended that the legal is the cross-examination and that testimonies not tested and discredited through that process sound straight forward, convincing and apparently credible and submitted in this brief as follows:-

"With respect, the counsel on both sides did not so much assist the court. It is with the assistance proffered by the effect of cross-examination that the court can judiciously come to a considered opinion to believe one side or the other, to prefer one side's case to the other. It is my humble submission that where the case of the prosecution remains uncontradicted by cross-examination, the court is tempted to believe it; Similarly, where the case of the defence stands uncontradicted, the Court even if it does not believe it is duty bound to appreciate that a doubt has been thrown into the prosecution's case."

Learned counsel finally submitted "that with the parallel stands of the case for the prosecution and the case for the defence, the court below and the trial court had no proper bases for preferring one side to the other " and urges this court to discharge the appellant.

Learned counsel for the respondent in his reply to the submissions by learned counsel for the Respondent on issue 2 submitted that there are no material contradictions in the evidence of p.w.1 and that of p.w.3 and p.w.4 to effect the prosecution's case. He said the contradiction between shoe and slippers is not fundamental as to effect the identity of the appellant and that what ever the appellant wore on his feet that day, be it shoes or slippers could not amount to material contradiction. He cited and relied on the following cases to buttress his submissions- Asariyu v. The State (1987) 11-12 SCNJ 125 at 130; Ogbodu v. The State (1987)2

NWLR (pt.54)20 at 27; Grace Abraham Akpabio & 10 Ors. v. The State (1994)7-8 SCNJ (pt.111) 429 at 453; Onubogu v. The State (1974) 9 SC 1 and SUGH v. The State (1988) NSCC (pt.1) 852 at 862.

On Issue 3, learned counsel submitted that the cases of the prosecution and the defence were not at par as the case put up by the defence was disbelieved by both the trial court and the Court of Appeal. He finally submitted that the courts below were satisfied that the prosecution had proved its case beyond reasonable doubt and urged that the appeal be dismissed. He cited the case of Nwaga Nwuzoke v. The State (1988) 2 SCNJ 344.

The appellant and the 1st accused were jointly charged under S. 221(a) read with S. 79 of the Penal Code, with the murder of Anda Ali. The substratum of argument of learned counsel is that had the Court of Appeal made a thorough consideration of the prosecution's evidence viz-a-viz that of the defence it would have come to the inevitable conclusion that such evidence was not reliable due to contradiction and discrepancy in that evidence. The particular contradiction or discrepancy in the prosecution's evidence is related to the statement of p.w.1 who is one of the two eye witnesses to the incident where he said:-

"After they had killed Anda Ali the accused persons tried to run away. Accused 1 left his slippers (sic) while the cap being worn by accused 2 got hung to one of the sticks by the roof of the house. All these things were left there until the policemen came to the scene;"

While the 3rd witness for the prosecution, Sgt. Atere Olugba said in his evidence-

"At the scene I saw a cap bearing the captain "Coke" and a pair of black shoes."

The 1st accused in his evidence in Chief said-

"I left my shoes and facing cap on the ground there because I was afraid."

The pair of shoes and the cap were admitted in evidence without objection as Exhibits 1 and 2 and which 1st accused under cross-examination admitted he left in James Averehi's compound i.e. p.w.1 on the day of the incident. It was as a result of this contradiction or discrep-

any that learned counsel argued that there was no proper identification of the appellant by p.w.1.

I shall now examine the evidence to see whether the submissions as regards the complaint against the proper consideration and evaluation of the evidence adduced viz-a-viz the identification of the appellant in the participation of the criminal act are so material and fundamental to raise any doubt in his favour.

P.w. 1, the most important witness for the prosecution and in whose compound the brutal murder of the deceased was committed said in part of his evidence as follows:

"On 7/12/93 at about 8.00 p.m. I was sitting in my compound / house at Obehira. On that day, I was eating beans prepared for me by my wife. After I had taken two spoonful I heard shouts from a crowd. When I was about taking a third spoonful of the cooked beans, I saw Anda Ali rushed to me to say: "Help me Baba ", Help me Baba,. He entered into a room whose door was not closed. The room was in my house. I saw the second accused, Idrisu chasing the said Anda into the room. He said "this is the room he has entered, this is the room he has entered" and immediately the 1st accused followed the 2nd accused into my compound and made for the room. The room anda Ali ran into was in my compound. He closed the door. The 2nd accused stood by the door to say to the 1st accused "this is the room he has entered." I inquired from both the accused persons what the matter was. The two accused persons hit the door with their legs and forced it open. The mud of the house that held the frame of the broken door is still on the ground at the spot up till now. After the accused persons forced the door opened, they both pushed Anda Ali backwards. Both accused held his two legs and brought him out into the open compound. The two accused persons flogged Anda Ali. When the flogging was too much, I started to appeal and beg the accused persons that since I am an old man, they should honour him and desist, promising that I would intervene in whatever their matter was on the next day. My wife and myself knelt down to beg the two accused persons. Accused 2 said we should not kneel down for them because the matter did not concern us and that we should go away from the scene to avoid blood

splash. The deceased was held down by the two accused persons. As a result of their warning that we should not kneel down, my wife and myself got up. The first accused brought out a short gun from his pocket and pointed it directly at the neck of Anda Ali. I heard a sound from the gun shot when accused 1 fired at Anda Ali. I was frightened. Immediately accused 1 shot at Anda Ali, I started to shout to call on all the Obehira Community, shouting that two accused persons had killed Anda Ali in my compound. I did not know what was the matter between them. I went to a nearby Police Station at a village called Akuhavi. After they had killed Anda Ali the accused persons tried to run away. Accused 1 left his slippers while the cap being worn by accused 2 got hung to one of the sticks by the roof of the house. All these things were left there until the policemen came to the scene."

Under cross-examination the p.w.1 gave evidence that at the time of the incident there was light in his house. He said:-

"On that night there was electricity light. Even the accused persons know that everywhere in my compound is lit."

With regard to consideration of p.w.1's compound that night, 1st accused testified that:-

In Averehi's compound there were many fluorescent lights and I therefore could not see the person I was pursuing as a result of the reflection of the light."

The learned trial Chief Judge, after considering the totality of the evidence by the prosecution and the defence, was in no doubt as regards the identity of 1st accused and the appellant and their joint participation in the criminal act when he found as follows:-

"I have considered the totality of the evidence adduced by the prosecution before me. It is indeed a clear case. The totality of the evidence by the prosecution is not only direct, positive, unequivocal, but points to each and every ingredients required to make for a complete offence of culpable homicide. I find as a fact from the evidence of p.w.1, whom I believe that, Anda Ali was pursued by both accused 1&2 to his compound on the said 7/12/93. I also believe p.w. 1 and find as a fact that, Anda Ali hid in one of p.w.1's rooms when both accused 1&2 broke

the door of the room with their legs by hitting it and dragging Anda Ali to the compound of p.w.1. I find as a fact that both accused 1&2 held Anda Ali to the ground and that accused 1 used Exhibit 7, the locally made pistol (gun) and shot the deceased on the neck."

B xxx

"I find as a fact that, accused 2 told p.w.1. that, the issue between them and Anda Ali was not a matter for p.w.1 to beg them. Exhibits 3 and 4 are statements volunteered and written by accused 1 himself owning up to exhibit 7, the locally made pistol which the Ballistician has aptly described as a lethal weapon in his Report marked Exhibit 9.

On the whole, I believe the evidence of all the prosecution witnesses and find as a fact that accused 1 and 2 were not only responsible and pinned as the direct cause of the death of Anda Ali but that it was so D done on 7/12/93 at Obehira in p.w.1's compound."

XX

On accused 2, his outright denial, except that he heard the shout of "thief, thief" like that of his witness, is a make up story which I do not believe. I have no doubt in my mind, from evidence of p.w.1 that, accused 2 not only identified the room where Anda Ali hid in p.w.1's compound, but assisted in breaking open the door and dragging Anda Ali outside into the compound to receive the beating and the gun shot from accused 1 which eventually snuffed off life from the said Anda Ali."

The Court of Appeal in its lead judgment by Ayo Salami JCA with which both Kalgo and Opene JJCA agreed, after meticulous consideration of the evidence, agreed with the learned trial chief judge in his findings when the Learned Justice said:-

G *"Learned counsel for appellant contended that since first accused admitted ownership of the facing cap, ownership of which was ascribed to appellant by the eye -witness, it was unsafe to accept all what first prosecution witness said. The cap bearing inscription coker cola*
H *(sic) was tendered and admitted as exhibit 2. This piece of evidence is not material to the determination of the real issue calling for determination, that is the charge preferred against the appellant. The appellant's identity was not in doubt. Indeed the appellant did not deny his presence*

on the grounds of Averehi on the day in question. He peremptorily declared "we got to Averehi's compound -Averehi was p.w.1 who testified before this court". In the result, the failure of learned trial chief judge to consider the contradiction did not result in miscarriage of justice as contended by learned counsel for appellant. See Abdul Mohammed v. The State (1991) 5 NWLR (pt.92) 438. B

There is no conflict between the testimony of the first prosecution witness and his previous statement in which he alleged that appellant participated in the beating of the deceased. It is immaterial whether appellant single handedly beat the deceased or he was joined by others in beating him, in either view the appellant was implicated and not exculpated by the pieces of evidence. The parties were charged jointly. It is, therefore, immaterial to draw a line between the role played by each person since as it was observed earlier in this judgment the act of one accused is deemed to be the act of every member of the assembly which gathered at Averehi's compound on that fateful night." C D

On the issue relating to the consideration and evaluation of the evidence by the trial court, the learned Justice of the Court of Appeal E opined thus-

"It is a serious overstatement on the part of learned counsel for appellant to contend that the only findings made by learned trial judge were as to the cause of death and the one touching on the preference of witnesses. He found that Anda Ali was pursued by both accused at page 52 lines 20, 21 and 22. Apart from this finding learned trial chief judge made several other findings at page 52 of the record touching upon the hiding place of the deceased in the home of James Averehi and the appellant's role in exposing the deceased, and the pall he played in terminating the life of the deceased as well as the appellant telling first prosecution witness "that the issue between them and Anda Ali was not a matter for p.w.1 to beg them". Learned chief judge went on at page 53 of the record to observe thus - F G H

"I treat the evidence of accused 2 and that of his witness as those of copious liars that needed to be treated with only pinch of salt. He and accused 1 clearly took the laws into their hands and made non-

sense and mockery out of the life of a human being"
This is a case where S. 79 of the Penal Code is involved. It deals with common intention. The section provides thus:-

"When a criminal act is done by several persons in furtherance
B of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Although the learned trial chief judge did not specifically comment on this section the learned Justice of the Court of Appeal and by virtue of section 16 of the Court of Appeal Act, 1976, had taken pains to deal with
C it in his judgment wherein in said-

"I agree with the learned counsel for the respondent that on the evidence before the court there is sufficient material evidence to draw an irresistible inference that both appellant and the 1st accused had a com-
D mon intention to kill the deceased."

xx

"A common intention need not be based on direct evidence of an express agreement rather it can be presumed from the circumstance of the
E case but a common intention should not be hastily drawn. See Abu Peter and Another v. The State (1977) NNLR 81 89. On the evidence accepted by the learned trial chief judge, the appellant's involvement in the com-
F mission of the crime exceeded the prosecution of common object of apprehending a common thief urged upon us by learned counsel for appel-
lant. In the circumstance of this case it can be reasonably inferred from the conduct of the appellant as well as statement imputed to him that he had common intention to terminate or eliminate the deceased. In the
G result, it is immaterial that the appellant did not personally carry the short gun nor pull the trigger of the gun that snuffed life out of deceased. The fatal shot given by the first accused is seen in the eye of the law to be a shot by all those present and pursuing the deceased. The possession of the short gun and catridges by the first accused was the possession of the
H appellant."

On the question of the learned chief judge's reliance to convict on the evidence of p.w. 1 as a sole witness, the learned Justice of the Court of Appeal after considering counsel's argument on it, came to the

following correct conclusion-

"In this connection, the learned counsel for appellant, in the appellant's brief delve into a lot of irrelevances. The substance of his submissions is that the learned trial chief judge was in error in accepting the evidence of the only eye witness, James Averehi, without caution, when the accused were not cross-examined when they testified which failure by the prosecution, renders their version truthful. There is nothing truthful about the testimony of appellant and his only witness. The two witnesses contradicted themselves materially; while the appellant admitted that he got to the house of James Avarehi, his only witness, Audu Aliyu, claimed that both of them turned back to their respective homes when, on approaching the house of first prosecution witness, they heard a report of gun shot from the direction of the house. The learned trial judge considered the evidence adduced by the appellant and his witness along with that of the prosecution and rejected the defence of the appellant. There was, therefore, no two credible conflicting evidence which can be subjected to the forensic test enunciated in Modupe v. State (1988)9 SCNJ 1 and Oladimeji v. The State (1964) 1 All NLR 131 cited in appellant's brief."

There is plethora of evidence with no iota of doubt that both the appellant and the 1st accused had the common intention of terminating the life of the deceased by inflicting such grievous body injury on the mortal part of the body to wit: neck with such a lethal weapon as Exhibit 7. See The State v. Nwali & Ors. (1971) NMLR 78; Akpankere Apishe Ors .v. The State SC 97/70 dated 12/2/71 and Eyo Okon Eyo & Ors .v. The State SC. 288/69 dated 25/9/70.

Both the appellant and the accused were known to the p.w.1 long before the incident and that apart, each of them admitted pursuing the deceased to the deceased's compound. The appellant in Exhibit 6, his statement made under caution, said-

"I know Musa Yusuf and Anda Ali, the two of them are my relation. I live in the same area with them. On 7/12/93 between 7.00 p.m and 8.00 p.m. I was in my house. I heard Anda Ali was shouting calling

B *Musa Yusuf that Musa Yusuf want (sic) to kill him. I came out I saw Musa Yusuf pursuing Anda Ali and that Anda Ali is a thief, today is today. Musa Yusuf pursued him into the compound of one James Averehi. When Anda Ali ran into the compound, he entered inside one of the rooms and locked himself. Musa Yusuf forced the door open with his leg. The landlord then pleaded to Musa Yusuf that what happened? He should not kill some body in his house. I was also inside the compound." (underlining supplied for emphasis)*

C This excerpt from Exhibit 6 corroborated and confirmed in material particular the evidence of p.w.1 and that of 1st accused and his statements made under caution. The story is too complete and exact to be narrated by a person who was not inside the compound of p.w.1.

D **The learned trial chief judge (Umoru Eri) as well as Ayo Salami JCA, after having meticulously considered and evaluated the evidence both came to the inevitable conclusion that the deceased, Anda Ali died as a result of the concerted criminal act against him perpetrated by the 1st accused and the appellant. From the words uttered by the appellant to the 1st p.w. that unless the latter stopped from pleading on behalf of the appellant and left the scene, he would be splashed with blood, coupled with jointly holding the deceased by the 1st accused and the appellant when the 1st accused shot him with the gun (Exhibit 7) on the neck, the two courts below were in my view right in separately coming to the conclusion that the deceased died from the gun shot on the neck. The killing of the deceased was premeditated. See R.V. Hasan Owary 5 WACA 66 and Egbe Nkanu v. The State (1980) 3 -4 SC .1.**

G This is an appeal basically involving issues of fact and the findings of the lower courts thereon. **To succeed against findings of fact, it must be shown that the court, in the performance of its primary duty to appraise the evidence and ascribe probative values to it, it made imperfect or improper case of hearing and seeing the witnesses, or has drawn wrong conclusions from the accepted or proved facts which those facts do not support, or it has approached the determination of these facts in a manner which these facts cannot**

and do not support. See Fashanu v. Adekoya (1974)1 All NLR 282. Okolo v. Uzoka (1978)4 SC 77; Ebba v. Ogodo(1984) N.S.C.C. 255 and Idundun v. Okumagba (1976) NMLR 200.

There is no such error or misdirection in the findings of the learned trial judge which were rightly affirmed by the Court of Appeal. Where the entire appeal revolved around issues of fact and there was nothing on the record of the lower courts to show that such findings were erroneous, the Appeal Court would dismiss the appeal. See Fatoyinbo & Ors. v. Williams & Ors (1956) 1 FSC 87; Adio & Anor .v. The State (1986)2 NWLR (pt.24) 581 and Onyejekwe v. The State (1992) 4 SCR (pt.1)19.

This court has no duty in interfering with concurrent findings of fact by the two lower courts unless they are shown to be perverse. See American Cyanamid Co. v. Vitarity Pharm. Ltd.(1991)2 NWLR (pt.171)15; Sunday Baridan v. The State (1994)1 SCNJ 1 at 12; Onuoha v. The State (1988)3 NWLR(pt.83) 360 and Ugwumba v. The State(1993)5 NWLR (pt. 296) 660 at 671.

Having considered the issues raised in this appeal I find on the whole, it has no merit and it is hereby dismissed. The conviction and sentence of the appellant which were affirmed by the Court of Appeal are hereby confirmed.

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my learned brother Wali, JSC just read. I agree entirely with his reasoning and conclusion that this appeal lacks merit. I may just make a few comments in further elaboration of the reasoning of my learned brother Wali, JSC.

On Issue (2) which complains of contradiction in the evidence of pw1 and pw3, the complaint to my mind is imaginary. Whether what the 1st accused wore that day was a pair of shoes or a pair of slippers is of no consequence. The 1st accused admitted what he wore was what was found in the compound of PW1. It is crystal clear that what the 1st

accused left behind was what pw1 called a pair of slippers and what pw3 called a pair of shoes. I do not see how the difference in the nomenclature given to what the 1st accused was wearing that night affected the case for the prosecution. In the same vein, the issue as to who, between
B the 1st accused and the Appellant, wore the cap that night is equally of no consequence. Pw1 said it was the Appellant that wore the cap, 1st accused however, in his evidence claimed that it was he who wore the cap. The Appellant in his evidence admitted being in the compound of
C the p.w1 that night. I do not see, therefore, how this contradiction in the evidence of pw1 and the 1st accused effected the case for the prosecution having regard to the admission of the Appellant that he was in the compound of the p.w1 that fateful night.

I find some difficulty in comprehending the contention of the
D Appellant on issue (3). Pw1 whose evidence the learned trial Chief Judge accepted as credible gave a clear picture of the role played by the Appellant in the incident leading to the death of the deceased. On the other hand the Appellant equally testified as to the role he played that night
E which evidence, if believed, would exonerate him of responsibility for the death of the deceased. The learned trial Chief Judge who saw and hear the two witnesses give evidence and observed their demeanours rejected, for good cause, the evidence of the Appellant. This is a straight
F forward case of ascription of credibility to a witness which is entirely within the province of the trial Chief Judge. The learned trial Chief Judge considered the evidence of the Appellant and that of his witness "as those of copious liars that needed to be treated with only a pinch of salt." On
G the evidence before the learned trial Chief Judge, I do not see anything improper in his preferring the case for the prosecution to that for the Appellant. In fact, as an umpire, this is what was expected of him. Adjudication is an essential part of his duty.

In the light of the findings of fact made by the learned Chief
H Judge and affirmed by the court below, I think the Appellant was rightly convicted. He has not convinced me in this appeal that there is any justification for my interfering with those findings of facts. Consequently I dismiss the appeal and affirm the judgment of the court below.

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Wali, JSC., and I agree with him that there is no merit in this appeal. For the reasons given in the judgment I also dismiss the appeal and affirm the conviction and sentence passed by the trial court. B

ONU JSC

I have been privileged to read in draft the leading judgment of my learned brother Wali, JSC. I am in entire agreement with him that the appeal lacks merit and must perforce fail. C

Of all three issues submitted by the appellant (2nd accused in the trial court) as arising for determination on page 3 of his brief, only issues Nos. 2 and 3 which emanate from Grounds 2 and 3 of the Grounds of Appeal contained at pages 151-152 of the Record of proceedings, I deem necessary to consider in this appeal. This is because ever before learned counsel for him (appellant) fully embarked on the argument on the first issue, he saw the futility of doing so, withdrew same and it was accordingly struck out. D E

On issue No.2 which complains of whether the court below was right in basing its decisions on the evidence of p.w1 in spite of apparent contradictions and twists in the course of trial which must of necessity flow from Ground 2 of the Grounds of Appeal, the particulars of error state as follows:- F

(a) *The p.w 1 testified as to what were left by the fleeing accused persons 1&2.* G

(b) *Pw3 testified that what he saw were cap and shoes and not slippers.*

(c) *The accused No.2 stated that he never entered the compound of p.w1 and did not own anything there.* H

(d) *First accused claimed ownership uncontradicted of Exhibit 1&2 said to belong to accused 1&2."*

After making reference to relevant portions of the appellant's

brief, learned counsel argued, inter alia, that a pair of slippers is not the same as a pair of shoes which pw3 said he collected from the scene of crime on the evening of 12th December, 1993 between 7.30 pm. and 8 pm and for that reason, he submitted, appellant was not properly identified by pw1, the only eye-witness to the incident; further that the benefit of doubt created by the contradiction in the prosecution's case ought to be resolved in appellant's favour. Reliance was placed on the cases of Oje v. The State (1972)1 SC. 23 and Njoku v. The State (1996)7 SCNJ 36.

I am inclined to reject this submission having regard to the credible evidence of pw1 coupled with the fact that there are no material contradictions between the evidence of pw1, pw3 and pw4 detrimental to the prosecution's case. This is because any contradiction between shoe and slippers is not fundamental as to affect the identity of the appellant based on the totality of the evidence adduced. I agree in this regard with the respondent that whatever appellant wore on his feet that day, be it shoes or slippers, could not amount to a material contradiction. See the cases of Asariyu v. The State (1987) 11-12 SCNJ 125 at 130; Ogbodu v. The State (1987)2 NWLR (part 54) Grace Akpabio & Ors. v. The State 7-8 SCNJ (part 111) 429 at 453; Onubogu v. The State (1974)9 SC.1 at 20 and Sugh v. The State (1988) NSCC (part 1) 852 at 862.

Grounds 3 states as follows:-

"The Judges below were wrong in preferring the case of the prosecution to that of the defence as both sides stood parallel and undemolished."

The issue (issue 3), which is tied to the above Ground asks: whether it was proper for the court below to prefer the case of the prosecution to that of the defence when each of the cases stood parallel and uncontradicted by cross-examinations.

The particulars of errors of the Ground are that:

- "(a) The prosecution told its story straight and unbending*
- (b) The defence equally told its story straight and unbending*
- (c) There was no serious cross-examination either way to demolish the case of either side*
- (d) The lower court had no clue on where actually to throw its*

belief as the evidence stood parallel."

In this case, the appellant's story was a total denial of the offence charged, and at the end of the day the learned trial Chief Judge said of him in finding him guilty thereof as follows:-

"..... He and accused 1 clearly took the laws into their hands made nonsense and mockery out of the life of human being which for all intent and purposes, ought to be treated with sanctity." As for accused 1, there was no provocation whatsoever and therefore, the issue of sudden provocation does not arise. The deceased was unarmed and the issue of self defence does not avail either 1 or 2nd accused.".....

"..... After all, accused 1 himself admitted that it was Exhibit 7 he used in shooting Anda Ali and his two statements to the Police including his oral testimony before this court are not only direct and positive but unequivocal.

Accused 1 and accused 2 have therefore no defence whatsoever to this charge which is proved beyond reasonable doubt by the prosecution. I find accused 1 and 2 guilty of the offence of culpable homicide punishable with death contrary to section 221(a) of the Penal Code, in that on 7/12/93 they intentionally caused the death of Anda Ali " (Underlining above is mine for emphasis).

The court below confirmed the above findings in the lead judgment with which the other Justice agreed, Salami, JCA held inter alia that:

"There was sufficient evidence from which the learned Chief Judge could infer that first accused and the appellant had common intention to kill the deceased."

"I agree with learned counsel for respondent that on the evidence before the court there is sufficient material to draw an irresistible inference that both appellant and the first accused had a common intention to kill the deceased."

And later down in the judgment that he also found:

"The appellant is clearly caught by the provisions of Section 79 of the Penal Code and is equally responsible with the 1st accused for the consequence of their action which was the killing of the deceased."

The two decisions which constitute concurrent findings of fact, both not having been shown to be perverse, ought not to be lightly set aside or disturbed. See Amasa & Ors .v. Kososi Ors. (1986)4 NWLR (part 33)57; Adimora v. Ajufo (1989)3 NWLR (part 80)1 and Okafor v. Idigo (1984)6 SC.1. Nor can the assertion that as against prosecution's case, the defence could have told its story as being straight and unbending be correct; that there was no serious cross-examination either way to demolish the case of either side nor further still that the court below had no clue on where actually to throw its belief as the evidence stood parallel be a true statement of fact. Not only is the argument here proffered ingeniously mischievous, it is totally misconceived in the light of extracts of the unimpeachable conclusions of the two courts below hereinbefore set out. In other words, it is fallacious to put the relative strengths of the prosecution and defence cases at par more so, that the prosecution had proved its case beyond reasonable doubt and the trial court that saw and heard the witnesses on both sides preferred the prosecution's.

For the reasons proffered by me and the fuller ones contained in the leading judgment of my learned brother Wali, JSC I, too, dismiss this appeal and affirm the decisions of the two courts below.

IGUH JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Wali, JSC and I totally agree that this appeal is without substance and ought to be dismissed.

From the findings of both courts below, the appellant, the 2nd convict, along with one Musa Yusuf, the 1st convict, acting in concert, chased the deceased into the compound of p.w.1, James Averehi. This was at about 8.00 pm on the 9th day of December, 1993 at Obehiria in the Okene Local Government Area of Kogi State. The deceased ran into a room in the house of p.w. 1 and fastened its door. Both convicts forced the door open by kicking it with their legs, entered the room, dragged the deceased outside the house and jointly flogged him mercilessly.

When the flogging became unbearable for p.w 1 to witness, he

and his wife knelt down before both convicts and begged them to stop the assault but the appellant ordered them to leave the scene in order to avoid blood splash on them. At that stage, both convicts firmly pinned down the deceased to the ground while the first convict, Musa Yusuf, brought out a short gun from his pocket, pointed it directly at the neck of B the deceased and shot him. The deceased died on the spot. At this juncture, both convicts took to their heels.

The first convict admitted his complicity in the commission of the offence and made a clean breast of the incident. The appellant, on the other hand, denied the charge. Both convicts were at the conclusion of C their trial on the 26th day of February, 1996 found guilty of the offence of culpable homicide punishable with death by causing the death of the deceased, Anda Ali, by the High Court of Justice of Kogi State, holden at D Lokoja and were accordingly sentenced to death. Their conviction and sentenced were on the 30th day of June, 1997 affirmed by the Court of Appeal, Abuja Division. The 2nd convict has now appealed against his conviction and sentence to this court.

The main issue canvassed on behalf of the appellant before this E court was that he could not have been properly convicted of the offence of culpable homicide punishable with death by shooting the deceased, Anda Ali, in the neck with a shot gun unless there is definite evidence of common intention between him and the first convict. This is because it F was the first convict who fired the gun that killed the deceased and not the second convict. With this submission, I am in complete agreement. A vital question for determination, therefore, must be whether both courts below were right in holding that the prosecution had proved the essential G element of common intention between the two convicts to kill the deceased.

In this regard, Section 79 of the Penal Code, Cap. 89, Laws Northern Nigeria, 1963 applicable in Kogi State of Nigeria provides thus-

"When a criminal act is done by several persons in furtherance H of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him." (underlining supplied).

It has, however, to be stressed that common intention may be inferred

from circumstances by evidence and need not only be by express agreement between the perpetrators of an offence although such a presumption of a common intention should not be too readily applied without very clear evidence in support thereof.. See Ogu Ofor and Another v. The

B Queen (1955) 15 W.A.C.A. 4.

Turning now to the facts of the present case, the evidence before the trial court which the learned trial Judge accepted and affirmed by the court below was that both the appellant and the 1st convict chased the deceased into the compound of p.w.1. They both forced open the door of the room the deceased ran into by kicking it with their legs. Having forcefully broken the door open, both convicts dragged the deceased out of the room on to the open ground of the compound and flogged him mercilessly.

D Shocked by what was going on, p.w.1 and his wife interceded on behalf of the deceased, pleading that he be spared. Significantly, it was the appellant who at that stage told p.w.1 to spare his breath because the matter did not concern them. The appellant further ordered them to leave the scene to avoid blood splash on them. The deceased at this time, was pinned firmly on the ground by both convicts whereupon the 1st convict brought out a short gun from his pocket, pointed it directly at the neck of the deceased while both pinned the deceased to the ground as aforesaid and shot him. The deceased died on the spot.

F Dealing with this aspect of the case, the Court of Appeal observed thus-

"There was sufficient evidence from which the learned Chief Judge could infer that first accused and the appellant had common intention to kill the deceased. What else was his interest in the matter in forcing the door at first prosecution witness' home open, joining first accused in dragging the deceased out of his hiding place and assisting in pinning the deceased down when the first accused got ready for the kill? And more importantly, if he were not working in concert with the first accused how did he know that blood would be spilled to justify the warning he gave first prosecution witness and his wife to stand clear to avoid blood splashing on them."

I have given a most careful consideration to the issue of common intention raised on behalf of the appellant in this case. In my view, there was overwhelming evidence of common intention between the appellant and the first convict to kill the deceased as found by both courts below otherwise, as queried by the court below, how did the appellant B know that blood would be spilled to justify the warning he gave to p.w 1 and his wife.

As I indicated earlier on in this judgment, a common intention need not be based on direct evidence of an express agreement between the perpetrators of an offence charge. It can also be inferred from the C circumstances of the case, although, as I have already pointed out, common intention should not be too hastily drawn. On the particular facts of the present case, I entertain no doubt that there is sufficient evidence D from which an irresistible inference may be drawn to the effect that both the appellant and the 1st convict had a common intention to eliminate the deceased at all material times. That being so, it would not matter that it was not the appellant who with his own fingers pulled the trigger of the short gun that terminated the life of the deceased. E

This is because, a fatal blow, in this type of case, though given by one accused person, is deemed in the eyes of the law to have been given by all those who were present at the time of the commission of the offence and aided and abetted in its commission. See too Ogu Ofor and F anor v. Queen, (supra). I am in total agreement with the court below that the appellant is clearly caught by the provision of Section 79 of the Penal Code and is equally criminally responsible as the first convict for the direct consequences of their action which was the killing of the deceased. G

No defence is available to the appellant for this unlawful killing of the deceased and I agree entirely that the court below was right in dismissing the appeal before it.

It is for the above and the more detailed reasons contained in the H judgment of my learned brother, Wali, JSC that I, too, dismiss this appeal. The conviction and sentence passed on the appellant by both courts below are hereby further affirmed.

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